A

DIGEST OF INDIAN LAW CASES

CONTAINING

HIGH COURT REPORTS

AND

PRIVY COUNCIL REPORTS OF APPEALS FROM INDIA, FROM 1910 TO 1921, INCLUSIVE.

BEING A SUPPLEMENT TO THE CONSOLIDATED DIGEST OF INDIAN LAW 1836-1909.

COMPILED UNDER THE ORDERS OF THE GOVERNMENT OF INDIA

BY

S. WEBB-JOHNSON, LL.B. (Hons.)

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IN TWO VOLUMES.

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PREFACE.

THIS work is published as a supplement to the Consolidated Digest 1836-1909 compiled by Mr. B. D. Bose. It contains the cases published in the Calcutta, Bombay, Madras and Allahabad Series of the Indian Law Reports, the Law Reports Indian Appeals, and the Calcutta Weekly Notes, from 1910 and in the Indian Law Reports, Lahore Series and the Patna Law Journal since they were first published in 1920 and 1915 respectively to 1921 inclusive and Volume XXVI of Calcutta Weekly Notes 1922.

For easy reference, a number of words and phrases, which are expounded in the judgments digested, are given in a separate list, in alphabetical order, under the heading "Words and Phrases."

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The Hon'ble Sir George Edwards Knox Kt., J.P., I.C.S. (*Actg.*)
" " " Edward Grimwood Mears, Kt. (*Barrister-at-Law*).

PUISNE JUDGES.

The Hon'ble Sir George Edward Knox, Kt, J.P., I.C.S.
" " " P. C. Banerji, Kt., B.A., B.L., J.P.
" " Mr. Justice H. G. Richards (*Barrister-at-Law*), K.C., J.P.
" " " " Saiyad Karamat Husain (*Barrister-at-Law*), J.P.
" " " " H. D. Griffin, J.P., I.C.S.
" " " " W. Tudball, J.P., I.C.S.
" " " " T. C. Piggott, J.P., I.C.S.
" " " " E. M. D. Chamier (*Barrister-at-Law*).
" " " " Mohammad Rafiq, J.P. (*Barrister at-Law*).
" " " " A. E. Ryves, B.A. (*Barrister-at-Law*).
The Hon'ble Mr. Justice D. R. Lyle, J.P. (I.C.S.), (*Offg.*)
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" " " " C. Walsh, K.C. (*Barrister-at-Law*), M.A. (*Oxon*), J.P.
" " " " B. Lindsay, J.P. (I.C.S.).
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" " " " W. Wallach (*Barrister-at Law.*)
" " " " B. J. Dalal, I.C.S, (*Barrister-at-Law*).
" " " " Gokul Prasad Rai Bahadur, M.A., LL.B.
" " Justice Dr. S. M. Sulaiman, LL.D (*Barrister-at-Law.*)
The Hon'ble Mr. Justice K. Lal, Rai Bahadur, M.A., LL.B.

GOVERNMENT ADVOCATES.

Mr. A. E. Ryves, B.A., (*Barrister-at-Law*).
Mr W. Wallach, (*Barrister-at-Law*), (*Offg.*)

HIGH COURT, PATNA, 1915-1921.

CHIEF JUSTICE.

The Hon'ble Sir Dawson Miller, Kt, K.C.
The Hon'ble Mr. Jawala Prasad, Rai Bahadur (*Actg.*)

HIGH COURT, BOMBAY, 1910-1921—*continued.*

PUISNE JUDGES.

The Hon'ble Mr. Justice L. P. Russell.
" " Sir N. G. Chandavarkar, Kt.
" " " S. L. Batchelor.
" " " D. D. Davar.
" " " F. C. O. Beaman, I.C.S.
" " " J. J. Heaton, I.C.S.
" " " N. C. Macleod, Kt.
" " Mr. Justice R. Knight, I.C.S. (*Offg.*)
" " " " L. J. Robertson (*Offg.*)
" " Sir Mahadev Bhaskar Chaubal.
" " Mr. Justice G. S. Rao (*Offg.*)
" " " H. W. Hayward, LL.B. I.C.S.

The Hon'ble Sir Lallubhai A. Shah, Kt., M.A., LL.B.
" " Mr. Justice C. G. H. Fawcett, I.C.S.
" " " " N. W. Kemp (*Offg.*)
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" " " " L. C. Crump, I.C.S.
" " Sir Chimanlal H. Setalvad, B.A., LL.B.
" " Mr. Justice C. A. Kincaid, C.V.O., I.C.S.
" " " " J. B. Kanga, M.A., LL.B. (*Addl.*)

The Hon'ble Mr. Justice D. N. Bahadurji (*Offg.*)

ADVOCATES GENERAL.

The Hon'ble Sir Thomas Strangman, Kt.
Mr. M. R. Jardine, B.A.
The Hon'ble Mr. D. N. Bahadurji.

HIGH COURT, MADRAS, 1910-1921.

CHIEF JUSTICES.

The Hon'ble Sir Charles Arnold White, Kt. (*Bar-at-Law*).
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" " John Edward Power Wallis, Kt., M.A. (*Bar-at-Law*).

The Hon'ble Sir Abdur Rahim, M.A., F.M.U., (*Bar-at-Law*), (*Actg.*)
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PUISNE JUDGES.

The Hon'ble Sir R. S. Benson, Kt., M.A., LL.B. (*Bar-at-Law*), I.C.S.
" " Mr. Justice J. E. P. Wallis, M.A. (*Bar-at-Law*).
" " " " L. C. Miller, I.C.S.
" " " " J. H. Munro, I.C.S.
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" " Mr. Justice V. Krishnaswami Ayyer, B.A., B.L.
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" " " " P. R. Sundara Ayyar, B.A., B.L.
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" " " " Faiz Hasan Badruddin Tyabji, M.A. (*Bar-at-Law*).

The Hon'ble Mr. Justice T. B. Seshagiri Ayyar B.A., B.L.
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" " Sir Lewis Grenville Moore, I.C.S. (*Offg.*)
" " Mr. Justice K. Srinivasa Ayyangar, B.A., B.L.
" " " " C. Krishnan, M.A. (*Bar-at-Law*), *Diwan Bahadur.*
" " " " John Gunn Burn, B.A., LL.B. (*Bar-at-Law*).
" " " " C. E. Odgers, M.A., B.L. (*Bar-at-Law*) (*Offg.*)
" " " " V. Ramesam, B.A., B.L.
" " " " John Williams Hughes, I.C.S. (*Offg.*)
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" " " " M. Venkatasubba Rao, B.A., B.L.
" " Rao Bahadur C. Krishnaswamy Rao, B.A., B.L. (*Offg.*)

HIGH COURT, MADRAS, 1910-1921—*continued*.

ADVOCATES GENERAL.

The Hon'ble Sir P. S. Sivaswami Ayyer, B.A., B.L., C.I.E.
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The Hon'ble Mr F. H. M. Corbet (*Bar-at-Law*).
" " " S. Srinivasa Ayyanger, B.A., B.L.
" " " K. Srinivasa Ayyangar.

Mr. C. P. Ramaswami Ayyar, B.A., B.L.

HIGH COURT, ALLAHABAD, 1910-1921.

CHIEF JUSTICES.

The Hon'ble Sir John Stanley, Kt. K.C., J.P. (*Barrister-at-Law*).
" " " Henry George Richards, Kt. K.C., J.P. (*Barrister-at-Law*).,

The Hon'ble Sir George Edwards Knox Kt., J.P., I.C.S. (*Actg.*)
" " " Edward Grimwood Mears, Kt. (*Barrister-at-Law*).

PUISNE JUDGES.

The Hon'ble Sir George Edward Knox, Kt., J.P., I.C.S.
" " " P. C. Banerji, Kt, B.A., B.L., J.P.
" " Mr. Justice H. G. Richards (*Barrister-at-Law*), K.C., J.P.
" " " " Saiyad Karamat Husain (*Barrister-at-Law*), J.P.
" " " " H. D. Griffin, J P., I.C.S.
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" " " " T. C. Piggott, J.P, I.C.S.
" " " " E. M. D. Chamier (*Barrister-at-Law*).
" " " " Mohammad Rafiq, J.P. (*Barrister at-Law*).
" " " " A. E. Ryves, B.A. (*Barrister-at-Law*).

The Hon'ble Mr. Justice D. R. Lyle, J.P. (I.C.S.), (*Offg.*)
" " " " Dr. Sundar Lal, Rai Bahadur, B.A., LL.D., C.I.E.
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" " " " B Lindsay, J.P. (I.C.S.).
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" " " " Abdul Raoof (*Barrister-at-Law*).
" " " " W. Wallach (*Barrister-at Law.*)
" " " " B. J. Dalal, I.C.S, (*Barrister-at-Law*).
" " " " Gokul Prasad Rai Bahadur, M.A., LL.B.
" " Justice Dr. S. M. Sulaiman, LL.D (*Barrister-at-Law.*)

The Hon'ble Mr. Justice K. Lal, Rai Bahadur, M.A., LL.B.

GOVERNMENT ADVOCATES.

Mr. A. E. Ryves, B.A., (*Barrister-at-Law*).

Mr. W. Wallach, (*Barrister-at-Law*), (*Offg.*)

HIGH COURT, PATNA, 1915-1921.

CHIEF JUSTICE.

The Hon'ble Sir Dawson Miller, Kt, K.C.

The Hon'ble Mr. Jawala Prasad, Rai Bahadur (*Actg.*)

HIGH COURT, PATNA, 1920-1921—*continued*.

PUISNE JUDGES.

The Hon'ble Sir Basanta Kumar Mullick, Kt., I.C.S.
" " Mr. Justice Jawala Prasad, Rai Bahadur.
" " " " William Strachan Coutts, C.I.E., I.C.S. (*Bar-at-Law*).
The Hon'ble Mr. Justice Prafulla Ranjan Das (*Bar-at-Law*).
" " " " Leonard Christian Adami, I.C.S.
" " Sir John Alexander.
" " Mr. Justice Strachey Bucknill, Kt., K.C. (*Bar-at-Law*).

GOVERNMENT ADVOCATE.

Mr. Saiyid Sultan Ahmad (*Bar-at-Law*).

HIGH COURT, LAHORE, 1920-1921.

CHIEF JUSTICES.

The Hon'ble Sir Shadi Lal, Kt., R.B. (*Bar-at-Law*) | The Hon'ble Sir W. Chevis, Kt. I.C.S. (*Actg*).

PUISNE JUDGES.

The Hon'ble Sir W. Chevis, Kt.
" " Mr. Justice H. Scott-Smith.
" " " " W. A. LeRossignol.
" " " " L. H. Leslie Jones.
" " " " A. B. Broadway.
" " " " Abdul Raoof.
" " " " S. Wilberforce (*Temporary*).
The Hon'ble Mr. Justice A. E. Martineau (*Temporary*).
" " " " C. Bevan-Petman (*Offg.*)
" " " " C. L. Dundas (*Offg.*)
" " " " D. M. H. Harrison, I.C.S.
" " " " Abdul Kadir Sheikh, K.B (*Bar-at-Law*).
" " " " A. Campbell, I.C.S.
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GOVERNMENT ADVOCATE.

Mr. H. A. Herbert.

THE PRIVY COUNCIL, 1910-1921.

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THE PRIVY COUNCIL, 1910-1921—*continued.*

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And others who being present or past Lords Justices of Appeal are Members of the Privy Council (44 Vict., c 3) or who being Members of the Privy Council hold or have held high judicial offices (50 and 51 Vict., c 70).

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Madras Series, Vols. 33 to 44 .		12	High Court, Madras, and Privy Council.	I. L. R. Mad
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See Trading with enemy.
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——— The abetment sections of the Penal Code apply to an offence created by bye-law framed under the Calcutta Municipal Act. Probodh Chandra Das v. Corporation of Calcutta . . . . **24 C. W. N. 196**

——— *Instigating a public servant to instigate a Magistrate to accept a bribe—Magistrate not instigated—Penal Code (Act XLV of 1860), ss. 107, 108 Expl. (2), (4), 109, 116 and 161.* The words "when the abetment of an offence is an offence" do not mean "when an abetment of an offence is actually committed," but that, when the abetment of an offence is by definition or description an offence under the Penal Code, that is, when an abetment of an offence is punishable under s. 109 or s. 116 or other provision of the Code, then the abetment of such abetment is also an offence. Where *S* instigated *K*, a bench clerk in the Court of *M*, a Presidency Magistrate, to instigate the latter to accept an illegal gratification for acquitting an accused in a case pending before him and granting sanction against the complainant in the case, and *K* received such gratification as a police spy, and intending to get *S* arrested, and did not in fact instigate *M* to accept the same: *Held*,

ABETMENT—*contd.*

that *S* was guilty of the abetment of bribery under s. 161 read with s. 116 of the Penal Code It is immaterial to the guilt of the abettor whethe or not the person first abetted falls in with th plan of the former knowing his criminal purpos but intending to cause its detection. *Empress v Troyluckho Nath Choudhry, I. L. R 4 Calc. 366* referred to. Srilal Chamaria v. Emperor (1918).
I. L. R. 46 Calc. 607

ABISHEGAM.

——— effect of—

See Mutt . **I. L. R. 40 Mad. 177**

ABKARI LAW.

See Bengal Excise Acts.

See Bombay Abkari Act V of 1878.

See Madras Abkari Act I of 1886.

ABSCONDING OFFENDER.

See Criminal Procedure Code, s. 512
I. L. R. 38 All. 29
I. L. R. 41 All. 69

See Search without Warrant.
I. L. R. 38 Calc. 304

See Criminal Procedure Code (Act V of 1898), s. 88.
I. L. R. 39 Mad. 831

ABSCONDING SUSPECT.

——— return of—

See Security for good behaviour.
I. L. R. 39 Calc. 456

ABSENCE.

See Complainant **I. L. R. 42 Calc. 365**

ABSENCE OF CHARGE.

See Criminal Trespass.
I. L. R. 41 Calc. 662

ABSENT PROPRIETORS.

——— liability of—

See Public Nuisance.
I. L. R. 46 Calc. 515

ABSENT WITNESSES.

See Witness . **I. L. R. 47 Calc. 758**

ABSOLUTE ESTATE.

See Hindu Law—Will.
14 C. W. N. 458

ABSOLUTE GIFT.

See Hindu Law—Will.
I. L. R. 42 Calc. 561

ABSOLUTE INAM.

——— The resumption of an absolute inam by Government and the grant by them of a Ryotwari patta does not put an end to the occupancy rights acquired by tenants. Venkatappa Charyolu v. Royapa Reddi.
I. L. R. 44 Mad. 550

ABSOLUTE TITLE.

———— purchaser of—

See HINDU LAW—ENDOWMENT. **I. L. R. 38 Calc. 526**

ABWAB.

See ILLEGAL CESS **I. L. R. 45 Calc. 259**

See LEASE . **I. L. R. 39 Calc. 663**

See PESHKOSH . **I. L. R. 45 Calc. 866**

See REGULATION VIII OF 1819. **26 C. W. N. 634**

———— Uttarayan—Income Tax if payable on—

See INCOME TAX ACT, s. 2. **25 C. W. N. 89**

1. ———— *Illegal cess—Rent—Bengal Tenancy Act (VIII of 1885), s. 74—Regulation VIII of 1793, ss. 54 and 55—Contract.* If, upon a fair interpretation of the terms of the contract, the sum claimed can be deemed part of the actual rent, the tenant is bound to pay it; if, on the other hand, the sum claimed can only be regarded as an imposition in addition to the actual rent, the stipulation for its payment is void. Under a lease of certain lands the yearly rent was specified as assessed at a certain rate, and at the and of the lease, in a clause entirely distinct from the one wherein the rent was assessed, a provision was made for the delivery of husk, which was not expressly or by implication made part of the rent. The plaintiffs brought a suit for arrears of rent on the basis of this lease, claiming a deduction of a certain sum of money for unculturable lands, and seeking to recover arrears of rent besides husk. They further claimed cesses upon the amount stated to be rent, and not upon the amount claimed as price of the husk: *Held*, that the sum claimed as the value of the husk did not form part of the consolidated rent, but was an independent item falling within the description of an imposition in addition to the actual rent. *Sonnum Sookul* v. *Shaikh Elahee Buksh, 7 W. R. 453, Ram-Narain Mitra* v. *Panna Chand Singh, 7 C. W. N. 203, Gayratullah Sardar* v. *Girish Chandra Bhaulmick, 12 C. W. N. 175, Krishna Chandra Sen* v. *Susila Soondary Dassee, I. L. R. 26 Calc. 611, Sreekanta Prasad* v. *Irshad Ali Sircar, 16 C. L. J. 225*, approved. *Radha Charan Ray Chaudhury* v. *Golak Chandra Ghose, I. L. R. 31 Calc. 834*, distinguished. *Tilukdhari Singh* v. *Chulhan Mahton I. L. R. 17 Calc. 131, Radha Prasad Singh* v. *Bal Kowar Koeri, I. L. R. 17 Calc. 726*, referred to, MATHURA PRASAD *v.* TOTA SINGH (1912). **I. L. R. 40 Calc. 806**

2. ———— *Reg. V. of 1812, s. 3—Whether each of several sums mentioned as payable in a lease, recoverable as rent—Every sum which is consideration for use and occupation, if rent—Full Bench decision, on point not arising in the case but accepted for years as good law, if may be departed from by Division Bench.* A *kabuliyat* after stating that the annual rent was to be Rs. 3,351-4 proceeded:—"Besides this I shall continue to pay in the month of Bhadro every year the sum of Rs. 15 as the *mamuli* (usual) for the Iswar Thakur at your house at Azimgunj. If I fail to pay the aforesaid sum amicably then you shall deduct the same from the money remitted to me as the rent, or sue for the amount along with, or separately from, the arrears of rent. I shall not take objections thereto." *Held*, on the construction of the *kabuliyat*, that the sum of Rs. 15 was not intended by the parties to be part of the consideration for the use and occupation of the land or as part of the rent, and being an *abwab* was irrecoverable. *Per* SANDERSON, *C. J.*—The rule that has been followed in this Court is that each case must depend upon the proper construction of the contract before the Court and if upon a fair interpretation of the contract it can be seen that a particular sum is specified in the contract or agreed to be paid as the lawful consideration for the use and occupation of the land, *i.e.*, if it is really part of the rent although not described as such, the landlord can recover it. The opinion of the majority in *Radha Prosad Singh* v. *Bal Kowar Koeri, I. L. R. 17 Calc. 726*, even though not strictly necessary for the decision of the case, having been acted upon since 1885, should not be departed from by Division Benches of the Court. BEJOY SING DUDHURIA *v.* KRISHNA BEHARY BISWAS (1917). **21 C. W. N. 959**

ACCELERATION.

———— by the widow to next reversioners—

See HINDU LAW—WIDOW. **I. L. R. 41 Bom. 93**

See HINDU LAW—REVERSIONER. **I. L. R. 44 Bom. 255**

ACCEPTANCE.

See BILL OF EXCHANGE. **I. L. R. 41 Bom. 566**
I. L. R. 46 Calc. 584

See CONTRACT . **I. L. R. 47 Calc. 583**

See LAND ACQUISITION. **I. L. R. 44 Bom. 797**

See OFFER.

———— by creditor—

See LIMITATION. **I. L. R. 38 Mad. 374**

———— by Pleader—

See VAKALATNAMA. **I. L. R. 43 Calc. 884**

ACCESSORY EASEMENT.

See EASEMENTS ACT (V OF 1882), s. 24. **I. L. R. 42 Bom. 529**

ACCIDENT.

———— plea of—

See PENAL CODE, s. 80. **19 C. W. N. 1043**

ACCOMMODATION PARTY.

See CONTRACT . **I. L. R. 47 Calc. 583**

ACCOMPLICE.

See CONSPIRACY TO WAGE WAR. **I. L. R. 38 Calc. 559**

See CRIMINAL PROCEDURE CODE, 1898, s. 337 . **I. L. R. 1 Lah. 102**

See EVIDENCE ACT, ss. 25, 114, 133, 157. **I. L. R. 35 Mad. 397**

1. ———— *Corroboration—Material particulars—Identity of accused.* Before the testimony of an accomplice can be acted on, it must be corroborated in material particulars.

ACCOMPLICE—contd.

There must be corroboration not only as to the crime, but also as to the identity of each one of the accused. This is no technical rule, but one founded on long judicial experience. EMPEROR *v.* LALIT MOHAN CHUCKERBUTTY (1911).

I. L. R. 38 Calc. 559

2. ———————— *Spy or detective associating with a wrong-doer for the purpose of discovery and disclosure of an offence—Necessity of corroboration—Evidence Act (I of 1872), ss. 114, 133.* A person who makes himself an agent for the prosecution with the purpose of discovering and disclosing the commission of an offence,

whose evidence does not require corroboration, though the weight to be attached to it depends on the character of each individual witness in each case. But a person who is associated with an offence with a criminal design, and extends no aid to the prosecution till after its commission, is an accomplice requiring corroboration. *Rex* v. *Despard, 28 How. St. Tr. 346, Reg.* v. *Dowling, 3 Cox C. C. 509, Reg.* v. *Mullins, 3 Cox C. C. 526, Rex* v. *Bickley, 2 Cr. App. Rep. 53, 73 J. P. 239, Reg.* v. *Sharkar Shobag, Ratan unreported Cr. Ca. 428,* approved of. *Queen-Empress* v. *Javecharam, I. L. R. 19 Bom. 363,* distinguished by HOLMWOOD, *J.*, and dissented from by DOSS, *J.* EMPEROR *v.* CHATURBHUJ SAHU (1910).

I. L. R. 38 Calc. 96

3. ———————— *Accomplice, Testimony of—Corroboration.* Under s. 133 of the Evidence Act, a conviction is not illegal merely because it proceeds on the uncorroborated testimony of an accomplice. To justify the High Court in setting aside the conviction it is necessary to show not only that there is no corroboration, but that the Judge, taking all the evidence together, was wrong in acting on it. Where, immediately after a dacoity and before the arrival of the police, one of the accused who had been caught made a confession to a private person, naming the other persons concerned in it except two, one of whom he named two days after in his confession to the Magistrate, which agreed with the evidence subsequently given by the informer, both the confessions being afterwards retracted, and another accused made a confession naming all the persons mentioned by the approvers, the two accused and the latter having been arrested at different times and places, and there was evidence that some of the dacoits were seen in company together shortly before the dacoity and that they were absent from their homes shortly after it: *Held,* that the confessions of the two accused and the other facts were sufficient corroboration of an approver, who had been believed by the Judge and assessor, as against the co-accused who had not made confessions. LALAN MALLIK *v.* KING-EMPEROR (1911).

16 C. W. N. 669

4. ———————— *Testimony of Accomplice, Spy or Informer—Corroboration.* Per HARRINGTON, *J.*—The testimony of persons who have been members of a criminal conspiracy or else have joined it for the purpose of betraying its secrets must be very carefully scrutinised and much weight cannot be attached to it unless it is corroborated by other circumstances. *Per* MOOKERJEE, *J.*—Where a witness has made himself an agent for the prosecution before associating with the wrong-doers or before the actual perpetration of the offence, he is not an accomplice, but he may be, if he extends no aid to the prosecution until after the offence is committed. A mere detective or decoy is not therefore an accom-

there is concerted intention members of the conspiracy who after such agreement have out of fear or repentance transformed themselves into spies and informers do not thereby cease to be accomplices, and their evidence requires corroboration of the same extent and character as in the case of accomplices. PULIN BEHARI DAS *v.* KING-EMPEROR (1911) . . **16 C. W. N. 1105**

5. ———————— *Accomplice, competency of, as witness—Corroboration required, nature of.* An accomplice is a competent witness and there is no absolute rule of law which enacts that the conviction on the evidence of an accomplice is bad, but there is an established practice, founded on the judicial experience of generations, which requires corroboration by some untainted evidence and that in a material particular pointing not only to the crime but to the participation of the accused in that crime. SIAR NONIA *v.* KING-EMPEROR (1913) . . **18 C. W. N. 550**

6. ———————— *Evidence of.* The Appellant who was the station master of a railway station was prosecuted along with another person who was the goods clerk on a charge of criminal breach of trust as servant. The goods clerk was further charged with having committed an offence under s. 477A, and the Appellant with abetment thereof. The facts appeared to be that *G*, the servant of a firm of merchants, loaded a consignment of goods on behalf of the firm at the Appellant's station but less than the actual weight was entered in the books of the Railway Company and the freight credited to the Company was based on the false weight, and a sum of Rs. 2 more was alleged to have been paid by *G* and appropriated by the accused. *Held, per* NEWBOULD, *J.* That *G* was not an accomplice within the meaning of that word as used in ss. 114 *(b)* and 133 of the Indian Evidence Act even if he was a party to a conspiracy to defraud the Railway Company in as much as he was not concerned in the offence under enquiry and the Sessions Judge did not misdirect the Jury when he told them that they should hold the Appellant to [illegible] *G*'s evidence be [illegible] that it was unsafe [illegible] it was corroborated in material particulars. An indication of the meaning of the word accomplice (which is not defined in the Evidence Act or any other Indian Statute) may be found in s. 337 Criminal Procedure Code, [illegible] v. *Emperor, I. L. R. 27 Mad.* [illegible] referred to. [illegible] JJ. That the facts alleged [illegible] an offence either of [illegible] of criminal breach of [illegible] Sessions Judge misdirected the Jury as to the evidence of *G* and the misdirection was such as vitiated the trial. [illegible], J. That to constitute

ACCOMPLICE—*contd.*

an accomplice there need only be the intention of assisting in the commission of a crime but he need not know exactly what crime was being committed. *Caries Cratchley, 9 Cr. App. Rep. 232 (1913)*, referred to. That even if *G* was not an accomplice in the technical sense of the term, his evidence was no better than that of an accomplice and should have been dealt with on that footing. *The Queen* v. *Chando Chandalinee, 24 W. R. (Cr.) 55 (1875)*, *Alimuddin* v. *Queen-Empress, I. L. R. 23 Calc. 361 (1895)*, and *Ishan Chandra Chandra* v. *Queen-Empress, I. L. R. 21 Calc. 328 (1899)*, referred to. That the learned Sessions Judge should have explained to the Jury what an accomplice was and should have asked them to say upon the facts before them whether *G* was or was not an accomplice. The Jury should further have been told that if *G* was a party to the conspiracy to cheat the Railway Company he was an accomplice and it was not safe or proper to convict upon his evidence without corroboration in material particulars. The Judge should have also explained to the Jury what was the nature of corroboration necessary in such cases. SURJA KANTA BHATTACHARJEE *v.* KING-EMPEROR . . . . **24 C. W. N. 119**

ACCORD AND SATISFACTION.

See CIVIL PROCEDURE CODE, O. XXIII, R. 3 . **I. L. R. 45 Bom 245**

ACCOUNT.

See ACCOUNTS.

See CIVIL PROCEDURE CODE (ACT V OF 1908, O. I, R. 8.
I. L. R. 40 Bom. 158

See COMMISSIONER.
I. L. R. 41 Bom. 719

See CONTINUOUS ACCOUNT.

See DECREE (EXECUTION).
I. L. R. 34 Bom. 260

See DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879), s. 13.
I. L. R. 41 Bom. 453
I. L. R. 45 Bom. 216, 323

See HINDU LAW—PARTITION.
I. L. R. 43 Calc. 459

See LIMITATION ACT, IX OF 1908, SCH. I,
ART. 62 . **I. L. R. 45 Bom. 313**
ART. 106 . **I. L. R. 34 Bom. 515**

See MINOR . **I. L. R. 43 Mad. 429**

See PARTNERSHIP. (12)
I. L. R. 43 Calc. 733

See SUIT FOR ACCOUNT.

———— **adjustment of—**

See PARTNERSHIP . **15 C. W. N. 882**
I. L. R. 37 Bom. 158

———— **by Guardian.**

See GUARDIANS AND WARDS ACT (VIII OF 1890), SECS. 34 (*a*), 35.
I. L. R. 44 Bom. 852

———— **current mutual—**

See LIMITATION ACT (XV OF 1877, SCH. II, ART. 85 . **I. L. R. 32 All. 11**

ACCOUNT—*contd.*

———— **suit for—**

See ADMINISTRATOR PENDENTE LITE.
I. L. R. 39 Calc. 587
I. L. R. 41 Calc. 771

See CIVIL PROCEDURE CODE (ACT V OF 1908), s. 92. **I. L. R. 40 Bom. 439**

See COMMON MANAGER.
I. L. R. 40 Calc. 150
I. L. R. 44 Calc. 800

See COURT FEES. **I. L. R. 39 Mad. 725**
ACT s. 7 . **I. L. R. 45 Calc. 634**

See DEKKHAN AGRICULTURISTS' RELIEF ACT, ss. 2, 13, 15D, 16.
I. L. R. 34 Bom. 161
I. L. R. 35 Bom. 204
s. 15 . . **I. L. R. 34 Bom. 158**
I. L. R. 37 Bom. 614
s. 13 . . **I. L. R. 39 Bom. 73**

See HINDU LAW—PARTITION.
I. L. R. 38 Mad. 556

See LIMITATION ACT, 1877, SCH. II, ARTS. 89, 115, 116, 132.
14 C. W. N. 121

See PARTNERSHIP. **I. L. R. 40 All. 446**

See PRINCIPAL AND AGENT.
I. L. R. 43 Calc. 248
I. L. R. 41 Mad. 1

1. ———— *Administrator pendente lite, accounts of, when not objected to by parties and passed by Court, if may be re-opened in the absence of fraud or omission—Principle on which commission is charged, objection as to proper time for taking objection.* When accounts submitted by an administrator *pendente lite* have been passed by the Court in the presence of parties entitled to call on him to account and such parties have had an opportunity of being heard, he cannot thereafter be called upon to account again to such parties or their representatives unless fraud, or mistake, or omission on the part of such administrator *pendente lite* is proved in such accounts. An administrator *pendente lite* discharges his duties of accountability when his accounts are complete and honest, and do not contain false or fraudulent entries or omissions. If the parties had any objection to the principle on which he charged his commission on the assets they should have objected to it when the account was before the Court. KHITISH CHANDRA ACHARYA CHOWDHURY *v.* OSMOND BEEBY (1911).
15 C. W. N. 332

2. ———— *Suit for account—Civil Procedure Code (Act XIV of 1882), ss. 12, 13—Suit for account against agent—Cross-suit by agent—Separate trial, if illegal—One suit if should be stayed pending decision in the other.—Res judicata.* *C* being sued as agent to account for moneys given to him instituted a separate suit claiming to recover a certain sum which he alleged was due to him from the principal over and above the amount in respect of which account was sought from him: *Held*, that the decision in the former suit cannot operate as a bar to the trial of the latter on the principle of *res judicata*. That though it was desirable, that the two suits should have been tried together, there was no legal bar to their being tried separately, though the same ground might have to be traversed over again. Section 12,

ACCOUNT—*contd.*

Civil Procedure Code, has no application to suits of this kind. CHANDRA KUMAR MAJUMDAR *v.* PRAMATHO NATH RAY (1911) . **15 C. W. N. 930**

3. ———————— *Principal and Agent —Proprietor appointed by the co-proprietors as Common Manager for payment of joint debts, whether an agent of the latter and of the heirs of a deceased proprietor—Limitation—Limitation Act (IX of 1908), Sch. I, Art. 89—Plea of Limitation under the Act taken on remand after previous unsuccessful plea of limitation under Act VIII of 1869, s. 30.* A proprietor appointed by the other co-proprietors of an estate as common manager thereof, for the purpose of realizing its profits and appropriating them to the payment of their joint debt,

and the period of limitation of a suit for accounts brought by the latter against such manager is governed thereby. Where repeated demands for accounts were alleged in the plaint to have been made, but the dates were not mentioned nor proved, and the demands appeared to have continued to the termination of the agency, it was *held* that limitation commenced to run from the date of the termination of the agency. A plea of limitation under the Limitation Act may be raised on the hearing after the remand of a case by the High Court notwithstanding the failure of a similar plea taken only under s. 30 of Act VIII, 1869, on the first hearing in the Court below. CHANDRA MADHAB BARUA *v.* NOBIN CHANDRA BARUA (1912) . . **I. L. R. 40 Calc. 108**

4. ———————— *Continuous—Cause of action.* Where there are dealings between two parties which give rise to a continuous account so that one item, if not paid, shall be united with another and form one continuous demand, the whole together forms but one cause of action and cannot be divided. *Bonsey* v. *Wordsworth, 18 C. B. 325, 334,* followed. KEDAR NATH MITRA *v.* DINOBANDHU SHAHA (1916).

19 C. W. N. 724
I. L. R. 42 Calc. 1043

5. ———————— *Account, suit for, costs of suit pending reference for account.* In a suit for accounts where the defendant resisted plaintiff's claim for an account costs were awarded to the plaintiffs up to and including the hearing by the decree directing reference for an account. HYAM *v.* BENGAL STONE CO. (1916) . **20 C. W. N. 368**

6. ———————— *Limitation Act (XV of 1877), Sch. II, Art. 89, and s. 8.—Principal and Agent—Death of Principal leaving sons some of whom were minors—Proprietor appointed by co-proprietors manager of estate for payment of joint debts—Omission to bring cross-appeal to High Court or file cross-objections under s. 561, Civil Procedure Code, 1882—Bar to decree for claim in full on appeal to Privy Council.* In this case, which was an appeal from th
Chandra Madhub . . . .
I. L. R. 40 Calc. 1
Committee found that there was no evidence of any kind that a demand for, and refusal of accounts was made after the death of the plaintiffs (appellants') father; and that there was nothing in the plaint to justify the inference drawn by the High Court in that respect adversely to the plaintiffs. *Held*, that the minor plaintiffs being entitled to

ACCOUNT—*contd.*

the benefit of s. 8 of the Limitation Act, 1877, and Art. 89 of Sch. II of that Act being applicable to the suit, there was nothing in the provisions of that Article to protect the defendant (respondent) against the liability to render accounts from July, 1896 (as decreed by the Subordinate Judge) and limit 1901, (as d[illegible] [illegible]sence of an[illegible] High Court, under s. 561 of the Civil Procedure Code, 1882, they

Subordinate Judge for accounts for the longer period. NOBIN CHANDRA BARUA *v.* CHANDRA MADHAB BARUA (1916) . **I. L. R. 44 Calc. 1**

7. ———————— *Circumstances in which accounts settled between parties may be re-opened—Fraud—Substantial error.* Accounts settled between parties may be re-opened on the ground of substantial error or fraud. If the errors are sufficient in number and importance, whether they are caused by mistake or by fraud, the Court has a right to open the accounts. But when the account is between persons in a fiduciary relation and the person who occupies the position of accounting party—that is, the trustee or agent, is the defendant, it is easier to open the account than it is in cases where persons do not occupy that position, that is to say, that a less amount of error will justify the court in opening the account. *Williamson* v. *Barbour, L. R. 9 Ch. D. 529,* and *McKellar* v. *Wallace, 8 Moo. I. A. 372,* followed. BHAGWAN BAKHSH SINGH *v.* JOSHI DAMODARJI. . . . **I. L. R. 42 All. 230**

8. ———————— *Payment by debtor—Appropriation to principal or interest.* A creditor to whom principal and interest are owed is entitled to appropriate against the interest any sum which the debtor pays stipulating that it is to be appropriated against the principal. If the debtor on paying a sum stipulates that it shall go in discharge of principal, the creditor can refuse to accept it on that condition, but if he accept it he is bound by the appropriation. Where a creditor receives a sum which the debtor does not appropriate to interest, and the creditor believing that compound interest is payable, makes an entry in an account book showing the amount due at a certain date by crediting the sum received with interest to that date, he is not precluded from afterwards appropriating the sum to interest when the account is taken on the basis that simple interest is payable. Judgment of the Court of the Chief Commissioner is reversed. NEMI CHAND *v.* RADHA KISSEN (1921) . . **I. L. R. 48 Calc. 839**

9. ———————— *Restitution—Principal interest—Appropriation of payments—Rate of interest—Discretion of High Court—Code of Civil Procedure (V of 1908), s. 144.* Upon taking an account of principal and interest due, the ordinary rule as to payments by the debtor unappropriated either to principal or interest is that they are first to be applied to the discharge of interest. A creditor under the belief that interest was payable with yearly rests prepared a statement in which payments by the debtor were carried forward to the end of the year with interest, and the amounts so found were then credited against the total sum due. Upon the account being taken with

ACCOUNT BOOK—*contd.*

simple interest, *Held,* that the creditor had not by this statement appropriated the payments against the principal, so as to be precluded from applying the rule stated above. The discretion of the High Court when making an order for restitution under s. 144 of the Code of Civil Procedure, 1908, to fix the rate of interest payable will not be lightly interfered with. Where in the case of restitution of money paid out by a Receiver under a decree the Court ordered restitution to the opposite party with interest at a rate higher than the Bank rate, an appeal was dismissed. VENKATADRI APPA RAO *v.* PARTHASARATHI APPA RAO (1921) . . **I. L. R. 44 Mad. (P. C.), 570**

ACCOUNT BOOK.

——— **entries in, as evidence—**

See MAHOMEDAN LAW—MARRIAGE. **I. L. R. 45 Calc. 878**

See RES JUDICATA **I. L. R. 1 Lah. 83**

——— **presumption to be drawn from—**

See PRINCIPAL AND AGENT (ACCOUNTS) **I. L. R. 43 Calc. 527**

——— **production of—**

See MAGISTRATE, POWER OF. **I. L. R. 38 Calc. 68**

——— **title page of—**

See MAGISTRATE, POWER OF. **I. L. R. 38 Calc. 68**

ACCOUNT STATED.

See LIMITATION ACT 1908, s. 19. **5 Pat. L. J. 371**

ACCOUNTS.

See ACCOUNT.

See DISSOLUTION OF PARTNERSHIP. **I. L. R. 42 Calc. 914**

See LIMITATION ACT ,1908, ART. 89. **26 C. W. N. 61**

See MORTGAGE (REDEMPTION). **I. L. R. 48 Calc. 22**

See PROBATE . **I. L. R. 48 Calc. 1051**

See RESIDUARY LEGATEE. **I. L. R. 41 Calc. 271**

——— **re-opening of—**

See PRINCIPAL AND AGENT (ACCOUNTS) **I. L. R. 41 All. 635**

——— **suit for—**

See DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879), s. 13(*d*). **I. L. R. 43 Bom. 1**

See PARTNERSHIP. **I. L. R. 2 Lah. 351**

——— **Defendant refusing to produce papers**—*Presumption against him—Evidence Act (I of 1872), s. 114 (b—Commissioner's report accepted by trial Court, may be reviewed on appeal—Costs of whole enquiry, may be ordered against obstructive Defendant—Defendants, may be transferred to category of Plaintiffs after preliminary decree—Decree, may be avried in favour of non-appealing party—Civil Procedure Code (Act V of 1908*

ACCOUNTS—*contd.*

O. 1, r. 10, O. XLI, rr. 4 and 33. DEBENDRO NARAIN SINHA *v.* NARENDRO NARAIN SINHA **24 C. W. N. 110**

——— *Defendant dismissed and papers, seized.* In a suit for account the Defendant's plea that he was preparing the account when he was dismissed and a superior officer took possession of all the papers without giving him any receipt for the same, was proved. *Held,* that it was impossible for the Defendant to render an account without the Plaintiff's producing the papers that were with them. JATINDRO NATH DUTTA *v.* SURESH CHANDRA ROY CHOWDHURY. **24 C. W. N. 942**

——— A Rent Collector employed under a regular agreement was called upon to render accounts up to 12th April on or before 13th May 1914. No accounts were rendered and on 11th October, 1915, he was dismissed and a suit for accounts instituted on 27th August 1918. *Held* that Arts. 115 and 116 of the Limitation Act did not apply and to be made applicable it must be shewn that the suit was not specifically provided for in the schedule. PRAM RAM MOOKERJEE *v.* MAHARAJ KUMAR. . . **26 C. W. N. 61.**

ACCOUNTS AND ADMINISTRATION.

——— **suit for—**

See COURT FEES ACT (VII OF 1870) s. 7, CL. IV (F) AND s. 11. **I. L. R. 39 Bom. 545**

ACCOUNTANT-GENERAL.

See EXECUTION OF DECREE. **I. L. R. 44 Calc. 1072**

ACCRETION.

See ALLUVION **I. L. R. 40 Mad. 1083**

See BENGAL ALLUVION ACT XI OF 1825. **5 Pat. L. J. 1**

See LANDLORD AND TENANT (MISC.). **14 C. W. N. 681**

——— *Island formed in the mouth of a river subsequently becoming joined to the mainland, ownership of.* Where an island is formed in the mouth of a river, which subsequently becomes part of the mainland through the drying up of the intervening channel, the increase being perceptible or sudden, the land which formed the island is not an accretion to the mainland but merely an "adjunction" and the owner of the mainland obtains no proprietary rights therein as against Government. SURIYA RAO BAHADUR *v.* THE SECRETARY OF STATE FOR INDIA (1913). **I. L. R. 36 Mad. 57**

ACCUMULATION.

See WILL (27) . **I. L. R. 47 Calc. 76**

ACCUSED PERSON.

See CHARGE . **I. L. R. 42 Calc. 957**

See CRIMINAL PROCEDURE CODE. ss. 119 200, 437 . **I. L. R. 35 Bom. 401**

s. 342 . . **I. L. R. 45 Bom. 672**

See CROSS-EXAMINATION **I. L. R. 42 Calc. 957**

See PRACTICE . **I. L. R. 40 Bom. 220**

See REVIEW . **I. L. R. 38 Calc. 82**

ACCUSED PERSONS—*contd.*

See Witness . I. L. R. 45 Calc. 720

——— examination of—

See Charge . I. L. R. 42 Calc. 957

See Criminal Procedure Code, ss. 435, 439 . . . 25 C. W. N. 609

See Jury, right of trial by. I. L. R. 37 Calc. 467

See Summary Trial. I. L. R. 41 Calc. 7

——— rights of—

See Contempt of Court. I. L. R. 41 Calc. 173

——— statements by—

See Criminal Procedure Code (Act V of 1898), ss. 162, 288. I. L. R. 34 Bom. 599

See Defamation I. L. R. 40 Calc. 433

See Witness . I. L. R. 46 Calc. 700

——— value of statements by—

See Causing death by rash or negligent act . I. L. R. 39 Calc. 855

——— questions to, by Court—

See Criminal Procedure Code (Act V of 1898), s. 342. I. L. R. 39 Mad. 770

——— Right of to recall and cross-examine prosecution witnesses—

See Criminal Procedure Code (Act V of 1898), s. 256. I. L. R. 39 Mad. 503

——— statement of—

See Criminal Procedure Code, s. 364. I. L. R. 39 All. 399

ACKNOWLEDGMENT.

See Administrator pendente lite. I. L. R. 41 Calc. 771

See Acknowledgment of Debt.

See Debtor and Creditor. I. L. R. 41 Calc. 137

See Hatchitta I. L. R. 46 Calc. 746

See Lease . I. L. R. 40 Mad. 910

See Limitation Act (XV of 1877), s. 19.

See Limitation Act (IX of 1908)—

ss. 16, 19. . I. L. R. 35 Bom. 383

s. 19 . .

s. 20 . .

Sch. I, Arts. 116, 66, s. 19. I. L. R. 38 Bom. 177

See Mahomedan Law—Gift. I. L. R. 38 All. 627

See Mahomedan Law—Legitimacy. I. L. R. 46 Calc. 259
I. L. R. 48 Calc. 856

See Mortgage . I. L. R. 38 All. 540

See Registration Act (III of 1877), s. 17(*n*) . I. L. R. 35 All. 202

See Stamp Act (II of 1899)—
ss. 2 (*23*), 62 and 63. I. L. R. 35 All. 290

ACKNOWLEDGMENT—*contd.*

s. 12; Sch. I, Arts. 1 and 5. I. L. R. 41 All. 169

——— By father of a son by a female slave—

See Muhammadan Law. I. L. R. 1 Lah. 229

——— conditional, operation of—

See Limitation Act (IX of 1908), s. 19. I. L. R. 40 Mad. 701

——— In pleas of another case—

See Limitation Act, 1908, s. 19. I. L. R. 1 Lah. 357

——— of legitimacy—

See Mahomedan Law. 23 C. W. N. 50

——— of claim against Ward—

See Limitation Act (IX of 1908), s. 19. I. L. R. 44 Bom. 871

——— *Unstamped Acknowledgment, whether acknowledgment of debt—Stamp Act (II of 1899), Sch. I, Art. 1.—Evidence—Limitation Act (IX of 1908), s. 19—Stamp-duty.* In an account between the parties headed "Account current," kept by the plaintiff, the defendant was debited with advances made by the plaintiff, together with interest on sums due from time to time, and credited with payments made by the defendant, the balances being carried forward half-yearly. On the account being adjusted and stated, a certain sum E. & O. E. was shown due by the defendant: the plaintiff appended the words "I accept this correct," and the defendant subscribed his signature thereto. The account was continued, the said sum being carried forward and further sums were debited to the defendant, but there were no further items of credit: *Held, that, in the circumstances of the case, the instrument was not an acknowledgment of debt within* the meaning of Art. 1 of Sch. I of the Stamp Act and was admissible in evidence without being stamped. *Brojender Coomar* v. *Bromomoyee Chowdhrani, I. L. R. 4 Calc. 885, Brojo Gobind Shaha* v. *Goluck Chunder Shaha, I. L. R. 9 Calc. 127,* and *Nund Kumar Shaha* v. *Shurnomoyi, I. L. R. 15 Calc. 162,* followed. Galstaun *v.* Hutchison (1912) . . . . I. L. R. 39 Calc. 789

ACKNOWLEDGMENT OF DEBT.

See Acknowledgment.

See Court of Wards. I. L. R. 43 Calc. 211

See Limitation Act, ss. 19 and 20.

See Principal and Surety. I. L. R. 44 Calc. 978

——— Limitation Act (IX of 1908), s. 19. Where the principal sum advanced

I. L. R. 48 Calc. 1046

ACKNOWLEDGMENT OF SON.

See ACKNOWLEDGMENT.

See MAHOMEDAN LAW—ACKNOWLEDGMENT OF SON. **I. L. R. 40 Bom. 28**

ACKNOWLEDGMENT OF TITLE.

See MORTGAGE . **I. L. R. 42 All. 575**

ACQUIESCENCE.

See ADMINISTRATOR PENDENTE LITE. **I. L. R. 41 Calc. 771**

See ADVERSE POSSESSION. **I. L. R. 40 Calc. 173**

See CIVIL PROCEDURE CODE, 1908, O. XXI, R. 66 . . **15 C. W. N. 428**

See CUSTOM . **I. L. R. 39 Calc. 418**

See EVIDENCE ACT (I OF 1872) s. 115. **I. L. R. 35 Bom. 182**

See HINDU LAW ALIENATION. **I. L. R. 40 Calc. 966**
I. L. R. 41 Calc. 793

See PARTITION SUIT FOR. **I. L. R. 38 Calc. 681**

See PROBATE . **I. L. R. 42 Calc. 480**

See SETTLEMENT, CONSTRUCTION OF. **I. L. R. 39 Calc. 1**

———— **by Government—**

See ACTIO PERSONALIS MORITUR CUM PERSONA . **I. L. R. 35 Bom. 12**

1. ———— **Order of demolition of unauthorised erections—Disobedience—Negotiations for compromise**—*Re-assessment of the whole premises, including the unauthorised portions, and receipt of rates and taxes for the same—Calcutta Municipal Act (Beng. III of 1899), ss. 449, 580.* Where after the passing of an order of demolition under s. 449 of the Calcutta Municipal Act, negotiations have been going on between the person directed to demolish an unauthorised erection and the Corporation, the receipt of rates and taxes by the latter on re-assessment of the whole premises including the portions objected to, during the period of such negotiations, is not an acquiescence on their part in the continued disobedience to the order so as to disentitle them from proceeding with the prosecution for such disobedience after the failure of the negotiations. LACHMI NARAYAN MAHTO *v.* CORPORATION OF CALCUTTA (1910). **I. L. R. 37 Calc. 833**

2. ———— *Possession for many years by co-sharer—Presumption—Consent.* When one co-sharer has been in exclusive possession of a particular plot for a very long time and has made constructions thereon, the presumption is that he is in possession with the consent of the other co-sharers. The other co-sharers cannot after lying by for many years come in and ask to have the constructions demolished. LAHASO KUAR *v.* MAHABIR TIWARI (1915). **I. L. R. 37 All. 412**

3. ———— *when knowledge comes after act.* There can be no acquiescence without full knowledge both of the right infringed and the acts which constitute the infringement. There is a distinction between acquiescence occurring while the act acquiesced in is in progress and acquiescence taking place after the act has been completed, for a mere delay to take legal proceedings cannot by itself constitute a bar to such proceedings unless the delay on his part, after he has acquired full knowledge, has affected or altered the position of his opponent. SYAMA CHARAN BAISYA *v.* PRAFULLA SUNDARI GUPTA (1914). **19 C. W. N. 882**

ACQUIESCENCE—*concld.*

4. ———— *what amounts to—Doctrine not to be invoked in favour of party taking possession of land by wrongful means.* The plaintiff sued for recovery of possession of land on declaration that it was included within his tenancy under the defendants landlords who had induced him to give up possession of the land upon a promise to pay consideration for it or in exchange to give lands situated elsewhere, neither of which, however, was given to the plaintiff. *Held,* that the plaintiff did not stand by in such a manner as to induce the defendants to believe that he assented to the acts of the defendants and the doctrine of acquiescence had no application in the circumstances of the case. That the defendants acquired no title to the land and the Court should not assist them in disregard of the principles of justice, equity and good conscience to retain possession of land which they had seized by questionable methods. That a Court of Equity will not have recourse to the doctrine of estoppel or acquiescence for the benefit of a party who does not come into Court with clean hands. JAHARADDI MANDAL *v.* DEBNATH NATH CHAUDHURY (1915) . . . . **20 C. W. N. 657**

5. ———— *Estoppel—Joint property sold by one of three brothers—other brothers standing by for years and allowing bendee to spend large sums on building operations.* One A. C. died in 1907, leaving to his three sons a business and immovable property including an *ahata* and some *kucha* buildings in Lyallpur which he had purchased for Rs. 125. In July 1909 S. M., his second son, sold this *ahata* and *kucha* buildings to one G. M. for Rs. 2,600. G. M. immediately began to build and spent some Rs. 3,000 on erecting a two-storeyed house on the site. In 1913 he sold this house to the Punjab National Bank and they spent Rs. 207 on alterations. In July 1916 the youngest brother and the sons of the eldest brother (then deceased) sued for possession of the property on the ground that S. M. had no right to see it without their consent. *Held,* that the plaintiff's long silence coupled with the fact that they knew all along of the building operations and abstained from asserting their own rights, showed that they acquiesced in the sale and that they were consequently estopped from asserting those rights. *Gopi Chand* v. *Ram Chand* (*177 P. W. R. 1911*), *Hope Mills* v. *Sir Cowasji J. Readymoney* (*13 Bom. L. R. 162*), *Syama Charan* v. *Profulla* (*19 Calc. W. N. 882*), and *Dewa Singh* v. *Haku* (*39 P. W. R. 1910*), followed. *Jaharaddi Mandal* v. *Debnath Nath* (*20 Calc. W. N. 657*), *Fatehyab Khan* v. *Muhammad Yusuf* (*I. L. R. 9 All. 434*), *Naunihal Bhagat* v. *Rameshar Bhagat* (*I. L. R. 16 All. 28 :* and *Beni Ram* v. *Kundan Lal* (*I. L. R. 21 All. 496 P. C.*) cited. DHANPAT RAI *v.* GURANDITTA MAL . **I. L. R. 2 Lah. 258**

ACQUISITION.

See LAND ACQUISITION.

———— **by landlord—**

See MADRAS ESTATES LAND ACT (I OF 1908), s. 6, SUB-S. (6), s. 8. **I. L. R. 39 Mad. 944**

ACQUISITION—*contd.*

——— by tenant—

See MADRAS ESTATES LANDS ACT, ss. 6, 8 . . I. L. R. 39 Mad. 944

——— *Compensation is payable to a person who had acquired a title by adverse possession*—RAJBANS SAHAY *v.* RAI MAHABIR PRASAD (1916) . 1 Pat. L. J. 258

ACQUITTAL.

See CRIMINAL PROCEDURE CODE—
s. 55 . . I. L. R. 41 All. 483
s. 247 . . 1 Pat. L. J. 264
s. 403 . . I. L. R. 40 Bom. 97
ss. 403, 423 AND 439 I. L. R. 36 All. 4
ss. 421, 233 AND 537. I. L. R. 39 Mad. 527
ss. 423 AND 439. I. L. R. 37 Mad. 119
I. L. R. 34 All. 115
s. 438 . . I. L. R. 38 Mad. 1028
ss. 439, 422 AND 423. I. L. R. 39 Mad. 505
I. L. R. 41 Bom. 560

See CRIMINAL TRESPASS. I. L. R. 41 Calc. 662

See PRESIDENCY MAGISTRATE.

See PREVIOUS ACQUITTAL.

See SANCTION FOR PROSECUTION. I. L. R. 44 Calc. 970

——— appeal from—

See PUBLIC PROSECUTOR. I. L. R. 41 Calc. 425

——— by Jury—

See AUTREFOIS ACQUIT. I. L. R. 41 Calc. 1072

——— effect of—

See COMPLAINANT. I. L. R. 42 Calc. 365

See CONSPIRACY I. L. R. 41 Calc. 754

See CONSPIRACY TO WAGE WAR. I. L. R. 38 Calc. 559
15 C. W. N. 646

——— of criminal lunatic—

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), s. 471. I. L. R. 43 Bom. 134

———Order of, on Revision by High Court—

See CRIMINAL PROCEDURE CODE, s. 435. 25 C. W. N. 609

——— power to alter finding of—

See DACOITY . I. L. R. 41 Calc. 350

——— power to revise an order of, at the instance of private party—

See JURISDICTION OF HIGH COURT. I. L. R. 38 Calc. 786

———, revision of orders of—

See WRONGFUL CONFINEMENT. I. L. R. 47 Calc. 818

1. ——— Previous acquittal—*Acquittal under s. 182 of the Penal Code—Subsequent complaint under s. 500, by the person defamed, in respect of the same statement—Subsequent prosecution not barred—Criminal Procedure Code (Act V of 1898), s. 403.* An acquittal under s. 182 of the Penal Code in respect of false information contained in a petition to the manager of an estate is no bar to a subsequent prosecution for defamation under s. 500 of the Penal Code on the same statements. *Sharbekhan Gohain* v. *Emperor, 10 C. W. N. 85,* distinguished. RAMSEBAK LAL *v.* MUNESWAR SINGH (1910). I. L. R. 37 Calc. 604

2. ——— *Previous acquittal plea of—Acquittal of some accused charged with rioting, grievous hurt and murder—Liability of others to be tried for the same offences—Prosecution story found to be false as to the grievous hurt and murder.—Criminal Procedure Code (Act V of 1898), s. 403.* An acquittal of some of the accused on charges of rioting armed with deadly weapons, grievous hurt and murder is no bar, under s. 403, of the Criminal Procedure Code, to the trial of others concerned in the same offences. Where the Sessions Judge was of opinion, at the original trial, that the prosecution story as to the manner in which the deceased met his death did not represent the truth and acquitted the accused, though he did not disbelieve the fact of a rioting having occurred, while one of the Assessors believed the whole story:—*Held,* that the High Court would not interfere with a pending prosecution against others for the same offences. *Bishun Das Ghosh* v. *King-Emperor, 7 C. W. N. 493,* distinguished. KOKAI SARDAR *v.* MEHER KHAN (1910). I. L. R. 37 Calc. 680

3. ——— *Inquiry under Workmen's Breach of Contract Act (XIII of 1859), s. 2—Hearing concluded—Case adjourned for judgment—Absence of complainant on date of judgment—Power of Magistrate to acquit—Criminal Procedure Code (Act V of 1898), s. 247.* Section 247 of the Criminal Procedure Code does not apply when the hearing has concluded and the case is adjourned only for judgment, without the attendance of the complainant having been specially directed, and an order of acquittal on the ground of the absence of the complainant on the date of judgment is, therefore, illegal. GIRISH CHANDRA DAS *v.* BHUSAN DAS (1919). I. L. R. 46 Calc. 867

4. ——— *Charge of conspiracy—Whether a person acquitted can be charged with same offence, as part of a conspiracy.* Where a person has been tried for a specific offence and acquitted, and he is subsequently charged with conspiracy of which that offence is alleged to from a part: *Held,* that an acquittal is conclusive; and it would be very dangerous principle to regard a judgment of not guilty as not fully establishing the innocence of the person to whom it relates *Rex* v. *Plummer,* [1902] *2 K. B. 339,* referred to EMPEROR *v.* LALIT MOHAN CHUCKERBUTTY (1911). I. L. R. 38 Calc. 559

5. ——— A judgment of not guilty against an accused person fully establishes his innocence and the incident in respect of which the charge was brought cannot be used against the acquitted person in a subsequent trial for conspiracy. *Emperor* v. *Nani Gopal, 15 C. W. N. 594,* followed. PULIN BEHARI DAS *v.* KING-EMPEROR (1911). 16 C. W. N. 1105

ACQUITTAL—*contd.*

6. ——————— *Revision—Practice—Interference by High Court in revision with an order of acquittal on the application of a private party—Criminal Procedure Code (Act V of 1898), s. 439.* The High Court has jurisdiction, under s. 439 of the Criminal Procedure Code, to set aside an order of acquittal, but it has now become a settled practice that it will not ordinarily interfere, in revision, in such cases, at the instance of a private prosecutor. *Queen-Empress* v. *Shekh Saheb Badrudin, I. L. R. 8 Bom. 197, Heerabai* v. *Framji Bhikaji, I. L. R. 15 Bom. 349, Thandavan* v. *Perianna, I. L. R. 14 Mad. 363, Queen-Empress* v. *Ala Baksh, I. L. R. 6 All. 484, Queen-Empress* v. *Prag Dat, I. L. R. 20 All. 459, In the matter of Shaikh Aminuddin, I. L. R. 24 All. 346, Qayyum Ali* v. *Faiyaz Ali, I. L. R. 27 All. 359,* In re *Municipal Committee of Dacca* v. *Hingoo Raj, I. L. R. 8 Calc. 895,* and *Deputy Legal Remembrancer* v. *Karuna Baistobi, I. L. R. 22 Calc. 164,* followed. *Rakhal Das Roy* v. *Kailash Bannu, 11 C. L. J. 113,* explained by JENKINS, *C. J.* FAUJDAR THAKUR *v.* KASI CHOWDHURY (1914).

I. L. R. 42 Calc. 612
19 C. W. N. 184

7. ——————— *Reference therefrom to High Court by District Magistrate—Revision, hearing of, on evidence, whether appeal—Appeal from acquittal by the Local Government—Criminal Procedure Code (Act V of 1898), ss. 417, 435, 438—Jurisdiction—Practice.* In the case of an acquittal, when the Local Government has not preferred an appeal under s. 417 of the Criminal Procedure Code, the High Court ought not to interfere in revision on a reference under s. 438, where it cannot do so without practically hearing the case on the evidence as an appeal in order to satisfy itself that the opinion of the referring Court is correct, though it has jurisdiction to intervene in revision in such cases. *Faujdar Thakur* v. *Kasi Chowdhuri, I. L. R. 42 Calc. 612 ; 19 C. W. N. 184,* referred to. HRISHIKESH MANDAL *v.* ABADHAUT MANDAL (1916). **I. L. R. 44 Calc. 703**

ACT.

——————— **1817—VII—**

See MADRAS REGULATION ACT.

——————— **1827—II.**

See BOMBAY REGULATION.

——————— **1838—XIX.**

See COASTING-VESSELS ACT. (BOMBAY.)

——————— **1839—XXXII.**

See INTEREST ACT.

——————— **1840—V.**

See OATHS ACT.

——————— **1841—XIX.**

See SUCCESSION (PROPERTY PROTECTION) ACT.

——————— **1846—I.**

See PLEADERS ACT.

——————— **1847—XX.**

See COPYRIGHT ACT.

IX.

See BENGAL ALLUVION AND DILUVION ACT.

ACT—*contd.*

——————— **1850—XVIII.**

See JUDICIAL OFFICERS' PROTECTION ACT.

XXI.

See FREEDOM OF RELIGION ACT.

See CASTE DISABILITIES REMOVAL ACT.

——————— **1852—XVIII.**

See PLEADERS LOWER PROVINCES ACT.

——————— **1855—XIII.**

See FATAL ACCIDENTS ACT.

——————— **1856—XV.**

See HINDU WIDOWS' REMARRIAGE ACT.

——————— **1857—III.**

See CATTLE TRESPASS ACT.

——————— **1858—I.**

See MADRAS COMPULSORY LABOUR ACT.

XXXV.

See LUNACY ACT.

——————— **1859—I.**

See MERCHANT SEAMEN ACT.

VIII.

See CIVIL PROCEDURE CODE.

XI.

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See SALE FOR ARREARS OF REVENUE.

See BENGAL LAND REVENUE SALES ACT.

XIII.

See WORKMEN'S BREACH, OF CONTRACT ACT.

XIV.

See LIMITATION ACT, 1859.

——————— **1860—XXVIII.**

See BOUNDARIES ACT.

XXI.

See SOCIETIES REGISTRATION ACT.

XLV.

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——————— **1861—V.**

See POLICE ACT.

——————— **1863—XX.**

See RELIGIOUS ENDOWMENTS ACT.

XXIII.

See WASTE LANDS ACT.

——————— **1864—II.**

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See CARRIERS' ACT.

X.

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XV.

See PARSI MARRIAGE AND DIVORCE ACT.

XX.

See PLEADERS, MUKHTEARS AND REVENUE AGENTS' ACT.

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——— 1866—XXVII.

See TRUSTEES ACT.

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See PUBLIC GAMBLING ACT.

XXV.

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See OUDH RENT ACT.

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See DIVORCE ACT.

——— 1870—VII.

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XXI.

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——— 1871—I.

See CATTLE TRESPASS ACT.

IX.

See LIMITATION ACT.

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IX.

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XV.

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See GENERAL REPEALING ACT.

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III.

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VI.

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XIV.

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See REVENUE JURISDICTION ACT.

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XV.

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——— 1878—I.

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VI.

See TREASURE TROVE ACT.

VII.

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VIII.

See SEA CUSTOMS ACT.

XI.

See ARMS ACT.

XVIII.

See OUDH RENT ACT.

——— 1879—XVII.

See DEKKHAN AGRICULTURISTS' RELIEF ACT.

XIV.

See HACKNEY CARRIAGE ACT.

XVIII.

See LEGAL PRACTITIONERS' ACT.

XXI.

See EXTRADITION ACT, 1879.

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See CANTONMENTS ACT.

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See KAZIS ACT.

——— 1881—V.

See PROBATE AND ADMINISTRATION ACT.

XVIII.

See CENTRAL PROVINCES LAND REVENUE ACT.

XXVI.

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——— 1882—II.

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IV.

See TRANSFER OF PROPERTY ACT

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VI.

See COMPANIES ACT.

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See POWERS OF ATTORNEY ACT.

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See CRIMINAL LAW AMENDMENT ACT.

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See CO-OPERATIVE SOCIETIES ACT.

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See LUNACY ACT.

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See PROVIDENT INSURANCE SOCIETIES ACT.

VI.

See LIFE ASSURANCE COMPANIES ACT.

XIII.

See DELHI LAWS ACT.

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See MUSSALMAN WAKF VALIDATING ACT.

VII.

See COMPANIES ACT.

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See COPYRIGHT ACT.

VIII.

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X.

See REPEALING AND AMENDING ACT.

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See ESTOPPEL . I. L. R. 38 Calc. 512

ACT OF STATE.

——— *Acts done by Government in exercise of its sovereign rights—Status of non-feudatory zamindars in Central Provinces—Withdrawal from non-feudatory zamindars, the Police, Excise, and Cattle-pounds administration—Withdrawal of other rights in wajib-ul-arz or administration paper—Police Act (V of 1861)—Excise Act (X of 1871)—Cattle Trespass Acts (III of 1857 and I of 1871)—Central Provinces Land Revenue Act (XVIII of 1881).* The plaintiffs in these appeals were members of a group of non-feudatory zamindars in the Central Provinces whose status was in 1864 determined by the Government to be that of ordinary British subjects. When they first came by conquest or cession under British rule, the management of their estates and the judicial and administrative powers exercised by them were left in their hands as a matter of convenience or economy of administration; and in no case were they recognised as entitled to independent powers or as possessing any sovereign rights. In 1874 sanads giving them proprietary rights in the soil were granted; but subsequently at various times the Government withdrew from them the Police and Excise administration, and also the rights they had exercised in respect of cattle pounds; and in 1903 they were required by the settlement officials to execute (which they did under protest) *wajib-ul-arzes* containing provisions restricting their rights in various ways which they considered prejudicial to their interests and prestige. In suits brought by them against the Secretary of State in which they complained that they had been illegally deprived of rights to which they [illegible] privileges: *Held*, that in the exercise of the Police and Excise functions, the plaintiffs were acting not as of right, but either by sufferance or by delegation, and that the resumption of those functions by the Government was an act done by the Government in the exercise of its sovereign powers, and consequently the suits were not maintainable in the Civil Courts. The maintenance of private cattle-pounds was incompatible with the provisions of the Cattle Trespass Act and their establishment under the superintendence and control of Government, as being under the circumstances essential for the maintenance of law and order and the peace and

ACT OF STATE—*contd.*

good government of the country, was an act of the executive Government with which it was not competent for the Civil Court to interfere. BIR BIKRAM DEO *v.* SECRETARY OF STATE FOR INDIA (1912).
I. L. R. 39 Calc. 615

ACTIO PERSONALIS MORITUR CUM PERSONA.

See MAHOMEDAN LAW—PRE-EMPTION.
I. L. R. 36 Bom. 144

——— *Maxim applies to actions in tort—No application to actions where contractual obligation implied by law—Government—Employment of shroff to accept Babashai coins—Shroff accepting Shikkai coins instead—The coins accepted by Mint officers—Loss to Government—Measure of damages—Acquiescence or ratification by Government.* On the occasion of calling in the Babashai coins from the British villages in the Kaira District, the plaintiff was employed by Government as a shroff to examine and accept the Babashai coins only. The plaintiff worked for about a month during which period he passed 12,170 Shikkai coins as Babashai coins. At that date the Shikkai coins were not current and had only bullion value. The coins were finally sent to H. M.'s Mint, where they were melted. Government alleged that by the shroff's neglect in accepting Shikkai coins they suffered a loss of R1,758-15-1, which they asked the shroff to pay. The shroff paid R1,095. To recover the remaining R663-15-1 Government filed a suit against the shroff. The shroff also filed a counter suit against Government to recover R1,095 which he alleged were wrongfully recovered from him. Both suits were heard together. The District Judge dismissed both suits holding that Government had suffered a loss by the shroff's action, but it was compensated by the money already paid by the shroff. Against this decision both parties appealed. While the appeals were pending in the High Court, the shroff died and his son was brought on the record as his legal representative:—*Held,* that the maxim *actio personalis moritur cum persona* did not apply to the case, as there was an obligation implied by law. The shroff undertook to pass only Babashai coins; and it was an implied term of that contract that if he passed any other, and Government suffered loss, he should make it good (s. 211 of the Indian Contract Act, 1872). *Held,* further, that the fact that Government had kept and had the benefit of Shikkai coins was not sufficient by itself to raise any presumption of either estoppel or acquiescence or ratification on the part of Government. *Held,* also, that the action of the Mint officers in accepting the Shikkai coins could bind Government only so far as they had derived benefit from the action of the Mint officers; that that benefit made them liable only so far that it was to be taken into account in measuring the damages for the loss sustained by Government in consequence of the shroff's deviation from the directions given to him and the purpose of this employment. *Held,* therefore, that in estimating the loss suffered by Government owing to the shroff's action, the bullion value of the Shikkai coins must be taken into account, for they had, on the date they were accepted, ceased to be current coin. It is a principle that nominal damages are awarded only where there is failure to prove any appreciable damage in fact. CHUNI LAL *v.* SECRETARY OF STATE FOR INDIA (1910) **I. L. R. 35 Bom. 12**

ACTION

——— Ex Contractu—

See CANTONMENTS ACT (XIII OF 1889), s. 80 . . **I. L. R. 34 Bom. 583**

——— Ex Delicto—

See CANTONMENTS ACT (XIII OF 1879), s. 80 . . **I. L. R. 34 Bom. 583**

——— In Rem—

See ARREST OF SHIP.
I. L. R. 42 Calc. 85

——— In Tort—

See CAUSE OF ACTION.
I. L. R. 38 Calc. 797

——— survival of—

See MAHOMEDAN LAW—PRE-EMPTION.
I. L. R. 36 Bom. 144

ACTIONABLE CLAIM.

See TRANSFER OF PROPERTY ACT (IV OF 1882 AS AMENDED BY ACT II OF 1900), s. 130 **I. L. R. 37 Bom. 198**

——— nature of—

See MORTGAGE . **I. L. R. 40 Mad. 683**

——— purchase of, by a pleader—

See LEGAL PRACTITIONERS' ACT (XVIII OF 1879), s. 13 . **I. L. R. 37 Mad. 238**

ACTIONABLE INTERFERENCE.

See EASEMENT . **L. R. 41 I. A. 180**

ACTS AND DECLARATIONS OF GOVERNMENT.

See INAM . **I. L. R. 40 Mad. 268**

ADDITION.

See EMBANKMENT
I. L. R. 46 Calc. 825

See DEMOLITION OF BUILDING.
I. L. R. 37 Calc. 585

——— of party—

See CIVIL PROCEDURE CODE 1908, ss. 107, 151 . **3 Pat. L. J. 409**

ADDITIONAL SESSIONS JUDGE.

See CRIMINAL PROCEDURE CODE, s. 195.
I. L. R. 44 Bom. 877

See JURISDICTION.
I. L. R. 41 Calc. 866

See TRANSFER . **I. L. R. 48 Calc. 53**

ADDITIONAL EVIDENCE.

See APPEAL . **I. L. R. 42 Calc. 675**

See CIVIL PROCEDURE CODE, 1908, O. XLI, R. 27. . **5 Pat. L. J. 263**
I. L. R. 38 All. 191

See CRIMINAL PROCEDURE CODE, s. 195.
I. L. R. 44 Mad. 47

ADDITIONAL DISTRICT MAGISTRATE.

See APPEAL . **I. L. R. 48 Calc. 874**

ADEN COURTS ACT (II OF 1864).

———— s. 3—

See DIVORCE ACT (IV OF 1869), s. 3 (2).
I. L. R. 37 Bom. 57

———— s. 8—

See ASSESSMENT **I. L. R. 42 Bom. 692**

————ss. 8 and 15—*Court-fees Act (VII of 1870), s. 7, sub-s. 4, cls. (c) and (d) —Suits Valuation Act (VII of 1887), s. 8—Civil Procedure Code (Act XIV of 1882), s. 551—Civil Procedure Code (Act V of 1908), s. 115 —Valuation for the purposes of Court-fees and jurisdiction—Suit for declaration and injunction—Rejection of plaint as not properly stamped—Appeal—Application to state a case to High Court—Summary dismissal of appeal—Application for revision—Jurisdiction.* The plaintiff brought a suit in the Court of the Assistant Resident at Aden for a declaration of heirship and an injunction with reference to certain property of the value of upwards R50,000. The claim being for declaration and injunction was, under the provisions of the Court-fees Act (VII of 1870), s. 7, sub-s. 4, cls. (*c*) and (*d*) valued by the plaintiff at R130 upon which the prescribed Court-fee stamp was R10 only. The Assistant Resident rejected the plaint on the ground that it was not properly stamped. Against the order of the Assistant Resident the plaintiff appealed to the Resident at Aden and on the 23rd September 1908 presented an application under s. 8 of the Aden Act (II of 1864) to state a case to the High Court upon certain questions specified in the application. The Resident, however, on the next day, that is, on the 24th September summarily dismissed the appeal under s. 551 of the Civil Procedure Code (Act XIV of 1882). The judgment dismissing the appeal was read out to the plaintiff on the 7th October following, when she attended the Court. The plaintiff, thereupon,

to state a case. A question having arisen as to whether the High Court had jurisdiction to interfere in revision with any order passed by the Resident in the exercise of his Civil jurisdiction under the Aden Act (II of 1864): *Held*, that with regard to questions which might arise regarding cases to be stated by the Resident for the decision of the High Court under the provisions of s. 8 of the Aden Act (II of 1864) the Resident's Court is subordinate to the High Court. Under s. 15 of the Aden Act (II of 1864) as the Court of the Resident is to be guided by the spirit and principle of the laws and regulations in force in the Presidency of Bombay and
that Presidency n
and in the High Co
tion as a Court of Appeal from those Courts, the provisions of the Suits Valuation Act (VII of 1887) are 'the law for the time being for the valuation of claims' in the Courts of the Resident of Aden. *Held*, further, that the plaintiff's claim being valued at R130 according to the law for the valuation of claims for the time being in force and according to the rulings of the Bombay High Court, it did not fulfil the requirements of s. 8 of the Aden Act (II of 1864) so as to give the plaintiff a right to demand the statement of the case upon any question of fact or law arising in the suit. RHIMBAI JAMALBHOY *v.* MARIAM BINTE ABDUL (1909) . . . . **I. L. R. 34 Bom. 267**

ADEN SETTLEMENT REGULATION (VII OF 1900).

———— s. 13—*Municipal affairs at Aden—Executive Committee—Rating of property for purposes of taxation—Rating value fixed by the Resident at Aden in a rating appeal—Finality of the decision of the Resident as to value—Jurisdiction of Civil Courts to examine the value in a civil suit—Rule made under the Regulation to give finality to the Resident's decision in rating appeal is ultra vires.* The Aden Settlement Regulation (VII of 1900) provided for the establishment of an Executive Committee for the Municipal Government of Aden ; and its clause 13 authorised the Resident, subject to the previous sanction of the Local Government, to make rules to provide for "the assessment and collection of any toll, cess, tax or other impost imposed under the Regulation." The rules so made provided, *inter alia*, for the preparation of an assessment list containing "the annual letting value or other valuation on which the property is assessed," for complaints to the Executive Committee where any property was for the time being entered in the list or in which the entered rateable value had been increased, and for appeals against any rateable value to the Judge of the Resident's Court. Rule 12 provided that

held, on a construction of the above rule, that it made the decision of the Judge of the Resident's Court in a rating appeal conclusive, and that the aggrieved party could not question it by a civil suit. *Held*, that the rule 12, read as it had been by the lower Courts, was *ultra vires*, inasmuch as a distinct unequivocal enactment was required for the purpose of either adding to or taking away the jurisdiction of a Court. ABDULLABHAI LALLJEE *v.* THE EXECUTIVE COMMITTEE, ADEN (1916).
I. L. R. 40 Bom. 446

ADHLAPI.

———— Transaction—whether a sale—

See PRE-EMPTION . **I. L. R. 2 Lah. 199**

AD INTERIM PROTECTION.

See INSOLVENCY . **14 C. W. N. 586**

ADJOURNMENT.

See CIVIL PROCEDURE CODE 1908 s. 47
O. XXI R. 2 . **5 Pat. L. J. 70**
. **5 Pat. L. J. 672**
O. XXI R. 6 . **5 Pat. L. J. 390**

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), s. 344 **I. L. R. 42 Bom. 254**

See EX PARTE DECREE.
I. L. R. 41 Calc. 956

———— application for—

See LIMITATION ACT (IX OF 1908), SCH. I, ART. 179 . **I. L. R. 38 Mad. 695**

See TRANSFER . **I. L. R. 41 Calc. 719**

———— for judgment—

See ACQUITTAL . **I. L. R. 46 Calc. 867**

———— for production of document—

See CRIMINAL PROCEDURE CODE, s. 145.
25 C. W. N 602.

ADJOURNED HEARING.

See Civil Procedure Code (Act V of 1908), O. XVII, r. 2, and O. IX, r. 3.
I. L. R. 44 Bom. 767

ADJUDICATION.

See Insolvency.
I. L. R. 44 Calc. 899

See Provincial Insolvency Act, 1907, ss. 4, 5, 6, etc. **I. L. R. 36 Mad. 402**

——— **date of—**

See Insolvency.
I. L. R. 46 Calc. 991

——— **effect of—**

See Insolvency . **I. L. R. 40 Calc. 78**

——— **in England—**

See Insolvency.
I. L. R. 38 Calc. 542

——— **order for—**

See Insolvency.
I. L. R. 44 Calc. 535

See Provincial Insolvency Act, s. 15 (2) . . . **15 C. W. N. 244**

——— **petition for, what to contain—**

See Presidency Towns Insolvency Act (III of 1909), s. 9 (*d*) (iii).
I. L. R. 37 Mad. 555

——— **plea of—**

See Execution of Decree.
I. L. R. 37 All. 531

——— **annulment of—** *Payment in full of a disputed debt—Judgment debt carrying interest at 6 p. c. —Interest paid up to the date of adjudication order, if payment in full—Presidency Towns Insolvency Act (III of 1909), s. 21.* On an application by an insolvent for the annulment of adjudication under s. 21 of the Presidency Towns Insolvency Act (III of 1909) on the ground that the debts of the insolvent have been paid in full, it appeared that the insolvent had not paid interest on judgment-debts carrying interest at 6 per cent. up to the date of payment, but had paid only up to the date of the adjudication order :—*Held*, that the insolvent did not bring himself within the terms of s. 21, and that the application must be refused. A. A. Hailes, *In re.*
I. L. R. 47 Calc. 914

ADJUSTMENT.

See Civil Procedure Code (Act XIV of 1882), s. 258 . **I. L. R. 34 Bom. 575**
O. XXI, r. 2, O. XXXII, r. 7.
I. L. R. 45 Bom. 91
5 Pat. L. J. 379

——— **uncertified—**

See Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 2.
I. L. R. 43 Bom. 240
I. L. R. 45 Bom. 91

ADJUSTMENT OF ACCOUNT.

See Partnership . **15 C. W. N. 882**

ADJUSTMENT OF SUIT.

See Civil Procedure Code (Act V of 1908), s. 89, O. XXIII, r. 3.
I. L. R. 40 Bom. 386

ADMINISTRATION.

See Administration Suit.

See Transfer of Property Act, 1882, s. 6 . . **I. L. R. 33 All. 414**

——— **order of—**

See Insolvency. **I. L. R. 44 Calc. 1016**

1. ——— *Court-fees—Inventory—Proceedings to amend Valuation—Limitation—Probate and Administration Act (V of 1881), s. 98—Court-fees Amendment Act (XI of 1899), s. 19 H, sub-s. (4).* The six months within which the Collector may move under the Court-fees Amendment Act, s. 19 H, to obtain an amended valuation of an estate in respect of which letters of administration have been granted, runs from the date of the exhibition of an inventory to satisfy the Probate and Administration Act, 1881, s. 98, and from the date when the District Judge holds that a sufficient inventory has been exhibited. Documents filed in another suit cannot be taken in conjunction with lists exhibited by an administratrix for the purpose of constituting a sufficient inventory. Rameshwar Kumar *v.* Collector of Gaya (1913) . . **I. L. R. 41 Calc. 556**
L. R. 40 I. A. 236

2. ——— *Crown debt, priority of—Still-head duty—English mortgage of immoveables—Fixtures—Hypothecation of moveables and shares.* The owner of a distillery died, leaving a certain debt due to Government as still-head duty in respect thereof, as also two mortgages (in the English form) on the land and premises together with the buildings and structures thereon constituting the distillery, the first mortgage being in favour of the Alliance Bank of Simla, Ld., and the second in favour of the Delhi and London Bank, Ld. The moveables appertaining to the distillery were similarly hypothecated to the said Banks and certain shares registered in the deceased's name were hypothecated to and deposited with the Alliance Bank. *Held*, that so far as the immoveable properties were concerned including the fixtures, the Crown was not entitled to priority, that the Alliance Bank as first mortgagee ranked first, but the Delhi and London Bank as second mortgagee was not entitled to priority over the Crown. *Dost Muhammad Khan* v. *Maniram, I. L. R. 29 All. 537, Rama Chandra* v. *Pitchai Kanni, I. L. R. 7 Mad. 434, Ibrahim Khan Sahib* v. *Rangasami Naicken, I. L. R. 28 Mad. 420,* followed. *Mersey Steel and Iron Co.* v. *Naylor Benzon & Co., L. R. 9 Q. B. D. 648 ; L. R. 9 A. C. 434, The Secretary of State for India* v. *Bombay Landing and Shipping Co., 5 Bom. H. C. R. (O. C.) 23, Giles* v. *Grover, 9 Bing. 128, The King* v. *Cotton, (1751) Parker 112, Ganpatputaya* v. *The Collection of Kanara, I. L. R. 1 Bom. 7, Puthia Valapil Barga* v. *Veloth Assenar, I. L. R. 25 Mad. 733, Gayanada Bala Dassee* v. *Butto Kristo Bairagi, I. L. R. 33 Calc. 1040. The Collector of Moradabad* v. *Muhammad Daim, I. L. R. 2 All. 196,* referred to. *Re Henley and Co., L. R. 9 Ch. D. 469, New South Wales Taxation Commissioners* v. *Palmer, [1907] A. C. 179, Rex* v. *Wells, 16 East 278,* distinguished. So far as the moveable properties and the shares were concerned, the Alliance Bank did not have priority over the Crown. *Harrold* v. *Plenty, [1901] 2 Ch. 214,* followed. Bank of Upper India *v.* The Administator-General of Bengal (1917).
I. L. R. 45 Calc. 653

ADMINISTRATION BOND.

———— *Letters of administration—Probate and Administration Act, 1881, ss. 78, 79, 86—Administration bond in favour of District Judge—Assignment of the bond by the District Judge—Second assignment—Appeal—Memorandum of appeal treated as petition for revision.* Under s. 79 of the Probate and Administration Act, 1881, a District Judge has no authority to assign an administration bond again to a person so long as a previous assignment of the said bond to another person is in force. No appeal lies against an order passed by the District Judge assigning a bond under s. 79 of the Act; but where the District Judge passes an order which he has no authority to do, the High Court may interfere, treating the memorandum of appeal as an application for revision. *Uma Charan Das* v. *Muktakeshi Dasi, I. L. R. 28 Calc. 149,* discussed. Kalimuddin *v.* Meharui (1912) . . . . **I. L. R. 39 Calc. 563**

ADMINISTRATION SUIT.

See Civil Procedure Code, 1908, s. 33 O. XX, rr. 6, 7.
I. L. R. 34 Bom. 182

s. 92 . **I. L. R. 40 Bom. 439, 541**

See Costs . **I. L. R. 48 Calc. 352**

See Court-fee **I. L. R. 45 Calc. 634**

See Hindu Law—Will.
I. L. R. 42 Calc. 561

See Res Judicata
I. L. R. 48 Calc. 499

See Solicitor's Lien for Costs.
I. L. R. 35 Bom. 352

———— **Parties**—*Practice—Civil Procedure Code (Act V of 1908), o. 1, r. 8—Suit filed by*

and an individual member of that body applies to be made a party, he must show that his interests will be seriously prejudiced if he is not allowed to come in. He must show that the conduct of the suit is not in proper hands, or that action prejudicial to his interest is being taken by those who purport to represent him. In an administration suit it is extremely undesirable that individual creditors should be added as parties unless they show some very strong reason. The willingness of the applicants to bear their own costs does not counterbalance the delay caused by the addition of a party and the consequent increase in the costs of other parties. Vassonji Tricumji & Co. *v.* Esmailbhai Shivji (1909).
I. L. R. 34 Bom. 420

———— **Valuation of suit**—*Creditor's action*

claimed. On the analogy of s. 11 of the Court-fees Act, after the preliminary decree has been made in a creditor's suit for administration and the other creditors have been invited to establish their claim, if any, against the debtor, each credited who puts forward a claim not already transformed into a judgment-debt, may well be required to pay court-fees *ad valorem* on his application, as if it were a plaint in a suit for the recovery of the sum he claims. The valuation for the purpose of jurisdiction must be identical under s. 8 of the Suits' Valuation Act, with the valuation for the purpose of court-fees. Where a suit is valued on the basis of the claim of the plaintiff and instituted

a suit only in a Court of higher grade, the remedy will be the transfer of the suit at that stage from the Court of the lowest grade to the Court competent to try a claim of enhanced value. Shashi Bhushan Bose *v.* Manindra Chandra Nandy (1916).
I. L. R. 44 Calc. 890

———— **Costs of an intervener**—*Discretion of Court—Intervention, propriety of.* In an administration suit one S. S. was allowed to prove an alleg-

measure, not of immediate protection but of possible personal benefit hereafter, it would be clearly unjust to make the claimant S. S. pay an additional bill of costs of the intervener. *In re* Watts, *22 Ch. D. 5 (1879),* and *In re, Schuabacher, (1907), 1 Ch. 719,* followed. *William* v. *Buchanan, (1891), 7 T. R. 226, Hanbury* v. *Upper Inny Drain-* ...nd *In re,* Souren-

24 C. W. N. 888

———— *A Mahomedan dying intestate—Heir entitled to bring a suit for account and administration of the estate—Heir not bound to file a suit for partition—Mahomedan law.* One Gulam Husain, a Mahomedan, died leaving among other heirs, his father and mother. They having died their shares passed to their son, the plaintiff.

having an interest in the estate of Gulam Hussein he was entitled to come to Court and ask for a preliminary decree for the administration of that estate and that he was not bound to file a suit for partition. Essafally *v.* Abdeali.
I. L. R. 45. Bom. 75

———— **Report by administrator**—*Defendant in possession of the estate—Defendant contending that the Court had no jurisdiction to deal with certain properties in his possession not belonging to the estate of the deceased—Duty of the Court to direct inquiry.* In an administration suit filed by the plaintiff against the defendant who was *in possession* of the whole of the property of the *deceased* a preliminary decree was passed *directing an* account to be taken of the estate of *the deceased*. An administrator was appointed ...

ADMINISTRATION SUIT—*contd.*

and to report as to the nature of the properties and rights of the parties thereto. The administrator filed the report. Objections were raised by the parties to the report, the defendant contending that the Court had no jurisdiction to deal with certain properties in his possession on the ground that the properties did not belong to the estate of the deceased. The Subordinate Judge upheld the contention and refused to direct an enquiry regarding the said properties. On an application being made to the High Court. *Held*, setting aside the order, that the Court should have directed an enquiry with regard to the objections raised by the defendant to the administrator's report, as the assets were in the possession of the defendant, and there was no reason why the Court should not decide between the parties to the suit whether those assets belonged to the estate of the deceased or not. MOTIBHAI SHANKERBHAI *v.* NATHABHAI NARANBHAI (1920) **I. L. R. 45 Bom. 1053**

ADMINISTRATOR.

See ADMINISTRATORS—

———— *Suit against administrator of minor's father's estate—Limitation, date from which runs—Trustee, whether administrator is —Acquisition of property with trust funds—right beneficiary—Mis-joinder of causes of action.* The period of limitation for a suit against an administrator whose administration is limited by the letters of administration to the minority of the beneficiary, begins to run from the day on which the beneficiary attains his majority. An Administrator in whom no special trust is vested for a specific purpose is not trustee within the meaning of S. 10 of the Limitation Act, 1908. Where, in one suit, the plaintiff prayed for an order directing the administrator of his father's estate to render an account of his administration, and also for recovery of immoveable property in the hands of third parties, *held*, that the suit was in contravention or O. II, r. 4, of the Code of Civil Procedure, 1908. Where a trustee makes a profit by the improper employment of trust money he is liable to make good to the beneficiary the amount of that profit in addition to the money improperly employed. But the beneficiary is not entitled to claim a title in the property acquired by the trustee by the improper use of trust funds. Even if the beneficiary in such a case is entitled to claim either the money used with interest or the property acquired with the money, limitation for the exercise of such an option would be the limitation prescribed for recovery of the money used. JANARDHAN PRASAD THAKUR *v.* JANKIBATI THAKURAIN. **2 Pat. L. J. 642**

ADMINISTRATOR PENDENTE LITE.

See ACCOUNT . . **15 C. W. N. 832**

———— *Discharge, order of—Passing of accounts—Suit for account, whether subsequently maintainable—Civil Procedure Code (Act V of 1908), O. XIV, r. 6.* An order discharging an administrator *pendente lite* from further acting as such upon passing his accounts, and the consequent passing of his accounts, in the circumstances of the case, did not constitute a bar to a suit for an account brought against him. KHITISH CHANDRA ACHARJYA CHOWDHURY *v.* OSMOND BEEBY (1912) . **I. L. R. 39 Calc. 587**

ADMINISTRATOR PENDENTE LITE—*contd.*

———— *Commission—" Assets come into his hands " meaning of—Pledge—Action for account—Estoppel—Evidence Act (I of 1872), s. 115—Acquiescence—Laches—Partition.* Where part of the estate of which the defendant was appointed administrator *pendente lite* consisted of Government promissory notes, which had been pledged with certain Banks as security against advances, and these Government promissory notes were subsequently sold by the Banks under instructions from the defendant, and the sale-proceeds applied towards satisfying the indebtedness to the Banks, and the surplus money paid to the defendant: *Held*, that the defendant under the order of his appointment which provided for his remuneration by the allowance of " a commission of 2 per cent. on the assets that will come into his hands " was not entitled to charge commission on the gross value of the Government promissory notes, but only on the surplus moneys which he actually received after the indebtedness to the Banks had been satisfied. *Scott* v. *Franklin, 15 East 428*, referred to. Where an administrator *pendente lite* had retained as his remuneration more than he was entitled to claim, and his accounts showing such amounts had been passed by the Court with the knowledge of the plaintiffs and without any objection being taken by them, and a suit was subsequently brought by the plaintiffs to recover from him such excess, within the time allowed by law: *Held*, that such suit was not barred by estoppel, acquiescence or laches. *Redgrave* v. *Hurd, L. R. 20 Ch. D. 1*, referred to. The part of the estate to which the administrator *pendente lite* was appointed, was the undivided share of one out of four brothers in a joint family estate, the mother being alive, and subsequently by a decree in a partition suit, the mother was held entitled to a one-fifth share: *Held*, that the administrator *pendente lite* was entitled to charge his commission as on a one-fourth share. OSMOND BEEBY *v.* KHITISH CHANDRA ACHARJYA CHOWDHURY (1914) . . **I. L. R. 41 Calc. 771**

ADMINISTRATORS.

See ADMINISTRATOR.

See MAHOMEDAN LAW—PRE-EMPTION. **I. L. R. 41 Bom. 636**

See MORTGAGEE **I. L. R. 38 Calc. 342**

———— **Directions to—**

See SUCCESSION ACT (X OF 1865), SS. 264B AND 239. **I. L. R. 44 Bom. 682**

———— **disagreement between—**

See LETTERS OF ADMINISTRATION. **I. L. R. 40 Calc. 50**

ADMINISTRATRIX.

See VENDOR AND PURCHASER. **I. L. R. 40 Bom. 69**

ADMINISTRATOR-GENERAL'S ACT (II OF 1874).

———— **ss. 20, 52 and 54**— *Grant of Letters of Administration to the Administrator-General—Vesting of the estate in him—Sale by him of lands for his commission without sanction of Court, validity of.* A grant of Letters of Administration under s. 20 of Administrator-General's Act to the the Administrator-General in respect of the estate

ADMINISTRATOR-GENERAL'S ACT (II OF 1874)—*contd.*

——— ss. 20, 52 and 54—*contd.*

of a deceased Hindu vests the estate in the Administrator-General and enables him to dispose of immovable property without the consent of the Court. The administration cannot be treated as closed until every act necessary for its completion has been done. Hence a sale by the Administrator-General of some immovable property of the deceased, for the purpose of realising the commission due to him under the Act, is a valid sale in the course of administration and it takes precedence over a prior sale effected by the heir of the deceased. ALWAR CHETTY *v.* CHIDAMBARA MUDALI (1914). **I. L. R. 38 Mad. 1134**

of creditors—Construction of instrument of agreement—Creditor to be paid out of cheques or monies received from a third party for work done by the creditor—Charge on such cheques or monies received after Letters of Administrations granted—"Specific fund," meaning of —Equitable assignment—" Pay

and contains a provision that nothing contained in the section shall prejudice the right of any creditor or other claimant to follow the assets or any part thereof in the hands of the persons who may have received the same respectively. When Probate or Letters of Administration have been granted to the Administrator-General there is no machinery for the administration of the insol-

to have been improperly paid by the Administrator-General to such creditors in priority to the plaintiff. When an agreement contained a clause, *viz.*, "It is agreed that you should have a lien or charge over cheques or monies received for works done with your capital," the instrument operated to create a charge on cheques or monies payable for work done after the instrument, although the

D. 342, and *Tailby* v. *Official Receiver, 13 A. C. 523,* followed. *Bhansidhar* v. *Sant Lal, I. L. R. 10 All. 133,* referred to. *Ex parte Nicholas In re James, 22 Ch. D. 782,* and *Ex parte Moss In re Toward, 14 Q. B. D. 310,* explained. When an instrument refers to specific funds out of which the claims of a creditor are to be satisfied, the creditor has a charge on such fund. When a creditor is to be paid "out of the fund" as distinguished from "when the assignor gets the fund," a valid equitable assignment is created provided the transaction is for value. Fisher on Mortgage, page 126, White and Tudor's Leading Cases, 8th Edition. Volume I, page 117. *Field* v. *Megaw, L. R. 4 C. P. 660,* distinguished. *Ramsidh Pande*

ADMINISTRATOR-GENERAL'S ACT (II OF 1874)—*contd.*

——— ss. 28, 34 and 35—*contd.*

v. *Balgobind, I. L. R. 9 All 158,* referred to NAVAJEE *v.* THE ADMINISTRATOR-GENERAL, MADRAS (1913) . . **I. L. R. 38 Mad. 500**

——— s. 36—

——— *Hindu Wills Act (XXI of 1870), ss. 2 and 5—Indian Succession Act (X of 1865), s. 187—Administrator-General's Act (II of 1874), s. 36—Will made in Bombay—Pro-*

Indian Succession Act (X of 1865) which is incorporated in the Hindu Wills Act (XXI of 1870). The provision of the Administrator-General's Act (II of 1874) is not affected by the incorporation in the Hindu Wills Act (XXI of 1870) of s. 187 of the Indian Succession Act (X of 1865) NARAYAN SHRIDHAR *v.* PANDURANG BAPUZI (1910).
I. L. R. 34 Bom. 506

ADMINISTRATOR-GENERAL'S ACT (III OF 1913).

——— **s. 11**—*applicability of—Meaning of the word "succession."* The admission by the applicant that there is a valid Will does not prevent him from taking recourse to s. 11 of the Administrator-General's Act. The word "succession" in s. 11 should not be read as meaning intestate succession only. IN THE GOODS OF PASUPATI MUKERJI . . . . **24 C. W. N. 326**

——— **Costs of an intervener**—*Discretion of Court—Intervention, propriety of.* In an administration suit one S. S. was allowed to prove an alleged claim against the estate of the deceased, and the Receiver of the estate was given liberty to contest it. Subsequently on the application of one P. C., he was given liberty at his own risk as to costs to oppose the claim of S. S. against the estate: *Held*—That P. C.'s intervention did not change the character of the proceeding or alter the scope of the suit and as he voluntarily came into it as a prudent measure, not of immediate protection but of possible personal benefit hereafter, it would be clearly unjust to make the claimant S. S. pay an additional bill of costs of the intervener. *In re, Watts, 22 Ch. D. 5 (1879)* and *In re, Schwabacher, (1907) 1 Ch. 719,* followed. *Williams* v. *Buchanan, (1891) 7 T. R. 226, Hanbury* v. *Upper Inny Drainage Board, (1883) L. R. 12 Ir.* and *In re, Salmon, 42 Ch. D. 351 (1889),* referred to. SOURENDRO MOHAN SINHA *v.* MURARILAL SINHA . . . . **24 C. W. N. 888**

ADMIRALTY COURT ACT, 1861 (24 VIC., C. 10).

——— s. 5—

See ARREST OF SHIP.
I. L. R. 42 Calc. 85

ADMIRALTY JURISDICTION.

See ARREST OF SHIP.
I. L. R. 42 Calc. 85

ADMIRALTY JURISDICTION—*contd.*

——— *Collision case—Decision of trial Judge, weight to be attached to—Trial with aid of Nautical Assessors.* In collision cases, no rule is better established than this, that when questions of fact alone arise, a Court of Appeal should be most chary of interfering with the decision of a trial Judge who has seen the witnesses and had the opportunity of forming his estimate of them by their demeanour. Only in exceptional cases and for special reasons, should a Court which has not had this advantage reverse the judgment of the trial Judge on questions of fact. RIVERS STEAM NAVIGATION COMPANY *v.* THE HATHOR STEAMSHIP COMPANY, LD., (1916).
20 C. W. N. 1022

ADMIRALTY OFFENCES (COLONIAL) ACT (12 & 13 VIC. C. 96)

See HIGH SEAS **I. L. R. 42 Bom. 234**

ADMISSIBILITY.

See CONSTRUCTION OF DOCUMENT. **I. L. R. 37 Mad. 480**

See DEPOSITION **I. L. R. 45 Calc. 825**

See EVIDENCE . **I. L. R. 47 Calc. 671**

ADMISSION.

See CONTEMPT OF COURT. **I. L. R. 41 Calc. 173**

See DIVORCE . **I. L. R. 38 Calc. 907**

See EVIDENCE ACT (I OF 1872).
s. 58 . . **I. L. R. 42 Bom. 352**
s. 70 . . . **I. L. R. 38 All. 1**

See MALICIOUS PROSECUTION. **4 Pat. L. J. 676**

See PARTIES . **I. L. R. 45 Calc. 159**

See TRANSFER OF PROPERTY ACT, s. 107. **I. L. R. 36 Bom. 500**

——— **by defendant—**

See EVIDENCE **I. L. R. 44 Calc. 130**

——— **By Pleader—**

See PENSIONERS ACT, 1871, s. 6. **I. L. R. 39 Bom. 352**

See VAKALATNAMA **24 C. W. N. 385**

——— **In a compromise—**

See HINDU LAW—JOINT FAMILY. **1 Pat. L. J. 509**

——— **Throws onus of proving untrue on person who makes it—**

See SECOND APPEAL. **I. L. R. 2 Lah. 249**

——— **to police—**

See JURY, RIGHT OF TRIAL BY. **I. L. R. 37 Calc. 467**

1. ——— **What constitutes**—*Admission.* To constitute an admission, the document needs not to be written by the party against whom it is used: it is sufficient if it is found in his possession, and his conduct thereto creates an inference that he was aware of its contents and admitted their accuracy; but, unless this is done the document cannot be used against him as proof of its contents. What conduct would properly gives rise to such inference depends on the facts of each case. The mere fact of possession of letters is not of much value, unless it is shown that their contents were recognized and adopted by the replies elicited or the conduct inspired by them. BARINDRA KUMAR GHOSE *v.* EMPEROR (1909) . . . . **I. L. R. 37 Calc. 467**

2. ——— **By a defendant**—A plaintiff may rely on the admissions of defendant as to his title in proof of his claim just as much as on any other evidence, and if a defendant goes into the witness box and admits his title there is no further onus upon him to prove it, at least as against such defendant. An erroneous statement made without knowledge in an affidavit filed as a matter of routine by a person whose authority to make it was not proved, could not bind a party to a proceeding, nor affect the character of a sale held in such proceeding under the provisions of s. 124 (Beng. Act I of 1879), so as to confer upon the auction-purchaser a right which he could not obtain by the sale itself. *Janardan Singh* v. *Maharajah Pertap Udai Nath Sahi Deo, R. A. No. 6 of 1880, Per* CUNNINGHAM AND PRINSEP, *JJ.*, referred to. KALI SANKAR SAHAI *v.* UDAI NATH SAHI DEO (1911) . . . **16 C. W. N. 683**

3. ——— **Effect of**—*Declaratory suit to safeguard plaintiff's rights as a reversioner—Specific Relief Act, I of 1877, s. 42. Held,* that what a party admits to be true may reasonably be presumed to be so, and until the presumption is rebutted the fact admitted must be taken to be established. *Chandar Kunwar* v. *Chaudhri Narpat Singh* (*I. L. R. 29 All. 184 P. C.*) and *Lal Shah* v. *Hira Lal* (*106 P. R. 1917 p. 418*), referred to. *Held also,* that a brother may sue for a declaration that his brother (a lunatic) is entitled to a share in a mortgage acquired by the two defendants in their own names (one of them being the manager of the lunatic) where the plaintiff is entitled to succeed on the death of the lunatic as one of his heirs. VIR SINGH *v.* HARNAM SINGH.
I. L. R. 1 Lah. 137

4. ——— **Statement by accused**—*Pointing out places of crime by others and of his subsequent concealment, and houses visited for help—Exculpatory statements as to the occurrence—Admission of blood stains on clothes worn by the accused—Admissibility of such statements—Useful test of admissibility of statements to the police—Admissibility of previous deposition when witness cannot be found—Sufficiency of evidence that he could not be found—Evidence Act (I of 1872), ss. 25 and 33—Circumstantial evidence, rule of.* S. 25 of the Evidence Act does not exclude all statements by an accused to the police but only confessions. There is a distinction between mere admissions and confessions which are statements either directly admitting guilt or suggesting the inference of guilt of the crime charged. The general rule in the section is further subject to that which admits statements leading to discovery whether they amount to confessions or not. Statements by an accused to police officers pointing out the places where the offence was committed by others or where he concealed himself thereafter, and the houses to which he went for assistance, whether regarded as information leading to discovery, or as statements made by him as part of his defence, are admissible in evidence as admissions. Exculpatory statements by an accused to the police as to what, according to his case, actually

ADMISSION—*concld.*

happened on the occasion of the commission of the offence and put forward by way of defence, are admissible as admissions, notwithstanding that they are shown by other evidence to be untruthful. So where the accused told the police that certain other persons had killed the deceased, described the occurrence, and stated that he was seized by them but escaped and concealed himself in a paddy field, that he went to the houses of several people for assistance against the murderers but was turned away as a mad man, and that he then went and slept at the house of another person: *Held,* that the statements were admissible in evidence. A useful test as to the admissibility of statements made to the police is to ascertain the purpose to which they are put by the prosecution. If the prosecution relies on the statements as true they may, and probably in many cases will be found to, amount to confessions. If they are relied on not because of their truth but of their falsity and as a circumstance thereby tending to prove the guilt of the accused, they are admissible as admissions. But a statement by the accused to the police that a mark found in the *dhoti,* which he was wearing at the time of the occurrence, was a blood stain, was *held,* under the circumstances (*viz.,* the distance he was from the place of the murder and his prevarication as to the nature of the mark), to be of an incriminating character from which an inference might possibly though not necessarily, be drawn. Where the only evidence that a witness could not be found was the statement of a police officer that search had been made for him to summon him but he could not be found, that a warrant was also issued and that he was a man of another district, but no warrant was produced and there was no evidence of any attempt to serve it, or, if so, of what was done for the purpose: *Held,* that sufficient ground had not been established for the admission of the

the accused and incapable of explanation on any other reasonable hypothesis than that of guilt. EMPEROR *v.* KANGAL MALL (1905).

I. L. R. 41 Calc. 601

5. ———— Retracted confession—*Evidence Act (I of 1872), ss. 21, 30—Relevancy.* For a conspiracy to wage war, no act or illegal omission is necessary; the agreement of two or more will suffice. While admissions, which include confessions, are by s. 21 of the Evidence Act, 1872, declared *relevant* and may be proved as against the persons making them, all that s. 30 of the Evidence Act provides is that the Court *may* take them into consideration as against other persons. This distinction of language is significant,

co-accused alone would be bad in law. Moreover, under s. 30, that only can be taken into consideration which is a confession in the true sense of the term, so that to place any reliance on a retracted confession against a co-accused would be most unsafe. *Yasin* v. *Emperor, I. L. R. 28 Calc. 689,* referred to. A retracted confession cannot ordinarily take the place of legal proof. EMPEROR *v.* LALIT MOHAN CHUCKERBUTTY (1911).

I. L. R. 38 Calc. 559

ADMISSION IN PLEADINGS.

See EVIDENCE ACT (I OF 1872), s. 92 AND PROV. (2) I. L. R. 39 Bom. 399

ADMISSION OF EXECUTION.

See MORTGAGE . I. L. R. 37 All. 426

ADMISSION OF LEGITIMACY.

See MAHOMEDAN LAW—LEGITIMACY.
I. L. R. 46 Calc. 259

ADOPTED SON.

See GUARDIANS AND WARDS ACT, s. 17.
15 C. W. N. 558

See HINDU LAW—ADOPTION.
24 C. W. N. 905

See HINDU LAW—ALIENATION.
I. L. R. 40 Calc. 966

See HINDU LAW—WIDOW.
I. L. R. 41 Bom. 93

See PARTIES—RELIGIOUS ENDOWMENT.
I. L. R. 40 Calc. 323

———— of a Sudra, share, of on partition—

See HINDU LAW—PARTITION.
I. L. R. 40 Mad. 632

———— rights of——

See HINDU LAW—STRIDHAN.
I. L. R. 43 Calc. 944

ADOPTION.

See AGRA TENANCY ACT (ACT II OF 1901), s. 22 . . I. L. R. 34 All. 658

See BURMESE BUDDIST LAW.
I. L. R. 45 Calc. 1

See CUSTOM.

See ESTOPPEL . I. L. R. 34 All. 398

See JURISDICTION.
I. L. R. 35 Bom. 264

See HINDU LAW—ADOPTION.
23 C. W. N. 177
I. L. R. 42 All. 382

See HINDU LAW—IMPARTIBLE ESTATE.
I. L. R. 37 Mad 199

See HINDU LAW—PARTITION.
I. L. R. 40 Bom. 270

See HINDU LAW—STRIDHAN.
I. L. R. 43 Calc. 944

See HINDU LAW—WIDOW.
I. L. R. 47 Calc. 466

See HINDU LAW—WOMAN'S ESTATE.
L. R. 46 I. A. 259

See JURISDICTION.
I. L. R. 35 Bom. 264

See LIMITATION ACT (IX OF 1908), SCH. I, ARTS. 118, 119.

See NAIKINS. . I. L. R. 37 Bom. 116

———— by an adopted son of his brothers—

See CUSTOM (ADOPTION).
I. L. R. 1 Lah. 33

———— by minor widow—

See HINDU LAW—ADOPTION.
I. L. R. 40 Mad. 625

ADOPTION—*contd.*

———— by widow—

See APPEAL TO PRIVY COUNCIL.
I. L. R. 38 Mad. 406

See HINDU LAW—ALIENATION.
I. L. R. 41 Mad. 75

See HINDU LAW—ADOPTION.
24 C. W. N. 57

See HINDU LAW—ADOPTION.
24 C. W. N. 294

———— by widow—not succeeding a heiress—
See HINDU LAW—ADOPTION.
24 C. W. N. 57

———— by widow in contravention of Husband's directions—

See HINDU LAW—WILL.
24 C. W. N. 274
L. R. 47 I. A. 203

———— Consent of Supindas—when necessary—

See HINDU LAW—ADOPTION.
24 C. W. N. 905

———— By Sudra—

See HINDU LAW—ADOPTION—
I. L. R. 45 Bom. 459, 829, 754, 1167

See HINDU LAW—JOINT FAMILY.
26 C. W. N. 1

———— Dvyamushayana form—

See HINDU LAW—ADOPTION.
I. L. R. 42 Bom. 277

———— During life-time of a son adopted by her husband—

See HINDU LAW—ADOPTION.
I. L. R. 44 Bom. 627

———— evidence of—

See HINDU LAW—ADOPTION.
I. L. R. 44 Calc. 201

———— Husband dying in union with co-parceners—Widow succeeding as heir to her unmarried son after partition—Power of widow to adopt—

See HINDU LAW—ADOPTION
I. L. R. 44 Bom. 297

———— Widow of a co-parcener adopting after the death of surviving co-parcener—

See HINDU LAW—ADOPTION
I. L. R. 44 Bom. 483

———— Junior daughter-in-law adopting a son with the consent of her father-in-law—

See HINDU LAW—ADOPTION.
I. L. R. 44 Bom. 508

———— payment for—

See ADOPTION . **L. R. 35 Bom. 169**

———— not in *Dattaka* form—whether adoptee entitled to collateral succession—

See HINDU LAW—ADOPTION.
I. L. R. 1 Lah. 588

———— object of—

See HINDU LAW—ADOPTION.
I. L. R. 46 Calc. 749

ADOPTION—*contd.*

———— of brother's daughter's son—

See CUSTOM (ADOPTION) (1).
I. L. R. 1 Lah. 15

———— of Daughter's son—

See CUSTOM (ADOPTION).
I. L. R. 2 Lah. 193

———— of an Orphan—

See THE HINDU LAW—ADOPTION.
I. L. R. 44 Mad. 260

———— of stranger—

See CUSTOM (ADOPTION) (2).
I. L. R. 1 Lah. 31

———— subsequent completion of, by testator—

See HINDU LAW—WILL.
I. L. R. 39 Mad. 107

———— suit to set aside—

See RES JUDICATA . **23 C. W. N. 326**

———— validity of—

See HINDU LAW—ADOPTION.
I. L. R. 39 Mad. 77

1. ———— **Suit by reversioner to set aside**—*Previous suit by adoptive mother, binding effect of—Civil Procedure Code (1908), s. 11.* A Hindu widow as such brought a suit to set aside an adoption of a son made by her on the ground that she was not vested with authority from her husband to adopt. The suit was contested by the adopted son and it was decided by the Court in India, on the ground of estoppel. It was however *held* by the Privy Council that the adoption was valid and that the adoptive mother had authority from her husband to adopt. After the death of the widow, the present suit was brought by an alleged reversioner to the estate of her husband for a declaration that the adoption was invalid and for possession of the estate. *Held,* per BANERJI and CHAMIER, JJ. (RICHARDS, C.J., dissenting) that widow represented the estate and the interest of the reversioners to her husband, and as the Privy Council had held in the previous suit that the widow had full authority to make the adoption that decision was binding on the reversioners and the present suit was not maintainable. *Per* RICHARDS, C.J. (*contra*) the decision in the suit of the widow was not binding on the reversioners and the present suit was maintainable. RISAL SINGH *v.* BALWANT SINGH (1915).
I. L. R. 37 All. 496

2. ———— **By Widow of twelve years of age**—*Adoption invalid*—A Hindu widow of twelve years of age, who has not reached puberty cannot make a valid adoption. MURGEPPA *v.* KALAWA.
I. L. R. 44 Bom. 327

3. ———— **Valuation of suit for**—*Suit to set aside Adoption—Munsif, jurisdiction of—Forum Practice.* According to a long-standing practice a suit to set aside an adoption is, for the purposes of jurisdiction, incapable of Valuation: and it is competent to the plaintiff in such a suit to value the relief claimed and that valuation determines the forum to decide the suit. *Aklemannessa Bibi v. Mahomed Hatem, I. L. R. 31 Calc. 849,* commented on. *Jan Mahomed Mandal v. Mashar Bibi, I. L. R. 34 Calc. 352,* referred to. PRAHLAD CHANDRA DAS *v.* DWARKA NATH GHOSE (1910).
I. L. R. 37 Calc. 860

ADOPTION—*contd.*

129—Adverse possession in widow's life-time, plea of—Gift of orphan boy to be adopted by elder brother—Validity—Factum valet—Will—Construction—Authority to adopt son—Successive adoptions if valid—Gift to widow, if absolute. When a plaintiff, a Hindu, seeks to recover possession as rever-

vided by Art. 141 of Sch. II of the Limitation Act of 1877, and not Art. 118. The limitation runs from the death of the widow when the cause of action arises entitling the plaintiff to sue for possession. Art. 118 could not be applied to this case where the reversioner had brought a suit during life-time of the widow, praying amongst other reliefs, for a decree declaring the adoption void (as contemplated by Art. 129 of Act IX of 1871 and within the period provided therein), but the Court virtually decided that the plaintiff had no cause of action for such a suit until the succession opened to him and his alleged right to recover possession of the property accrued. The alleged adopted son could not claim to have acquired title by adverse possession during the widow's life-time. A will confering on the widow power "to adopt son" and containing no special words restricting that power to one adoption, authorised the widow to adopt a second son on the death during minority of the first adopted son. Where an adoption made 48 years ago was attacked on the ground that the gift of the boy was not properly made in that it was made by his brother, both his parents being then dead: *Held,* that the doctrine of *factum valet* applied, and the adoption, the setting aside of which would deprive the adopted child of his status after it had been accepted for 48 years, should be upheld. *Wooma Daee* v. *Gokoolanund Dass, I. L. R. 3 Calc. 587*; *Chinna Gaundan* v. *Kumara Gaundan, 1 Mad. H. C. Rep. 54*; *Raja Vyankataav* v. *Jayavantrav, 4 Bom. H. C. Rep. A. C. 191*, *Janokee Debea* v. *Gopaul Achariya I. L. R. 2 Calc. 365*, applied. *Held,* on the construction of the will, that the intention of the testator was that, on the death of the adopted son and failure of any issue, the entire moveable and immoveable properties of the testator would pass to his widow absolutely so that on the death of the first adopted son the property vested in the widow as her *stridhan.* BHAGWAT PERSHAD *v.* MURARI LALL (1910) . . . . **15 C. W. N. 524**

5. ———— **Suit for declaration of invalidity of an adoption**—*Suit dismissed as time-barred—Plaintiff debarred from obtaining a decree for possession on title.* When the setting aside of an adoption is essential to the granting of a decree for possession of immoveable property, the fact that a suit to set aside the adoption has become time-barred is a bar to the granting of a decree for possession on title. *Lachman Lal Chowdhri* v. *Kanhaya Lal Mowar, I. L. R. 22 Calc. 609*, referred to. *Nathu Singh* v. *Gulab Singh, I. L. R. 17 All. 167*, and *Chandania* v. *Salig Ram, I. L. R. 26 All. 40* distinguished. CHUNNI LAL *v.* SITA RAM (1911). . . . **I. L. R. 34 All. 8**

ADOPTION—*concld.*

6. ———— **Custom**—*Agarwal Banias of Zira, Punjab—Custom—Adopted person, an orphan and married—Adoption by declaration of adoption and subsequent treatment of adoptee as adopted son—Privy Council, practice of—Concurrent decisions on fact.* In this case in which the plaintiff sued for a declaration of his adoption the parties were Agarwal Banias of Zira in the Punjab and the plaintiff being an orphan and married, the validity of the adoption, if made depended upon whether they were governed by custom or by the Hindu law. Their Lordships of the Judicial Committee considered that the Courts below had concurrently

ing father that a boy had been adopted and the subsequent treatment of that boy as the adopted son, was sufficient to constitute a valid adoption; and that, in fact, the defendant had so adopted the plaintiff and treated him as his adopted son. In accordance, therefore, with the usual practice as to such concurrent decisions: *Held,* that the adoption had been established. Owing, however, to the limited nature of the evidence as to custom among the Agarwal Banias of Zira, the effect of the decision should be confined to the particular circumstances of the case. CHIMAN LAL *v.* HARI CHAND (1913) . . **I. L. R. 40 Calc. 879**

6. (a) ———————— In this case where the issue was as to whether Plaintiff had been adopted the onus being on the Plaintiff the Judicial Committee held he had not discharged that onus and condemned the Indian practice of advocates not putting their own Clients in the Witness Box but trying to force their opponents to do so that they can cross examine their own clients. LAL KUNWAR *v.* CHIRANJI LAL.
I. L. R. 32 All. 104

7. ———— **Under Will**—*Hindu law—Construction of will—Power of adoption conferred upon the*

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other was of no effect. *Narasimha Appa Row* v. *Parthasarathy Appa Row, I. L. R. 37 Mad. 199*, referred to. LACHHMI PRASAD *v.* MUSAMMAT PARBATI . . . . **I. L. R. 42 All. 268**

8. ———— **Son subsequently born to adoptive father**—*Rights of adopted and natural-born son inter se—Agreement by adoptive father with father of adopted son that adopted son shall share inheritance with natural-born son equally.* Agreement binds debottar property if agreement shows that it was the father's intention. . **24 C. W. N. 794**

9. ———— **Sons of Sudras in Madras** are entitled to an equal share with the after acquired son on partition. ARUMILLI PERRAYU *v.* ARUMILLI SUBBARAYADA. **26 C. W. N. 1**

10. ———— **What amounts to.** It is not necessary to give direct evidence of adoption where it has been publicly recognized for a long time. JAGANNATH MARWARI *v.* SA CHANDRI BIBI.
26 C. W. N. 65

ADULTERATION.

See CALCUTTA MUNICIPAL ACT (BENG. III OF 1899), s. 495A.
22 C. W. N. 745

See GHEE . **I. L. R. 47 Calc. 633**

See UNITED PROVINCES PREVENTION OF ADULTERATION ACT (VI OF 1912), ss. 4, 6 . . **I. L. R. 40 All. 661**

——— *Adulterated Ghee, sale of—Master and servant—Sale by servant or partner—Liability therefor of master or co-partner of a firm of Commission Agents—Calcutta Municipal Act (Beng. III of 1899), ss. 494 and 574.* Section 495 of the Calcutta Municipal Act imposes a positive prohibition against the sale of adulterated articles of food or drink, and covers the case of an agent or firm as well as that of a master and servant. A master is liable under the section for sale by his servant of such as adulterated articles at his shop without his connivance. The partners of a firm carrying on business as agents of the manufacturers of *ghee* in shops bearing their names, are each responsible for everything sold therein in contravention of the section. *Brown* v. *Foot, 17 Cox C. C. 509,* followed. SEW KARAN v. CORPORATION OF CALCUTTA (1912) **I. L. R. 39 Calc. 682**

ADULTERY.

See DIVORCE. **I. L. R. 44 Calc. 1091**
I. L. R. 47 Calc. 1068

See DIVORCE ACT

——— admission of—

See DIVORCE. **I. L. R. 38 Calc. 907**

AD VALOREM COURT-FEE.

See DECLARATION.
I. L. R. 38 Mad. 922

ADVANCEMENT.

See MARRIED WOMEN'S PROPERTY ACT (III OF 1874), s. 6.
I. L. R. 37 Mad. 483

See BENAMIDAR . **L. R. 47 I. A. 275**

ADVERSE ENJOYMENT.

See EASEMENTS ACT (V OF 1882), s. 15
I. L. R. 38 Mad. 1

ADVERSE POSSESSION.

See ATTACHMENT
I. L. R. 45 Bom. 1020

See BENGAL FERRIES ACT 1885.
5 Pat. L. J. 500

See BOMBAY LAND REVENUE ACT 1879, s. 121.
I. L. R. 45 Bom. 67

See BHAGDARI AND NARWADARI TENURES ACT (BOM. V OF 1862), s. 3.
I. L. R. 39 Bom. 358

See BOMBAY DISTRICT MUNICIPAL ACT (BOM. ACT III OF 1901), ss. 113, 122.
I. L. R. 38 Bom. 15

See CO-OWNERS.
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See GUJARAT TALUKDARS' ACT (BOM. ACT VI OF 1888), s. 31.
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See HEREDITARY OFFICES ACT (BOM. III OF 1874), s. 5.
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I. L. R. 37 Bom. 224, 231
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I. L. R. 44 Mad. 883

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(SCH. I, ART. 144).
I. L. R. 30 All. 461
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(SCH. I ART. 120).
I. L. R. 42 Bom. 333

SCH. I, ART. 123.
I. L. R. 45 Bom. 519

SCH. I, ARTS. 134, 144 AND 148.
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See SARANJAM. **I. L. R. 40 Bom. 606**

See SHEBAIT . **I. L. R. 39 Calc. 887**

See TRANSFER OF PROPERTY ACT (IV OF 1882), ss. 4 AND 54.
I. L. R. 38 Mad. 1158

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See WILL . . **3 Pat. L. J. 199**

——— **against a Hindu widow**—

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——— **against a person not entitled to present possession**—

See CENTRAL PROVINCES LAND REVENUE ACT, 1881. . **1 Pat. L. J. 293**

——— **against Government**—

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I. L. R. 38 Mad. 6

——— **by mortgagee**—

See TRANSFER OF PROPERTY ACT (IV OF 1882), ss. 54, 118.
I. L. R. 37 Mad. 423

——— **by one co-owner against another**—

See CO-OWNERS . **24 C. W. N. 1057**

——— **End of by the passing of the decree**—

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I. L. R. 44 Bom. 934

——— **Entitling to Land Acquisition Compensation**—

See ACQUISITION OF LAND.
1 Pat. L. J. 258

——— **Entry in Revenue records more than 12 years old**—

See EQUITY OF REDEMPTION.
I. L. R. 1 Lah. 549

——— **In two Capital Cities**—

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I. L. R. 37 Calc. 709

——— **tacking of**—

See EVIDENCE ACT (I OF 1872), ss. 107, 108 . . **I. L. R. 37 Mad. 440**

——— **to Auction Purchaser**—

See CRIMINAL PROCEDURE CODE, s. 145.
25 C. W. N. 743

——— **Under decree**—

See MORTGAGE . **I. L. R. 2 Lah. 53**

1. ——— **Government against Court of Wards representing private persons**—*Court of Wards, position of—Chur land, suit to recover—Gradual formation—Proof that any portion formed within period of limitation—Onus.* The Government and the Court of Wards are not identical bodies, nor can the latter be regarded as merely a department of the former. The latter is a statutory body and the mere fact that

ADVERSE POSSESSION—*contd.*

in this province the Board of Revenue as the Court of Wards does not make the possession by Government of newly formed *chur* land during the time the claimants' property was under the direction of the Court of Wards possession by the latter on behalf of the claimants: *Held,* on the evidence, that Government was in adverse possession of the disputed land as against the Court of Wards representing the claimants. *Choudhree Sheoraj Singh* v. *The Collector of Moradabad, 2 N. W. P. 379,* approved. In a suit for recovery of possession of *chur* land, which commenced forming more than 12 years before the suit, the onus is on the plaintiffs to prove that any portion of the *chur* formed within 12 years of the suit. *Kumar Ranjit Singh* v. *Schœne, 4 C. L. R. 319,* referred to. GURU DAS KUNDU CHOWDHURY *v.* KUMAR BASANTA KUMAR ROY (1909) . . **14 C. W. N. 317**

2. ——— **Suit for profits**—*Limitation—Profits collected by co-sharers—Suit by other co-sharers to recover their shares.* Co-sharers who collect profits for other co-sharers are in a position similar to that of a lambardar. Where no adverse title has been set up, the mere fact that a co-sharer plaintiff has not received profits for more than twelve years before suit will not bar his claim. *Raj Bahadur* v. *Bharat Singh, I. L. R. 27 All. 348,* and *Mihin Lal* v. *Badri Prasad, I. L. R. 27 All. 436,* followed. HARACHARAN *v.* BINDU (1910).
I. L. R. 32 All. 389

3. ——— **Saranjam—Inam**—*Claim to hold as Mirasi tenant—Limited interest.* Where in an ejectment suit by an Inamdar it was shown that the defendants, for more than twelve years before the suit, openly asserted their claim to hold as permanent Mirasi tenants: *Held,* that the defendants had acquired a title to the limited interest claimed by them and could not be ejected. TRIMBAK RAMCHANDRA *v.* SHEKH GULAM ZILANI (1909) . . . . **I. L. R. 34 Bom. 329**

[illegible] right, title and interest in a certain homestead land forming part of a *ghatwali* tenure was sold in 1878 by the Collector. In the sale-certificate granted to the auction-purchaser, the land was described as rent-free, and, as a matter of fact no rent was ever paid to the *ghatwal* or anybody by the judgment-debtor, or after him, by the auction-purchaser. In 1888 the plaintiff, an infant of 4 years of age, succeeded as *ghatwal* on the relinquishment of the office by his father. Thereafter, by an agreement between the young *ghatwal*, the Maharajah of Burdwan, who was the superior zemindar, and the Government, the young *ghatwal* relinquished the office on condition that the property should be treated as resumed by the State to be settled permanently with the Maharajah, by whom it would be [illegible]

ADVERSE POSSESSION—*contd.*

of the auction-purchaser from the homestead land and to recover possession of the same. *Held*, that mere non-payment of rent or discontinuance of payment of rent did not by itself constitute adverse possession. *Madan Mohan Gossain* v. *Kumar Rameswar Malia, 7 C. L. J. 615, Troyluckha Tarinee Dossia* v. *Mohima Chunder Muttuck, 7 W. R. 400, Rungo Lall Mundal* v. *Abdool Guffor, I. L. R. 4 Calc. 314, Poresh Narain Roy* v. *Kassi Chunder Talukdar, I. L. R. 4 Calc. 661, Musyatulla* v. *Noorzahan, I. L. R. 9 Calc. 808, Prem Sukh Das* v. *Bhupia, I. L. R. 2 All. 517*, referred to. *Held*, also, that in a suit of this description Article 144 of the Limitation Act must be applied and the plaintiff as *ghatwal* did not claim through his father as his predecessor within the meaning of section 2 of the Limitation Act. *Ram Chander Singh v. Madho Kumari, I. L. R. 12 Calc. 484; L. R. 12 I. A., 188*, referred to. *Held*, further that the plaintiff, when he succeeded as *ghatwal*, was an infant, and as he commenced the present suit within three years from the attainment of majority, the plea of limitation could not be sustained. *Held*, further, that no title by estoppel accrued in favour of the purchase at the certificate sale. There was no estoppel in this case as against the decree-holder, and the appellants, as representatives of the purchaser at the certificate sale, could not avail themselves of any possible estoppel against the Secretary of State or against the plaintiff as grantee from him through the Maharajah of Burdwan. *Held*, further, that even if there had been any estoppel available against the Secretary of State, there could have been none against the plaintiff; none was created by reason of what happened in 1888, because the estate did not then vest in the Crown to be granted afresh to the plaintiff, nor was any created by reason of what happened in 1895, because the so-called after-acquired title of the Secretary of State was acquired by him on condition that a clear title would be granted to the Maharajah of Burdwan as zemindar and to the plaintiff as *mokararidar* under him. The doctrine of estoppel does not apply where an after-acquired title is taken by the grantor under a conveyance made to him as a conduit and for the purpose of vesting the title in a third person. PRASANNA KUMAR MOOKERJEE *v.* SRIKANTHA ROUT (1912).

I. L. R. 40 Calc. 173

5. ———— **Chur land**—*Posting of bamboo accompanied by beat of drum, if constitutes adverse possession.* Where the only act of possession exercised was the posting of a bamboo accompanied by beat of drum: *Held*, that that was not by itself sufficient to enable a person to acquire as against the rightful owner, a title by adverse possession. Adverse possession to be effective must be actual, visible, exclusive, hostile and continuous for the statutory period. TARA CHAND ROY *v.* SECRETARY OF STATE FOR INDIA (1919) . . . . . **23 C. W. N. 380**

6. ———— **Possession adverse to mortgagor** —*if adverse to mortgagee out of possession.* The possession of a mortgaged property by a person claiming adversely to the mortgagor is not adverse against the mortgagee until the mortgagee has the right to possess the property. KALI KRISHAN CHOWDHURY *v.* TARA PROSANNA CHONGDAR (1918) . . . . **23 C. W. N. 815**

7. ———— **Title against Crown**—*Burden of proof—What facts prove adverse possession—Entry as poramboke not sufficient to prove title of Crown.* In mirasi tracts, the gathering of wild flowers and fruits from poramboke lands and the gathering of fish from small tanks will not indicate ownership, as such acts are permitted by Government. It is otherwise where large sums are spent on tanks by mirasidars in clearing silt and in constructing masonry dams. Such acts are indicative of ownership and when they are proved to have been done for 30 or 40 years, the presumption will be that they have been done for more than the statutory period and the burden will be on the Crown to explain such acts and prove possession within the statutory period. Mere entry as poramboke in the *pymash* and settlement-registers is insufficient to prove the title of Government, without proof of acts of ownership. VENCATARAMA IYER *v.* SECRETARY OF STATE FOR INDIA (1909) . . **I. L. R. 33 Mad. 362**

8. ———— **Plea of acquisition of title by**— Where no case of acquisition of title by adverse possession is made in the plaint nor is the question raised directly or indirectly in the issues, the plaintiff ought not to be allowed to succeed on such a case. *Joytara* v. *Mobaruck, I. L. R. 8 Calc. 975, Sundari* v. *Mudhoo Chandra, I. L. R. 14 Calc. 592; Ananda Hari* v. *Secretary of State, 3 C. L. J. 316*, referred to. But where the question reduces itself to one of law upon facts admitted or proved, it is not only competent to the Court but also expedient in the interests of justice to entertain the plea of adverse possession if such a case arises on the facts stated in the plaint and the defendant is not prejudiced, or taken by surprise. *Lilabati* v. *Bishun Chobey, 6 C. L. J. 621*, referred to. NEPEN BALA DEBI *v.* SITI KANTA BANERJEE (1910).

15 C. W. N. 158

9. ———— **Cantonment land**—*Limitation—Land situate in a cantonment—Presumption as to title.* Certain land situate in the cantonment of Dehra Dun was appropriated in the beginning of the nineteenth century by the predecessor in title of the defendant for the purpose of building a house. The land was held, subject to the rules from time to time applicable to cantonments, by various occupiers until the year 1874, when the cantonments were handed over to the civil authorities. In 1890 the Secretary of State sued the then occupant for a declaration of title and assessment of ground rent, or, in the event of the defendant refusing to pay rent, for possession. *Held*, that the circumstances of the case warranted the presumption that the title to the land in suit was vested in the Crown, and that the possession thereof could not be regarded as adverse until at the earliest the year 1874, when the land in suit ceased to be a part of the cantonment. *Secretary of State for India* v. *Jagan Prasad, I. L. R. 6 All. 648*, referred to. BANK OF UPPER INDIA *v.* THE SECRETARY OF STATE (1910).

I. L. R. 33 All. 229

10. ———— **Mortgaged property**—*Limitation—Purchaser of a decree on a mortgage allowing a puisne mortgagee to pay him off—Such position inconsistent with a claim to be in adverse possession of the mortgaged property. Held*, that when the purchaser of a decree for sale on a mortgage accepted from a puisne mortgagee the amount due under the decree which he had purchased, he by so doing admitted the validity of the puisne mort-

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gage, and his position was not consistent with a claim to be in adverse possession of the mortgaged property. *Ramcharan* v. *Sadashiv, I. L. R. 11 Bom. 422,* referred to. JAGDIP NARAIN SINGH *v.* BILAR SINGH (1911). . I. L. R. 33 All. 463

. by—*Possession ... to possession ... affect rights under a simple mortgage executed before adverse possession began.* Possession adverse to the mortgagor is not adverse to and does not affect the right of a simple mortgagee not entitled to possession when the adverse possession commenced, when such mortgage was granted prior to the commencement of such possession *Aimadar Mandal* v. *Makhan Lal Day, I. L. R. 33 Calc. 1015,* followed. The interest in immoveable property which is acquired by adverse possession can only be that interest which the person entitled to immediate possession had at the time that adverse possession began. It will attach against the whole of the interest of the person so entitled to possession notwithstanding that he has subsequent to the commencement of the adverse possession alienated the whole or any part of such interest provided possession continued uninterrupted. PARTHASARATHY NAICKER *v.* LAKSHMANA NAICKER (1911).

I. L. R. 35 Mad. 231

Quære:— ... mortgagee ... nguish the rights of the mortgagee under a previously executed mortgage. NANDA KUMAR DEY *v.* AJODHYA SAHU (1911). . . . . 16 C. W. N. 351

13. ———— **Co-sharers inter se**—*Non-participation, for a long time, effect of.* In order to establish adverse possession by one tenant in common against his co-tenants, there must be exclusion or ouster and the possession subsequent to that must be for the statutory period. Mere non-participation of rents and profits would not necessarily of itself amount to exclusion, but such non-participation or non-possession may in the circumstances of a particular case amount to an adverse possession. What the circumstances may be which may have to be considered in determining the question of ouster, discussed. AYEKENUSSA BIBI *v.* SHEIKH ISUF (1912) . . . . . 16 C. W. N. 849

14. ———— **Hypothecation—Stranger in adverse possession** *for 12 years as against mortgagor—Effect of, on mortgagee's rights—Payments of interest and acknowledgment by mortgagor, effect of.* Adverse possession by a stranger for more than 12 years of a property, which is subject to a hypothecation not only extinguishes the rights of the mortgagor but bars also those of the mortgagee, though the rights of the mortgagee may have been kept alive by payments or acknowledgments made by the mortgagor. *Prannath Roy Chowdry* v. *Rookea Begum, 7 Moo. I. A. 323, 355, Karan Singh* v. *Bakar Ali Khan, I. L. R. 5 All. 1, Ammu* v. *Ramakrishna Sastri, I. L. R. 2 Mad. 226, 229, Ram Coomar Sein* v. *Prossunno Coomar Sein, 1, W. R. 375,* and *Sheoumber Sahoo* v. *Bhowanee deen Kulwar, 2 N. W. P. H. C. 223,* followed. *Aimadar Mandal* v. *Makhan Lal Day, I. L. R. 33 Calc. 1015,* and *Second Appeal No. 682 of 1909* (unreported), not followed. *Heath* v. *Pugh, L. R. 6 Q. B. D. 345,* and *on appeal Pugh* v. *Heath, L. R. 7 A. C. 235,* distinguished. *Per Curiam*: The rights of the mortgagee would be extinguished in such a case even where he is not entitled to possession under the mortgage, as the mortgagee is not without remedy against the trespasser and could protect his interests by proper proceedings A mortgage is merely a security for the debt and a mortgagee's right is to sell the interest of the mortgagor in the land and a mortgage decree under which the land is attempted to be sold cannot bind persons who do not derive their title from the mortgagor and were not parties to the suit in which the mortgage decree was passed but claim a statutory title adversely to the mortgagor. RAMASWAMI CHETTI *v.* PONNA PADAYACHI (1913) . . . I. L. R. 36 Mad. 97

15. ———— **By agent collecting rent**—*Agent paying over the rent to the landlord—Agent setting up his own title and keeping the rent to himself during continuance of lease—Landlord's right to land at determination of tenancy.* In 1887 certain land belonging to defendant No. 2's family was leased to a tenant for 18 years by a registered lease by the plaintiff's family, who acted as agents of the defendant No. 2's family, and collected the rent and paid it over to them. The rent was so paid till 1893, when the plaintiff's family set up their own title to the land and ceased paying over the rent to the defendant No. 2. The tenant remained in possession of the land till the determination of the tenancy in 1905; and then attorned to defendant No. 2. In 1908, the plaintiff sued to recover possession of the land, alleging that the title of defendant No 2 to the land was lost by the adverse possession of the plaintiff. The lower Courts decreed the ... dant No. 2: *Held* ... long as the tenant ... he held it as the tenant of defendant No. 2's family and their rights were just as good at the end of the tenancy as they were at the beginning, and were absolutely unaffected in any particular by the reiterated assertions made by the plaintiff of an adverse title or by the fact that the rents were retained by the plaintiff KRISHNADIXIT *v.* BALDIXIT VAMANDIXIT (1913).

I. L. R. 38 Bom. 53

16. ———— **Absence of intention to acquire absolute interest**—*Limitation.* In a suit to recover possession by an adopted son against the lessees of the deceased adoptive mother who was in possession, where the plaintiff believed that the adoptive mother was entitled to remain in possession for life and she shared that belief and so remained in possession while the plaintiff took no steps to disturb her: *Held,* that the plea of adverse possession by the adoptive mother could not arise, there being no intention to hold adversely so as to acquire an absolute estate. PIRSAB VALAD KASIMSAB *v.* GURAPPA BASAPPA (1913) . . . . I. L. R. 38 Bom. 227

17. ———— **Trustee**—*Animus possidendi determines nature of right prescribed—Estoppel—Landlord and tenant.* When a person purports to hold property as a trustee, he cannot by such possession acquire a right to the property by prescription for himself against the beneficiaries. The character in which possession is held, and the *animus possidendi* of the holder determines the right which the possession would confer. *Madhava v. Narayana, I. L. R. 9 Mad. 224, Thakore Fatesingji* v. *Bamanji A. Dalal, I. L. R. 27 Bom.*

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515, Secretary of State for India v. *Krishnamoni Gupta, I. L. R. 29 Calc. 518, Lyell* v. *Kennedy, L. R. 14 A. C. 437,* and *Soar* v. *Ashwell, [1893] 2 Q. B. 390,* referred to. The plaintiff's father claiming to be the trustee of a temple demised temple lands in 1866 on kanom to the first defendant, and the second defendant was the ultimate assignee of the kanom interest at the date of suit. The plaintiff's claim to the trusteeship was negatived by decree of Court in 1894 when a third party was declared to be the trustee. It was found that the plaintiff was not the trustee at the date of the present suit instituted by the plaintiff for recovery of possession of the kanom lands from the second defendant: *Held,* that the suit must fail, as the plaintiff was not the trustee. *Held,* further, that the second defendant was not estopped from denying the plaintiff's right on the ground that he was no longer the trustee, though he would be estopped from denying the title of the temple. THUPPAN NAMBUDRIPAD *v.* ITTICHIRI AMMA (1914).

I. L. R. 37 Mad. 373

18. ———— **Mortgagor and mortgagee agreeing that latter's possession should be as absolute owner**—*Effect of.* Where a mortgage deed provided that in default of payment of the mortgage amount within the stipulated period, the mortgagee should take possession of the mortgaged property and enjoy the same as absolute owner, and accordingly the mortgagor after the said period, and in consideration of a further payment of Rs. 250 by the mortgagee, relinquished the mortgaged property to be held by the mortgagee as absolute owner, and had the patta transferred to his name: *Held,* that the possession of the mortgagee under the circumstances for over twelve years, was adverse to the mortgagor, whose right to redeem consequently became barred by limitation. An unregistered agreement between the mortgagor and the mortgagee, that the mortgagee shall hold possession as owner will not confer an immediate title on the mortgagee, but is valid in so far as it has the effect of changing the legal character of the possession of a mortgagee into possession as owner. A mortgagee cannot by a mere assertion of his own or by any unilateral act on his part, convert his possession as mortgagee into possession as absolute owner. *Ali Muhammad* v. *Lalta Buksh, I. L. R. 1, All. 655,* referred to. *Kurri Veerareddi* v. *Kurri Bapireddi, I. L. R. 29 Mad. 336, Sri Raja Papamma Rao* v. *Sri Vira Pratapa H. V. Ramachandra Razu, I. L. R. 19 Mad. 249,* and *Dasharatha* v. *Nyahalchand, I. L. R. 16 Bom. 134,* distinguished. USMAN KHAN *v.* DASANNA (1914).

I. L. R. 37 Mad 545

18(a). ———————— The question of adverse possession is a mixed question of fact and law. The facts found by the Judge must be accepted but the conclusion drawn from them, namely, whether the possession was adverse or not, is a question of law.

To prove dispossession of one co-sharer by another, it must be shewn that there was exclusion or ouster to the knowledge of the former and this principle is applicable to all cases of co-owners and is not confined to cases where the co-owners were persons who at one time had formed members of a family.

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The possession of one co-owner is the possession of all for the purpose of limitation.

There can be no dispossession by one joint tenant in the absence of an assertion of a hostile title by him to the knowledge of the other joint tenants sought to be excluded from the joint tenancy and if no notice is given to the co-sharer of of the denial of his right, the occupant must make his possession so visibly hostile and notorious and so apparently exclusive and adverse as to justify the inference of knowledge on the part of the co-owner sought to be ousted and of laches if he fails to discover and assert his rights. JOGENDRA NATH MUKHERJEE *v.* RAJENDRA NATH BHATACHARJEE . . . . **26 C. W. N. 890**

19. ———— **Ex-proprietary tenant**—*Right acquired by*—*Semble*: That although a leasehold or an ex-proprietary interest can be acquired by adverse possession as against the person who is the lessee or the ex-proprietary tenant, yet where there never has been a lessee or an ex-proprietary tenant it is not possible to become such by adverse possession. BASDEO *v.* ULFAT RAI (1914).

I. L. R. 37 All. 22

20. ———— **Co-owners—Notice of hostile claim, if necessary**—*Possession, hostile at commencement—Subsequent accrual of title as co-owner—Possession continued, not hostile—Limitation Act (IX of 1908), Sch. II, Arts. 134 and 144.* The plaintiff and the third defendant were the reversionary heirs of one *C* who had mortgaged the suit properties to one *P*. The third defendant's father purchased the properties from *P* in 1893 without notice of the mortgage and has been in possession of the same ever since. The widow of *C* died on the 6th September 1900. The plaintiff brought this suit on the 2nd Sepember 1912 to redeem the properties. The third defendant pleaded that the suit was barred by limitation: *Held,* that the suit was not barred by limitation. Possession held by one of the co-owners will not be adverse to the others until they have notice of the hostile claim. Though possession was hostile when it commenced, still such possession will not continue to be hostile on the accrual of a peaceful title before the completion of the adverse possession. VELAYUTHAM *v.* SUBBAROYA (1915) . **I. L. R. 39 Mad. 879**

21. ———— **Simple mortgage**—*Dispossession of mortgagor after mortgage, not adverse to the mortgagee.* The possession of a trespasser who has dispossessed a mortgagor, the mortgage being simple is not adverse to the simple mortgagee. *Parthasarathy Naicker* v. *Lakshmana Naicker, I. L. R. 35 Mad. 231,* followed. RAMASAMI CHETTI *v.* PONNA PADAYACHI, *I. L. R. 36 Mad. 97,* overruled. VYAPURI *v.* SONAMMA BOI AMMANI (1915) . . . . **I. L. R. 39 Mad. 811**

22. ———————— *Simple Mortgage —Adverse possession, against mortgagor, whether adverse against mortgagee in case of simple mortgage—Limitation—Limitation Act (IX of 1908) s. 28, Sch. I, Art. 144.* Adverse possession against the mortgagor is not *per se adverse* also against the mortgagee in the case of a simple mortgage. *Per* SANDERSON, *C.J.* Adverse possession affects the interest which the person, who was entitled to immediate possession, had at that time. *Per* MOOKERJEE, *J.* S. 28 of the Limitation Act clearly contemplates that the person, whose right is extinguished by lapse of time, is a person entitled to institute a suit for possession of the property.

ADVERSE POSSESSION—*contd.*

Karan Singh v. *Bakar Ali Khan, I.L.R. 5 All.* 1; *I. R. 9 I. A. 99*, and *Prannath Roy Choudhury* v. *Rookea Begum, 7 Moo. I. A. 323*, distinguished. *Aimadar Mandal* v. *Makhan Lal Dey, I. L. R. 33 Calc. 1015*; *10 C. W. N. 904*, and *Parthasarathy Naicker* v. *Lakshmana Naicker, I. L. R. 35 Mad. 231*; *21 Mad. L. J. 467*, referred to *Nallamuttu* v. *Betha Naicken, I. L. R. 23 Mad. 37*, dissented from. PRIYA SAKHI DEBI v. MANBODH BIB (1916).
I. L. R. 44 Calc. 425

23. ———— **Acts necessary to constitute**—*against putnidar previous to purchase by zamindar of putnidar's interest, effect of, on purchaser.* The plaintiffs sued for declaration of their title to and *khas* possession of a certain tank which the plaintiffs claimed they held under a lease granted to them in 1883 by some persons who were in possession as *putnidars* under the first defendant whose case on the other hand was that the tank was included in a different *putni* held under them by different *putnidars* and that in 1899 he purchased the *putni* right of the latter and was consequently entitled to take possession of the tank. It was found that the tank in question was not included in the *putni* of the plaintiffs' lessors but in the other *putni* as alleged by the defendant but since the date of their lease the plaintiffs had been in occupation of the tank on the basis of their lease and had in assertion of their right let it out to subtenants from time to time, mortgaged it and re-excavated it: *Held*, that the acts exercised by the plaintiffs in respect of the disputed tank constituted adverse possession and were sufficient to extinguish the title of the defendant's vendors on the date of the purchase by the defendant who consequently did not by his purchase acquire any title to the tank in dispute and could not successfully resist the claim of the plaintiffs for declaration of title and recovery of possession. BIJAY CHAND MAHATAP BAHADUR v. ISWAR CANDRA DAS (1916) . . . . . **21 C. W. N. 199**

23(a). ———— **Inamdar**—*Decree against Inamdar—Court-Sale —— "Right title and interest of Inamdar" purchased at the Court-sale—Suit by Inamdar to levy assessment—Indian Limitation Act (IX of 1908), Sch. I, Art. 131—Judi—Inamdar remiss in recovering assessment—No obligation on occupancy tenant to pay judi—Indian Contract Act (IX of 1872), s. 69.* In 1874, defendant purchased at a Court-sale the "right, title and interest" of the then Inamdar in the suit lands in execution of a money decree against him. Since then the defendant remained in possession of the property and no attempt was made by the Inamdar or his successor to levy assessment or to recover possession until 1916 when plaintiff as Inamdar sued to recover assessment from the defendant as an inferior holder contending that it was a periodically recurring right under Art. 131 of the Limitation Act, 1908. *Held*, that Art. 131 of the Limitation Act did not apply and that the suit was barred as the defendant had established his right to hold land free of assessment by adverse possession. *Ganesh Vinayak* v. *Sitabai (1916), 41 Bom. 159*, distinguished. BHIMA BAI v. SWAMIRAO. . **I. L. R. 45 Bom. 638**

24. ———— **Trespasser's possession during currency of lease**—*if adverse to lessor, if gives rise to equity, when his case that he held bona fide under person whom he believed to be owner found false. Held*, on a review of authorities that where property has been let out in lease, the possession of a trespasser does not become adverse as against the lessor until the termination of the lease. Trespassers whose case that they *bona fide* held the land under a person whom they believed to be the owner thereof, is found to be false, are not entitled in equity to protection against ejectment. HAJRA SARDARA v. KUNJA BEHARY NAG CHOWDHURY (1917).
21 C. W. N. 1001

25. ———— **of holders portions of estate in Revenue Sale**—*effect of, on purchaser of estate at revenue sale.* On the failure of an owner to pay the Government assessment, his estate or interest in the land is forfeited or rather determined and the purchaser at a Revenue sale purchases not the interest of the defaulting owner but that of the Crown, subject to the payment of the Government assessment, and as against a person who claims title to any portion of the estate by adverse possession, the time limited by the Limitation Act commences to run from the date of the sale. SURJA KANTA ACHARJYA v. SARAT CHANDRA ROY CHOWDHURY (1914) . . . . **18 C. W. N. 1281**

25 (a). Though a tenant is put in possession of land by a mortgagee his possession cannot become adverse against the mortgagor until the mortgage is reduced and the mortgagor becomes entitled to immediate possession. GITABAI v. KRISHNA MALHARI.
I. L. R. 45 Bom. 661

26. ———— **Co-sharers**—In order to establish adverse possession between co-sharers there must be evidence of an open assertion of a hostile title by one with the knowledge of the others. Mere non-partition in profits by one and exclusive occupation by others is not sufficient. JANGANNATH MARWARI v. SRI CHANDRI BIBI. **26 C. W. N. 65**

27. ———— **Partition decree**—*Property remaining in possession of Judgment debtor—Limitation.* The defendant obtained in 1896 a decree against the Plaintiff to recover his share in lands by partition. He applied in 1899 and 1902 to execute the decree but the land remained in possession of Plaintiff. In 1911 defendant managed to get possession. Plaintiff sued in 1915 to recover possession. *Held* dismissing the suit that though the Defendant went in possession without intervention of the court his possession would be ascribed in the decree and plaintiff could turn him out if she could show she had acquired a good title against the world before he got possession. RAKHMABAI v. RAM CHANDRA. . **I. L. R. 45 Bom. 943**

28. ————**Trespasser**—Where the original title is unknown and both parties in a suit for ejectment give evidence of possession the Court will be justified in deciding in favour

case forest land) was capable of in the way of possession and what upon a broad view would be considered an adequate assertion of title by sufficient occupation.

But where the Plaintiff has succeeded in proving a clear title the onus lies on the Defendant to prove adverse possession for the statutory period; and possession to be "adverse" must have all the

ADVERSE POSSESSION—*concld.*

qualities of adequacy, continuity and exclusiveness.

When the holder of title proves that he too has been exercising during the currency of his title various acts of possession, then the quality of these acts, even though they might have failed to constitute adverse possession as against another, may be quite sufficient to destroy that adequacy and interrupt that exclusiveness and continuity which is demanded from any person challenging by possession the title which he holds. KRISHNAN (ALIAS KUTHALITI) MOOTHAVAR *v.* PERINGATI KUNHARANKUTTY HAJI . **26 C. W. N. 666**

ADVERTISEMENT.

See TRADE MARK. **I. L. R. 37 All. 446**

ADVICE.

———— **improper, to client**—

See PROFESSIONAL MISCONDUCT. **I. L. R. 40 Mad. 69**

ADVOCACY.

———— The Practice of advocate on each side seeking to force his opponent to produce his own client as a witness in order that he may have an opportunity of cross-examining that client, condemned as one that must embarrass and perplex judicial investigation and as being unworthy of a high toned or reputable system of advocacy. LAL KUNWAR *v.* CHIRANJI LAL (1909) . . **14 C. W. N. 285** **I. L. R. 22 All. 104**

ADVOCATE.

See DEFAMATION **I. L. R. 41 Calc. 514**

See HIGH COURT JURISDICTION OF **I. L. R. 44 Bom. 418**

See LEGAL PRACTITIONER.

———— **Advocate as witness**—*Professional ethics—Counsel retained by party if may be exempted as witness.* It is a rule of professional ethics of almost universal application that having taken up the position of an advocate, a counsel should refrain from testifying on a trial which is being conducted by him. PEARY MOHAN DAS *v.* WESTON (1911). **16 C. W. N. 145**

ADVOCATE-GENERAL.

See CHARITABLE TRUST. **I. L. R. 48 Calc. 124**

See CIVIL PROCEDURE CODE, 1908, s. 92. **I. L. R. 36 Bom. 168**

See COSTS . **I. L. R. 40 Bom. 588**

———— **sanction of**—

See PUBLIC CHARITIES **14 C. W. N. 932**

———— **consent of**—

See PUBLIC RELIGIOUS TRUST. **I. L. R. 41 Calc. 749**

AFFIDAVIT.

See CRIMINAL PROCEDURE CODE, ss. 244, 540 . . . **I. L. R. 36 All. 13**

See MUNICIPAL ELECTION. **I. L. R. 46 Calc. 119**

AFFIDAVIT—*contd.*

———— **Practice**—*Grounds of belief—Civil Procedure Code (Act V of 1908), order XIX, rule 3—Jurisdiction—Re-hearing.* The provisions of order XIX, rule 3 of the Code of Civil Procedure must be strictly observed; every affidavit should clearly express how much is a statement of the deponent's knowledge and how much is a statement of his belief, and the grounds of belief must be stated with sufficient particularity. The Court has inherent jurisdiction to re-hear a matter before the order passed by the Court at a previous hearing has been perfected. PADMABATI DASI *v.* RASIK LAL DHAR (1909) . . **I. L. R. 37 Calc. 259**

———— **Scandalous matter**—*Civil Procedure Code (Act V of 1908), order XIX, rule 3—Statements on information and belief, when source of information not indicated if admissible—Allegations of dishonesty, not relevant to relief prayed.* Scandalous matter should be avoided in pleadings, and if a statement of this character is inserted in an affidavit, it may be ordered to be taken off the file or the particular passage may be directed to be expunged. The Court may take action of its own motion or upon the application of the aggrieved party. Allegations of dishonesty are scandalous but they cannot be treated as such if they are relevant to the issue. *Fisher* v. *Owen, 8 Ch. D. 645, 653, Millington* v. *Loring, 6 Q. B. D. 196,* referred to. "If in future an affidavit is filed in which allegations are made on belief without a statement on the grounds for such belief, the Court will be prepared, if objection is taken, to enforce the strict rule laid down in order XIX, rule 3 of the Civil Procedure Code." *In re Young Manufacturing Co. [1900], 2 Ch. 753,* referred to. GOBIND MOHON DAS *v.* KUNJA BEHARI DAS (1909). **14 C. W. N. 153**

AFFIDAVIT OF DOCUMENTS.

See DISCOVERY **I. L. R. 38 Calc. 428**

See DOCUMENT . **25 C. W. N. 99**

AFFREIGHTMENT.

———— **contract of**—

See SALE OF GOODS. **I. L. R. 45 Calc. 28**

AFTERBORN SON.

———— **whether he succeeds from date of conception**—

See HINDU LAW—WIDOW. **I. L. R. 1 Lah. 128**

———— **suit for declaration by**—

See LIMITATION ACT, 1908, s. 6. **I. L. R. 1 Lah. 558**

AGARWAL BANIAS OF ZIRA.

See ADOPTION . **I. L. R. 40 Calc. 879**

AGENCY.

See PAKKI ADAT TRANSACTIONS. **I. L. R. 39 Bom. 1**

See SCOPE OF AGENCY.

———— **termination of**—

See LIMITATION ACT (IX OF 1908), SCH. I, ART. 89 . **I. L. R. 39 Mad. 376**

AGENCY—*contd.*

See PRINCIPAL AND AGENT.
I. L. R. 41 Mad. 1

———— **Joint principals**—*Joint power of attorney—Execution of mortgage in pursuance of the authority—Death of one of the principals, effect on the power of attorney—Position of the parties, object of the power and the nature of the property, whether material in construing the power—Members of a Mitakshara family—Indian Contract Act (IX of 1872), s. 201.* S. P., R. K. and R. S, three brothers, executed a joint power-of-attorney in favour of R. P., the fourth brother (all the

to mortgage their joint property. Subsequently R. S. died without issue. After his death a mortgage was executed by R. P. and R. K. on their own behalf and by R. P. as attorney for S. P. A second mortgage was executed of the same properties by R. P. on his own behalf and as attorney for R. K. and S. P. A third mortgage of the same properties was executed by R. P. on his own behalf and as attorney for S. P, R. K. having died previously to the execution of the third mortgage, leaving certain minor sons, and R. P. also purported to execute the third mortgage as guardian of these minor sons of R. K. *Held,* that the intention of the parties was that the power-of-attorney should continue as long as the property remained undivided, and so the deaths of R. S. and R. K. did not revoke the power-of-attorney. *Held,* also, that consequently the mortgages were valid and binding on the joint properties. *Per* MOOKERJEE, *J.*—We cannot hold, as an inflexible rule of law, that whenever two principals appoint an agent to take charge of some matter in which they are jointly interested, the death of one of them terminates the authority of the agent not merely as regards the deceased, but also as regards the surviving principal. We have, in each case, to determine the true intention of the parties to the contract, from the terms thereof and from the surrounding circumstances. SITAL PROSAD, *Re* (1916) . . . . . 21 C. W. N. 620

AGENCY RULES OF GODAVARI DISTRICT.

———— **rr. 8 and 16**—*Dismissal of suit, for default, by Assistant Agent—Order of Agent restoring suit—Revision petition to High Court, maintainability of—Decree under rule 8, construction of—Order setting aside dismissal without notice to defendant, validity of—Petition to Government, necessity for.* An order, passed by a Government Agent, directing that a suit dismissed by an Assistant Agent for default of appearance of the plaintiff be restored to file, is not a decree within the meaning of rule 8 of the Agency Rules for the Godavari district, and is not revisable by the High Court by a petition filed directly in the High Court. *Sri Pedda Vikrama Deo Garu* v. *The Mahraja of Jeypore (1916) 4 L. W. 499,* followed. VENKATA NAGABUSHANAM *v.* MAHALAKSHMI (1917).
I. L. R. 41 Mad. 325

AGENCY TRACTS.

See CONTRACT ACT (IX OF 1872), ss. 69 AND 70 . . I. L. R. 39 Mad. 795

AGENT.

See ADVERSE POSSESSION.
I. L. R. 38 Bom. 53

See COMPANIES ACT (VI OF 1882), ss. 76, 77 . . . I. L. R. 36 All. 416

See NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881), ss. 26, 27, 28.
I. L. R. 41 Mad. 815

See PRINCIPAL AND AGENT.
I. L. R. 41 Mad. 1

See TRADING WITH ENEMY.
19 C. W. N. 1239

———— **acceptance of bribe or commission by**—

See PRINCIPAL AND AGENT.
I. L. R. 37 Calc. 81

———— **acts of**—

See RIOTING . I. L. R. 39 Calc. 834

See ACCOUNT, SUIT FOR.
I. L. R. 40 Calc. 108

———— **damages for negligence of**—

See TRANSFER OF PROPERTY ACT (IV OF 1882), s. 6 (*e*) I. L. R. 38 Mad. 138

See CARRIERS . I L R. 41 Calc. 80

———— **duty of**—

See PRINCIPAL AND AGENT.
I. L. R. 43 Calc. 248

———— **fraudulent conduct of**—

See PRINCIPAL AND AGENT
I. L. R. 43 Calc. 511

———— **knowledge of**—

See PRINCIPAL AND AGENT.
L. R. 46 I. A. 250

———— **liability of, to principal**—

See LIMITATION ACT (IX OF 1908), SCH. I, ART. 89. . I. L. R. 39 Mad. 376

———— **trading by**—

See TRADING WITH THE ENEMY.
I. L. R. 42 Calc. 1094

———— **Hindu Family Manager**—

See LIMITATION ACT, 1908, SCH. I, ART. 62 . . I. L. R. 45 Bom. 313

AGENT AND PRINCIPAL.

See COMPANY . I. L. R. 42 Bom. 159

AGGREGATE SENTENCE.

See APPEAL . I. L. R. 40 Calc. 631

See CRIMINAL PROCEDURE CODE—
ss. 35, 408 . I. L. R. 35 All. 154
3 Pat. L. J. 138
s. 413 . . . 15 C. W. N. 734

AGGRIEVED PARTY.

———— **remedies of**—

See DECREE . I. L. R. 44 Calc. 627

AGNATES.

See CUSTOM . I. L. R. 44 Calc. 749

AGRAHAR GIFT.

——— **Condition necessitating residence treated as recommendatory—**

See HINDU LAW —GIFT **I. L. R. 44 Bom. 304**

AGRADANI BRAHMIN.

See HINDU LAW—GIFTS.

14 C. W. N. 1005

AGRA TENANCY ACT (II OF 1901).

See JURISDICTION OF CIVIL AND REVENUE COURTS

I. L. R. 42 All. 412

——— **s. 4**—"*Land Resumption of rent-free grants—Grove-land—Suit for resumption of grove-land not maintainable in Revenue Court. Held,* that grove-land not being "land held for agricultural purposes" within the meaning of s. 4 (2) of the Agra Tenancy Act, 1901, nor "land" within the meaning of Chapter X of the Act, no suit will lie in a Revenue Court for resumption of rent-free grant of grove-land. *Sheomangal* v. *Sardar Singh, 6, A. L. J. 749,* and *Megh Singh* v. *Nasar Fatima, Select decisions of 1911, No. 4,* referred to. HADI HASAN KHAN *v.* PATI RAM (1913) . . **I. L. R. 35 All. 200**

——— **ss. 4, 19**——*Question of proprietary title—Jurisdiction—Civil and Revenue Courts —Res judicata.* In a suit for ejectment in a Revenue Court (Assistant Collector) the defendants pleaded that the plaintiff "brought them from their villages and established them in the property promising that they should have the property in suit." The Revenue Court found that these were the true facts, and came to the conclusion that the defendants were "rent-free holders of the land in suit, which was given to them in gift by the plaintiff." The plaintiff appealed to the Commissioner, who confirmed the finding of the Assistant Collector. *Held,* that the plaintiff could not reopen in a Civil Court the question of the defendants' right to the land, inasmuch as the decision of the Assistant Collector had become final, no appeal having been made to the proper Court, namely, the District Judge. *Shahzade Singh* v. *Muhammad Mehdi Ali Khan, I. L. R. 32 All. 8, Bed Saran Kunwar* v. *Bhagat Deo, I. L. R. 33 All. 453,* and *Beni Pandey* v. *Raja Kausal Kishore, I. L. R. 29 All. 160,* referred to. SUNDAR KUNWAR *v.* DINA NATH (*1915*).

I. L. R. 37 All. 280

——— **ss. 4, 58 and 63**—*Civil and Revenue Courts—Jurisdiction—Suit for ejectment from land used for grazing purposes. Held,* that a suit to eject the defendants from certain land which they held of the plaintiffs on rent primarily as pasture land and incidentally for the sake of a certain kind of long grass which grew there, was a suit which would lie in a Court of Revenue and not in a Civil Court. *Abdul Qayum* v. *Fida Husain, 13 A. L. J., 854,* overruled. *Rameshar Singh* v. *Madho Lal, I. L. R. 42 All. 35,* followed. PARAM HANSMAN TIWARI *v.* DASRATHMAN TIWARI.

I. L. R. 43 All. 445

——— **ss. 4, 95, 167, 197.**

See JURISDICTION OF CIVIL COURTS.

I. L. R. 34 All. 358

——— **ss. 4, 167**—*Grove—Suit by zamindar for part of produce of grove—Rent—Civil and Revenue Courts—Jurisdiction.* Where a zamindar permits a person to plant a grove in his zamindari upon the condition of the grove-holders paying yearly to the zamindar a fixed proportion of the produce thereof, the part of the produce paid to the zamindar is rent and a suit for the recovery of the same lies in a Revenue, and not in a Civil Court, RAGHUBIR RAI *v.* MADHO (1917). . **I. L. R. 39 All. 605**

——— **ss. 5, 18, 20, 57.**

See TRANSFER OF PROPERTY ACT, s. 91.

I. L. R. 33 All. 111

——— **s. 9**— *Fixed-rate tenancy—Entry of name of tenant in revenue records—"Conclusive proof."* The entry mentioned in s. 9 of the Agra Tenancy Act, 1901, is "conclusive proof" only as to the nature of the tenancy as between the zamindar and the tenant and does not apply to questions as to the title to the tenancy as between rival claimants thereto. *Mulai Singh* v. *Rajwant Singh, All. Weekly Notes, 1906, p. 58,* overruled. JAINATH PATHAK *v.* KALKA UPADHYA (1912).

I. L. R. 34 All. 285

2. ——— *Entry of land claimed at last settlement as fixed rate tenancy—Suit between rival claimants—"Conclusive proof."* The matter in dispute being whether the land claimed by the plaintiff was his *mufia* or the fixed-rate holding of the defendant, it was *held* that the entry of the names of the predecessors in title (vendors) of the defendant as fixed rate tenants at the last settlement prior to 1901 was, in virtue of s. 9 of the Agra Tenancy Act, 1901, conclusive as to the title of the defendant, and it was not open to the plaintiff to plead that the entry was in fact due to a mistake. *Jai Nath Pathak* v. *Kalka Upadhya, I. L. R. 34 All. 285,* distinguished. RAM SARAN CHAUBE *v.* RAM BHAWAN UPADHYA.

I. L. R. 43 All. 615

——— **s. 10**—*Ex-proprietary tenant—Contract to pay a higher rate of rent than that prescribed by law, invalid. Held,* that a proprietor who becomes, by the operation of section 10 of the Agra Tenancy Act, 1901, an ex-proprietary tenant cannot enter into a valid agreement to pay rent for his ex-proprietary holding at a higher rate than that prescribed by the section. PRAG *v.* SITAL PRASAD (1914). . . **I. L. R. 36 All. 155**

2. ——— *Ex-proprietary tenant—Contract to pay a higher rate of rent than that prescribed by law invalid. Held,* that the provisions of s. 10 of the Agra Tenancy Act, 1901, are mandatory, and it is not competent to an ex-proprietary tenant to contract himself out of the section and agree to pay a rent in excess of that laid down thereby. *Prag* v. *Sital Prasasad, I. L. R. 16 All. 156,* followed. MANSA RAM *v.* GANGA FAM.

I. L. R. 42 All. 334

——— **ss. 10, 20, 83**—*Sale of zamindari—Agreement to surrender ex-proprietary rights—Possession not delivery—Suit for damages for breach of* those rights shall vest in the other party, or a sale of zamindari property coupled with an agreement to relinquish the ex-proprietary rights of the vendor, is void so far as the relinquishment of ex-proprietary rights is concerned. *Bhikham Singh* v. *Har Prasad, I. L. R. 19 All. 35, Murlidhar* v. *Pem Raj, I. L. R. 22 All. 205, Kashi Prasad* v. *Kedar Nath Sahu, I. L. R. 20 All. 219, Raghubans Sahai* v. *Brijnandan Lal, 6 All. L. J. 477, Bharath Singh* v. *Debi Dayal Singh, 6 All. L. J. 555,* and *Khurshed*

AGRA TENANCY ACT (II OF 1901)—*contd.*

———— ss. 10, 20, 83—*contd.*

Ali v. *Wazir-un-nissa, 7 All. J. 778,* referred to. IKRAMULLAH KHAN *v.* MOTI CHAND (*1911*).
I. L. R. 33 All. 695

2. ———— *Attempt to evade the provisions of the law as to the alienation of* sir *land—Mortgage and relinquishment of ex-proprietary rights executed by two separate documents of even date.* Certain zamindars, appurtenant to whose proprietary share was a considerable area of *sir* land, executed on the same day in favour of creditors to whom they were indebted to the extent of Rs. 9,000, two documents. By one of these the proprietors covenanted to mortgage with possession 30 bighas of land forming part of their *sir* lands. They recited that they had put the mortgagee in actual possession of the land in question, surrendering all their rights in the *sir* and *khudkasht.* They further covenanted that if the mortgagees should fail to obtain possession, or if the mortgagors should after all not give up the *sir* land from their own cultivation, or should set up any claim to hold it as ex-proprietary tenants, then the mortgagees should be entitled to sue for their mortgage money with heavy interest and to enforce the same by sale of the proprietary rights of the mortgagors, not merely in the 30 bighas of *sir* land, but in a total area of 63 bighas and odd belonging to the mortgagors. The consideration of this document was stated at a sum of Rs. 8,000. A further attempt was made to safeguard the mortgagees by the insertion of a covenant that they should, further, be entitled at any time to sue for the [illegible] as security for the debt. The other document was a deed of relinquishment, by which the mortgagors under the former deed purported to surrender or to relinquish in favour of the mortgagees in return for a consideration of Rs. 1,000, their rights as ex-proprietary tenants in the 30 bighas of *sir* land in question. *Held,* that the whole transaction was but a single one effected under cover of two deeds, and was nothing more than an attempt to evade by an ingenious device the provisions of sections 10 and 20 of the Agra Tenancy Act, 1901. *Moti Chand* v. *Ikram-ullah Khan, I. L. R. 39 All. 173,* and *Dipan Rai* v. *Ram Khelawan, I. L. R. 32 All. 383,* followed. *Lekhraj* v. *Parshadi, 6 A. L. J. 713,* discussed. MIR DAD KHAN *v.* RAMZAN KHAN (1918).
I. L. R. 40 All. 449

3. ———— *Sale of zamindari—Agreement to surrender ex-proprietary rights—Suit for damages for breach of contract to deliver possession—Contract void as contravening policy of Act—Contract Act (IX of 1872), ss. 23, 65.* In this appeal their Lordships of the Judicial Committee affirmed the decision of the High Court at Allahabad in the case of *Ikram-ullah Khan* v. *Moti Chand, I. L. R. 33 All. 695,* holding that an agreement by the defendants for relinquishment of all their "*sir*" and "*khudkasht*" lands, and ex-proprietary rights therein to the plaintiffs, none of whom were at the execution of the agreement proprietors, landholders or co-sharers in the land to be relinquished, and agreeing to pay damages for any breach of the contract by them, was illegal and void as being in contravention of the policy of Act II of 1901 (Agra Tenancy Act). MOTI CHAND *v.* IKRAM-ULLAH KHAN (1916).
I. L. R. 39 All. 173

———— ss. 10, 202—*Exchange of lands or partition—Ex-proprietary tenant—Suit for possession in Civil Court—Res judicata—Procedure.* By s. 10 of the Agra Tenancy Act, 1901, where therein [illegible] stances exist to which s. 202 of the same Act applies, the Court has no option, but is bound to adopt the procedure laid down in that section. KURA SINGH *v.* CHHALLU (1911).
I. L. R. 33 All. 501

———— ss. 11, et seq.—*Occupancy holding—Mahant—Mahant capable of acquiring occupancy rights for the benefit of the math which he represents. Held,* that the Mahant of a *math,* just as much as any other tenant who holds for his own personal benefit, can acquire occupancy rights under the provisions of the Agra Tenancy Act, 1901, for the benefit of the *math* which he represents. PARMANAND SINGH *v.* MAHANT RAMANAND GIR.
I. L. R. 35 All. 474

———— s. 16—*Landlord and tenant—Agreement by landlord to treat tenant as an occupancy tenant—Estoppel. Held,* that it is not illegal for a landlord to enter into an agreement with a tenant that the tenant shall have the right not to be ejected so long as he pays the rent and observes the conditions of his tenancy. BHOLA NATH TIWARI *v.* SURAJ BALI RAI (1918).
I. L. R. 41 All. 221

———— ss. 18 and 20—

See TRANSFER OF PROPERTY ACT, s. 91.
I. L. R. 33 All. 111

———— ss. 18 and 88—*Landlord and tenant—Occupancy tenant by agreement with the zamindar converting part of holding into a grove—Effect of such conversion on tenancy.* The zamindar gave permission to an occupancy tenant to plant a grove on his holding. Trees were planted and grew up, and the land ceased entirely to be used for agricultural purposes. *Held,* that the legal effect of this agreement between the zamindar and the occupancy tenant was that the land over which the trees were planted ceased to be an occupancy holding and became "grove-land" and liable to the incidents appropriate to such land. The methods provided by s. 18 of the Agra Tenancy Act, 1901, for the extinction of an occupancy tenancy are not exhaustive; but such tenancy may be implied, between the zamindar and the occupancy tenant. The principles deducible from various rulings relating to groveland explained. JALESAR SAHU *v.* RAJ MANGAL . **I. L. R. 43 All. 606**

———— s. 19—

See s. 4 . . **I. L. R. 37 All. 280**
I. L. R. 43 All. 445

———— [illegible] 1872), s. [illegible] —Possessi[illegible] recover pos[illegible] repayment of money advanced to them by the plaintiff the defendants executed a usufructuary mortgage of certain *sir* land, but did not give

AGRA TENANCY ACT (II OF 1901)—*contd.*

———— ss. 19, 20—*contd.*

possession. The mortgagee sued to recover possession of the land or to realize the mortgage debt by sale. *Held,* that neither relief was open to him: but he could treat the mortgagees as ex-proprietary tenants and get rent assessed against them. *Murlidhar* v. *Pem Raj, I. L. R. 22 All. 305,* followed. *Jijibhai Laldas* v. *Nagji Gulab, 11 Bom. L. R. 693,* distinguished. DIPAN RAI *v.* RAM KHELAWAN (1910) . **I. L. R. 32 All. 383**

———— ss. 19 and 58—*Tenant of grove-land paying an annual rent therefor—Non-occupancy tenant—Suit for ejectment.*—*Held,* that a rent-paying holder of grove-land is a non-occupancy tenant within the meaning of s. 19 of the Agra Tenancy Act, 1901, and liable to ejectment as such tenant under the provisions of s. 58 of the Act. RAMESHAR SINGH *v.* MADHO LAL . **I. L. R. 42 All. 36**

———— s. 20—

See s. 10 . **I. L. R. 33 All. 695**
I. L. R. 40 All. 449
I. L. R. 39 All. 173

1. ———— *Occupancy holding of*—A mortgage of an occupancy tenancy executed prior to the coming into operation of the Agra Tenancy Act is a perfectly valid transaction, and is not affected by the subsequent passing of that Act. *Babu Lal* v. *Ram Kali, All. Weekly Notes (1906) 28,* referred to. *Harnandan Rai* v. *Nakchedi Rai, All. Weekly Notes (1906) 302,* distinguished. RAM PARGAS UPADHIA *v.* SUBA UPADHIA (1910).
I. L. R. 32 All. 628

2. ———— *Civil Procedure Code, 1882, s. 266—Occupancy holding—Mortgage of occupancy holding and appurtenant house—Mortgaged property not saleable.* Where an occupancy tenant purported to mortgage (i) a grove, which was his occupancy holding, and (ii) a house appurtenant to such holding: *Held,* that having regard to s. 20 (2) of the Agra Tenancy Act, 1901, and s. 266 of the Code of Civil Procedure, 1882, neither the grove nor the house could be sold in execution of a decree on the mortgage. RAM DIAL *v.* NARPAT SINGH (1909) . . . **I. L. R. 33 All. 136**

3. ———— *Occupancy holding—Mortgage—Sub-mortgage by mortgage of occupancy holding—Rights of sub-mortgagees.* Where the usufructuary mortgagee of an occupancy holding purported to sub-mortgage his mortgagee rights: *Held,* that the sub-mortgagees were entitled to a money decree against their sub-mortgagor for the money advanced by them. BALGOBIND BHAGAT *v.* NAGINA MISIR (1913) . **I. L. R. 35 All. 405**

4. ———— *Occupancy holding—Transfer—Mortgage executed before the Act came into force.—Execution of decree.* A usufructuary mortgage of an occupancy holding executed before the coming into force of the Agra Tenancy Act, 1901, is a good mortgage. *Babu Lal* v. *Ram Kali, 3 All. L. J. 40,* and *Harbans Rai* v. *Sri Niwas Rao, 8 All. L. J. 1301,* followed. Where therefore the mortgagee, not having obtained possession, the judgment-debtor cannot set up s. 20 of the Act as a bar to its execution. RANG LAL KUNWAR *v.* KISHORI LAL (1915).
I. L. R. 37 All. 278

5. ———— *Occupancy holding—Execution of decree—Court not competent to sell an occupancy holding, even in execution of a mortgage decree specifically directing the sale thereof.* In view of the provisions of s. 20 of the Agra Tenancy Act, 1901, a court executing a decree cannot order an occupancy holding to be sold, no matter whether the decree is a decree directing the sale of the holding or is a simple money decree. *Madho Lal* v. *Katwari, I. L. R. 10 All. 130,* overruled. *Bhola Nath* v. *Musammat Kishori, I. L. R. 34 All. 25,* referred to. KATWARI *v.* SITA RAM TIWARI.
I. L. R. 43 All. 547

6. ———— *Occupancy tenancy acquired by a member of a joint Hindu family—Profits thrown into common stock—Member of joint family other than the tenant allowed to cultivate.* A special Statute like the Agra Tenancy Act can and does modify the operation of the ordinary Hindu Law in certain matters. Where a zamindar admitted as an occupancy tenant a person who was a member of a Joint Hindu family, it was *held* that such tenant did not, by throwing the profits derived from this land into the common stock of the joint family, cause the tenancy to become part of the joint family property, nor did he, by allowing another member of the joint family to cultivate specific plots forming parts of the holding, effect anything more than the creation of a subtenancy in favour of such member. KALLU *v.* SITAL (1918) . **I. L. R. 40 All. 314**

———— s. 21—*Occupancy holding—Mortgage—Suit by mortgagor to recover possession—Illegal contract—Restitution of benefit.* *Held,* that the mortgagor of an occupancy holding who has put the mortgagee in possession cannot recover possession upon the ground merely that the mortgage is void under the provisions of the Agra Tenancy Act, 1901, without repaying to the mortgagee the money which he has received from him. *Fasih-ud-din* v. *Karamat-ullah, All. Weekly Notes (1888) 128,* followed. BAHORAN UPADHYA *v.* UTTAMGIR (1911) . . **I. L. R. 33 All. 779**

———— s. 22—*Occupancy holding—Succession—Hindu Law.* An occupancy tenant died before the coming into operation of the Agra Tenancy Act leaving two daughters, one indigent and the other rich, and was succeeded by the former. After the Tenancy Act came into operation the indigent daughter died. *Held,* that the rich daughter was entitled to inherit the holding upon the death of her sister in preference to the latter's son; her right, which had accrued on the death of her father, having been merely postponed during the lifetime of the indigent daughter. DULARI *v.* MUL CHAND (1910) **I. L. R. 32 All. 314**

———— *"Lineal descendant"—Adopted son.* *Held,* that an adopted son is a lineal descendant within the meaning of s. 22 of the Agra Tenancy Act, 1901. LALA *v.* NAHAR SINGH (1912) . . . **I. L. R. 34 All. 658**

2. ———— *Succession—Special rule of succession exclusive of personal law of parties.* *Held,* that the rule of succession which is laid down by s. 22 of the Agra Tenancy Act, 1901, is independent and exclusive of the personal law of the parties to whom the section applies. Consequently the grandsons of a deceased occupancy tenant, as his male lineal descendants, would be entitled to share in the tenancy jointly with the sons of the late tenant. *Bhura* v

AGRA TENANCY ACT (II OF 1901)—*contd.*

———— s. 22—*contd.*

Shahab-ud-din, I. L. R. 30 All. 128, followed. ALI BAKHSH v. BARKATULLAH (1912).
I. L. R. 34 All. 419

3. ———————— *Occupancy holding —Succession—Hindu law.* One P, an occupancy tenant, died while the Rent Act of 1881 was in force leaving a widow and a daughter him surviving. The widow entered into possession and died after the present Tenancy Act had come into force. The present suit was brought by the brothers and nephews of P to eject the daughter and to get possession of the holding *Held,* that the plaintiffs had no title either under s. 22 of the Agra Tenancy Act or under Hindu Law. NATHU v. GOKALIA (1915) . . **I. L. R. 37 All. 65**

4. ———————— *Occupancy holding —Succession—"Lineal descendant"—Hindu law—Adoption. Held,* that, as regards the right of succession to an occupancy holding, a Hindu who has been adopted ceases to be the lineal descendant of his natural father for the purposes of s. 22 of the Agra Tenancy Act, 1901. *Lala* v. *Nahar Singh, I. L. R. 34 All 358,* followed. *Nandan Tewari* v. *Raj Kishore Rai,* Select Decisions, 1904, No. 5, approved. *Ali Bakhsh* v. *Barkat-ullah, I. L. R. 34 All. 419,* distinguished. THAMMAN SINGH v. DAL SINGH (1914) **I. L. R. 37 All. 7**

5. ———————— *Occupancy holding —Hindu female in possession as such of occupancy holding—Succession.* There is nothing in the Agra Tenancy Act to enlarge the estate in an occupancy holding of a Hindu female in possession at the time the Act of 1901 was passed, beyond the ordinary estate of a Hindu female. The Act not having provided for the devolution of the interest in an occupancy holding where it was, at the passing of the Act, in the possession of a Hindu female as such, the rights of the parties claiming such holding on the death of the last female occupant must be ascertained according to the ordinary Hindu Law. BISHESHAR AHIR v. DUKHARAN AHIR (1916).
I. L. R. 38 All. 197

6. ———————— *Occupancy holding —Succession—Holding owned by a joint Hindu family.* An occupancy holding owned by a joint Hindu family does not devolve at the death of the last surviving member of the joint family on that member's widow. MAHABIR SINGH v. BHAGWANTI (1916) . **I. L. R. 38 All. 325**

7. ———————— *Succession to tenancy—Status of illegitimate son of Kshatriya by* ... iate son ... a Sudra ... *ana* v. JWALA ... All. 629

8. ———————— *Occupancy holding —Holding owned by a joint Hindu family—Death of* ...

MENDYA v. JHURYA . **I. L. R. 42 All. 668**

———— ss. 25, 31, 57 ; Sch. IV (c) Art. 18— *Civil and Revenue Courts—Jurisdiction—Appeal—Suit to eject ex-proprietary tenant.* Plaintiffs sued in a Revenue Court to eject certain ex-proprietary tenants and their lessee upon the ground that the tenants had given a sub-lease of their holding for a period of more than five years in contravention of section 25 of the Agra Tenancy Act, 1901. The lessee pleaded that his document of title was in fact not a lease, but a mortgage, which, having been executed before the coming into force of the Agra Tenancy Act, 1901, was valid and gave him a good title to possession. The Court of Revenue overruled this plea and gave the plaintiffs a decree for ejectment of the defendants. *Held,* that the suit as brought being one falling within article 18 of group (C) of the fourth schedule to the Agra Tenancy Act, no appeal lay to the District Judge. *Deo Narain Singh* v. *Sitla Bakhsh Singh, S. A. No. 429 of 1915,* referred to. UMRAI SINGH v. EWAZ SINGH (1918).
I. L. R. 41 All. 270

———— ss. 28, 29, 30, 34—*Ex-proprietary tenant—Mortgagee from ex-proprietary tenant holding over after ejectment of mortgagor—Rent not fixed by agreement or by a decree of the Court-Right of zamindar to recover rent.* G and H were Zamindars who owned some *sir* land and an occupancy holding. They executed a usufructuary mortgage of their *sir* land and occupancy holding in favour of K and the predecessor of J. In execution of a money decree against G and H their zamindari rights were sold and P purchased the same. Subsequently, in execution of a decree for arrear of rent, P got G and H ejected by the Revenue Court. Later on P got K and J the mortgagees also ejected by the Revenue Court. P then brought a suit against K and J for arrears of rent for the period between the ejectment of G and H and their own ejectment. *Held,* that P was not entitled to recover the rent in regard to the period of time between the two ejectments as the rent had not been fixed either by agreement between the parties or by a decree of Court KAMTA PRASAD v. PANNA LAL (1912) . **I. L. R. 35 All. 123**

———— s. 31—

See s. 25 . **I. L. R. 41 All. 270**

———— s. 32—

See CIVIL PROCEDURE CODE, O. XX, r. 18 . . **I. L. R. 36 All. 461**

———————— *Suit for possession of portion of holding—Suit maintainable.* All that s. 32 of the Tenancy Act provides against is the splitting up of a holding or the distribution of the rent so as to bind the land-holders. Cl. 2 does no more than enact that a suit brought for such a purpose shall not be entertained by a Civil or Revenue Court; but where a plaintiff sues for possession of a portion of a fixed rate tenancy alleging that he is owner thereof and the defendant is a trespasser, such a suit is not barred by the provisions of s. 32 of the Agra Tenancy Act, 1901. *Najibullah* v. *Gulsher Khan, I. L. R. 29 All. 66,* followed. KEDAR v. DEO NARAIN (1915).
I. L. R. 37 All. 656

———— s. 34—

See s. 28 . **I. L. R. 35 All. 123**

1. ———————— *Defendant in possession of land without consent of owner—Ejectment of defendant through Revenue Court—Subsequent suit for rent—Cause of action—Misjoinder of causes of action—Civil Procedure Code, 1908, Order II*

AGRA TENANCY ACT (II OF 1901)—*contd.*

——— s. 34—*contd.*

rule 2. On a partition of certain revenue-paying property some land which fell to the plaintiff's share remained in possession of the defendant, who refused to vacate it. The plaintiff sued the defendant for ejectment in the Revenue Court. The defendant pleaded that he was an ex-proprietary tenant, but the Court held him to be a non-occupancy tenant and ejected him. The plaintiff then brought the present suit under s. 34 of the Agra Tenancy Act, 1901, for rent of the land held by the defendant during the period prior to his ejectment as land occupied by the defendant without the plaintiff's consent. *Held,* that the defendant, being in occupation of the land without the consent of the plaintiff, was liable to pay rent therefor, under s. 34 of the Agra Tenancy Act, and further that the claim could be maintained notwithstanding that the defendant was not in possession at the date of the suit. *Sheo Gopal Pande* v. *Thakur Baldeo Singh, 8 All. L. J. 1087,* distinguished. *Held* further, that the suit was not barred by reason of the plaintiff having in his previous suit for ejectment treated the defendant as a tenant. *Held,* also, that the plaintiff's cause of action under s. 34 of the Agra Tenancy Act was no part of his cause of action to recover possession of the property, and could not be joined in the previous suit, and the present suit was, therefore, not barred by the provisions of the Code of Civil Procedure, O. II, r. 2. NANDAN SINGH *v.* GANGA PRASAD (1913) . . . . **I. L. R. 35 All. 512**

——— *Person occupying land without consent of landlord—Ejectment—Non-occupancy tenant—Usufructuary mortgagee entitled to possession.* The plaintiffs were the usufructuary mortgagees entitled to possession of the mortgaged property. The defendant having acquired a part of the equity of redemption asserted a right to the possession of some of the *sir* lands comprised in the mortgage without tendering the mortgage money, and somehow managed to get into possession of certain plots. *Held,* that s. 34 of the Agra Tenancy Act, 1901, applied, and the defendant could be regarded as a person in possession of a land without the consent of the landlord and ejected as if he were non-occupancy tenant. *Balli* v. *Nanbat Singh, 9 A. L. J. 771,* followed. JAGARDEO SINGH *v.* ALI HAMMAD (1918).
I. L. R. 40 All. 300

——— s. 41—

See UNITED PROVINCES LAND REVENUE ACT (III OF 1901), s. 36.
I. L. R. 39 All. 318

——— s. 56—*Jurisdiction—Civil and Revenue Courts—Suit for ejectment of a tenant in Revenue Court—Subsequent suit in Civil Court against the same defendant as trespasser.* Where the plaintiff had previously sought to eject the defendant by suit in the Revenue Court on the plea that he was the plaintiff's sub-tenant, but had failed, on the finding that the defendant was an occupancy-tenant, it was *held,* that the plaintiff could not thereafter sue the defendant in the Civil Court to evict him as a trespasser. NARAIN SINGH *v.* GOBIND RAM (1911) . **I. L. R. 33 All. 523**

——— s. 57—

See S. 25 . . **I. L. R. 41 All. 270**

AGRA TENANCY ACT (II OF 1901)—*contd.*

——— s 57—*contd.*

See TRANSFER OF PROPERTY ACT, 1882, s. 91 . . **I. L. R. 33 All. 111**

——— ss. 57, 65, 167—

See CIVIL AND REVENUE COURTS.
I. L. R. 40 All. 646

——— s. 58—

See s. 4 . **I. L. R. 43 All. 445**

——— ss. 58, 167—*Suit for ejectment—Decision of first Court as to defendant's tenancy—Appeal—Order by District Judge returning plaint for presentation to proper Court—Revision.* In a suit for ejectment before a Court of Revenue the defendant pleaded that no relation of landlord and tenant subsisted between the parties. The Court, however, found that the defendant was the plaintiff's tenant, and decreed his ejectment. On appeal by the defendant to the Court of the District Judge, that Court held that no appeal lay to it and returned the memorandum of appeal for presentation to the proper Court: *Held,* that no revision lay against this order to the High Court. *Damber Singh* v. *S. Dass, 31 All. 445 followed.* **I. L. R. 41 All. 28**

——— ss. 58, 177(*e*)—*Suit for ejectment—Question of proprietary title—Appeal—Jurisdiction.* In a suit for ejectment under section 58 of the Tenancy Act, defendant denied the plaintiff's title and set up another man as his landlord. The Court of first instance decreed the claim. *Held,* that an appeal from his decision lay to the District Judge under s. 177 (*e*) of the Act, inasmuch as the question of the plaintiff's proprietary title was put in issue in the Court of first instance and was a matter in issue in the appeal. GANGA PRASAD *v.* HAR NARAIN (1916) . . **I. L. R. 38 All. 465**

——— ss. 58, 200—*Appeal—Question of proprietary title—Defendants setting up a title as mortgagees of the proprietary rights.* In a suit for ejectment under s. 58 of the Agra Tenancy Act, 1901, the defendants pleaded that they were not tenants but mortgagees of the proprietary rights of which the plaintiff was alleged to be the purchaser of the equity of redemption. *Held,* that this amounted to a distinct claiming of a proprietary title or at least of a portion of the bundle of rights which go to make up a proprietary title and the appeal would lie to the District Judge. KALYAN MAL *v.* SAMAND (1913).
I. L. R. 35 All. 157

——— s. 63—

See s. 4 . **I. L. R. 43 All. 445**

——— *Civil Procedure Code 1908, s. 11, Expln. VI—Suit for ejectment in Revenue Court—Question of title decided by Assistant Collector—Decision allowed to become final—Res judicata.* In a suit for ejectment in the Revenue Court, the defendants to that suit pleaded title in themselves, and the Assistant Collector determined that question and held that the plaintiff had failed to prove title as against them. This decision became final. In a subsequent suit in the Civil Court for declaration of title against the former defendants and also certain others: *Held,* that the decision of the Revenue Court operated as *res judicata* so far as concerned those persons who had been defendants to the previous suit, but not as against those who were no parties to the suit. *Behari* v. *Sheobalak, I. L. R. 29 All. 601,* referred to. BED SARAN KUNWARI *v.* BHAGAT DEO (1911).
I. L. R. 33 All. 453

AGRA TENANCY ACT (II OF 1901)—*contd.*

——— s. 65—

See CIVIL AND REVENUE COURTS.
I. L. R. 40 All. 646

——— ss. 74 *to* 76—"*Crops or other products*"—*Jasmine and Bela plants. Held,* that jasmine and *bela* plants come under the category of crops or other products within the meaning of ss. 74, 75 and 76 of the Agra Tenancy Act, 1901. *Sheo Pershad Tiwary* v. *Mussumat Moleema Beebee, N.-W. P. H. C. Rep. 108,* and *Abdul Baki* v. *Mathura Prasad, All. Weekly Notes (1893) 24,* referred to. RAM PRASAD BHAGAL *v.* SUBA RAI (1910) . . . . I. L. R. 32 All. 458

——— s. 76—

See s. 74 . I. L. R. 32 All. 458

——— s. 79—*Fixed-rate holding—Purchase of holding at auction sale in execution of a decree—Formal possession obtained—Suit for physical possession—Jurisdiction.* The purchasers of a fixed-rate holding at an auction sale held in pursuance of a decree on a mortgage applied for and obtained formal possession of the holding; the zamindar, however, refused to allow them to cultivate, and in consequence thereof they instituted, in a Civil Court, a suit for possession of the holding. *Held,* that the position of the plaintiffs was that of tenants who had been wrongfully ejected by the zamindar, to which s. 79 of the Agra Tenancy Act, 1901, applied, and that no suit would lie in a Civil Court. *Collector of Benares* v. *Shiam Das, 13 All. L. J. 329,* distinguished. ABDUL HASAN *v.* MAKHDUM BAKHSH (1917) I. L. R. 39 All. 455

——— ss. 79, 95—*Jurisdiction—Landholder and tenant—Occupancy holding—Suit for declaration that plaintiff is heir of deceased occupancy tenant and for possession of holding—Practice—Useless declaration refused.* The son of a deceased occupancy tenant filed a suit against the zamindar in the Civil Court (i) to have it declared that he was the son and lawful heir of the late tenant, and (ii) for possession of the occupancy holding held by him. The plaintiff had been ejected more than two years before suit. *Held,* that although so far as the first relief claimed was concerned the suit might be cognizable by a Civil Court, so far as the second relief was concerned the plaintiff's remedy was by suit under s. 79 of the Agra Tenancy Act, and, inasmuch as the time for filing such a suit had long since expired, there was no object to be gained by granting the first relief. The entire suit was accordingly dismissed. *Dori Lal* v. *Sardar Singh, 5 All. L. J. 514,* referred to. BIRHAM KHUSHAL *v.* SUMERA (1913).
I. L. R. 35 All. 299

——— s. 83—

See s. 10 . I. L. R. 33 All. 695
I. L. R. 39 All. 873
I. L. R. 40 All. 449

——— s. 95—

See JURISDICTION I. L. R. 34 All. 358

See s. 79 . I. L. R. 35 All. 289

——— s. 95—*Civil and Revenue Courts—Jurisdiction—Dispute between two rival claimants to a tenancy. Held,* that the question of title to a tenancy arising between rival claimants to that tenancy is a question which is cognizable by a Civil Court and is not a matter coming within the purview of s. 95 of the Agra Tenancy Act, 1901. *Bhup* v. *Ram Lal, I. L. R. 33 All. 795,* followed. *Zubeda Bibi* v. *Sheo Charan, I. L. R. 22 All. 83,* and *Hamid Ali Shah* v. *Wilayat Ali, I. L. R. 22 All. 93,* referred to. JAGAN NATH *v* AJUDHIA SINGH (1912) . I. L. R. 35 All. 14

2. ——— *Scope of section—Power to fix rent not given.* It was never intended that the Court in proceedings under s. 95 of the Agra Tenancy Act, 1901, was to fix the amount of rent. Under s. 95 it was intended that the Court should ascertain what in fact was the rent payable. RAM CHARAN LAL *v.* KARIM-UN-NISSA BIBI (1914) . . . I. L. R. 37 All. 12

3. ——— *Jurisdiction—Civil and Revenue Courts—Res judicata—Dispute between two rival claimants to a holding.* A sued B for ejectment in a Court of Revenue, alleging that B was his sub-tenant, and obtained a decree. B then sued in the Civil Court for a declaration that he was the owner of a certain occupancy holding and for possession if he was found not to be in possession. *Held* (i) that B's suit was properly triable by a Civil Court and not by a Court of Revenue and (ii) that the previous judgment of the Court of revenue ejecting B could not operate as *res judicata.* Neither was the suit barred by s. 95 of the Agra Tenancy Act, 1901. That section deals with questions arising between landlord and tenant, and not between rival claimants to a tenancy. *Jagannath* v. *Ajudhia Singh, I. L. R. 35 All. 14,* followed. *Diwan Singh* v. *Bandhera 12 All. L. J.,* overruled. KANHAI RAM *v.* DURGA PRASAD (1915) . . I. L. R. 37 All. 223

ALSO *See* COURT-FEES ACT (VII OF 1870) SCH. II, ART. 5; s. 7, xi.
I L. R. 40 All. 358

See UNITED PROVINCES LAND REVENUE ACT (III OF 1901), ss. 142, 143, 146.
I. L. R. 39 All. 711

——— ss. 95, 167—*Civil and Revenue Courts—Jurisdiction—Dispute between rival claimants to a tenancy.* S. 95 of the Tenancy Act was not intended to apply to the case of disputes between rival claimants to a tenancy. It was intended to apply to questions arising between the landlord on the one side and the tenant on the other. *Primâ facie* the Civil Court is the proper Court to try all questions, and it is only when suits are expressly excluded from its cognizance that its jurisdiction is ousted. *Kali Charan* v. *Musammat Utmi, 7 All. L. J. 658,* referred to. BHUP *v.* RAM LAL (1911) . . . I. L. R. 33 All. 735

2. ——— *Jurisdiction—Civil and Revenue Courts—Suit for ejectment of tenant—Decision of incidental question by Revenue Court—Suit in Civil Court with the object of defeating the Revenue Court's decree—Res judicata.* In a suit for ejectment of a tenant filed in a Court of Revenue the defendants pleaded that they held under an unexpired lease granted by the plaintiffs' *karinda.* The plaintiffs replied that the *karinda* [illegible] e Court [illegible] favour [illegible] t. The [illegible] for a [illegible] have [illegible] *Held,* that [illegible] would not lie. The Court of Revenue [illegible] suit the main object of which was the [illegible]

AGRA TENANCY ACT (II OF 1901)—*contd.*

——— **ss. 95, 167**—*contd.*

the defendants, had jurisdiction to decide the question of the validity of the lease, and the suit was barred by the operation of ss. 95 and 167 of the Agra Tenancy Act, 1901. *Gomti Kunwar* v. *Gudri, I. L. R. 25 All. 138,* distinguished. *Rai Krishn Chand* v. *Mahadeo Singh, All. Weekly Notes, 1901, 49.* RAM SINGH *v.* GIRRAJ SINGH (1914) . . . . **I. L. R. 37 All. 41**

——— **ss. 95, 167; Sch. IV, group C. No. 34**—*Jurisdiction—Civil and Revenue Courts —Occupancy holding—Succession.* On the death of an occupancy tenant, a person alleging herself to be his widow applied in the Revenue Court for mutation of names in her favour. This application was resisted by the zamindars, who denied that the applicant was legally the wife of the deceased tenant. The Revenue Court rejected the application for mutation, and the applicant thereupon filed her suit in the Civil Court asking for a declaration that she had been legally married to the deceased tenant and was the rightful heir to his estate, *viz.*, occupancy holding. No other property of the deceased was specified: *Held,* that in the circumstances the relief claimed fell within the purview of section 95 of the Agra Tenancy Act, 1901, and that the suit was not cognizable by a Civil Court. *Birham Khusal* v. *Sumera, I. L. R. 35 All. 229,* referred to. RAM CHARITRA RAI *v.* JINSI AHIRIN (1913).

I L. R. 36 All. 48

——— **ss. 95, 177** *(f)*—*Civil and Revenue Courts—Jurisdiction—Appeal.* A party to a suit in a Revenue Court cannot, merely by formally raising an absolutely untenable plea of jurisdiction, remove the case from the Revenue Court to a Civil Court. DEO NARAIN SINGH *v.* SITLA BAKHSH SINGH (1916) . . . **I. L. R. 40 All. 177**

2. ——— *Suit for declaration of status of tenant—Plea that plaintiff was not a tenant at all—Question of jurisdiction decided—Appeal.* In a suit, which was framed as a suit under s. 95 of the Agra Tenancy Act, 1901, asking for a declaration of the plaintiff's status as an occupancy tenant, the defendant zamindar pleaded that the plaintiff was a mere trespasser, and further stated that " there was no allegation in the plaint regarding the jurisdiction of the Court as was required under the law." An issue was framed—" Is the suit under s. 95, Act II of 1901, maintainable and cognizable by this Court "—upon which the decision was—" S. 95 of the Tenancy Act is the only section under which suits can be brought. The suit is maintainable under s. 95 and as such is cognizable by the Court." *Held,* that it could not be said, that in these circumstances a question of jurisdiction had been decided within the meaning in s. 177 *(f)* of the Agra Tenancy Act, 1901, and the appeal lay to the Commissioner and not to the District Judge. RATAN SINGH *v.* PRAN SUKH.

I. L. R. 43 All. 368

——— **s. 97**—*Attestation of instrument by Revenue Court or Officer—Registration Act (XVI of 1908), s. 47. Held,* that where a lease has been attested by a Revenue Court or Officer under s. 97 of the Agra Tenancy Act, 1901, such attestation, in the same way as registration under the Indian Registration Act, relates back to the date of execution of the document. BANWARI LAL *v.* KHUBI RAM (1914) . **I. L. R. 37 All. 59**

AGRA TENANCY ACT (II OF 1901)—*contd.*

——— **ss. 102, 198**—*Landlord and tenant—Suit for rent—Jus tertii—Intervenor to whom tenant has not actually paid rent. Held,* that s. 198 of the Agra Tenancy Act, 1901, does not apply to the case of an intervenor, whose *jus tertii* the tenant defendant in a suit for rent has set up, and who has been made a party to the suit, but to whom the tenant has not actually and in good faith paid rent. SHEO DIHAL SINGH *v.* BADRI NARAIN SINGH (1905) . . . . **I. L. R. 33 All. 61**

——— **s. 124**—*Distress—Attachment—Removal by tenants of distrained crops—Theft—Penal Code (Act XLV of 1860), s. 379.* A distress legally carried out according to the provisions of the Agra Tenancy Act, 1901, takes priority over the rights of a decree-holder who has attached the crops distrained, and this notwithstanding that the distress may be the result of collusion between the landlord and his tenants. When, therefore, certain cultivators acting under section 124 *(1)* of the Agra Tenancy Act, cut and stored certain crops which had been distrained by their landlord, but which had also been previously attached by a decree-holder: *Held,* that they had committed no offence. EMPEROR *v.* RAM DAYAL (1915).

I. L. R. 38 All. 40

——— **ss. 142, 199**—*Usufructuary mortgage—Lease by mortgagee in favour of mortgagor—Distraint for arrears of rent—Suit to contest distraint —Subsequent suit by mortgagee for possession of property mortgaged—Res judicata.* A usufructuary mortgagee of certain zamindari gave a lease of the mortgaged property to the mortgagors. Subsequently the lessor distrained for rent due under the lease. The lessees instituted a suit under section 142 of the Agra Tenancy Act, disputing the validity of the distraint on the ground that the mortgage debt had been discharged and the lease had therefore come to an end. In this suit the Court of Revenue found that the mortgage had been discharged. Thereupon the mortgagee instituted the present suit in a Civil Court against the mortgagors claiming possession of the mortgaged property upon the ground that the mortgage still subsisted. *Held,* that the decision of the Court of Revenue could not operate as *res judicata.* Section 199 of the Agra Tenancy Act, 1901, did not apply to a suit by an alleged tenant against an alleged landlord but only to a suit by landlord against a tenant. SURAJ KUMAR *v.* CHET RAM (1919).

I. L. R. 41 All. 369

——— **s. 150**—*Resumption of muafi—" Proprietor "—Perpetual lessee entitled to resume.* In substitution for a monthly cash payment which the Maharaja of Benares used to make to the lessees, the Maharaja granted to them a perpetual lease of a certain *muafi* village. He transferred to the lessees all rights of every kind, reserving only to himself an annual sum payable as rent with a right to re-enter in case of default of payment. *Held,* that in the circumstances the lessees must be regarded as " proprietors " within the meaning of s. 150 of the Agra Tenancy Act, 1901, and were entitled to sue for resumption of the *muafi.* MATABADAL SINGH *v.* GOURISH NARAIN SINGH (1918).

I. L. R. 40 All. 656

——— **ss. 154, 158**—*Muafi land—Suit for resumption—Portion of muafi grant converted into a grove, but restored to the position of agricultural land before suit.* Where a certain area had been held

AGRA TENANCY ACT (II OF 1901)—*contd.*

———— **ss. 154, 158**—*contd.*

rent-free for fifty years and by two successors to the area had at which, however, years before suit, it was *held*, on suit for resumption, that there was no justification for drawing a distinction between that part of the area which had at one time been a grove, and the rest, which had all along been culturable land, and that, as s. 154 of the Agra Tenancy Act, 1901, did not apply, no portion of the area could be resumed. MUHAMMAD ISA KHAN *v.* MUHAMMAD KHAN (1917) **I. L. R. 40 All. 60**

———— **ss. 154, 177**—*Suit for resumption of rent-free land—Question of proprietary title in issue—Civil and Revenue Courts—Jurisdiction.* In a suit for resumption of rent-free land under s. 154 of the Agra Tenancy Act, the defence was that the land was not resumable and that it had been held rent-free for fifty years and by two successors to the original grantee. The Court of first instance (Assistant Collector), holding that the land was resumable, passed a decree for ejectment. The defendants appealed to the Commissioner, before whom it was pleaded, *inter alia*, that the lower Court should have proceeded under s. 158 of the Tenancy Act, but it did not appear that any finding was arrived at or any evidence given or arguments addressed upon this question before the Commissioner: *Held*, that in the circumstances it did not appear that a question of proprietary title was in issue in the Court of first instance and also in the Court of Appeal so as to give appellate jurisdiction to the Civil Court and oust the jurisdiction of the Courts of Revenue. KAREHRU *v.* MATHURA PRASAD (1919). **I. L. R. 41 All. 318**

———— **s. 158**—

See s. 154 . . **I. L. R. 40 All. 60**

1. ———— *Definition—"Successor"—Transferee from a rent-free grantee. Held*, that a transferee from a rent-free grantee is a successor of the grantee within the meaning of s. 158 of the Agra Tenancy Act, 1901. SUNDER SINGH *v.* THE COLLECTOR OF SHAHJAHANPUR (1911). **I. L. R. 33 All. 553**

2. ———— *United Provinces Land Revenue Act (III of 1901), s. 34—Muafi grant—Resumption—Grant to mahant of temple. Held*, that s. 158 of the Agra Tenancy Act, 1901, and s. 34 of the United Provinces Land Revenue Act, 1901, apply to land granted rent-free for charitable purposes to the *mahant* of a temple. Where, therefore, land so granted has been held for more than fifty years, and by two or more successors to the original grantee, it cannot be resumed. BHARAT DAS *v.* NANDRANI KUNWAR (1917) . . . . **I. L. R. 39 All. 689**

———— **ss. 158, 167**—*Civil and Revenue Courts—Jurisdiction—Suit for declaration of plaintiff's proprietary title in land originally muafi. Held*, that a suit brought under the provisions of s. 158 of the Agra Tenancy Act, 1901, for a declaration that plaintiffs have acquired proprietary rights in respect of land originally a *muafi* grant, is a suit exclusively within the jurisdiction of a Court of Revenue. *Baldeo Singh* v. *Mardan Singh, 7 A. L. J. 818*, followed. NANHU *v.* SRI THAKURJI MAHARAJ (1918) . . **I. L. R. 41 All. 37**

AGRA TENANCY ACT (II OF 1901)—*contd.*

———— **s. 159**—*"Co-sharer"—Owner of specific plots of land assessed to revenue—Suit by lambardar to recover revenue paid on behalf of such person.* The word "co-sharer" in s. 159 of the Agra Tenancy Act means a person holding proprietary rights in the mahal, who is jointly and severally liable for land revenue with other proprietors in the mahal and whose revenue is payable through the lambardar under the provisions of s. 144 of the United Provinces Land Revenue Act, 1901. MURLIDHAR *v.* BABU RAM. **I. L. R. 42 All. 311**

———— **s. 164**—

See CIVIL PROCEDURE CODE (1908), O. XXVI, RR. 9, 16, 17, 18. **I. L. R. 39 All. 694**

1. ———— *Lambardar and co-sharer—Suit for profits—Decree to be either on gross rental or actual collections, but not on both—Finding as to negligence of lambardar a mixed finding of law and fact.* In a suit for profits by a co-sharer against a lambardar the decree must be based either on the gross rental or on the actual collections. It cannot be based partly on one and partly on the other. *Nand Kishore* v. *Ram Ratan, W. N. 1887, p. 250*, referred to. *Held* also, that a finding of negligence or misconduct on the part of a lambardar is a mixed finding of fact and law, and is not exempt from reconsideration by the High Court in second appeal. CHHABRAJI KUNWAR *v.* GANGA SINGH. **I. L. R. 43 All. 29**

2. ———— *Suit by co-sharer against lambardar for share of profits—Burden of proof.* In a suit by a co-sharer against a lambardar for his share of profits under s. 164 of the Tenancy Act, if the co-sharer gives general evidence to show that the rents are greatly in arrear, that the tenants are solvent and that there are no special circumstances why the rents should not have been collected, the *onus* is shifted on to the defendant of showing that for some reason, not connected with his own neligence or misconduct, he was unable to collect the rents. *Mithan Lal* v. *Mizaji Lal, 10 All. L. J. 529*, followed SHIVA CHANDAR SINGH *v.* RAM CHANDAR SINGH (1915). **I. L. R. 37 All. 595**

3. ———— *Jurisdiction—Civil and Revenue Courts—"Profits"—Income derived from land and houses in the abadi. Held*, that the income derived from land and houses in the abadi could not properly be regarded as profits of the mahal in respect of which a suit was cognizable exclusively by the Court of Revenue under section 164 of the Agra Tenancy Act, 1901. *Baldeo Singh* v. *Beni Singh*, 1899, *All. Weekly Notes*, 57, referred to. DIGBIJAI SINGH *v.* HIRA DEVI (1916). **I. L. R. 38 All. 223**

4. ———— *Suit against lambardar for profits—Sir and khud-kasht land held by co-sharers to be taken into account. Held*, that in a suit for profits brought by a co-sharer against a lambardar under s. 164 of the Agra Tenancy Act, 1901, the plaintiff is entitled to have taken into account the profits of *sir* and *khud-kasht* land held by the other co-sharers in the village. *Bishambhar Nath* v. *Bhullo, I. L. R. 34 All. 98*, discussed. *Gulzari Mal* v. *Jai Ram, I. L. R. 36 All. 441*, referred to. GANGA SINGH *v.* RAM SARUP (1916). **I. L. R. 38 All. 223**

AGRA TENANCY ACT (II OF 1901)—*contd.*

———— **ss. 95, 167**—*contd.*

the defendants, had jurisdiction to decide the question of the validity of the lease, and the suit was barred by the operation of ss. 95 and 167 of the Agra Tenancy Act, 1901. *Gomti Kunwar* v. *Gudri, I. L. R. 25 All. 138,* distinguished. *Rai Krishn Chand* v. *Mahadeo Singh, All. Weekly Notes, 1901, 49.* RAM SINGH *v.* GIRRAJ SINGH (1914) . . . . **I. L. R. 37 All. 41**

———— **ss. 95, 167 ; Sch. IV, group C. No. 34**—*Jurisdiction—Civil and Revenue Courts—Occupancy holding—Succession.* On the death of an occupancy tenant, a person alleging herself to be his widow applied in the Revenue Court for mutation of names in her favour. This application was resisted by the zamindars, who denied that the applicant was legally the wife of the deceased tenant. The Revenue Court rejected the application for mutation, and the applicant thereupon filed her suit in the Civil Court asking for a declaration that she had been legally married to the deceased tenant and was the rightful heir to his estate, *viz.*, occupancy holding. No other property of the deceased was specified: *Held*, that in the circumstances the relief claimed fell within the purview of section 95 of the Agra Tenancy Act, 1901, and that the suit was not cognizable by a Civil Court. *Birham Khusal* v. *Sumera, I. L. R. 35 All. 229,* referred to. RAM CHARITRA RAI *v.* JINSI AHIRIN (1913).

I L. R. 36 All. 48

———— **ss. 95, 177** *(f)*—*Civil and Revenue Courts—Jurisdiction—Appeal.* A party to a suit in a Revenue Court cannot, merely by formally raising an absolutely untenable plea of jurisdiction, remove the case from the Revenue Court to a Civil Court. DEO NARAIN SINGH *v.* SITLA BAKHSH SINGH (1916) . . . **I. L. R. 40 All. 177**

2. ———— *Suit for declaration of status of tenant—Plea that plaintiff was not a tenant at all—Question of jurisdiction decided—Appeal.* In a suit, which was framed as a suit under s. 95 of the Agra Tenancy Act, 1901, asking for a declaration of the plaintiff's status as an occupancy tenant, the defendant zamindar pleaded that the plaintiff was a mere trespasser, and further stated that "there was no allegation in the plaint regarding the jurisdiction of the Court as was required under the law." An issue was framed—"Is the suit under s. 95, Act II of 1901, maintainable and cognizable by this Court"—upon which the decision was—"S. 95 of the Tenancy Act is the only section under which suits can be brought. The suit is maintainable under s. 95 and as such is cognizable by the Court." *Held*, that it could not be said, that in these circumstances a question of jurisdiction had been decided within the meaning in s. 177 (*f*) of the Agra Tenancy Act, 1901, and the appeal lay to the Commissioner and not to the District Judge. RATAN SINGH *v.* PRAN SUKH.

I. L. R. 43 All. 368

———— **s. 97**—*Attestation of instrument by Revenue Court or Officer—Registration Act (XVI of 1908), s. 47. Held*, that where a lease has been attested by a Revenue Court or Officer under s. 97 of the Agra Tenancy Act, 1901, such attestation, in the same way as registration under the Indian Registration Act, relates back to the date of execution of the document. BANWARI LAL *v.* KHUBI RAM (1914) . **I. L. R. 37 All. 59**

AGRA TENANCY ACT (II OF 1901)—*contd.*

———— **ss. 102, 198**—*Landlord and tenant—Suit for rent—Jus tertii—Intervenor to whom tenant has not actually paid rent. Held*, that s. 198 of the Agra Tenancy Act, 1901, does not apply to the case of an intervenor, whose *jus tertii* the tenant defendant in a suit for rent has set up, and who has been made a party to the suit, but to whom the tenant has not actually and in good faith paid rent. SHEO DIHAL SINGH *v.* BADRI NARAIN SINGH (1905) . . . . **I. L. R. 33 All. 61**

———— **s. 124**—*Distress—Attachment—Removal by tenants of distrained crops—Theft—Penal Code (Act XLV of 1860), s. 379.* A distress legally carried out according to the provisions of the Agra Tenancy Act, 1901, takes priority over the rights of a decree-holder who has attached the crops distrained, and this notwithstanding that the distress may be the result of collusion between the landlord and his tenants. When, therefore, certain cultivators acting under section 124 (*1*) of the Agra Tenancy Act, cut and stored certain crops which had been distrained by their landlord, but which had also been previously attached by a decree-holder : *Held*, that they had committed no offence. EMPEROR *v.* RAM DAYAL (1915).

I. L. R. 38 All. 40

———— **ss. 142, 199**—*Usufructuary mortgage—Lease by mortgagee in favour of mortgagor—Distraint for arrears of rent—Suit to contest distraint—Subsequent suit by mortgagee for possession of property mortgaged—Res judicata.* A usufructuary mortgagee of certain zamindari gave a lease of the mortgaged property to the mortgagors. Subsequently the lessor distrained for rent due under the lease. The lessees instituted a suit under section 142 of the Agra Tenancy Act, disputing the validity of the distraint on the ground that the mortgage debt had been discharged and the lease had therefore come to an end. In this suit the Court of Revenue found that the mortgage had been discharged. Thereupon the mortgagee instituted the present suit in a Civil Court against the mortgagors claiming possession of the mortgaged property upon the ground that the mortgage still subsisted. *Held*, that the decision of the Court of Revenue could not operate as *res judicata*. Section 199 of the Agra Tenancy Act, 1901, did not apply to a suit by an alleged tenant against an alleged landlord but only to a suit by landlord against a tenant. SURAJ KUMAR *v.* CHET RAM (1919).

I. L. R. 41 All. 369

———— **s. 150**—*Resumption of muafi—"Proprietor"—Perpetual lessee entitled to resume.* In substitution for a monthly cash payment which the Maharaja of Benares used to make to the lessees, the Maharaja granted to them a perpetual lease of a certain *muafi* village. He transferred to the lessees all rights of every kind, reserving only to himself an annual sum payable as rent with a right to re-enter in case of default of payment. *Held*, that in the circumstances the lessees must be regarded as "proprietors" within the meaning of s. 150 of the Agra Tenancy Act, 1901, and were entitled to sue for resumption of the *muafi*. MATABADAL SINGH *v.* GOURISH NARAIN SINGH (1918).

I. L. R. 40 All. 656

———— **ss. 154, 158**—*Muafi land—Suit for resumption—Portion of muafi grant converted into a grove, but restored to the position of agricultural land before suit.* Where a certain area had been held

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——— **ss. 154, 158**—*contd.*

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——— **s. 158**—

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——— **s. 164**—

See CIVIL PROCEDURE CODE (1908), O. XXVI, RR. 9, 10, 17, 18.

I. L. R. 39 All. 694

1. ——— *Lambardar and co-sharer—Suit for profits—Decree to be either on gross rental or actual collections, but not on both—Finding as to negligence of lambardar a mixed finding of law and fact.* In a suit for profits by a co-sharer against a lambardar the decree must be based either on *the gross rental* or on *the actual collections. It* cannot be based partly on one and partly on the other. *Nand Kishore* v. *Ram Ratan, W. N. 1887, p. 250*, referred to. *Held* also, that a finding of negligence or misconduct on the part of a lambardar is a mixed finding of fact and law, and is not exempt from reconsideration by the High Court in second appeal. CHHABRAJI KUNWAR *v.* GANGA SINGH.

I. L. R. 43 All. 29

2. ——— *Suit by co-sharer against lambardar for share of profits—Burden of* ...

are solvent and that there are no special circumstances why the rents should not have been collected, the *onus* is shifted on to the defendant of showing that for some reason, not connected with his own neligence or misconduct, he was unable to collect the rents. *Mithan Lal* v. *Mizaji Lal, 10 All. L. J. 529*, followed. SHIVA CHANDAR SINGH *v.* RAM CHANDAR SINGH (1915).

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3. ——— *Jurisdiction—Civil and Revenue Courts—"Profits"—Income derived from land and houses in the abadi. Held*, that the income derived from land and houses in the abadi could not properly be regarded as profits of the mahal in respect of which a suit was cognizable exclusively by the Court of Revenue under section 164 of the Agra Tenancy Act, 1901. *Baldeo Singh* v. *Beni Singh*, 1899, *All Weekly Notes*, 57, referred to. DIGBIJAI SINGH *v.* HIRA DEVI (1916).

I. L. R. 38 All. 223

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I. L. R. 38 All. 223

AGRA TENANCY ACT (II OF 1901)—*contd.*

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I. L. R. 43 All. 368

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——— **ss. 102, 198**—*Landlord and tenant—Suit for rent—Jus tertii—Intervenor to whom tenant has not actually paid rent.* *Held*, that s. 198 of the Agra Tenancy Act, 1901, does not apply to the case of an intervenor, whose *jus tertii* the tenant defendant in a suit for rent has set up, and who has been made a party to the suit, but to whom the tenant has not actually and in good faith paid rent. SHEO DIHAL SINGH *v.* BADRI NARAIN SINGH (1905) . . . . **I. L. R. 33 All. 61**

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——— **ss. 154, 158**—*Muafi land—Suit for resumption—Portion of muafi grant converted into a grove, but restored to the position of agricultural land before suit.* Where a certain area had been held

AGRA TENANCY ACT (II OF 1901)—*contd.*

———— **ss. 154, 158**—*contd.*

rent-free for fifty years and by two successors to the original grantee, but part of the area had at one time been occupied by a grove, which, however, had ceased to exist some fifteen years before suit, it was *held*, on suit for resumption, that there was no justification for drawing a distinction between that part of the area which had at one time been a grove, and the rest, which had all along been culturable land, and that, as s. 154 of the Agra Tenancy Act, 1901, did not apply, no portion of the area could be resumed. MUHAMMAD ISA KHAN *v.* MUHAMMAD KHAN (1917) **I. L. R. 40 All. 60**

———— **ss. 154, 177**—*Suit for resumption of rent-free land—Question of proprietary title in issue—Civil and Revenue Courts—Jurisdiction.* In a suit for resumption of rent-free land under s. 154 of the Agra Tenancy Act, the defence was that the land was not resumable and that it had been held rent-free for fifty years and by two successors to the original grantee. The Court of first instance (Assistant Collector), holding that the land was resumable, passed a decree for ejectment. The defendants appealed to the Commissioner, before whom it was pleaded, *inter alia*, that the lower Court should have proceeded under s. 158 of the Tenancy Act, but it did not appear that any finding was arrived at or any evidence given or arguments addressed upon this question before the Commissioner: *Held*, that in the circumstances, it did not appear that a question of proprietary title was in issue in the Court of first instance and also in the Court of Appeal so as to give appellate jurisdiction to the Civil Court and oust the jurisdiction of the Courts of Revenue. KAREHRU *v.* MATHURA PRASAD (1919).

I. L. R. 41 All. 318

———— **s. 158**—

See s. 154 . . **I. L. R. 40 All. 60**

1. ———— *Definition—"Successor"—Transferee from a rent-free grantee. Held*, that a transferee from a rent-free grantee is a successor of the grantee within the meaning of s. 158 of the Agra Tenancy Act, 1901. SUNDER SINGH *v.* THE COLLECTOR OF SHAHJAHANPUR (1911).

I. L. R. 33 All. 553

2. ———— *United Provinces Land Revenue Act (III of 1901), s. 34—Muafi grant—Resumption—Grant to mahant of temple. Held*, that s. 158 of the Agra Tenancy Act, 1901, and s. 34 of the United Provinces Land Revenue Act, 1901, apply to land granted rent-free for charitable purposes to the *mahant* of a temple Where, therefore, land so granted has been held for more than fifty years, and by two or more successors to the original grantee, it cannot be resumed. BHARAT DAS *v.* NANDRANI KUNWAR (1917) . . . . **I. L. R. 39 All. 689**

———— **ss. 158, 167**—*Civil and Revenue Courts—Jurisdiction—Suit for declaration of plaintiff's proprietary title in land originally muafi. Held*, that a suit brought under the provisions of s. 158 of the Agra Tenancy Act, 1901, for a declaration that plaintiffs have acquired proprietary rights in respect of land originally a *muafi* grant, is a suit exclusively within the jurisdiction of a Court of Revenue. *Baldeo Singh* v. *Mardan Singh, 7 A. L. J. 818*, followed. NANNHU *v.* SRI THAKURJI MAHARAJ (1918) . . **I. L. R. 41 All. 37**

AGRA TENANCY ACT (II OF 1901)—*contd.*

———— **s. 159**—*"Co-sharer"—Owner of specific plots of land assessed to revenue—Suit by lambardar to recover revenue paid on behalf of such person.* The word "co-sharer" in s. 159 of the Agra Tenancy Act means a person holding proprietary rights in the mahal, who is jointly and severally liable for land revenue with other proprietors in the mahal and whose revenue is payable through the lambardar under the provisions of s. 144 of the United Provinces Land Revenue Act, 1901. MURLIDHAR *v.* BABU RAM.

I. L. R. 42 All. 311

———— **s. 164**—

See CIVIL PROCEDURE CODE (1908), O. XXVI, RR. 9, 16, 17, 18.

I. L. R. 39 All. 694

1. ———— *Lambardar and co-sharer—Suit for profits—Decree to be either on gross rental or actual collections, but not on both—Finding as to negligence of lambardar a mixed finding of law and fact.* In a suit for profits by a co-sharer against a lambardar the decree must be based either on the gross rental or on the actual collections. It cannot be based partly on one and partly on the other. *Nand Kishore* v. *Ram Ratan, W. N. 1887, p. 250*, referred to. *Held* also, that a finding of negligence or misconduct on the part of a lambardar is a mixed finding of fact and law, and is not exempt from reconsideration by the High Court in second appeal. CHHABRAJI KUNWAR *v.* GANGA SINGH.

I. L. R. 43 All. 29

2. ———— *Suit by co-sharer against lambardar for share of profits—Burden of proof.* In a suit by a co-sharer against a lambardar for his share of profits under s. 164 of the Tenancy Act, if the co-sharer gives general evidence to show that the rents are greatly in arrear, that the tenants are solvent and that there are no special circumstances why the rents should not have been collected, the *onus* is shifted on to the defendant of showing that for some reason, not connected with his own neligence or misconduct, he was unable to collect the rents. *Mithan Lal* v. *Mizaji Lal, 10 All. L. J. 529*, followed SHIVA CHANDAR SINGH *v.* RAM CHANDAR SINGH (1915).

I. L. R. 37 All. 595

3. ———— *Jurisdiction—Civil and Revenue Courts—"Profits"—Income derived from land and houses in the abadi. Held*, that the income derived from land and houses in the abadi could not properly be regarded as profits of the mahal in respect of which a suit was cognizable exclusively by the Court of Revenue under section 164 of the Agra Tenancy Act, 1901. *Baldeo Singh* v. *Beni Singh*, 1899, *All. Weekly Notes*, 57, referred to. DIGBIJAI SINGH *v.* HIRA DEVI (1916).

I. L. R. 38 All. 223

4. ———— *Suit against lambardar for profits—Sir and khud-kasht land held by co-sharers to be taken into account. Held*, that in a suit for profits brought by a co-sharer against a lambardar under s. 164 of the Agra Tenancy Act, 1901, the plaintiff is entitled to have taken into account the profits of *sir* and *khud-kasht* land held by the other co-sharers in the village. *Bishambhar Nath* v. *Bhullo, I. L. R. 34 All. 98*, discussed. *Gulzari Mal* v. *Jai Ram, I. L. R. 36 All. 441*, referred to. GANGA SINGH *v.* RAM SARUP (1916).

I. L. R. 38 All. 223

AGRA TENANCY ACT (II OF 1901)—*contd.*

——— **ss. 164, 166**—*Lambardar and co-sharer—Suit for profits against lambardar—Death of defendant pending suit—Liability of representative for sums not collected owing to negligence of lambardar. Held,* on a construction of ss. 164 and 166 of the Agra Tenancy Act, 1901, that where, a suit for profits having been filed against a lambardar, the lambardar dies pending the suit, and his legal representative is brought on the record as defendant, the representative is, so far as the assets of the deceased lambardar in his hands are concerned, liable to the same extent as the lambardar, that is to say, not only for money actually collected by the lambardar, but also for money left uncollected owing to his negligence or misconduct. *Muradun-nissa* v. *Ghulam Sajjad, I. L. R. 20 All. 73,* and *Dip Singh* v. *Ram Charan, I. L. R. 29 All. 15,* distinguished. BHARAT SINGH *v.* TEJ SINGH (1917).
I L. R. 40 All. 246

——— **ss. 164 and 194**—*Lambardar and co-sharer—Suit for profits—Liability of lambardar in respect of rents accruing due before the date of his appointment.* In a lambardari mahal the lambardar is, from the date of his appointment, the agent appointed to act on behalf of the co-sharers and he is the only person who, under s. 194, cl. (*1*), of the Agra Tenancy Act, has a right to institute a suit against a defaulting tenant for the recovery of any arrear of rent not statute-barred. A distinction, however, may require to be drawn in many cases between the degree of responsibility attaching to a lambardar in respect of arrears of rent which had accumulated during an *interregnum* prior to his appointment, and his responsibility for the realization of the current demand as it fell due after the date of his appointment. *Ganga Sahiai* v. *Ganga Bakhsh, W. N. 1890, p. 3,* and *Bharat Indu* v. *Syed Muhammad Mustafa Khan, I. L. R. 41 All. 316,* referred to. MOJIZ FATIMA BEGAM *v.* ALI AKBAR . . **I. L. R. 42 All. 414**

——— **ss. 164 and 201**—*Suit for profit—Plaintiff a recorded co-sharer at date of suit—Subsequent order of Revenue Court removing plaintiff's name from khewat.* Where at the date of institution of a suit for profits under s. 164 of the Agra Tenancy Act, 1901, the plaintiff is a recorded co-sharer, his right to obtain a decree will not be taken away by an order subsequently passed by a Court of Revenue removing his name from the khewat. The presumption raised by s. 201 of the Tenancy Act is irrebuttable so far as a Revenue Court is concerned. *Durga Prasad* v. *Hazari Singh, I. L. R. 33 All. 799,* referred to. LACHMAN PRASAD *v.* SHITABO KUNWAR . **I. L. R. 43 All. 177**

——— **s. 166**—

See s. 164 . **I. L. R. 40 All. 246**

——— **ss. 166, 201**—*Lessee continuing to be recorded as such after expiry of lease—Suit for profits—Presumption.* The lessee of a mortgage of zamindari property was recorded as entitled to the profits of the share, and remained so recorded even after the mortgage had been redeemed. *Held,* in a suit for profits, that the lessee was entitled to recover so long as he was recorded. *Durga Prasad* v. *Hazari Singh, I. L. R. 33 All. 799,* followed. MUHAMMAD AHMAD SAID KHAN *v.* MUHAMMAD MASIH-ULLAH KHAN (1912) **I. L. R. 34 All. 250**

——— **s. 167**—

See s. 4. . **I. L. R. 39 All. 605**

AGRA TENANCY ACT (II OF 1901)—*contd.*

——— s. 167—*contd.*

See S. 58 . **I. L. R. 41 All. 28**

See S. 95 . **I. L. R. 33 All. 785**

See S. 158 . **I. L. R. 41 All. 59**

See CIVIL AND REVENUE COURTS.
I. L. R. 40 All. 646

See JURISDICTION.
I. L. R. 34 All. 358

1. ——— *Civil and Revenue Courts—Jurisdiction—Question exclusively within the jurisdiction of a Court of Revenue decided by that Court—Suit in a Civil Court for the purpose of nullifying the Revenue Court's order barred.* Where a matter exclusively within the jurisdiction of a Court of Revenue has been tried and decided by that Court, as between the parties, no subsequent suit will lie in a Civil Court having for its sole object the annulment of the decree passed by the Court of Revenue. *Kishore Singh* v. *Bahadur Singh, I. L. R. 41 All. 97,* followed. *Kanhai Ram* v. *Durga Prasad, I. L. R. 37 All. 223,* distinguished. BALJIT *v.* MAHIPAT (1918).
I. L. R. 41 All. 203

2. ——— *Civil and Revenue Courts—Jurisdiction—Question exclusively within the jurisdiction of a Court of Revenue decided by that Court—Suit in a Civil Court for the purpose of nullifying the Revenue Court's order barred.* Where a Revenue Court has exclusive jurisdiction to try a certain question, and tries that question, as between the parties, the finding of the Revenue Court is binding upon them and cannot be questioned in a Civil Court, regard being had to s. 167 of the Agra Tenancy Act, 1901. *Shiva Prakash* v. *Karna, I. L. R. 35 All. 464, Ram Devi Kuari* v. *Bindeshri Upadhya, 8. A. L. J. 940, Ram Singh* v. *Girraj Singh, I. L. R. 37 All. 41,* and *Maharaja of Vizianagram* v. *Chhango Kurmi, 7 A. L. J. 555,* referred to. *Jagannath* v. *Ajudhia Singh, I. L. R. 35 All. 14,* distinguished. *Kanhai Ram* v. *Durga Prasad, I. L. R. 37 All. 223,* not followed. KISHORE SINGH *v.* BAHADUR SINGH (1918).
I. L. R. 41 All. 97

3. ——— *Jurisdiction—Civil and Revenue Courts—"Matter in respect of which a suit might have been brought" in the Revenue Courts.* The owners of certain zamindari property first mortgaged the property and then executed a perpetual lease of some land appertaining thereto. The mortgagees brought the zamindari to sale, and it was purchased by a stranger. The auction purchaser then sued the lessees in the Civil Court for recovery of possession of the land held by them. The lessees were directed to institute a suit in the Revenue Court to determine the question whether they were or were not tenants of the plaintiff. In this suit the auction purchaser admitted the existence of a tenancy, but pleaded that the precise nature of the tenancy, and in particular the validity of the perpetual lease was not a matter for determination *in that suit.* A decree was passed by the Revenue Court to the effect that the lessees were tenants of the plaintiff auction-purchaser. Subsequently the plaintiff amended his plaint by asking for a simple declaration that the perpetual lease was not binding on him. *Held,* that the suit so framed was barred by s. 167 of the Agra Tenancy Act, 1901. The plaintiff might have

AGRA TENANCY ACT (II OF 1901)—*concld.*

——— s. 167—*concld.*

instituted a suit for ejectment in the Revenue Court, in the course of which the validity of the perpetual lease would have to be determined. *Ram Singh* v. *Girraj Singh, I. L. R. 37 All. 41,* followed. SHER KHAN *v.* DEBI PRASAD (1915).

I. L. R. 37 All. 254

4. ——— *Suit in Revenue Court for arrears of rent as against sub-tenants—Suit decreed—Subsequent suit by defendants in Civil Court for a declaration that they were occupancy tenants barred—Res judicata.* In 1898, in a suit for ejectment, a Revenue Court decided, as against P. and R., that one H. was the tenant of a certain occupancy holding. In 1915 the heirs of P. and R. sued three nephews of H. for arrears of rent of part of the same occupancy holding on the ground that they were the plaintiff's sub-tenants, and succeeded in their suit. Two of the defendants to the suit of 1915 then brought a suit in the Civil Court (making the third defendant a *pro formâ* defendant thereto) and asked for a declaration that they were the occupancy tenants of the land. *Held,* that the suit was barred by the previous decision of the Revenue Court in the suit of 1915. *Kishore Singh* v. *Bahadur Singh, I. L. R. 41 All. 97,* followed. MULLO *v.* RAM LAL.

I. L. R. 43 All. 191

5. ——— *Jurisdiction—Civil and Revenue Courts—Suit by assignee of right to receive rent from fixed-rate tenant for declaration of plaintiff's title and for an injunction against zamindar and tenant.* The transferee of an assignee of the zamindar of the right to realize rent from a tenant at fixed rates of certain plots of land in a village filed a suit in a Civil Court asking for (i) a declaration of the plaintiff's right to receive the said rent, in virtue of a certain document styled a "perpetual lease" and (ii) a perpetual injunction against the zamindar and the fixed-rate tenant whose rent was assigned. *Held,* that the Civil Court had jurisdiction to entertain the suit. SIDDIQA BIBI *v.* RAM AUTAR PANDE (1917).

I. L. R. 39 All. 675

6. ——— *Revision—Powers of High Court—Suit for rent in the court of an Assistant Collector—Second appeal heard by District Judge.* The High Court has no power to entertain an application for revision against an order passed in an appeal by a District Judge against the decision of an Assistant Collector in a case exclusively triable by a Court of Revenue. *Muhammad Ehtisham Ali* v. *Lalji Singh, I. L. R. 41 All. 226,* followed. *Parbhu Narain Singh* v. *Harbans Lal, 14 A. L. J. 281,* referred to. GAJ KUMAR CHANDAR *v.* SALAMAT ALI . . . . I. L. R. 42 All. 83

——— ss. 167, 199—

See LANDLORD AND TENANT.

I. L. R. 41 All. 226

——— s. 167; Sch. IV, Group C, No. 30—*Civil and Revenue Courts—Jurisdiction—Suit by reversionary heir on death of Hindu to recover a holding.* The widow and son's widow of a separated Hindu, being in possession as such of a fixed-rate holding which had belonged to their late husband and father-in-law, sold the same to a *mahajan,* who in turn sold it to the zamindar: *Held,* on suit brought by the reversionary heir of the late tenant some three years after the last

AGRA TENANCY ACT (II OF 1901)—*contd.*

——— s. 167; Sch. IV, Group C, No. 30—*contd.*

widow's death for recovery of possession of the holding, (i) that the suit was of the nature contemplated by section 167 and Schedule IV, Group C, No. 30, of the Agra Tenancy Act, 1901, and would not lie in a Civil Court; and (ii) that the suit was therefore barred by limitation. *Ram Lal* v. *Chunni Lal, 2 All. L. J. 69,* referred to. BADRI KASAUNDHAN *v.* SARJU MISR (1913).

I. L. R. 36 All. 558

——— ss. 175, 177, 193—*Order passed by a Revenue Court staying or refusing to stay a suit—Appeal. Held,* that no appeal will lie to the High Court, from the order of a Court of Revenue staying, or refusing to stay, a suit pending before it. *Quære:* Whether any appeal lies at all. KIRPA DEVI *v.* RAM CHANDRA SARUP (1917).

I. L. R. 40 All. 219

——— ss. 176, 177—*Civil Procedure Code, 1882, ss. 2 and 102—Dismissal of suit for default—Order—Decree—Appeal.* An order of a Rent Court dismissing a suit for default of appearance by the plaintiff does not amount to a decree, and consequently such order when passed by an Assistant Collector of the first class is not appealable. *Zohra* v. *Mangu Lal, I. L. R. 18 All. 768,* followed. KARANPAL SINGH *v.* BHIMA MAL (1910) . . . I. L. R. 32 All. 373

——— s. 177—

See s. 154	.	I. L. R. 41 All. 318
See s. 175	.	I. L. R. 40 All. 219
See s. 176	.	I. L. R. 32 All. 373
See s. 58	.	I. L. R. 38 All. 465
See s. 95	.	I. L. R. 40 All. 177

1. ——— *Appeal—Question of proprietary title—Jus tertii pleaded by defendant—Third person added as a defendant—Question decided against the latter.* In a suit for assessment of revenue on land in the possession of the defendant, the defendant pleaded that the land belonged not to the plaintiff, but to a third person. The third person was brought upon the record as a defendant and claimed the land as his, and, on the question of ownership being decided against him, appealed: *Held,* that the question raised in the suit was a question of proprietary title which arose directly and substantially in the suit and that an appeal lay to the District Judge. MAHARAJA OF BENARES *v.* BALDEO PRASAD (1910) . I. L. R. 33 All. 260

2. ——— *Question of proprietary title—Jurisdiction—Civil and Revenue Courts—Pleadings—Plea of jurisdiction entertainable though not raised in the Court below. Held,* that the question whether a tenant, defendant in a suit for ejectment before a Court of Revenue, is a tenant of one kind or another is not a question of proprietary title within the meaning of s. 177 of the Agra Tenancy Act, 1901. *Held* also, that a plea of want of jurisdiction may be raised in the High Court although it was not raised in the Court below, provided that it can be decided on the record as it stands and involves no inquiry into any question of fact. *Niranjan* v. *Gajadhar, I. L. R. 30 All. 133,* followed. DAULATIA *v.* HARGOBIND. . . . I. L. R. 43 All. 18

3. ——— *Jurisdiction—Civil and Revenue Courts—Question of jurisdiction decided*

AGRA TENANCY ACT (II OF 1901)—*contd.*

———— s. 177—*contd.*

—*Appeal—Estoppel.* The plaintiff came into court alleging that on a partition between the defendant and himself certain plots of land had been allotted to him, but that the defendant had taken possession of them. He claimed that, under s. 34 of the Agra Tenancy Act he was entitled to treat the defendant as a tenant-at-will and he asked for a decree for his ejectment. The defendant pleaded that he was the occupancy tenant of the plots in suit; but he had never put forward the plea in the partition proceedings. He also pleaded that "having regard to the plaintiff's own allegations, the suit was not cognizable by the Revenue Court, and on that ground the suit should be dismissed." The Court of Revenue held that the suit was properly triable by it, but dismissed it upon the ground that the defendant was an occupancy tenant. The plaintiff appealed to the Commissioner, who returned the memorandum of appeal to the plaintiff, holding that the appeal lay to the District Judge. The District Judge entertained the appeal and gave a decree in favour of plaintiff. *Held* (1) that a question of jurisdiction had been decided within the meaning of s. 177 (*f*) of the Agra Tenancy Act, 1901, and the District Judge, therefore, had jurisdiction to hear the appeal, and (2) that the defendant, not having raised the question of his occupancy rights in the partition proceedings could not afterwards be permitted to raise it as a defence to the plaintiff's suit for ejectment. *Deo Narain Singh* v. *Sitla Bakhsh Singh, I. L. R. 40 All. 177, Damodar Das* v. *Jhaoo Singh, 1. A. L. J., 319,* and *Umrai Singh* v. *Ewaz Singh, I. L. R. 41 All. 270,* referred to. GOKARAN SINGH *v.* GANGA SINGH . . **I. L. R. 42 All. 91**

4. ————*Suit for ejectment in Revenue Court—Defendant pleading possession as proprietor—Question of proprietary title—Appeal* The plaintiff sued in a Revenue Court to eject the defendant on the allegation that he (the plaintiff) was the occupancy tenant of the plot in question and the defendant was his sub-tenant. The defendant pleaded that he was in possession not as a sub-tenant of the plaintiff but as a proprietor, and that the plot was his *khud-kasht*. *Held*, that on these pleadings a question of proprietary title was in issue in the case within the meaning of section 177 (*e*) of the Agra Tenancy Act, 1901, and that an appeal lay to the District Judge and not the Commissioner. *Dal Chand* v. *Shamla, 2 All. L. J. 176,* referred to. *Udit Tiwari* v. *Bihari Pande, I. L. R. 35 All. 521,* overruled. BINDESHRI PANDE *v.* GOKUL (1914).
I. L. R. 36 All. 183

———— ss. 182, 183—*Suit for rent—Second Appeal to District Judge—Remand—Appeal—Civil Procedure Code (1908), Order XLI, rule 23. Held,* that no appeal lies from an order of remand under Order XLI, rule 23, of the Code of Civil Procedure made by a District Judge in an appeal in a suit for rent under s. 180, clause (2), of the Agra Tenancy Act, 1901. GULZARI LAL *v.* LATIF HUSAIN (1916) .. . **I. L. R. 38 All. 181**

———— s. 183—

See s. 182 . **I. L. R. 38 All. 181**

———— s. 193—*Order of remand—Appeal—Preliminary and final decrees.* A suit was brought in a Court of Revenue for a declaration that the plaintiff was the proprietor of certain *muafi* land. The Court of first instance dismissed the suit. The lower Appellate Court set aside that decree and allowed the appeal to the extent that it held the plaintiff entitled to be declared a rent-free grantee of so much of the land as was entered in his name. It then added that "the suit be remanded to the lower Court for determination of the revenue payable by the plaintiff appellant." *Held*, that the order being one of remand no second appeal lay to the High Court; and as there was provision in the Tenancy Act about preliminary or final decrees, the order could not be appealed against as a preliminary decree. ANANDGIR *v.* SRI NIWAS (1918) . . . . **I. L. R. 40 All. 652**

———— s. 194.—*Lambardar—Suit by lambardar against co-sharers for excess of profits due to other co-sharers and himself—Lambardar not agent of co-sharers. Held*, that a lambardar is not the agent of the co-sharers generally so as to be entitled to sue on their behalf to recover profits due to some of them from other co-sharers holding *sir* and *khud-kasht* lands in excess of their proper shares. BISHAMBHAR NATH *v.* BHULLO (1911).
I. L. R. 34 All. 98

———— *Lambardar—Right of lambardar to eject tenants—Suit in ejectment—Other co-sharers not necessary parties. Held*, that when a lambardar in a lambardari village sues to eject a tenant he is not bound to join the other co-sharers as parties. *Semble :* That section 194 of the Tenancy Act was not intended to apply to the case of a lambardari village. *Bishambhar Nath* v. *Bhullo, I. L. R. 34 All. 98,* distinguished. GULZARI MAL *v.* JAI RAM (1914).
I. L. R. 36 All. 441

———— s. 197—

See BENGAL, N. W. P. AND ASSAM CIVIL COURTS ACT (XII OF 1887), s. 22 (*3*).
I. L. R. 37 All. 232

See JURISDICTION **I. L. R. 34 All. 358**

———— s. 198—

See s. 102 . **I. L. R. 33 All. 61**

See JURISDICTION OF CIVIL COURT.
I. L. R. 43 All. 325

———— *Arrears paid subsequent to suit to one of two co-lessees.* A mahal was leased to two persons M. and J. After the death of M., J. sued one of the tenants for arrears of rent. The tenant pleaded that he had always paid his rent to M., and after M.'s death, to his widow. After filing his defence in the suit the tenant proceeded to pay to M.'s widow the arrears which were then claimed. *Held*, that s. 198 of the Agra Tenancy Act, 1901, did not apply to the case. *Sheodial Singh* v. *Badri Narain 7 A. L. J. 1198,* referred to JEONI *v.* KALLU . **I. L. R. 43 All. 448**

———— ss. 198 and 200—

See PROVINCIAL INSOLVENCY ACT, 1907, SS. 16 AND 56. **I. L. R. 43 All. 510**

———— s. 199—

See s. 142 . **I. L. R. 41 All. 369**

See LANDLORD AND TENANT.
I. L. R. 41 All. 226

AGRA TENANCY ACT (II OF 1901)—*contd.*

——— s. 199—*contd.*

1. ——— *Civil and Revenue Courts—Jurisdiction—Appeal—Question of proprietary right.* The plaintiff sued in the Revenue Court to eject the defendant alleging that the land in suit was his occupancy holding and that the defendant was his sub-tenant. The defendant pleaded that he was a co-sharer in the village and that the land in suit was his *khud-kasht*. *Held*, that no question of proprietary title was raised by the pleadings, and that no appeal, therefore, lay to the District Judge from the order of the Assistant Collector who had decided the case in the first instance. *Dal Chand* v. *Shamla, 2 All. L. J. 176*, dissented from. UDIT TIWARI *v.* BIHARI PANDE (1913) . . . . **I. L. R. 35 All. 521**

2. ——— *Suit for ejectment—Plea that defendant was holding under an unexpired lease—Question of proprietary title.* In a suit for ejectment in a Court of Revenue, the defendant pleaded that he was entitled to remain in possession under a certain zar-i-peshgi lease the term of which had not expired. The Court of Revenue treated the question thus raised as falling under s. 199 of the Agra Tenancy Act, 1901, and directed the defendant to file a suit in the Civil Court within three months to vindicate his right. *Held*, that s. 199 was not applicable and the defendant was not bound to file his suit in the Civil Court within three months from the date of the order of the Court of Revenue. SURAJ MAL *v.* HIRA KUNWAR (1914).

I. L. R. 37 All. 94

3. ——— *Determination by Revenue Court of question of proprietary title—Subsequent suit in Civil Court—Res judicata. Held*, that the application of the principle that the decision of a question of title by a revenue court, under s. 199 of the Agra Tenancy Act, 1901, constitutes a *res judicata* in respect of a subsequent suit *in pari materia* brought in a Civil Court, is not affected by the fact that the Civil Court suit may be beyond the pecuniary limits of the jurisdiction of the Revenue Court. SHAHZADE SINGH *v.* MUHAMMAD MEHDI ALI KHAN (1909).

I. L. R. 32 All. 8

——— s. 200—

See s. 58 . **I. L. R. 35 All. 157**

——— s. 201—

See s. 166 . **I. L. R. 34 All. 250**

See TRANSFER OF PROPERTY ACT, s. 41.

I. L. R. 34 All. 22

——— *Evidence—Presumption—Record of plaintiff's name as co-sharer—Evidence Act (I of 1872), s. 4. Held* by RICHARDS, *C.J.*, KARAMAT HUSAIN, TUDBALL, CHAMIER AND PIGGOTT, *J.J.* (KNOX, *J.*, *dissenting*), that in a suit instituted under the provisions of chapter XI of the Agra Tenancy Act, 1901, where the plaintiff is recorded as having proprietary title entitling him to institute the suit, the Revenue Court is not competent to go behind the record, receive evidence and itself try the question of proprietary title. *Bechan Singh* v. *Karan Singh, I. L. R. 20 All. 427*, followed. *Waris Ali Khan* v. *Parsotam Narain, I. L. R. 32 All. 427*, overruled DURGA PRASAD *v.* HAZARI SINGH (1911) . . . **I. L. R. 33 All. 799**
I. L. R. 32 All. 427

——— *Suit for profits—Previous civil suit for declaration of title—Civil Court*

AGRA TENANCY ACT (II OF 1901)—*concld.*

——— s. 201—*contd.*

decision not relating to whole of the rights of the parties—Amendment of entry in the revenue papers after institution of suit for profits. In a suit for profits in a Revenue Court respecting an interest in a share amounting in all to 7 biswas, it appeared that the plaintiff had been during the period for which profits were claimed, and was at the date of the institution of the suit, recorded as having an interest in the whole 7 biswas. On the other hand, the Civil Court had previously decided that the plaintiff owned a one-sixth interest in half the 7 biswas, though it came to no decision in respect of her interest in the remaining half, which was *wayf* property. During the pendency of the suit for profits the entries in the revenue papers were amended by the revenue authorities and the plaintiff recorded as having an interest in half of the 7 biswas only. *Held*, that the alteration of the revenue records pending the plaintiff's suit for profits could not affect the plaintiff's rights, as they stood when the suit was filed, prejudicially. *Hargu Lal* v. *Med Singh, 29 Indian Cases, 509*, distinguished. *Lachman Prasad* v. *Shitabo Kunwar I. L. R. 43, All. 177*, followed. MUBARAK FATIMA *v.* MUHAMMAD QULI KHAN **I. L.R. 43 All. 697**

——— s. 202—

See s. 10 . **I. L. R. 33 All. 507**

See CIVIL AND REVENUE COURT.

I. L. R. 42 All. 222

See CIVIL PROCEDURE CODE (1908), s. 115.

I. L. R. 39 All. 254

——— *Remand—Effect of Revenue Court decision on question of tenancy in a former suit, in a subsequent suit in a Civil Court for ejectment as trespasser.* Defendants were tenants of one *D*, *D* took proceedings in the Revenue Courts to eject them as tenants at will. The Assistant Collector dismissed the suit, but the Commissioner allowed the appeal. The Board of Revenue, however, in second appeal dismissed the suit. *D* in the meantime had executed the decree passed by the Commissioner and obtained possession. Upon the decree passed by the Board of Revenue in their favour the defendants made an application to be restored to possession, but it was rejected as time-barred. *D's* son brought the present suit to eject the defendants as trespassers alleging that he had been in possession of the land as his *khude-kasht*; that the defendants had entered

[illegible]

subsisted. The Court of first instance decided that the tenancy was subsisting, but granted to the plaintiff damages for forcible dispossession. The lower Appellate Court remanded the case to the first Court with directions to act in accordance with the provisions of s. 202 of the Agra Tenancy Act. *Held*, that the order was the proper one to make in the circumstances of the case, and the question whether by reason of the events

to decide. *Maru* v. *Gauri Sahai*, (1904) All. WeeklyNotes, 46, *Sarju Misir* v. *Bindesri Pershad, 11 All. L. J. 691*, referred to. BHAWAN *v.* MADAN MOHAN LAL (1916) . **I. L. R. 38 All. 533**

AGREEMENT—

See ADMINISTRATOR-GENERAL'S ACT (II OF 1874), ss. 28, 34 AND 35.
I. L. R. 38 Mad. 500

See ADVERSE POSSESSION.
I. L. R. 37 Mad. 545

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), s. 257A.
I. L. R. 38 Bom. 219

See CONTRACT.

See CONTRACT ACT (IX OF 1872),
s. 28 . **I. L. R. 38 Bom. 344**
s. 65 . . **I. L. R 38 Bom. 249**

See EVIDENCE ACT, 1872, s. 92.

See HINDU LAW—ADOPTION.
I. L. R. 39 Bom. 528

See HIRE-PURCHASE AGREEMENT.
I. L. R. 44 Calc. 72

See LAND ACQUISITION.
I. L. R. 44 Bom. 797

See LIMITATION . **I. L. R. 38 Mad. 101**

See REGISTRATION.

See REGISTRATION ACT, 1908, s. 17.

See STAMP ACT (II OF 1899), s. 62; SCH. I, ART. 5 . **I. L. R. 40 All. 19**

———— ante-decree—

See EXECUTION PROCEEDINGS.
I. L. R. 40 Mad. 233

———— appointing creditor agent for sale of debtor's goods—

See PROVINCIAL INSOLVENCY ACT (III OF 1907), s. 31 . **I. L. R. 37 All. 383**

———— breach of—

See ARBITRATION.
I. L. R. 46 Calc. 1041

———— between predecessors in title—

See JURISDICTION OF HIGH COURT.
I. L. R. 39 Calc. 739

———— by executor—

See WILL . . . **14 C. W. N. 967**

———— Contemporary Oral agreement—

See EVIDENCE ACT, s. 92.

———— construction of—

See MAHA-BRAHMAN.
I. L. R. 35 All. 412

———— fixing compensation—

See LAND ACQUISITION.
I. L. R. 44 Bom. 797

———— for illegal consideration—

See COMPROMISE . **1 Pat. L. J. 48**

———— for sale of immoveable property—

See CONTRACT . **I. L. R. 45 Bom. 1170**

See TRANSFER OF PROPERTY ACT (IV OF 1882), s. 54 . **I. L. R. 41 Bom. 438**

———— in writing—admissibility of oral evidence—

See REGISTRATION . **I. L. R. 1 Lah. 436**

———— memorandum of —

See STAMP ACT (II OF 1899), s. 2 (*14*), SCH. I, ART. 5 . **I. L. R. 36 All. 11**

AGREEMENT—*contd.*

———— suit to enforce—

See MAHOMEDAN LAW OF MARRIAGE.
I. L. R. 32 All. 410

———— to lease—

See SPECIFIC PERFORMANCE.
14 C. W. N. 65

———— to supply funds to carry on suit—

See CHAMPERTY . **14 C. W. N. 191**

———— wrongful termination of —

See DAMAGES . **I. L. R. 47 Calc. 290**

1. ———— Interfering with the course of legal proceedings—*Agreement that suit should be decided in accordance with the result of another suit, whether a bar to its trial on the merits—Compromise.* An agreement by a party that a suit may be decided in a manner different from that prescribed by law is void and does not debar him from subsequently claiming a trial of the suit on its merits. *Rukhanbhai* v. *Adamji, I. L. R. 33 Bom. 69, and Moyan v. Pathukutti, I. L. R. 31 Mad. 1,* referred to. Pending an original suit in the Court of a District Munsif, by the maker of a promissory note, for a declaration that it was unenforceable, the payee instituted a suit on the promissory note for recovery of the amount due, in the Small Cause Court. The parties agreed that the small cause suit should be decided in accordance with the result of the original suit, and the former suit was finally dismissed without a trial, following the decision of the Munsif in the original suit: *Held*, that the agreement in question did not disentitle the plaintiff from claiming a trial of the small cause suit independently on its merits, and the suit must consequently be remanded. Subject to certain well-known exceptions, when the Court is seised of a case, it has jurisdiction to decide it in the manner prescribed by law, and that the parties have no right to interfere with its authority to do so. RAJA OF VENKATAGIRI *v.* CHINTA REDDY (1914).
I. L. R. 37 Mad. 408

2. ———— Notice of—*Agreement, forming part of consideration for a license to build on the land of another, for payment of haq chaharum in the event of sale of house—Purchaser, whether bound by agreement*—One of the conditions upon which the owner of certain land granted permission to a person to build on it was that if any house built on such land was sold, the licensee would pay to the owner of the soil one-fourth of the purchase money: *Held*, that the purchaser of a house to which this covenant applied who purchased with notice of the existence of the covenant was bound by it equally with his vendor. *Tulk* v. *Moxhay, 18 L. J. Ch. 83: 2 Phill. 774; Abadi Begam* v. *Asa Ram, I. L. R. 2 All. 162,* and *Churaman* v. *Balli, I. L. R. 9 All. 591,* referred to. PARBHU NARAIN SINGH *v.* RAMZAN (1919) . . . . **I. L. R. 41 All. 417**

3. ———— Sale subject to title being approved—*Agreement for purchase and sale of immoveable property—Condition for return of earnest money, on non-approval of title by purchaser's solicitor—Non-approval must be reasonable and not mala fide—Title, approval or rejection, condition as to, in agreement of sale.* Where an agreement for purchase and sale contained a

AGREEMENT—*concld.*

condition for the return of the earnest money on the vendor's title not being approved by the purchaser's *solicitor* and the solicitor disapproved of the title on the ground amongst others that one of the former owners had mortgaged the property pending a partition suit at which the property was sold by auction under directions of Court, and purchased by the present vendor's predecessor in title for value and the vendor was unable to furnish any information regarding the mortgage but urged that it was inoperative and that his title being derived from a purchaser without notice was not open to objection: *Held*, that it cannot be said that the solicitor was unreasonable in refusing to accept the title inasmuch as he cannot be expected to go into any question of evidence as to whether the purchase was without notice or not; and, further, there being nothing to show that he acted in bad faith or was unreasonable in advising his client to reject the title, the

ted for in the contract. ABRO *v.* PROMOTHO NATH MUKERJEE (1914) . . 18 C. W. N. 568

AGREEMENT AGAINST PUBLIC POLICY.

See CONTRACT ACT, 1872, s. 23.

See LANDLORD AND TENANT.
I. L. R. 35 All. 19

1. ———— Compounding a Criminal Case—*Contract Act (IX of 1872), s. 23—Compromise forbidden by law—An agreement to compound a non-compoundable offence, void—Criminal breach of trust—Mortgage—Illegal consideration.* It is

suggested by the Magistrate); and a suit by the master to enforce such a bond is not maintainable. *Nubbee Buksh v. Hingon, 8 W. R. 412,* commented on. MAJIDAR RAHMAN *v.* MUKTASHED HOSSEIN (1912). . I. L. R. 40 Calc. 113

2. ———— *compoundable with leave of Court only if oppose to public policy—Offence not so compoundable alleged but no summons issued—Effect.* In a Criminal case the Magistrate after examining the complainant summoned the accused under s. 323, Penal Code, although allegations were made in the petition of complaint of an offence under s. 147, Penal Code, also. An agreement was entered into between the parties and with the leave of the Court the case was

under s. 147, Penal Code, which was not accepted by the Magistrate when issuing process made no difference. MAHAMMAD ISMAIL *v.* SAMAD ALI BHUIYAN (1915) . . . 20 C. W. N. 946

AGREEMENT IN RESTRAINT OF PROFESSION, TRADE OR BUSINESS.

See CONTRACT ACT (IX OF 1872), ss. 23, 27 . . . I. L. R. 34 All. 587

s. 27 . . I. L. R. 37 All. 212

———— *term and* ... *England,* ... *tract Act (IV of 1872), s. 27—Agreement in restraint of profession—Specific Relief Act (I of 1877), s. 37.* Where *W*, having contracted with *C* to play for *C* and not to play in any other theatre on his own or on some one else's behalf until after the expiration of the period contracted for and until after his return to England, performed in another theatre after the expiration of the period for which he was under contract with *C* but before his return to England, it was held that under s. 27 of the Indian Contract Act, the agreement being in restraint of a lawful profession, trade or business is void and as such would not be enforced by injunction. S. 57 of the Specific Relief Act is not applicable to this case. COHEN, E. M. D. *v.* ALLAN WILKIE (1912).
16 C. W. N. 534

AGREEMENT OF SALE.

See AGREEMENT TO SALE.

AGREEMENT TO COMPOUND NON-COMPOUNDABLE OFFENCE.

See AGREEMENT AGAINST PUBLIC POLICY.
I. L. R. 40 Calc. 113
20 C. W. N. 946

AGREEMENT TO LEASE.

See REGISTRATION ACT, 1877 ss. 3, 17, 40.
I. L. R. 35 Mad. 63
s. 17 . I. L. R. 44 Mad. 399

See REGISTRATION OF DOCUMENTS.
I. L. R. 46 I. A. 240

———— *Compromise decree—Registration Act (XVI of 1908), s. 2 (7), s. 17, sub-s. (1) (b), (d), sub-s. (2) (vi), s. 49—Lands outside of suit compromised—Civil Procedure Code, 1882, s. 375—Document not requiring registration—Specific performance.* In 1895 the appellant instituted two suits in the Court of the Subordinate Judge of Nadia, the one against the Government (72) and the other against W. & Co. (73) of the same year; the object of the

that W. & Co. were to retain the lands, the

ment, she would grant a jote settlement of the lands in suit 72 to W. & Co., on the same conditions as those agreed to with regard to the lands is his possession. This agreement was reduced to writing, a petition of compromise based upon it was filed by the appellant in suit 73, and on 20th September 1897 judgment was given in terms of the compromise, and a decree was drawn up in pursuance of the judgment on the same date. This decree recited the claims in the suit and the petition for compromise and granted a decree in the terms of the compromise, which were then set out in full. The appellant succeeded in her suit against the Government, but refused to grant

AGREEMENT TO LEASE—*contd.*

to W. & Co., a jote settlement of the land, the subject of suit 72. In a suit by the respondents for specific performance of the agreement:—*Held*, that the compromise was not an "agreement to lease" within the meaning of s. 17 of the Registration Act (XVI of 1908), and was therefore admissible in evidence under s. 49 of that Act, though not registered. The phrase "agreement to lease" in that section relates to some document that creates a present and immediate interest in the land, and not a document like that in the present case, from which it was impossible to say whether there would be a lease or not. *Panchanan Bose* v. *Chandi Charan Misra, I. L. R. 37 Calc. 808*, approved. *Held*, also, that if the agreement was regarded as being a "decree," it is exempted from registration by s. 17, sub-s. (2) (vi), and on the true construction of s. 375 of the Civil Procedure Code, 1882, is none the less a decree under s. 17, sub-s. (2) (vi), because, though the whole of the agreement or compromise is recorded in it, the operation of the decree is limited only to so much of the subject-matter of the suit as is dealt with by the agreement. As a decree it may be incapable of being executed outside the land of the suit compromised, but can still be received in evidence of its contents, though unregistered. *Pranal Anni* v. *Lakshmi Anni, I. L. R. 22 Mad. 508; L. R. 26 I. A. 101*, followed. HEMANTA KUMARI DEBI *v.* MIDNAPUR ZAMINDARI CO.

I. L. R. 47 Calc. 485

AGREEMENT TO RECONVEY.

See SALE-DEED **I. L. R. 44 Bom. 961**

See TRANSFER OF PROPERTY ACT (IV OF 1882), s. 54.

AGREEMENT TO REFER.

See ARBITRATION.

I. L. R. 47 Calc. 752 & 951

AGREEMENT TO SELL.

See TRANSFER OF PROPERTY ACT (IV OF 1882), s. 54.

———— *Agreement by defendants 1 and 2 to sell property to plaintiff—Subsequent sale by the same defendants to defendants 3 and 4—Suit by the plaintiff for an order to execute a registered sale-deed and for possession—Burden of proof.* Defendants 1 and 2 having agreed to sell their property to the plaintiff, they subsequently sold the same property to defendants 3 and 4. In a suit brought by the plaintiff for an order to execute a deed of sale and also for recovery of possession of the property: *Held*, confirming the decree awarding the claim, that defendants 3 and 4 having contracted to purchase the property from the same defendants who had contracted to sell it previously to the plaintiff, defendants 3 and 4 were bound to show three things, namely, that (i) they were purchasers for value and (ii) *bonâ fide*, and (iii) without notice. The plaintiff under his contract having a prior equity was entitled to succeed. One who owns property subject to a charge can, in general, convey no title higher or more free than his own and it lies always on a succeeding owner to make out a case to defeat such a prior charge. HIMATLAL MOTILAL *v.* VASUDEV GANESH (1912).

I. L. R. 36 Bom. 446

AGREEMENT TO SELL—*contd.*

———— *The purpose of earnest money.* The defendant agreed to sell to the plaintiff an immoveable property for R4,400 of which R700 was paid by the plaintiff as earnest money. It was further agreed that in case the plaintiff failed to pay the balance of the consideration money within the time fixed he would forfeit the earnest money. The plaintiffs failed to pay the balance and brought a suit for the refund of R700: *Held*, that the primary purpose of the deposit being a guarantee for the performance of the contract, the plaintiff was not entitled to recover the money. *Soper* v. *Arnold, 14 A. C. 429 at p. 435 (1889)* and *Nabab Khaja Habibulla* v. *Arman Dewan, 30 C. L. J. 113 (1919)*, referred to. ATUL CHANDRA KUNDU *v.* SARAT CHANDRA LAHA . . . . . **24 C. W. N. 967**

AGREEMENT TO SEPARATE.

See CONTRACT ACT (IX OF 1872), s. 25.

I. L. R. 37 Bom. 280

AGREEMENT TO TRANSFER.

———— *Transferee taking possession before execution and registration of document.* Where in pursuance of an agreement to transfer property the intended transferee has taken possession though the requisite legal documents had not been executed and registered the position is the same as if the documents had been executed provided specific performance can be obtained between the parties to the agreement in the same Court and at the same time as the subsequent legal question falls to be determined. SHYAM KISHORE DEY *v.* UMESH CHANDRA BHATTACHARYA . . . **24 C. W. N. 463**

AGRICULTURAL INCOME.

See INCOME TAX **I. L. R. 48 Calc. 161**

AGRICULTURAL LANDS.

See BOMBAY LAND REVENUE CODE (BOM. ACT V OF 1879), s. 48.

I. L. R. 42 Bom. 126

See EXECUTION OF DECREE.

I. L. R. 1 Lah. 192

See UNDER-RAIYATI HOLDING.

I. L. R. 42 Calc. 751

See WATERFLOW. **I. L. R. 38 Mad. 149**

AGRICULTURAL HOLDING.

———— Hut built by tenant and converted—

See LANDLORD AND TENANT.

I. L. R. 44 Bom. 609

———— lease on Annual tenancy (compensation on ejectment of Tenant after building)—

See LANDLORD AND TENANT.

I. L. R. 44 Bom. 950

AGRICULTURAL TRIBE.

See BUNDELKHAND ALIENATION OF LAND ACT (II OF 1903),

s. 3 . . **I. L. R. 37 All. 662**

s. 9. . . **I. L. R. 36 All. 376**

s. 16 . . **I. L. R. 42 All. 142**

AGRICULTURIST.

See CIVIL PROCEDURE CODE, 1908, ss. 2 AND 97 . **I. L. R. 36 Bom. 536**
I. L. R. 39 Bom. 422

s. 60 (1) (*c*). **I. L. R. 34 All. 25**
I. L. R. 37 Bom. 415
I. L. R. 41 Bom. 475

See DEKKHAN AGRICULTURISTS' RELIEF ACT, 1879, ss. 2 AND 20.
I. L. R. 34 Bom. 161
I. L. R. 36 Bom. 36, 151, 199, 496 and 543
I. L. R. 37 Bom. 97, 398
I. L. R. 38 Bom. 18

s. 72 . . **I. L. R. 40 Bom. 189**

———— **Definition of—**

See DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879), ss. 2, 10A.
I. L. R. 44 Bom. 217

———— **house of—**

See PROVINCIAL INSOLVENCY ACT (III OF 1907), ss. 16, 36 AND 43.
I. L. R. 39 All. 120

———— **Mortgagor—**

See DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879), ss. 47 AND 48.
I. L. R. 36 Bom. 624

———— **Wife of—**

See DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879).
I. L. R. 35 Bom. 204

———— **custom of—In Punjab,**

See HINDU LAW—ALIENATION.
I. L. R. 40 Calc. 288

AHIRS.

See HINDU LAW—ADOPTION.
I. L. R. 35 All. 263

AHMADIS.

See MAHOMEDANS . **2 Pat. L. J. 108**

AHMEDABAD TALUQDARS ACT (BOM. VI OF 1862)

See KASBATIS . **I. L. R. 39 Bom. 625**

AJMER REGULATIONS.

See REGULATIONS.

AKBARI ACTS.

See UNDER LOCAL ACTS.

ALIBI.

See CRIMINAL PROCEDURE CODE, S. 307.
25 C. W. N. 682

ALIEN ENEMY.

See BILL OF EXCHANGE
I. L. R. 41 Bom. 566

See TRADING-WITH THE ENEMY.
I. L. R. 42 Calc. 1094

———— **British subject living in country of—**

See CIVIL PROCEDURE CODE, 1908. s. 83 . **I. L. R. 1 Lah. 276**

ALIEN ENEMY—*contd.*

———— **contract with—(Interest claimable by)—**

See CONTRACT WITH AN ALIEN ENEMY
I. L. R. 41 Bom. 390

See DEBTOR AND CREDITOR.
I. L. R. 44 Bom. 1

———— **Right to Sue in a British Court—**

See CIVIL PROCEDURE CODE 1908 s. 83
I. L. R. 39 All. 377

———— **Suit against**—*If maintainable during the continuance of war—Internment, its object,* It does not matter whether the cause of action arose before or after the war, an alien enemy can be sued in our Courts and has every right to present his case before the Courts in accordance with the laws of procedure. *Halsey* v. *Lowenfeld [1916] 1 K. B. 140,* followed. The fact that the defendant has been interned does not make any difference, as the object of internment is to prevent him from doing mischief and not to cut down his liabilities. ABDUL QUADER *v.* FRITZ KAPP (1916) . . **I. L. R. 43 Calc. 1141**

———— **Suit by—on promissory notes**—*Order of the Government of India restricting right to sue—Subsequent removal of the restriction—Period during which right to sue suspended, whether to be reckoned in computing limitation—"Disability" and "inability" to sue—Limitation Act (IX of 1908), ss. 6, 7, 9 and 15.* On the outbreak of war between England and Germany on the 4th August, 1914, the plaintiff Bank, which was an alien enemy concern carrying on business in Calcutta, had its right to bring suits suspended by an order of the Government of India. By a subsequent order of the Government, this restriction was removed on the 1st November, 1915, and sanction was given to the said Bank to institute suits in Civil Courts. On the 9th May, 1918, the said Bank brought a suit on four promissory notes payable on demand and executed on the 4th, 11th, 30th and 30th June 1914, respectively: *Held,* that this case was covered by s. 9 of the Limitation Act, and that the period between the 4th August, 1914, and the 1st November, 1915, could not be excluded from the time prescribed by the Act of Limitation. *Per* WOODROFFE, *J.* Section 15 of the Limitation Act does not apply. DEUTSCH ASIATISCHE BANK *v.* HIRA LALL BARDHAN & SONS (1918).
I. L. R. 46 Calc. 526

ALIENATED VILLAGE.

———— **Right of Inamdar to enhance assessment at the end of period of settlement—**

See BOMBAY LAND REVENUE CODE (BOM. ACT V OF 1879), s. 217.
I. L. R. 44 Bom. 110

ALIENATION.

See ALIENATION BY WIDOW.

Se BHAGDARI ACT ,1862, s. 3.
I. L. R. 38 Bom. 679

See BOMBAY LAND REVENUE CODE, s. 68
I. L. R. 45 Bom. 820

See CIVIL PROCEDURE CODE, 1882, s. 325A. . . **I. L. R. 33 All. 523**
I. [illegible] All 544

ALIENATION—*contd.*

See CUSTOM.

See DESAIGIRI ALLOWANCE.
I. L. R. 45 Bom. 948

See FRAUDULENT ALIENATION.

See HINDU LAW—ALIENATION.

See HINDU LAW—ENDOWMENT.
I. L. R. 38 Calc. 526

See HINDU LAW—JOINT FAMILY.
I. L. R. 33 All. 283

See HINDU LAW—LEGAL NECESSITY.

See HINDU LAW—REVERSIONER.
I. L. R. 45 Calc. 590
I. L. R. 48 Calc. 536

See HINDU LAW—WIDOW.

See HINDU LAW—WILL.
I. L. R. 42 Calc. 561

See IMPARTIBLE ESTATE.
I. L. R. 36 Mad. 325

See ITMAM ACT **I. L. R. 47 Calc. 979**

See LIMITATION **I. L. R. 37 Bom. 231**

See LIMITATION ACT (IX OF 1908), SCH. I, ARTS. 141, 144.
I. L. R. 42 Bom. 714

See MAHOMEDAN LAW—ALIENATION.

See MORTGAGE **I. L. R. 40 Calc. 342**

See PALA OR TURN OF WORSHIP.
I. L. R. 47 Calc. 990

———— **during execution**—

See TRANSFER OF PROPERTY ACT (IV OF 1882), s. 52.
I. L. R. 37 Bom. 621

———— **by de facto guardian**

See HINDU LAW—ADOPTION.
I. L. R. 38 Mad. 1105

———— **by father**—

See HINDU LAW—ALIENATION.
I. L. R. 40 Calc. 966
I. L. R. 41 Bom. 347

See INAM LANDS.
I. L. R. 38 Bom. 272

———— **by guardian**—

See LIMITATION ACT (XV OF 1877), SS. 7 AND 8 SCH. II, ART. 44.
I. L. R. 38 Mad. 118

———— **by head of mutt**—

See MUTT . **I. L. R. 41 Mad. 124**

See RELIGIOUS ENDOWMENT.
I. L. R. 44 Mad. 831

———— **by Inamdar's widow of Khatib Inam land**—

See BOMBAY REVENUE JURISDICTION ACT (X OF 1876), s. 4 (*a*), PROV. (*k*) AND s. 5(*a*) AND (*b*) **I. L. R. 44 Bom. 130**

———— **by natural guardian of minor**—

See LIMITATION ACT (IX OF 1908), ART. 44. . **I. L. R. 44 Bom. 742**

———— **by tenure holder**—

See MALABAR LAW.
I. L. R. 36 Mad. 380

ALIENATION—*contd.*

———— **by widow**—

See HINDU LAW—ALIENATION.
I. L. R. 37 All. 369
I. L. R. 42 Calc. 876
I. L. R. 41 Mad. 75

See HINDU WIDOW.
I. L. R. 42 Bom. 719

See LIMITATION ACT (IX OF 1908), SS. 6 AND 125 . **I. L. R. 36 Mad. 570**

SCH. ACT. 91 . **I. L. R. 40 Bom. 51**

———— **in part, for necessity**—

See HINDU LAW—JOINT FAMILY.
I. L. R. 37 Mad. 435

See HINDU LAW—WIDOW.
I. L. R. 37 Mad. 275

———— **of Agrahar gift—Condition necessitating residence treated as recommendatory —Validity of alienation by a donee not residing in the village**—

See HINDU LAW—GIFT.
I. L. R. 44 Bom. 304

———— **of emoluments of service inam**—

See PROPRIETARY ESTATES VILLAGE SERVICE ACT (II OF 1894), SS. 5 AND 10. CL. (2) . **I. L. R. 39 Mad. 930**

———— **of inamdars land**—

See BOMBAY REVENUE JURISDICTION ACT (X OF 1876), s. 4 (*a*), PROV. (*k*).
I. L. R. 44 Bom. 130

———— **of Joint Family property by co-parcener**—

See HINDU LAW—DEBTS.
I. L. R. 44 Bom. 341

———— **of member's share**—

See MALABAR LAW.
I. L. R. 39 Mad. 317

———— **of mutt properties**—

See MUTT, HEAD OF.
I. L. R. 38 Mad. 356

———— **of spes successionis by widow and next reversioner—Invalidity of**—

See HINDU LAW—WIDOW'S ESTATE.
I. L. R. 44 Bom. 488

———— **of vritti**—

See VRITTI. . **I. L. R. 39 Bom. 26**

———— **of widow's estate by Court of Wards**—

See HINDU LAW—REVERSIONERS.
I. L. R. 40 Mad. 871

———— **power of**—

See SHEBAIT . **I. L. R. 40 Calc. 895**

———— **restraint on**—

See TRANSFER OF PROPERTY ACT (IV OF 1882), s. 10. **I. L. R. 38 Mad. 867**

———— **For necessity but with Consent by the body of reversioners**—*Transaction for consideration—Gift—Partial relinquishment by widow—Hindu Law.* The general principle which prohibits a Hindu widow's alienation of immoveable property otherwise than for legal necessity is

ALIENATION—*contd.*

relaxed in cases where the consent of the whole body of persons constituting the next reversion has been obtained. The reason for the relaxation is referred to the principle that the consent of the person who would be interested in disputing the transfer affords good evidence that the transfer was in fact made for justifying cause, that is, for legal necessity. *Bajrangi Singh* v. *Manokarnika Bakhsh Singh, I. L. R. 30 All. 1,* and *Vinayak* v. *Govind, I. L. R. 25 Bom. 129,* followed. The operation of the principle is ordinarily limited to transfers for consideration and cannot be extended to voluntary transfers by way of gift where there is no room for the theory of legal necessity. It should not be extended to cases where the widow has made only a partial relinquishment of the estate. PILU *v.* BABAJI (1909) . . **I. L. R. 34 Bom. 165**

——— **Restrictions on**—*Gift burdened with an obligation—Alienation by donee.* When it is doubtful, whether a deed embodies a complete dedication of property to a religious trust or merely creates a gift of that property, subject to an obligation to perform certain services, the question should be decided by reference to the deed itself. In the former case the property would be inalienable and in the latter alienable, subject to the obligation, and notwithstanding restrictions as to selling or mortgaging the said property. DASSA RAMCHANDRA *v.* NARSINHA (1901) . **I. L. R. 35 Bom. 156**

ALIENEE.

See ATTACHMENT **I. L. R. 44 Calc. 662**

See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXI, R. 63.
I. L. R. 38 Mad. 535

——— **from trustee**—

See CIVIL PROCEDURE CODE (ACT V OF 1908), SS. 92 AND 93.
I. L. R. 38 Mad. 1064

——— **not a tenant in common**—

See HINDU LAW—JOINT FAMILY.
I. L. R. 38 Mad. 684

ALIMONY.

See DIVORCE ACT (IV OF 1869)—
ss. 3, 16, 37 AND 44.
I. L. R. 40 Bom. 109
s. 37 . . **I. L. R. 38 All. 688**

——— **decree for, against a soldier**—

See ARMY ACT (44 & 45 VIC, C. 58), SS. 145, 190. **I. L. R. 43 Bom. 368**

ALIYASANTANA LAW.

1. ——— *Ejman, removal of—Grounds on which Ejman of an Aliyasantana family may be removed.* When the Ejman of an

members of the family, the Courts will be justified in removing such Ejman. When unjustifiable alienations of family property are made, the Ejman, although
will be liable to
to set aside such
family, he sides with the defendants and seeks to support such alienations. THIMMAKKE *v.* AKKU (1910) . : **I. L. R. 34 Mad. 481**

ALIYASANTANA LAW—*concld.*

2. ——— *Separate maintenance, grounds for—What are proper grounds.* A member of the Aliyasantana or Marumakkathayam tarwad will be entitled to separate maintenance from the tarwad if there are good grounds for such allotment. What are proper grounds will depend upon the circumstances of each case. The cases show that where there is substantial inconvenience in living in the family house either on account of want of room there or because there are quarrels which make it uncomfortable to a member to live there and where there are several houses belonging to the tarwad and a member lives in one of them and where the karnavan's conduct has afforded a valid excuse for a member living away from the tarwad house, separate maintenance may be awarded. There may be other grounds which on social or economical reasons may be considered proper. Though a member of an Aliyasantana or Marumakkathayam tarwad may not be entitled to a partition or a specific portion of the income which may be an indirect method of enforcing a partition, he is still a co-owner with the karnavan of the tarwad property, and he may in a proper case be entitled to separate maintenance. Waiver (arising from conduct, etc.) is a good plea to a claim for past maintenance. *Raja Yerlagadda Mallikarjuna Prasada Nayudu* v. *Raja Yerlagadda Durga Prasada Nayudu, I. L. R. 24 Mad. 147* followed. Considering the special and common expenses which a yejman or karnavan has to incur out of the income of the family it is wrong to award a numerically proportionate share of the income to any particular member. The law as to the respective rights of a yejman or karnavan and the junior member of the tarwad, discussed with reference to decided cases. MARADEVI *v.* PAMMAKKA (1913) . . **I. L. R. 36 Mad. 203**

3. ——— *Inheritance—Woman's self-acquisition—All the members of her branch, and not her nearest blood relation alone, heirs.* A female member of an Aliyasantana family died issueless leaving self-acquired property. There was no issue of her mother then living, and the only relations the deceased left behind her were her own deceased mother's sister and the issue of another sister of her mother. It being contended that the sole heir was the deceased's mother's sister as being the nearest relation to her, to the exclusion of the other members of the branch to which the deceased belonged at the time of her death:
Held, that under the Aliyasantana law all the members of the nearest non-extinct branch to which the issueless deceased belonged at the time of her death (*viz.*, her maternal grandmother's descendants), were entitled to succeed and not only one of them, *viz.*, her mother's sister, who is nearer in degree than others. *Antamma* v. *Kaveri, I. L. R. 7 Mad. 575,* referred to. MANJAPPA AJRI *v.* MARUDEVI HENGSU (1915)
I. L. R. 39 Mad. 12

ALLAHABAD HIGH COURT RULES.

See INJUNCTION . **I. L. R. 42 All. 98**

See LEGAL PRACTITIONER.
I. L. R. 42 All. 125

——— **Ch. I, r. 3**—

See CIVIL PROCEDURE CODE, 1908, O. XLV, R. 5. **I. L. R. 43 All. 185**

ALLAHABAD HIGH COURT RULES—*contd.*

——— **Ch. III. r. 2**—

See Civil Procedure Code, 1908, s. 122 **I. L. R. 40 All. 1**

O. XLI, r. 1. **I. L. R. 43 All. 660**

——— **Ch. IV, r. 5 & 8**—

See Execution of decree. **I. L. R. 36 All. 33**

——— **Ch. VII, r. 8**—

See Criminal Procedure Code, s. 369. **I. L. R. 38 All. 134**

——— **Ch. XXI, r. 1**—

See High Court Rules.

ALLEGIANCE.

See Habeas Corpus. **I. L. R. 44 Calc. 459**

ALLEGORICAL POEM.

See Obscene Publication. **I. L. R. 39 Calc. 377**

ALLUVION.

See Bengal Alluvion and diluvion Act IX of 1847. **24 C. W. N. 737**

See Fishery. . **I. L. R. 42 Calc. 489**

——— *Gradual accretion to an already existing lanka.—Slow and imperceptible, meaning of—Land added in the bed of the river by slow, imperceptible, and gradual river action to a known extent of land, applicability of law of accretion to.* The plaintiff-respondent sued for a declaration against Government that a certain *lanka* or alluvial island formed in the bed of the Godavari at a place where it was both tidal and navigable, belonged to him as an accretion to his adjoining *lanka.* It was found by the Court below, with which finding the High Court agreed, that the suit *lanka* was originally formed in contiguity with the plaintiff's land, that it was formed very rapidly, and in some years, during the annual rise of the river, large additions were made, which could not but be perceptible as soon as the water subsided, that portion of the alluvial land was separated from the rest by a channel a few years before the suit and that it was not possible to say that the accretion was slow or imperceptible. *Held,* that the suit land was an accretion to the plaintiff's land, that in applying the rule of English law as to accretions, local physical conditions must be taken into consideration and that in the case of large rivers in India like the Godavari which on occasions leave large and sudden deposits, it is not necessary that the accretion should be slow or perceptible. *Rex (nom-Gifford)* v. *Yarborough, 2 Bligh (N. S.) 147,* and *Attorney-General* v. *M'Carthy, 2 Ir. R. 260,* referred to. *Srinath Roy* v. *Dhinabandhu Sen, I. L. R. 42 Calc. 489,* applied. *Held,* also, that the fact that in 1870 when the suit *lanka* was not as yet formed, the extent and boundaries of the plaintiff's *lankas* were known as ascertainable, did not render the law of accretion inapplicable. *Attorney-General of Southern Nigeria* v. *John Holt & Co. (Liverpool), Limited [1915], A. C. 519, 612,* followed. The Secretary of State for India v. Rajah of Vizianagaram (1916) . . . **I. L. R. 40 Mad. 1083**

ALLUVION—*contd.*

Confirmed on Appeal. **26 C. W. N. 348**

——— *Accretions—The Bengal Alluvion and Diluvion Regulation, 1825 (Ben. Reg. XI of 1825), ss. 4 and 5.* Where a party can show that *char* land is in fact a reformation *in situ* of land identifiable as his own he is entitled to that land though it may have been for a period submerged. It is not sufficient for such a claimant to show that the accretion is *in situ* of a river bed which has been settled with him. It is necessary for him to show that the land claimed had previous existence and was reformed. S. 4 of the Bengal Alluvion and Diluvion Regulation, 1825, as a whole, was not intended to apply to land which has been previously in existence and the property of individuals. S. 5 was intended to apply to such land. Nand Kishore Jagati *v.* Nidhi Bihara. **3 Pat. L. J. 438**

ALTERATION.

See Bond . **I. L. R. 44 Calc. 154**

See Deed . **I. L. R. 38 Mad. 746**

See Mortgage suit. **25 C. W. N. 942**

See Will . **I. L. R. 47 Calc. 1043**

ALTERNATIVE CHARGE.

See Autrefqis Acquit. **I. L. R. 45 Calc. 727**

ALTERNATIVE CLAIMS.

See Pre-emption **I. L. R. 36 All. 476**

ALWAN.

See "Shawls," meaning of. **I. L. R. 39 Calc. 1029**

AMALNAMA.

See Landlord and Tenant. **15 C. W. N. 536**

AMARAM TENURE.

See Madras Estates Land Act (I of 1908). . . **I. L. R. 37 Mad. 1**

AMBIGUITY.

See Hindu Law—Religious Endowment . . **I. L. R. 42 Calc. 536**

AMENDED LETTERS PATENT.

See Letters Patent.

——— Where an appeal has been presented beyond the time allowed by the law and application to excuse the delay refused same can be appealed from Ramchandra Gangadhar *v.* Mahadew Moreshwar. **I. L. R. 42 Bom. 260**

AMENDING ACT.

——— retrospective effect of—

See Limitation **I. L. R. 41 Calc. 1125**

AMENDMENT OF DECREE.

See Civil Procedure Code, 1908, ss. 151 and 152. . **4 Pat. L. J. 205**

See Decree . **I. L. R. 32 All. 295**

AMENDMENT OF DECREE—*contd.*

See DECREE HOLDER.
I. L. R. 38 Mad. 677

See LIMITATION . **2 Pat. L. J. 206**

See LIMITATION ACT (IX OF 1908).

See S. 5 . **I. L. R. 43 All. 380**

SCH. I, ARTS. 181, 182.
I. L. R. 42 Bom. 309

———— **Date from which limitation runs**—

See BENGAL TENANCY ACT, 1885.
ss. 105, 107, 109. **5 Pat. L. J. 472**

———— **successive applications for**—

See DECREE, AMENDMENT OF.
I. L. R. 39 Calc. 265

———— *by Court which granted it—after a revision to the High Court has been rejected.* The plaintiff-petitioner applied to the Judge of the Small Cause Court, Lahore, for amendment of a decree passed in his favour. The Court held that it had no power to grant the application inasmuch as the defendant had presented a petition for revision to the High Court, which, although rejected *in limine*, had the effect of merging its decree in that of the High Court. *Held,* that a decree of a Small Cause Court is final and not appealable, and although in certain circumstances it may be set aside or modified by a High Court in virtue of its revisional powers, it must remain the decree of the Court which originally passed it when the High Court declines to interfere with it on the revision side and that the Lower Court accordingly was competent to entertain the application for amendment. KHUDA BAKHSH *v.* ALLAH DITTA. **I. L. R. 1 Lah. 342**

AMENDMENT OF PLAINT.

See CIVIL PROCEDURE CODE, 1908,
s 9 **I. L. R. 45 Bom. 590**

See HINDU LAW (ADOPTION).
5 Pat. L. J. 164

See LIMITATION ACT, 1877, ss. 22, 28.
I. L. R. 34 Bom. 91

See LIS PENDENS. **I. L. R. 41 All. 534**

See PLAINT . **I. L. R. 48 Calc. 110**

See PROCEDURE.

See HIGH COURT **I. L. R. 44 Bom. 903**

———— **when it would convert suit into one of different character**—

See CIVIL PROCEDURE CODE (ACT V OF 1908), OS. VI, r. 17 AND XXI, R. 103.
I. L. R. 44 Bom. 515

———— **After arguments heard in appeal**—*After arguments in appeal have been heard the Court will not allow an amendment of the plaint so as to convert a suit of one character into a suit of a substantially different character.* BAYABAI *v.* HAJI NOOR MAHOMED (1908) . . . **I. L. R. 34 Bom. 244**

———— **By referring to document not included in list of documents relied on.** At the hearing of a suit brought by the plaintiff for the recovery of a sum due at the foot of an account the defendant raised a plea of limitation. The plaintiff thereupon applied for leave to amend his plaint by setting out an acknow-

AMENDMENT OF PLAINT—*contd.*

ledgment in writing signed by the defendant within the period of limitation. The lower Court refused the application. On appeal:—*Held,* that *the amendment should have been allowed.* GUNNAJI BHAWAJI *v.* MAKANJI KHOOSALCHAND (1909).
I. L. R. 34 Bom. 250

———— **Limitation**—*Fresh relief claimed in respect of which a suit would have been time-barred.* A deed of mortgage purported in the first place to mortgage with possession certain specified plots of *sir* and *khudkasht* land. There was, however, a stipulation in the mortgage-deed that, if the mortgagees failed to obtain possession under the deed or were disturbed in their possession, they would be entitled to recover their money from the mortgagors, and this either by sale of the mortgaged plots, or by sale of the zamindari share to which these plots appertained or from the persons and the property of the judgment-debtors A suit was filed just within the extended period of limitation allowed by section 31 of Act No. IX of 1908 for sale of the specified plots. After the period of limitation, however, had expired the plaintiffs applied for leave to amend the plaint and asked for sale of the zamindari share. The Court below allowed the amend-

in respect of such cause had expired *Muhammad Sadiq* v. *Abdul Majid, I. L. R. 33 All. 616,* distinguished BALKARAN UPADHYA *v.* GAYA DIN KALWAR (1914) . . **I. L. R. 36 All. 370**

———— **Mortgage Suit**—*Practice and procedure—Omission to include claims on previous mortgage and charge—Inadvertence, and bonâ fide and erroneous impression as to jurisdiction—Right of appeal—Civil Procedure Code (Act V of 1908), O. II, r. 2.* Where the Court on an application for amendment of plaint granted it without deciding the points urged but subject to any contention which the defendants might raise in answer to the claim as amended · *Held,* that it was better and more regular that the question of the right to amend the plaint should have been determined before the order was made, or if this would have involved a lengthy inquiry covering the same ground as the evidence in the suit, that the hearing of the application to amend should have

allow an amendment subject to the three chief conditions: that there is good faith on the part of the applicant; possibility of amendment without such prejudice to the other party as cannot be compensated by costs; and, lastly, that the amendment is not such as to turn a suit of one character into a suit of another character. O. II, r. 2 of the Civil Procedure Code refers to a case where there has been a suit in which there has been an omission to sue in respect of portion of a claim and a decree has been made in that suit. In that case a second suit in respect of the portion so omitted is barred. In a case, where the suit has not been heard but a claim has been omitted by inadvertence, an amendment may be allowed. [illegible] Whether there was an appeal or not [illegible] of amendment in this case. [illegible] v. JANAKI NATH ROY (1917)
[illegible]

AMENDMENT OF PLAINT—*contd.*

——— Courts will allow amendment of Pleadings subject to 3 general conditions, *viz.*, (1) *Bonâ fides* on the part of the applicant, (2) when the amendment does not cause such prejudice to the other party as cannot be compensated for by costs, (3) when it does not convert a suit of one character into a suit of another. GYANENDRA NATH CHAKRAVARTI *v.* PARESH NATH PAL . . . . . . **26 C. W. N. 73**

AMMUNITION.

——— **Empty cartridge-cases**—*Arms Act (XI of 1878), s. 4—Definition. Held,* that empty cartridge cases are ammunition within the meaning of s. 4 of the Indian Arms Act, 1878. *King-Emperor* v. *Ibrahim, 7 Bom. L. R. 474,* followed. EMPEROR *v.* BALDEO SINGH (1909).
I. L. R. 32 All. 152

ANALOGOUS APPEALS.

See PRACTICE . . **14 C. W. N. 352**

ANALOGOUS DESIGNS.

See DESIGN . **I. L. R. 45 Calc. 606**

ANCESTRAL PROPERTY.

See CIVIL PROCEDURE CODE (1908), O. XXI, R. 66. . **I. L. R. 38 All. 481**

s. 70 . . **I. L. R. 42 All. 275**

See CUSTOM . **I. L. R. 2 Lah. 195**

See EXECUTION OF DECREE.
I. L. R. 36 All. 33

See HINDU LAW—ALIENATION.
I. L. R. 39 All. 485
I. L. R. 40 Calc. 288

See HINDU LAW—MAINTENANCE.
I. L. R. 37 Mad. 396

See JOINT HINDU FAMILY.
I. L. R. 39 Bom. 245

See HINDU LAW—WILL.
I. L. R. 38 Bom. 293

See MADRAS PROPRIETARY ESTATES VILLAGE SERVICE ACT (II OF 1894), ss. 5, 10, CL. (2). . **I. L. R. 39 Mad. 930**

——— **Abandoned land reacquired**—
See CUSTOM. **I. L. R. 2 Lah. 366**

——— **leased government land in Ferozepore**—
See CUSTOM (ANCESTRAL PROPERTY).
I. L. R. 2 Lah. 195

ANCIENT DOCUMENT.

See EVIDENCE ACT (I OF 1872), ss. 4, 90.
I. L. R. 37 Mad. 455

ANCIENT LIGHTS.

See EASEMENT . **I. L. R. 39 Calc. 59**
I. L. R 42 Calc. 46

ANCIENT MONUMENTS PRESERVATION ACT (VII OF 1904).

——— **ss. 10, 21**—*Land Acquisition, Act (I of 1894), ss. 53, 54—Award of Court—Appeal to High Court—Practice.* An appeal lies to the High Court, under ss. 53 and 54 of the Land Acquisition Act (I of 1894) from an award of the Court

ANCIENT MONUMENTS PRESERVATION ACT (VII OF 1904)—*contd.*

for acquisition of immoveable property under s. 10 of the Ancient Monuments Preservation Act (VII of 1904). Section 21 of the Ancient Monuments Preservation Act clearly applies to the purchase of moveable antiquities or relics and the compensation which may have to be paid for incidental damage caused by the removal or protection of such objects of historical interest or art-value. In ascertaining the market value of such moveable antiquities and the amount of compensation to be paid to adjacent owners for acts done under the Act such acts being clearly enough indicated and by implication defined in s. 20, only the provisions of the Land Acquisition Act enumerated in s. 21 are to guide the Court. VISHNU NARAYAN *v.* THE DISTRICT DEPUTY COLLECTOR, KOLABA, (1917) . . . . **I. L. R. 42 Bom. 100**

ANIMALS.

See LICENSE . **I. L. R. 47 Calc. 809**

ANNUITY.

See CHARGE . **I. L. R. 37 All. 72**

See LIMITATION ACT (IX OF 1908), SCH. I, ARTS. 116, 120, 131 and 132.
I. L. R. 34 All. 246

See MORTGAGE . **I. L. R. 39 All. 700**

——— **in Mysore Province**—
See INCOME-TAX ACT (II OF 1886).
I. L. R. 39 Mad. 885

——— *Annuity, if a charge on property.* Where in an *ekrarnama* between *A* and *B* it was agreed that *A* would receive Rs. 150 per month during her lifetime from the share of the estate which she inherited from her son, that *B* would pay the said sum every month and if he did not pay it, *A* would be entitled to recover it by suit from the said share : *Held,* that the annuity was a charge upon the said share. The property could be easily ascertained and that being so it did not matter that no schedule of property was given in the deed. The question in all such cases is one of intention. "In equity no charge can be created unless there is an intent to charge." SHYAMPEARY DASYA *v.* THE EASTERN MORTGAGE AND AGENCY CO., LD. (1917) **22 C. W. N. 226**

——— *Payable to two persons—Survivor—If payable wholly to the survivor on the death of one—Penalty.* Although an annuity to two persons should ordinarily be construed to mean that on the death of one of them the other should get a proportionate amount, where there are indications of a contrary intention, the gift may be taken as a joint gift. *Jogeswar Narain Deo* v. *Ram Chandra Dutt, L. R. 23 I. A. 37 : s. c. I. L. R. 23 Calc. 670 (1896) and Mathura Prosad* v. *Rukmini Koer, 17 C. L. J. 87 (1911),* referred to. The testator in his Will provided that his brother was to get Rs. 25 a month during his life and on his death his sons were to get maintenance. On the death of the testator's brother a compromise was arrived at by which it was arranged that the Plaintiff and his brother, the sons of the testator's brother, were to get Rs. 10 a month but in the event of default of payment for four consecutive months they would be entitled to Rs. 15 a month. On a suit by the Plaintiff on the death of his brother: *Held*—That the Plaintiff was entitled to the entire amount of

ANNUITY—*contd.*

maintenance agreed upon in the compromise on the death of his brother and not a proportionate amount. That the stipulation to pay a higher amount in case of default of punctual payment was a stipulation by way of penalty but the Plaintiff was entitled to reasonable compensation (which was determined in the case to be 12 per cent. interest on the arrears). HEMANTA KUMAR BHADURI *v.* SUDHANSU GOBINDA CHOUDHURY.
25 C. W. N. 262

ANNULMENT OF SALE.

See SALE FOR ARREARS OF REVENUE.
I. L. R. 46 Calc. 255

ANNULMENT PROCEEDINGS.

———— notice of—

See LANDLORD AND TENANT.
I. L. R. 45 Calc. 756

ANONYMOUS COMMUNICATION.

See UNPROFESSIONAL CONDUCT.
I. L. R. 43 Calc. 685

ANTECEDENT DEBT

See HINDU LAW DEBT.
I. L. R. 48 Calc. 341

See HINDU LAW—JOINT FAMILY.
I. L. R. 36 All. 17
I. L. R. 41 All. 235

See HINDU LAW—JOINT FAMILY PROPERTY

See CUSTOM (ALIENATION)
I. L. R. 1 Lah. 472

ANTICIPATORY ATTACHMENT.

See EXECUTION OF DECREE.
I. L. R. 44 Calc. 1072

ANTICIPATORY BREACH.

See CONTRACT. **I. L. R. 48 Calc. 427**

See SALE OF GOODS.
I. L. R. 43 Calc. 305

ANUMATIPATRA.

———— construction of—

See HINDU LAW—ADOPTION.
I. L. R. 38 Calc. 694
I. L. R. 39 Calc. 582

ANVADHEYA STRIDHAN.

See HINDU LAW—STRIDHAN.
I. L. R. 34 Bom. 553

See HINDU LAW—SUCCESSION.
I. L. R. 34 Bom. 385

APOLOGY.

See CONTEMPT OF COURT.
15 C. W. N. 771

APOSTACY.

See MAHOMEDAN LAW—BIGAMY.
I. L. R. 39 Calc. 409

See PENAL CODE, 1860, s. 494
I. L. R. 1 Lah. 440

APPEAL.

APPEAL—*contd.*

See APPEAL FROM ORDER.

See APPEAL *in forma pauperis*.

See APPEAL, FORUM OF.

See APPEAL IN CRIMINAL CASE.

See APPEAL, RIGHT OF.

See ACQUITTAL . **I. L. R. 44 Calc. 703**

See ADMINISTRATION BOND.
I. L. R. 39 Calc. 563

See AGRA TENANCY ACT (II OF 1901), ss. 25, 31, 57; SCH. IV(C), ART. 18
I. L. R. 41 All. 270

ss. 58, 167. . **I. L. R. 41 All. 28**

ss. 58, 200 . **I. L. R. 35 All. 157**

ss. 95, 177 (*f*). **I. L. R. 40 All. 177**
I. L. R. 43 All. 368

ss. 175, 177 AND 193.
I. L. R. 40 All. 219

s. 177 . . **I. L. R. 32 All. 373**
I. L. R. 36 All. 183
I. L. R. 42 All. 91
I. L. R. 33 All. 260
I. L. R. 38 All. 465

ss. 182, 183 . **I. L. R. 38 All. 181**

s. 193 . . **I. L. R. 40 All. 652**

s. 199 . . **I. L. R. 35 All. 521**

See ARBITRATION.
I. L. R. 47 Calc. 848

See ARBITRATION ACT. (IX of 1899)

ss. 4 AND 20. **I. L. R. 43 All. 340**

s. 10 . . **I. L. R. 35 Bom. 136**

See ARBITRATION BY COURT.
I. L. R. 38 Calc. 421

See AMENDED LETTERS PATENT, CL 15.
I. L. R. 42 Bom. 260

See APPEAL TO PRIVY COUNCIL.
I. L. R. 40 All. 497

See AWARD . **I. L. R. 38 Mad. 256**

See BENGAL TENANCY ACT,—

s. 105 . . **15 C. W. N. 921**

s. 153 . . **15 C. W. N. 760**

See BENGAL, NORTH-WESTERN PROVINCES, ETC., CIVIL COURTS ACT (XII OF 1887), ss. 8, 20.
I. L. R. 32 All. 530
I. L. R. 34 All. 383

ss. 21, 22. . **I. L. R. 37 All. 76**

See CIVIL COURTS ACT (XII OF 1887), s. 21 . . **I. L. R. 41 All. 384**

s. 244 . . **15 C. W. N. 713**

See CIVIL PROCEDURE CODE (1908)—

s. 2 . . **I. L. R. 39 All. 582**

s. 2, 104, 118 **I. L. R. 35 All. 582**

APPEAL—*contd.*

s. 408 . . I. L. R. 33 All. 510
I. L. R. 37 All. 471
I. L. R. 38 All. 395

s. 413 . . I. L. R. 38 All. 395

s. 421 . . I. L. R. 36 All. 496

s. 423 . . I. L. R. 34 All. 115

s. 439 . . I. L. R. 39 All. 549

See DECREE . I. L. R. 36 Bom. 42

See DECREE . I. L. R. 44 Calc. 954

See DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879), ss. 3 (w), 10, 53.
I. L. R. 39 Bom. 165

See EXECUTION OF DECREE.
3 Pat. L. J. 571

See HINDU LAW—ADOPTION.
I. L. R. 40 Mad. 846

See INSOLVENCY.
I. L. R. 47 Calc. 721

See JURISDICTION OF CIVIL COURTS
I. L. R. 34 Bom. 267

See LAND ACQUISITION.
I. L. R. 43 Calc. 665
I. L. R. 46 Calc. 861

See LAND ACQUISITION ACT, 1894, s. 3.
I. L. R. 45 Bom. 277

See LETTERS PATENT,

See LIMITATION. I. L. R. 44 All. 218

See LIMITATION ACT (XV OF 1877)—

s. 12 . . 15 C. W. N. 787

s. 5 . . I. L. R. 37 All. 267

See LIMITATION ACT (IX OF 1908), s. 5 . . I. L. R. 43 All. 392
I. L. R. 45 Bom. 607

SCH. I, ART. 152 I. L. R. 34 All. 482
I. L. R. 43 Bom. 376

See MAMLATDAR'S COURTS ACT (BOM. ACT II OF 1906), s. 23.
I. L. R. 37 Bom. 595

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3 Pat. L. J. 166

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I. L. R. 39 Bom. 352

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See PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), ss. 6, 8, 25, 38, 39 (2), (*a*), (*b*), (*c*), (*d*), (*f*), (*i*)
I. L. R. 40 Bom. 461

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I. L. R. 32 All. 523
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I. L. R. 43 All. 644

——— **Abatement of—**

See ABATEMENT OF APPEAL.

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———— against the order of a single Judge—
See CRIMINAL PROCEDURE CODE (ACT V OF 1898), s. 488.
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I. L. R. 38 All. 440

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I. L. R. 41 Mad. 554

See PROVINCIAL INSOLVENCY ACT (III OF 1907), s. 46, CL. (3).
I. L. R. 39 Mad. 593

———— court-fee on appeal from decree for redemption—
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———— delay in filing—
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———— From consent decree (not allowable)—
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———— from decree of Lower Court in exercise of discretionary power—
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I. L. R. 1 Lah. 597

———— from decree of Lower Court deciding part of claim and remanding rest—
See CIVIL PROCEDURE CODE, 1908, s. 105.
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———— from order for appointment of receiver—
See RECEIVER . I. L. R. 40 Mad. 18

———— from preliminary decree—
See EVIDENCE ACT (I OF 1872), ss. 4, 90
I. L. R. 37 Mad. 455

———— from preliminary order—
See DECREE . . I. L. R. 37 Mad. 29

———— from order declining to arrest or attach property—
See CIVIL PROCEDURE CODE ACT (V OF 1908), O. XLIII, R. 1 (r); AND O. XXXIX, R. 2, CL. (3).
I. L. R. 39 Mad. 907

———— from order dismissing application to be brought on the record as representative of the deceased plaintiff—
See CIVIL PROCEDURE CODE, 1908, O. XXII, R. 5 . I. L. R. 1 Lah. 493

———— From order granting review—
See CIVIL PROCEDURE CODE 1908, XLIII AND XLVII 1 Pat. L. J. 193

———— from order of abatement by a person not a party to the suit—
See CIVIL PROCEDURE CODE, 1908, O. XXII R. 5. I. L. R. 1 Lah. 493

———— from order of Lower Appellate Court that appeal has abated—
See CIVIL PROCEDURE CODE, 1908, O. I. R. 8. . . I. L. R. 1 Lah. 582

———— from order of single Judge—
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I. L. R. 39 Mad. 235

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———— from unanimous verdict—

See JURY, TRIAL BY.
I. L. R. 46 Calc. 635

———— From order of Liquidating Judge reducing remuneration of an employee of Official Liquidator—

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———— from order of Executing Court disallowing application for arrest of judgment debtors—

See CIVIL PROCEDURE CODE, 1908, s. 47,104 . . I. L. R. 1 Lah. 77

———— from order refusing application by a creditor to take action against an insolvent—

See PROVINCIAL INSOLVENCY ACT, 1907 ss. 43, 46 . I. L. R. 1 Lah. 213

———— from order returning plaint for amendment—

See CIVIL PROCEDURE CODE, 1908, s. 105
I. L. R. 1 Lah. 54

———— from order of single Judge of Chief Court sanctioning prosecution of appellant—

See CRIMINAL PROCEDURE CODE, 1898 s. 195 . I. L. R. 1 Lah. 259

———— from Order—Second Appeal—Practice—

See CIVIL PROCEDURE CODE (ACT V OF 1908), ss. 47 AND 104 (2).
I. L. R. 44 Bom. 472

———— in criminal case—

See PRIVY COUNCIL.
I. L. R. 36 Mad. 501
I. L. R. 42 Calc. 739

———— Joint appeal from 2 separate cases

See COMPANIES (IN LIQUIDATION)
I. L. R. 1 Lah. 368

———— No appeal lies against an order refusing injunction to restrain prosecution of suit in a foreign Court—

See LETTERS PATENT, CL. 15.
I. L. R. 44 Bom. 472

———— Parties—Practice.

See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXI, R. 60.
I. L. R. 44 Bom. 860

———— presentation of—

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), ss. 421, 233, 537.
I. L. R. 39 Mad. 527

———— *prosecution of*—

See LIMITATION . I. L. R. 45 Calc. 94

———— Co-defendants—whether appellate Court can decree claim against a co-defendant on the appeal of the other defendant—

See CIVIL PROCEDURE CODE 1908 (21). O. XLI, RR. 22, 33 I. L. R. 1 Lah. 396

———— Order for *stay of*—whether appealable—

See CIVIL PROCEDURE CODE, 1908, s. 47.
I. L. R. 45 Bom. 241

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———— Order granting lease to Sue a Receiver—

See CIVIL PROCEDURE CODE, O. XLIII, R. 1 . . . .
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See COURT FEES . 3 Pat. L. J. 484

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See PROVINCIAL INSOLVENCY ACT (III OF 1907), s. 46, CL. (3).
I. L. R. 39 Mad. 593

———— our valuation of—

See REFUND OF COURT FEE.
I. L. R. 40 Calc. 365

———— Receiver—Lease to Sue for negligence—

See CIVIL PROCEDURE CODE, 1908, O XLII, R 1. I. L. R. 45 Bom. 99

———— Reference to Historical works (irregular)—

See CUSTOMARY LAW
1 Pat. L. J. 225

———— re-hearing of—

See CIVIL PROCEDURE CODE (1908), O. XLI, R. 21 .
I. L. R. 39 All. 388

———— reversal of—

See ATTACHMENT BEFORE JUDGMENT.
I. L. R. 45 Calc. 780

———— revision of—

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I. L. R. 38 Mad. 406

———— right of—

See ARBITRATION.
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I. L. R. 45 Calc. 305

See CIVIL PROCEDURE CODE (ACT V OF 1908), ss. 47, 73, 104.
I. L. R. 39 Mad. 570

See INSOLVENCY I. L. R. 47 Calc. 721

See MADRAS CITY MUNICIPALITY ACT, 1904 ss. 121, 125, etc.
I. L. R. 34 Mad. 120

See MUNICIPAL ELECTION.
I. L. R. 39 Calc. 754

See PROVINCIAL INSOLVENCY ACT. 1907 ss. 43 AND 46 I. L. R. 40 Mad. 630

See SANCTION FOR PROSECUTION.
I. L. R. 40 Calc. 239

———— Second appeal—

See SECOND APPEAL.

See ONUS OF PROOF.
I. L. R. 43 Mad. 587

———— service of notice of, on District Magistrate—

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), ss. 439, 422, 423.
I. L. R. 39 Mad. [illegible]

APPEAL—*contd.*

——— **subsequent filing of**—

See Civil Procedure Code (Act V of 1908), O. XLVII, r. 1.
I. L. R. 38 Bom. 416

——— **summary dismissal of**—

See Civil Procedure Code (Act V of 1908), O. XLI, r. 11.
I. L. R. 37 Bom. 610

See Penal Code s 170 **3 Pat. L. J. 389**

——— **Time for**—

See Limitation Act, 1908 s. 12.
1 Pat. L. J. 573

——— **transfer of**—

See Bengal, N.-W. P. and Assam Civil Courts Act (XII of 1887), s. 22 (*3*).
I. L. R. 37 All. 232

——— **valuation of**—

See Valuation of Appeal.

See Civil Procedure Code, 1908, s. 107.
I. L. R. 42 All. 48

——— **wrongly laid before Collector**—

See Jurisdiction of High Court.
I. L. R. 38 Calc. 832

1. ABATEMENT OF APPEAL.

——— **Limitation Act, IX of 1908, s. 3, Art. 177**—*Period of limitation provided in Art. 177 applicable to applications made after the day when the Act came into force—Effect of abatement of appeal against one of several joint trustees.* Applications to bring in the legal representatives of a deceased respondent made after the coming into force of Act IX of 1908 must, under s. 3 and Art. 177 of the Act, be made within six months of the death of such respondent. If not so made the appeal must abate against such respondent. Where the deceased respondent, in respect of whom the appeal abates, is a joint trustee with other respondents, the appeal cannot proceed against such other respondents. Arayil Kali Amma *v.* Sankaran Nambudripad (1910).
I. L. R. 34 Mad. 292

——— **Appeal, decree in**—*Plaintiff not appealing as regards part of suit dismissed—Position of, as respondent.* In a suit on a Promissory note *B* prayed for relief against *A* and *G* and obtained a decree aganist *G* alone. *B* preferred no appeal as regards his claim against *A*. On appeal by *G*.*B*'s suit was dismissed: *Held*: that the Judge in the appeal by *G* was right in not passing a decree against *A*, *B* not having asked for it at all in any manner. Asundi Basavva *v.* Bareddi Govindappa (1910).
I. L. R. 34 Mad. 249

——— Death of one of the Respondents does not abate an appeal. Velayan Chetty *v.* Mahalinga Aiyer
I. L. R. 39 Mad. 386

2. CONSOLIDATED APPEAL.

——— *Appeal—Cases governed by one judgment but not consolidated—One appeal, if lies.* Where in several execution cases one judgment was passed but a separate order was recorded for each case and there was no order for consolidation of the cases: *Held*, that there should be as many appeals as there were original cases and not one consolidated appeal against all the orders. Rakhal Chandra Tewari *v.* Manmotho Nath Mitter (1910). . . **15 C. W. N. 994**

——— *Consolidation of appeals—Plaint, amendment of, when allowable—Practice.* The Code of Civil Procedure contains no provisions for consolidating proceedings in India. Whether the Court has jurisdiction to consolidate proceedings or not, it would only do so where the consolidation is asked for before the trial of the suits begins or where the evidence given in the two cases is common in both of them. No amendment of plaint can be allowed where the proposed amendment would take away from the defendants, if allowed, a right that they would have if the plaintiffs had proceeded against them by way of original suit. Janardan Kishore Lal *v.* Shib Pershad Ram (1915) . **I. L. R. 43 Calc. 95**

3. DISMISSAL OF APPEAL.

——— *Civil Procedure Code (Act V of 1908), O. XLI, r. 18—Failure of appellant to file notice of appeal, dismissal of appeal, if proper.* Where a person preferred an appeal and at the same time deposited the fees for service of the notice of appeal on the respondent but did not file the notice to be served as required by the Circular Order of the High Court: *Held*, that the appeal could not be properly dismissed under O. XLI, r. 18, of the Civil Procedure Code. Gol Mahomed *v.* Abdul Jabbar (1912).
16 C. W. N. 498

——— *Dismissal for default—Order of Special Judge—Bengal Tenancy Act (VIII of 1885), ss. 106, 109A, sub-s. (2)—Civil Procedure Code (Act V of 1908), O. XLI, rr. 17, 19; O. XLIII, r. 1, cl. (t).* An appeal lies from an order refusing to rehear an appeal dismissed for default, even though such appeal has been preferred under s. 109 A, sub-s. (*2*), in a suit under s. 106 of the Bengal Tenancy Act. *Mothur Chandra Majumdar* v. *Tara Sunkur Ghose, 7 C. W. N. 440*, distinguished. Manmatha Nath Dey *v.* Gadadhar Mana (1917) **I. L. R. 45 Calc. 638**

4. JURISDICTION.

——— *Jurisdiction—Sambalpur—Appeal against decree or order passed by Deputy Commissioner acting as a Civil Court—Central Provinces Land Revenue Act (XVIII of 1881), as amended by Beng. Act IV of 1906, ss. 136 H (1) and 22, cl. (b)—Bengal, North-Western and Assam Civil Courts Act (XII of 1887)—Second Appeal, if it lies to High Court when original appeal decided by the wrong Court.* Section 136 H (*i*) introduced into the Central Provinces Land-Revenue Act of 1881 by Act XVI of 1889, qualifies s. 22, cl. (*b*) of the original Act, with the result that under it, read with s. 3 of the Sambalpur Civil Courts Act, 1906 (Beng. Act IV of 1906), an appeal against a decree or order passed by the Deputy Commissioner acting as Civil Court lies to the District Judge. Where, in such a case, an appeal was wrongfully preferred before the Commissioner, no second appeal from the Commissioner's decision lies to the High Court. Raghunath Singh *v.* Abdhut Singh (1911) . **I. L. R. 38 Calc. 391**

APPEAL—*contd.*

4. JURISDICTION—*contd.*

——— *Jurisdiction—Valuation—Suit for specific performance of contract to sell—Additional relief claimed by way of cancellation of sale-deed subsequently executed.* Where a suit was primarily a suit for specific performance of a contract to sell certain property to the plaintiffs, but also asked for the cancellation of a subsequent sale-deed of the property in favour of certain defendants, it was *held* that the latter relief was merely incidental to the former and its valuation would not affect the jurisdiction of the Appellate Court. *Pirthi Singh* v. *Maru Singh, 8 All. L. J. 266,* distinguished. NITYA NAND *v.* BISHAN LAL (1911) . **I. L. R. 33 All. 634**

——— *Appeal, jurisdiction* [illegible] *Consent* [illegible] *value* [illegible] *suit—Jurisdiction cannot be questioned in appeal—Evidence Act (I of 1872), s. 58.* The plaintiffs filed a suit for partition in the Court of the Subordinate Judge, First Class, valuing their claim at an amount which made the suit triable by that Court [illegible] r was any issue [illegible] ceeded on merits: and a decree was passed in favour of plaintiffs. The defendant appealed to the lower Appeallate Court, where he, for the first time, raised the question of jurisdiction on the strength of the market value stated in the plaint. The objection was overruled. On appeal:—*Held,* that the market value stated in the plaint *primâ facie* determined the jurisdiction. *Held,* further, that as neither party raised any question as to want of jurisdiction in the first Court, and as they by their conduct and silence treated the market value to be of the amount sufficient to give jurisdiction to the Court, they dispensed with proof on the question by their tacit admissions and thus the principle of law laid down in s. 58 of the Indian Evidence Act came into operation and prevented the result of the statement of the market value in the plaint. As a rule, parties cannot by consent give jurisdiction where none exists. This rule applies only where the law confers no jurisdiction. It does not prevent parties from waiving inquiry by the Court as to facts necessary for the determination of the question as to jurisdiction, where that question depends on facts to be ascertained. JOSE ANTANIO *v.* FRANCISCO ANTONIO (1910).
I. L. R. 35 Bom. 24

——— Additional Evidence—*Civil Procedure Code (Act V of 1908), O. XLI, r. 27; O. XLVII, r. 1—Jurisdiction of Appellate Court to admit additional evidence—Application to admit additional evidence before the hearing of the appeal, if it can be entertained.* Where in an appeal an application was made before the hearing of the appeal for the admission of additional evidence: *Held,* that such an application was not warranted by the terms of O. XLI, r. 27, and the Appellate Court had no jurisdiction to entertain it. O. XLI, r. 27, does not authorise an Appellate

APPEAL—*contd.*

4. JURISDICTION—*contd*

Court after examining the evidence on the record comes to the conclusion that it requires the additional evidence in order to enable it to pronounce judgment, namely, that there is a defect on the evidence on the record. An application to admit fresh evidence discovered out of Court by the parties comes under O. XLVII, r. 1, and not under O. XLI, r. 27. *Kessowji Issur* v. *Great Indian Peninsula Railway Co, I. L. R. 31 Bom. 381; L. J. 34 I. A. 115,* referred to. GARDEN REACH SPINNING AND MANUFACTURING CO. *v.* SECRETARY OF STATE FOR INDIA (1914).
I. L. R. 42 Calc. 675

——— *Revision, power of—Civil Procedure Code (Act V of 1908), s. 115—Appeal from order of single Judge sitting on Original Side, made in exercise of revisional jurisdiction—Appellate jurisdiction of High Court—Letters Patent of 1865, cls. 15, 16, 39.—"Judgment"—High Courts Act (24 and 25 Vic., c. 104), s. 13—Presidency Small Cause Courts Act (XV of 1882), ss. 6, 41.* An order made bya single Judge sitting on the Original Side under s. 115 of the Code of Civil Procedure, interfering with a judgment of the Presidency Small Cause Court, is a "judgment" within the meaning of s. 15 of the Letters Patent and is appealable. *Chappan* v. *Moidin Kutti, I. L. R. 22 Mad. 68,* followed, *Hiralal* v. *Bai Asi, I. L. R. 23 Bom. 891,* distinguished. *Girdharee Singh* v. *Hurdoy Narain Sahoo, 21 W. R. 263, Secretary of State for India* v. *British India Steam Navigation Co., 13 C. L. J, 90, Venkatta Reddi* v. *Taylor, I. L. R. 17 Mad. 100,* referred to. An application under s. 41 of the Presidency Small Cause Courts Act for the recovery of possession of certain immoveable property, was refused by the Presidency Small Cause Court on the ground that the relationship of landlord and tenant had not been established: *Held,* that, assuming that the judgment was erroneous, the High Court was not justified in interfering under s 115 of the Civil Procedure Code. *Amir Hassan Khan* v. *Sheo Baksh Singh, I. L. R. 11 Calc. 6,* followed. *Brij Mohan Thakur* v. *Rai Uma Nath Chowdhry, I. L. R. 20 Calc. 8,* and *Maharajah of Burdwan* v. *Apurba Krishna Roy, 15 C. W. N. 872,* distinguished. *Per* WOODROFFE, J.—The term "Jurisdiction" in s. 115 of the Code of Civil Procedure is used in the ordinary sense to mean a jurisdiction local, pecuniary, personal or with reference to the subject-matter of the suit. SHEW PROSAD BUNGSIDHUR *v.* RAM CHANDRA HARIBUX (1913)
I. L. R. 41 Calc. 323

——— *Jurisdiction—Written statement, order refusing leave to file—"Judgment"—Letters Patent, 1865, cl. 15—Rules and Orders of High Court, Chap. XIV, r. 3.* No appeal lies from an order made by a Judge sitting on the Original Side refusing an application by a defendant for leave to file his written statement. Such an order is not a "judgment" within the meaning of cl. 15 of the Letters Patent of 1865. *The Justice of the Peace for Calcutta* v. *The Oriental Gas Company, 8 B. L. R. 433,* referred to. *Mathura Sundari Dassi* v. *Haran Chandra Saha, I. L. R. 43 Calc. 857,* distinguished. MURALIDHAR CHAMARIA *v.* M. R. DALMIA (1917) . **I. L. R. 45 Calc. 818**

APPEAL—*contd.*

8. REMAND—*contd.*

Subsequently, the defendant proceeded to give evidence upon the issues raised in the case, and eventually, the plaintiff not appearing, the District Judge dismissed the whole case for default under s. 102 of the Code. On appeal to the Chief Court, the majority of a Full Bench of that Court decided that no appeal lay from an order dismissing a suit under s. 102, and the appeal was consequently dismissed: *Held*, by the Judicial Committee, that after the decision of the District Judge adverse to the plaintiff on the claim to recover the money paid, which left no question as to that claim open in the Court of first instance, and the abandonment by the plaintiff of the claim to damages, there remained nothing in substance to be tried; and that the case was one not proper to be dealt with under s. 102. Without deciding (as being, therefore, unnecessary) the question whether an appeal would lie against a dismissal regularly made under that section, their Lordships remanded the case to the Chief Court to decide the appeal on its merits. KANHYA LAL *v.* THE NATIONAL BANK OF INDIA (1910) . . **I. L. R. 37 Calc. 426**

——————— *Civil Procedure Code (Act V of 1908), s. 105, cl. (2), O. XLI, rr. 23, 25—Remand order—Appeal if lies after suit is finally disposed of on appeal.* Where a suit has been remanded on appeal, an appeal from the order after the suit has been taken up by the first Court on remand and finally disposed of is incompetent. *Madhu Sudan Sen* v. *Kamini Kanta Sen, I. L. R. 32 Calc. 1023 : s. c. 9 C. W. N. 895 ; Baikantha Nath Dey* v. *Nawab Salimullah, 12 C. W. N. 590 ; Mackenzie* v. *Narsingh Sahai, I. L. R. 36 Calc. 762*, followed. *Uman Konwari* v. *Janbandhan, I. L. R. 30 All. 479*, not followed. *Palani Chetty* v. *Rangiadoss Naidu, I. L. R. 32 Mad. 83*, distinguished. S. 105, cl. (2) of the new Civil Procedure Code, has no bearing on this question but applies to the converse case. JANAKI NATH RAY CHOWDHURY *v.* PROMOTHA NATH ROY CHOWDHURY (1911) . . . . . **15 C. W. N. 830**

——————— *Civil Procedure Code (Act V of 1908), ss. 115, 104, sub-s. 2, 154, O. XLI, r. 90, O. XLIII, r. 1, cl. (j)—Sale in execution, application to set aside on ground of fraud before new Code came into force —Order passed since if open to second appeal—General Clauses Act (X of 1897), s. 6, cl. (c)—Retrospective operation of repealing statute—Revision—Erroneous decision on question of limitation—Limitation Act (IX of 1908), ss. 7, 9.* An application to set aside an execution sale which took place on the 17th September 1900, on the ground of fraud and material irregularity in publishing and conducting it, was made on the 23rd July 1907 and allowed on the 6th July 1908, but the order was set aside on appeal and the case remanded on the 6th November 1908. On the 12th June 1909, the application was again dismissed but on appeal the order was set aside and the case once more remanded on 29th January 1910: *Held*, that a second appeal against the order of remand did not lie under the new Code (Act V of 1908), O. XXI, r. 90 and s. 104, sub-s. (2) read with O. 43, r. 1, cl. (*j*), which applied to the case. The right of second appeal which the judgment-debtor would have (by reason of repealed provisions of the old Code relating to appeals continuing to govern pending cases), had s. 6, cl. (*c*) of the General Clauses Act of 1897, alone applied, must be held to have been taken away by the express terms of s. 154 of the new Code. The words "present right of appeal" means only a right existing on the 1st of January 1909 to appeal against a particular order passed under the former Code and subsisting on that date. *The Colonial Sugar Refining Company, Limited* v. *Irving [1905], A. C. 369 ; Hornsey Local Board* v. *Monarch Investment Building Society, 24 Q. B. D. 1*, referred to. Where the lower Appellate Court had held that the application was not time-barred as the applicant was a minor, overlooking the fact that when the sale took place the father of the applicant was alive so that limitation had already begun running against him: *Held*, that the fact that the lower Appellate Court overlooked the applicability of s. 9 of the Limitation Act to the case was not sufficient to justify interference in revision by the High Court. BENOD BEHARI BHADRA *v.* RAM SARUP CHAMAR (1912). **16 C. W. N. 1015**

9. RIGHT OF APPEAL.

——————— *Leave to bid, refusal of, to decree-holder—Appeal.* No appeal lies against an order forbidding a decree holder to bid at a sale held in execution of a decree, the matter being one of the administration. *Jadunath Mandal* v. *Brojo Mohan Ghose* referred to. KO THA HEUYIN *v.* MA HUIN I. **15 C. W. N. 862**

——————— *Civil Procedure Code (Act XIV of 1882), ss. 622, 623, 624, 626—Review—"Sufficient reason"—Admission by defendant after suit dismissed that case true—Review upon evidence of admission—Appeal—Revision—Material irregularity.* Where an order dismissing a suit was reviewed on the ground of a subsequent admission by the defendant that the plaintiff's case was true, and the suit was decreed: *Held*, that no appeal lay from the order admitting the review as it was not in contravention of s. 624 or 626, Civil Procedure Code. *Munniram Chowdhry* v. *Bishen Perkash Narain, I. L. R. 24 Calc. 878 ; The Bombay and Persia Steam Navigation Co.* v. *S. S. "Zuari," I. L. R. 12 Bom. 171*, followed. But in admitting the review on that ground the Court acted with material irregularity in the exercise on its jurisdiction within the meaning of s. 622, Civil Procedure Code. A ground for review must be something which existed at the date of the decree and not a subsequent event. *Kotaghiri Venkata Subbamma Rao* v. *Vallanki Venkatarama Rao, I. L. R. 24 Mad. 1*, followed. GOLAM ALI JAMADAR *v.* ABDUL KARIM SIRKAR (1909) . . . . . **14 C. W. N. 244**

——————— *Civil Procedure Code (Act V of 1908), ss. 2, 47, O. XXI, r. 66—Interlocutory order in execution when appealable as decree—Order determining value of property to be sold in execution.* Every order passed in execution proceedings is not appealable. The order to be appealable as a decree must conclusively determine the rights of the parties. *Behary Lal Pundit* v. *Kedar Nath Mullick, I. L. R. 18 Calc. 469*, applied. No appeal lies against an order by which the value of property directed to be sold under a decree has been assessed at a certain figure according to the statement of the decree-holder. *Sivagami Achi* v. *Subrahmania Ayyar, I. L. R. 27*

APPEAL—*contd.*

9. RIGHT OF APPEAL—*contd.*

Mad. 259, approved; *Sivasami Naickar* v. *Ratnasami Naickar, I. L. R. 23 Mad. 568, Ganga Prasad* v. *Raj Coomar Singh, I. L. R. 30 Calc. 617, Kashi Pershad Singh* v. *Jamuna Pershad Sahu, I. L. R. 31 Calc. 922, Saurendra Mohan Tagore* v. *Hurruk Chand, 12 C. W. N. 542,* referred to. DEOKI NANDAN SINGH *v.* BANSI SINGH (1911).

16 C. W. N. 124

———— *Appeal—Order in execution of decree—Order refusing decree-holder permission to bid at sale in execution of decree—Civil Procedure Code (Act XIV of 1882), ss. 2, 244, cl. (c), 294, cl. (16), 540, 588 and 617—Act VII of 1888, s. 75—Revision where no appeal lies.* No appeal lies from an order refusing an application by a decree-holder for permission to bid at a sale in execution of a decree. *Jodoonath Mundul* v. *Brojo Mohan Ghose, I. L. R. 13 Calc. 174,* approved. KO THA HNYIN *v.* MA HNIN I (1911).

I. L. R. 38 Calc. 717
15 C. W. N. 682

———— *Civil Procedure Code (Act V of 1908), ss. 2, 47, O. 21, r. 66—Sale proclamation, valuation for purposes of—Order determining value if applicable.* An order by an exe- [illegible] decree. *Deoki Nandan Singh* v. *Bansi Singh, 16 C. W. N. 124,* followed. PANCH DUAR THAKUR *v.* MANI RAUT (1912) . **16 C. W. N. 970**

———— *High Court—Bombay* [illegible] of s. 160 of the Bombay District Municipal Act (Bom. Act III of 1901). Where a statute creates a right not existing at common law and prescribes a particular remedy for its enforcement, then that remedy alone must be followed. *Wolverhampton New Waterworks Co.* v. *Hawkesford, 6 C. B. N., s. 336,* followed. CHUNILAL VIRCHAND *v.* AHMEDABAD MUNICIPALITY (1911).

I. L. R. 36 Bom. 47

———— *Question in execution—Civil Procedure Code (Act V of 1908), s. 47:* [illegible] he appeal [illegible] parties to [illegible] under the provisions of s. 47 of the Civil Procedure Code (Act V of 1908), and the order passed by the lower Court was appealable. SORABJI COOVERJI *v.* KALA RAGHUNATH (1911) . **I. L. R. 36 Bom. 156**

———— *Succession Certificate Act (VII of 1889), ss. 9, 25, 26—Civil Procedure Code (Act V of 1908), s. 96—Succession Certificate—Condition of Sec-* [illegible] sion certificate [illegible] security should [illegible] directing that a [illegible] should not be granted unless security is furnished is not appealable. *Bai Dwkore* v. *Lalchand Jivandas, I. L. R. 19 Bom. 790,* explained. BAI NANDKORE *v.* SHA MAGANLAL VARAJBHUKHANDAS (1911).

I. L. R. 36 Bom. 272

APPEAL—*contd.*

9. RIGHT OF APPEAL—*contd.*

———— *Concurrent sentences of imprisonment not individually appealable—Aggregate of sentences—Right of appeal—Criminal Procedure Code (Act V of 1898), ss. 35 (3) and 413.* An accused sentenced to concurrent terms of imprisonment, not one of which is individually appealable, has no right of appeal. Concurrent sentences cannot, for the purposes of appeal, be taken collectively. *Suknandan Singh* v. *King-Emperor, 17 C. L. J. 392,* approved. *Abdul Khalek* v. *King-Emperor, 17 C. W. N. 72,* not followed. AZIZ SHEIKH *v.* EMPEROR (1913).

I. L. R. 40 Calc. 631

———— *Small Cause case tried as an ordinary suit—Jurisdiction.* Where a Judicial officer invested with Small Cause Court jurisdiction tries a suit, which he might have tried under the summary procedure, in the ordinary manner, the character of the suit is not thereby altered, and his decree is not appealable. *Shankarbhai* v. *Somabhai, I. L. R. 25 Bom. 417,* followed. INDRA CHANDRA MUKHERJEE *v.* SRISH CHANDRA BANERJEE (1913) . . **I. L. R. 40 Calc. 537**

———— *Attachment—Stay of execution—Security—Order accepting security, whether appealable—"Decree"—Civil Procedure Code (Act V of 1908), ss. 2 (2) and 47.* An order for security to stay execution is not an order determining any rights of the parties. It is neither an order under s. 47 nor is it a "decree" within the meaning of s. 2 (2) of the Code of Civil Procedure, 1908. It is, therefore, not appealable *Deoki Nandan Singh* v. *Bansi Singh, 14 C. L. J. 35,* and *Srinibash Prasad Singh* v. *Kesho Prasad Singh, I. L. R. 38 Calc. 754, 14 C. L. J. 489,* referred to. SARASWATI BARMANIA *v.* GOLAP DAS BARMAN (1913) . . **I. L. R. 41 Calc. 160**

———— *Mortgage decree—Representatives of Judgment-debtor—Transfer of Property Act (IV of 1882), ss. 52, 56, 81—Civil Procedure Code (Act V of 1908), ss. 2, 47, 151 and O. XXXIV, r. 5—Foreclosure—Sale—Exclusion of property.* Where the petitioners, subsequent mortgagees (who had foreclosed a property which it now transpired, was included in an earlier mortgage of several other properties to the present decree-holders, prior mortgagees) applied under s. 47 of the Code of Civil Procedure for the exclusion of the property from the present sale-proceedings and got this order, and the judgment-debtor (mortgagor) appealed therefrom: *Held,* that the petitioners were the representatives of the judgment-debtor within the meaning of s. 47 of the Code of Civil Procedure and that this order could not be regarded merely as an order under rule 5 of Order XXXIV of the Code of Civil Procedure but amounted to a decree within the meaning of s. 2 of the Code and was therefore appealable. *Held,* further, that the Courts have power, in appropriate circumstances, to make such orders under ss. 56 and 81 of the Transfer of Property Act. *Ishan Chandra Sirkar* v. *Beni Madhab Sirkar, I. L. R. 24 Calc. 62,* relied on. *Kommineni Appayya* v. *Mangala Rangayya, I. L. R. 31 Mad. 419,* distinguished. TARA PRASANNA BOSE *v.* NILMANI KHAN (1913) **I. L. R. 41 Calc. 418**

———— *When decree does not adversely affect appellant—Res judicata.* No appeal will lie from a decree which does not itself in

APPEAL—*contd.*

9. RIGHT OF APPEAL—*contd.*

some way or other adversely affect the appellant. The fact that in the judgment there is an adverse finding on a point not directly or substantially in issue between the parties will not give a party a right to contest such a finding where the decree is entirely in his favour and does not necessarily imply that finding. The finding would not act as *res judicata* as regards such point. *Quære:* Whether an appeal would lie even if the matter were *res judicata*? SECRETARY OF STATE *v.* SAMINATHA KOWNDEN (1914).
I. L. R. 37 Mad. 25

——— *Letters Patent, 1865, s. 15—"Judgment"—Order by single Judge on Original Side directing defendant to give security—Civil Procedure Code (Act V of 1908), O. XXXVII, r. 2.* An order made by a single Judge sitting on the Original Side under O. XXXVII, r. 2 of the Code of Civil Procedure, directing a defendant to give security as a term on which leave to defend should be given, is not a "Judgment" within the meaning of s. 15 of the Letters Patent and is not appealable. *Justices of the Peace for Calcutta* v. *Oriental Gas Company, 8 B. L. R. 433,* followed. *Sonbai* v. *Ahmedbhai Habibhai, 9 Bom. H. C. 398,* referred to. SUKHLAL CHUNDERMULL *v.* EASTERN BANK, LD. (1915).
I. L. R. 42 Calc. 735

——— *Order of Judge sitting on Original Side rejecting an application for an order to set aside dismissal of suit, whether appealable—Jurisdiction—Letters Patent, 1865, ss. 15, 44—"Judgment"—Civil Procedure Code (Act V of 1908), ss. 104, 117 : O. IX, rr. 8, 9 : O. XLIII, r. 1 (c) : O. XLIX, r. 3—Costs.* An appeal lies to the High Court in its Appellate Jurisdiction from an order made under Order IX, rule 9 of the Civil Procedure Code, by a single Judge sitting on the Original Side of the High Court, rejecting an application for an order to set aside the dismissal of a suit. *Hurrish Chunder Chowdhry* v. *Kali Sunderi Debi, I. L. R. 9 Calc. 482, Gobinda Lal Das* v. *Shib Das Chatterjee, I. L. R. 33 Calc. 1323, Munsab Ali* v. *Nihal Chand, I. L. R. 15 All. 359, Brij Coomaree* v. *Ramrick Das, 5 C. W. N. 781, Toolsee Money Dassee* v. *Sudevi Dassee, I. L. R. 26 Calc. 361. The Justices of the Peace for Calcutta* v. *The Oriental Gas Co., 8 B. L. R. 433, Sonabai* v. *Ahmedbhai Habibhai, 9 Bom. H. C. 398, Hadjee Ismail Hadjee Hubbeeb* v. *Hadjee Mahomed Hadjee Joosub, 13 B. L. R. 91,* referred to. *Gobinda Lal* v. *Shib Das, I. L. R. 33 Calc. 1323,* dissented from by MOOKERJEE, J. The order of dismissal set aside and the suit restored by the Court of Appeal, subject to an order for costs. *Southampton, Isle of Wight, Portsmouth Improved Steamboat Co.* v. *Rawlins, 34 L. J. Ch. 287, Michell* v. *Wilson, 25 W. R. 380, Birch* v. *Williams, 24 W. R. 700, Hall* v. *Lewis, 2 Keen 318, Muruga Chetty* v. *Rajasami, 22 Mad. L. J. 284, The Oriental Finance Corporation* v. *The Mercantile Credit and Finance Corporation, 2. Bom. H. C. 282,* and *Burgoine* v. *Taylor, L. R. 9 Ch. D. 1,* referred to by MOOKERJEE, J. MATHURA SUNDARI DASI *v.* HARAN CHANDRA SAHA (1915) . . . **I. L. R. 43 Calc. 857**

——— *The Right of appeal given by s. 97 of the Civil Procedure Code, 1908, is not taken away by the mere* fact that the Judge has passed the final decree. BHAGABAN CHANDRA K. DAS *v.* ISHAN CHANDRA K. DAS.
22 C. W. N. 831

——— *Sanction for prosecution refused by the Presidency Small Cause Court—High Court, revisional jurisdiction of—Appeal from order of single Judge sitting on Original Side made in exercise of such jurisdiction—Nature of trial—"Judgment"—Civil Procedure Code (Act V of 1908), s. 115—Criminal Procedure Code (Act V of 1898), s. 195 (6)—Letters Patent (1865), cl. 15.* Sanction to prosecute the plaintiff in a civil suit in the Presidency Small Cause Court for making a false claim and for making a false statement in an application for leave to institute a suit was refused by a Judge of that Court. The defendant, thereupon, applied to the Original Side of the High Court for a reversal of the order and obtained an order of remand to the Small Cause Court Judge. The plaintiff having appealed against this order of remand : *Held,* that the order appealed against was a "judgment" within the meaning of cl. 15 of the Letters Patent, and that there was a right of appeal. *The Justices of the Peace for Calcutta* v. *The Oriental Gas Company, 8 B. L. R. 433,* referred to. *Held,* also, that in every case where the Court is called upon to decide whether the decision under appeal is, or is not, a "judgment" within the meaning of cl. 15 of the Letters Patent, regard must be had to the nature and the contents of the order. *Ebrahim* v. *Fukhrunnissa Begum, I. L. R. 4 Calc. 531, Hadjee Ismail Hadjee Hubbeeb* v. *Hadjee Mahomed Hadjee Joosub, 13 B. L. R. 91, Rama Aiyar* v. *Venkatachella Padayachi, I. L. R. 30 Mad. 311,* and *Mathura Sundari Dasi* v. *Haran Chandra Saha, I. L. R. 43 Calc. 857,* referred to. BUDHU LAL *v.* CHATTU GOPE (1916).
I. L. R. 44 Calc. 804

——— *Arbitration—Award filed in Court—Application to set aside award—Arbitration Act (IX of 1899), s. 11 (2)—Civil Procedure Code (Act V of 1908), s. 104 (f)—Letters Patent, 1865, cl. 15.* No appeal lies under s. 104 (*f*) of the Civil Procedure Code from an order refusing to set aside an award made and filed under the provisions of the Arbitration Act. S. 104 (*f*) of the Civil Procedure Code does not apply to proceedings under cl. (2) of s. 11 of the Arbitration Act. The Court, however, has jurisdiction to hear the appeal under cl. 15 of the Letters Patent. CAMPBELL AND CO. *v.* JEASHRAJ GIRIDHARI LALL (1917) . . . . **I. L. R. 45 Calc. 502**

——— *Letters Patent, clause (15)—Judgment—Order as to costs only, passed by a Judge of the High Court on its Original Side, whether a judgment—Judgment, interpretation of.* An order as to costs, passed by a Judge of the High Court in the exercise of its original jurisdiction is not the less a judgment within the meaning of clause (*15*) of the Letters Patent because it relates to costs only. *Tuljaram Row* v. *Alagappa Chettiar, I. L. R. 35 Mad. 1,* followed. KULASEKARA NAICKER *v.* JAGADAMBAL AMMAL (1919).
I. L. R. 42 Mad. 352

——— *No appeal lies against an order passed by an Appellate Court remanding a case otherwise than under O. XLI, r. 23, C. P. C.* MOHENDRA NATH CHAKRAVARTI *v.* RAM TARAN BONDOPADHYAY (1919) . **23 C. W. N. 1049**

APPEAL—*contd.*

9. RIGHT OF APPEAL—*concld*

———————— *Against order of restoration of suit, if lies when defendant has taken some advantage under the order—Costs and allocatur—Protest, absence of.* Where a suit which was dismissed for non-prosecution was restored on an application on behalf of the plaintiffs and the Court made certain orders in respect of the payment of defendants' costs incidental to the application and the defendants got their costs taxed and obtained an allocatur: *Held*, that they having taken this advantage under the order were precluded from appealing against it. BANKU CHANDRA BOSE *v.* MARIUM BEGUM (1916).

21 C. W. N. 232

———————— An appeal, raising a question of costs only, where no question of principle is involved, is incompetent. UMESH CHANDRA DUTT *v.* BIBHUTI BHUSAN PAL CHOWDHURY (1919) . . **I. L. R. 47 Calc. 67**

———————— *Transfer—Order for transfer of a suit—"Judgment"—Letters Patent (1865), cls. 13 and 15.* An order for transfer of a suit to the High Court, under clause 13 of the Letters Patent, is not appealable. *Ismail Soleman Bhamji* v. *Mahomed Khan, I. L. R. 18 Calc 296, The Justices of the Peace for Calcutta* v. *The Oriental Gas Company, 8 B. L. R. 433,* referred to. *Hadjee Ismail Hadjee Hubbeeb* v. *Hadjee Mahomed Hadjee Joosub, 13 B. L. R. 91,* distinguished. KHATIZAN *v.* SONAIRAM DAULATRAM.

I. L. R. 47 Calc. 1104

claimed were statute barred. The trial Judge found that there was no account stated, but, the defendants being willing to pay what was due apart from the statutory defence, he took an account and made a decree for a particular sum. Upon appeal the High Court agreed with the finding that there was no account stated, but increased the amount of the decree:—Held, that the High Court not having differed from the finding above mentioned had no power to alter the decree, since it was a consent decree. RAJAH OF KILLIKOTA *v.* CHAITANA SAHU . . **L. R. 47 I. A. 200**

10. VALUATION OF SUIT..

———————— *Court-fees Act (VII of 1870), s. 12—Decision of trying Court as to valuation of suit, if open to question in appeal against decree dismissing suit for non-payment of additional Court-fee on day fixed—Civil Procedure Code (Act*

f deter-

which

under-

valued and directed the plaintiff to pay additional Court-fees by a certain date, but the plaintiff having failed to do so the suit was dismissed: *Held*, that an appeal lay against the decree dismissing the suit, and in that appeal the decision of the first Court regarding the valuation of the suit could be questioned, s. 12 of the Court-fees Act notwithstanding. *Omrao Mirza* v. *Mary Jones, 12 C. L. R. 148, H. C. Studa* v. *Mati Mahto, I. L. R. 28 Calc. 334,* relied on. *Held*, further, that the

APPEAL—*contd.*

10. VALUATION OF SUIT—*contd.*

appeal lay to the Court of the Judicial Commissioner, although the Subordinate Judge valued the suit at over Rs. 5,000 inasmuch as the plaintiff throughout contended that the value was below Rs. 5,000 as stated in the plaint. PROKASH CHANDRA SARKAR *v.* BISHAMBHAR NATH SAHI (1909) . . . . . **14 C. W. N. 343**

of the liability of certain properties the value of the appeal for the purpose of Court Fees, is the value of such properties. The Court Fees Act, Sch. II, Art. 17 having no application. JUGAL PERSHAD SINGH *v* PARBHU NARAIN JHA.

I. L. R. 37 Calc. 914

11. MISCELLANEOUS.

———————— *Suit to wind up partnership and for accounts—Preliminary decree referring suit to Assistant Referee—Question of disputed membership of firm—Report of Referee confirmed by final decree of Trial Judge—Omission to appeal fr*

decree rai

referred t

1908), s. .

after diss.

his own benefit. In a suit to wind up a partnership and to have accounts taken, the membership of the firm was in dispute, certain persons being by the plaintiff alleged to be partners, and by the defendants to have been only employees remunerated by a share of the profits. An adjudication was made by the Trial Judge which declared that the partnership was dissolved as from 1st July 1907, and then "ordered and decreed" that "it is referred to the Assistant Referee of this Court to take the following account and make the following enquiries, that is to say, (*a*) to enquire who were the partners entitled to share in the assets and goodwill of the partnership business,

the enquiries directed and took the account. His report as to enquiry (*a*) was adverse to the appellants, was excepted to by them, and was confirmed by the Trial Judge in his final decree. On an appeal by the appellants raising the question whether inquiry (*a*) was rightly included in the first adjudication, or whether it was not one which should have been made by the Court itself: *Held* (affirming the decision of the Courts below), that the first adjudication of the Trial Judge which included inquiry (*a*) was a preliminary decree under s. 97 of the Civil Procedure Code, 1908, and that the appellants not having preferred an appeal from it could not question it on appeal from the final decree. Where, on the dissolution of a partnership, one of the partners retains assets of the firm in his hands without any settlement of account, and applies them in containing the business for his own benefit, he may be [illegible] to account for such assets with interest [illegible] apart from fraud or misconduct in the [illegible] fraud. AHMED MUSAJI SALEJI *v.* [illegible] HIM SALEJI (1915) . . I. L. R. [illegible]

APPEAL—*contd.*

11. MISCELLANEOUS—*contd.*

———————— Where a suit has been remanded on appeal from the order after the suit has been taken up by the first court on remand and finally disposed of is incompetent. JANAKI NATH RAY *v.* PROMOTHA NATH RAY.

15 C. W. N. 830

———————— *Against preliminary decree after final decree, if can be entertained—Appeal against preliminary decree after final decree—Memorandum of appeal, leave to amend—Indian Contract Act (IX of 1872), s. 74—Interest payable at a reduced rate if punctually paid, if penal.* Where an appeal has been preferred against the preliminary decree only after the final decree has been passed, the appeal Court is incompetent to entertain the appeal. *Mackenzie* v. *Nursing Sahai, I. L. R. 36 Calc. 762 (1909)*, approved. *Khirodamoyee Dasi* v. *Adhar Chandra Ghose, 18 C. L. J. 321 (1912)*, distinguished. The Court, however, may in a proper case allow the Appellant to amend the memorandum of appeal at the hearing so as to turn the appeal against the preliminary decree into one against both the preliminary and the final decrees. An agreement to pay interest at a reduced rate, in lieu of the reserved interest at a higher scale, as an inducement for punctual payment, is not a penal clause. *Kirti Chunder Chatterjee,* v. *Atkinson, 10 C. W. N. 640 (1906), Kutubuddin* v. *Basiruddin, I. L. R. 32 All. 488 (1910)*, and *Mati Lal* v. *Eastern Mortgage and Agency Co., 25 C. W. N. 265 (1920)*, followed. KULADA PRASAD CHAUDHURY *v.* RAMANAND PATNAIK.

25 C. W. N. 776

———————— *Question of Fact—Weight to be given to the opinion of Trial Judge—Duty of Court of Appeal—Practice—Broker's Commission.* Decision of a Judge sitting on the Original Side decreeing a claim for commission reversed on appeal on questions of fact [SANDERSON, *C. J.*, dissenting]. Principles guiding the Court of Appeal in dealing with the findings of fact arrived at by a Judge of the Court of first instance discussed. LALJE MAHOMED *v.* GUZDAR (1915).

I. L. R. 43 Calc. 833

———————— *Review—Civil Procedure Code (Act V of 1908), O. XLI, r. 11; O. XLVII, r. 4—Notice of review to respondents, if necessary—"Opposite Party"—Grounds of appeal if restricted, on review—Bengal Tenancy Act (VIII of 1885), ss. 85, 159, 161—Sale in execution of a decree under Chap. XIV of that Act—Purchase by a stranger—Meaning of "encumbrances" in s. 161 of the Bengal Tenancy Act.* Where an appeal was summarily dismissed by a Divisional Bench of this Court and such order was ultimately set aside on review by the said Bench on an *ex parte* application without notice to the respondents: *Held*, that the last order was valid even in the absence of such notice. *Joy Kumar Dutt Jha* v. *Eshree Nand Dutt Jha, 16 W. R. 475, Haladhar Jha* v. *Syed Shah Mahomed, 25 Ind. Cas. 880*, followed. *Abdul Hakim Chowdhury* v. *Hem Chandra Das, I. L. R. 42 Calc. 433*, dissented from. The expression "opposite party" in O. XLVII, r. 4 of the Civil Procedure Code means the party interested to support the order sought to be vacated or modified upon the application for review. After an appeal is allowed under O. XLI, r 12, after review, the appellants are not restricted to the single ground for appeal which was the basis for review, but the whole appeal is before the Court when the case is taken up for final disposal. *Lukhi Narain* v. *Sri Ram Chandra, 15 C. W. N. 921*, followed. The rights of a stranger who purchases at a sale in execution of a decree under Chapter XIV of the Bengal Tenancy Act, are regulated by s. 159 and not by s. 85 of that Act. The word "encumbrances" in s. 161 of that Act includes the interests of an under-raiyat. JANAKI NATH HORE *v.* PRABHASINI DASSEE (1915).

I. L. R. 43 Calc. 178

———————— *Death of one of the respondents—Decree passed in ignorance of appellant not entitled to rehearing.* The death of one of the defendants or respondents does not abate a suit or appeal. *Duke* v. *Davies, [1890] 2 Q. B. 260*, referred to. An unsuccessful litigant has no right, therefore, to argue his case more than once merely on the ground that one of the other parties to the proceeding was dead at the time of the hearing. *Dictum in Goda Coopooramier* v. *Soondarammal, L. L. R. 36 Mad. 167*, approved. VELLAYAN CHETTY *v.* MAHALINGA AIYAR (1914).

I. L. R. 39 Mad. 386

———————— *Against preliminary decree, whether competent when appeal is filed after the passing of the final decree but before it is signed—Civil Procedure Code (Act V of 1908), s. 97.* Where in a suit for declaration of title and for partition instituted on the 5th July 1913, the preliminary decree was made on the 14th August 1916, and the final decree was passed on the 11th November 1916 but was not drawn up or signed till the 18th November 1916, and in the meantime on the 16th November the present appeal was preferred against the preliminary decree: and the respondents raised a preliminary objection that the decree having been passed at the date of the filing of the present appeal, the present appeal was incompetent: *Held*, that at the date when the appeal was preferred the only decree the defendant could appeal against was the preliminary decree, as clearly he was not able to appeal against the final decree of which he could not obtain a copy. The right of appeal given by s. 97, Civil Procedure Code, is not taken away by the mere fact that the Judge has passed the final decree. BHAGABAN CHANDRA KAIBARTA DAS *v.* ISHAN CHANDRA KAIBARTA DAS (1918). . **22 C. W. N. 831**

———————— *Change of case in.* In this case it was *held* that the lower Appellate Court had erred in accepting and acting upon a case made in that Court but not in the trial Court. BIRENDRA KISHORE MANIKYA *v.* DOULAT KHAN (1917) . . . **22 C. W. N. 856**

———————— **admission of, subject to being in time—practice—Limitation Act (V of 1908), s. 5**—An admission of a time passed appeal subject to any objection that may be taken subsequently is irregular. The High Court will not ordinarily interfere with the direction exercised by a lower appellate Court in extending time under s. 5 of the Limitation Act, 1908 but if that court has not in fact exercised any discretion it is open to the opposite party to raise the question in the High Court. MUHAMMAD ABDUL KASIM *v.* CHATURBHUJ SAHAY . . **6 Pat. L. J. 444**

APPEAL—*concld.*

II. MISCELLANEOUS—*concld.*

——————— *Additional District Magistrate—Whether appeal lies to District Magistrate from an order for security to be of good behaviour passed by the Additional District Magistrate—Criminal Procedure Code (Act V of 1898) ss. 10 (2), 406.* An appeal lies under s. 406 of the Criminal Procedure Code from the order of the Additional District Magistrate to the District Magistrate. The Sessions Judge has no appellate authority thereunder. MAHENDRA BHUMIJ *v.* EMPEROR (1921) . . . **I. L. R. 48 Calc. 874**

——————— *Preliminary decree—Final decree—Appeal against the preliminary decree after the passing of the final decree—Maintainability—Contract Act (IX of 1872), s. 74—Penalty—Stipulation to take interest at reduced rate if payment punctually made, whether penalty.* Where after the passing of the final decree a party appealed from the preliminary decree but did not also appeal from the final decree: *Held,* that the appeal from the preliminary decree was incompetent. *Khirodamoyee Dasi* v. *Adhar Chandra Ghose, 18 C. L. J. 321,* distinguished. The covenant to accept interest at a reduced rate, if it is paid punctually, does not make the original rate of interest a penalty within the meaning of s. 74 of the Indian Contract Act KULADA PROSAD CHOWDHURY *v.* RAMANANDA PATTANAIK (1921) . **I. L. R. 48 Calc. 1036**

APPEAL COMMITTEE.

See MUNICIPAL ASSESSMENT.
I. L. R. 39 Calc. 141

APPEAL (CRIMINAL CASES).

See PRIVY COUNCIL, PRACTICE OF.
I. L. R. 41 Calc. 1023
I. L. R. 44 Calc. 876

——————— *Limitation—Appeal erroneously filed in wrong Court—Extension of time—Sufficient cause—Indian Limitation Act (IX of 1908), s. 5.* On the 12th January 1920, the petitioner was sentenced by the Additional District Magistrate to two sentences of 4 years and 9 months' rigorous imprisonment, respectively. The sentences to run concurrently. On the 2nd February 1920 his counsel erroneously presented an appeal to the High Court, which was returned on the 21st February for presentation to the proper Court and was filed in the Sessions Court on the same day. The Sessions Judge dismissed it as time-barred, relying on *Sant Singh* v. *Qaim (118 P. R. 1908).* The petitioner filed a revision to the High Court: *Held,* that the case of *Sant Singh* v. *Qaim (118 P. R. 1908)* is distinguishable from the present case on the facts and especially inasmuch as that was a Civil Appeal. This appeal being a criminal one there is no "successful litigant" who has secured any "valuable right." The Crown cannot be said to gain anything by the appeal being dismissed as time-barred as all that the Government is, or should be, anxious for is that justice should be done. *Karsondas* v. *Bai Gungabai, I. L. R. 30 Bom. 329,* referred to in *Sant Singh* v. *Qaim, (118 P. R. 1908),* distinguished: *Held,* also, that the appellant who is in jail should not be deprived of the advantage of having his appeal heard merely because his counsel had been somewhat careless in filing the appeal in a wrong Court and the period of appeal should accordingly be extended. SURTA SINGH *v.* CROWN.
I. L. R. 1 Lah. 508

APPEAL (CRIMINAL CASES)—*contd.*

——————— *Criminal case—Practice—Duty of Appellate Court in dealing with the evidence on appeal—Proper standpoint—Conviction not to be upheld unless guilt beyond reasonable doubt affirmatively established—Criminal Procedure Code (Act V of 1898), s. 423.* In an appeal from a conviction it is for the Appellate Court, as it is for the first Court, to be satisfied affirmatively that the prosecution case is substantially true, and that the guilt of the appellant has been established beyond all reasonable doubt. To hold that, unless reasonable ground is given to the Appellate Court for differing from the lower Court, the Appellate Court must accept its findings of fact, is to approach the case from a wrong standpoint. KANCHAN MALLIK *v.* EMPEROR (1914).
I. L. R. 42 Calc. 374

APPEAL—FORUM OF.

See MADRAS CIVIL COURTS ACT 1873, s. 77.
I. L. R. 38 Mad. 531

——————— *Suit for accounts in a Munsif's Court—Munsif passing a decree for more than Rs. 5,000—Appeal lying to District Court and not to the High Court, under s. 13 of the Madras Civil Courts Act (III of 1873).* Where a District Munsif passed a decree for more than Rs. 5,000 in a suit for accounts wherein the plaintiff valued the subject-matter of the suit at an amount within the pecuniary jurisdiction of the Munsif: *Held,* that under s. 13 of the Madras Civil Courts Act (III of 1873) the appeal from the Munsif's decree lay to the District Court, and not to the High Court. *Ayyalu Naidu* v. *Ramaswami Raja,* Civil Miscellaneous Appeal No. 131 of 1915, and *Chathanath Madhavi* v. *Chathanath Kunhunni Menon, 4 Mad. L. J. 43,* overruled. *Ijjatulla Bhuyan* v. *Chandra Mohan Banerjee, I. L. R. 34 Calc. 954, 958,* dissented from. *Muttammal* v. *Chinnana Goundan, I. L. R. 4 Mad. 220,* referred to. KANNAYYA CHETTI *v.* VENKATANARASAYYA (1916) . . . . **I. L. R. 40 Mad. 1**

APPEAL FROM ACQUITTAL.

See STATUTE, 24 & 25 VICT., C. 104, SS. 1 AND 2 . . **I. L. R. 36 All. 168**

APPEAL FROM ORDER.

See JURISDICTION.
I. L. R. 45 Calc. 926

APPEAL IN FORMA PAUPERIS.

See CIVIL PROCEDURE CODE (1908), O. XLIV, R. 1 . **I. L. R. 40 All. 381**

See PROCEDURE. **I. L. R. 48 Calc. 481**

See SECURITY FOR COSTS.
I. L. R. 42 Bom. 5

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nouncing judgment on holidays, [illegible] application for leave to appeal *in forma* [illegible] accompanying an unstamped [illegible] appeal, filed in time, was rejected [illegible]

APPEAL IN FORMA PAUPERIS—*contd.*

Court, some months afterwards, during the Christmas holidays. On the reopening day, the appellant applied for, and obtained, from the Court three weeks' time to pay the court-fee on the memorandum of appeal. The court-fee was paid within the time allowed. *Held,* (*i*) that the appeal was in time and must be deemed to have been filed as on the original date of presentation; (*ii*) that the dismissal of an application to appeal *in forma pauperis* does not necessarily lead to a dismissal of the memorandum of appeal; and (*iii*) that an Appellate Court has, under s. 149, Civil Procedure Code, power to grant time to pay the requisite court-fee. *Bai Ful* v. *Desai Manorbhai, I. L. R. 22 Bom. 880,* followed. NALLAVADIYA AMMAL *v.* SUBRAMANIA PILLAI (1916).

I. L. R. 40 Mad. 687

APPEAL TO HIGH COURT.

See ANCIENT MONUMENTS PRESERVATION ACT (VII OF 1904), ss. 10, 21.
I. L. R. 42 Bom. 100

See SPECIAL APPEAL.
I. L. R. 38 Bom. 340

APPEAL TO PRIVY COUNCIL.

See APPEAL—

See CIVIL PROCEDURE CODE (1908)—
ss. 47 AND 109 . **3 Pat. L. J. 339**
s. 110 .
s. 115 . . **15 C. W. N. 848**

See LAND ACQUISITION ACT (I OF 1894), s. 54 . . **I. L. R. 37 Bom. 506**

See LEAVE TO APPEAL TO PRIVY COUNCIL.
I. L. R. 38 Bom. 421

See LEGAL PRACTITIONERS' ACT, 1879, s. 13 . . . . **4 Pat. L. J. 423**

See LIMITATION ACT (IX OF 1908), s. 12; SCH. I, ART. 179.
I. L. R. 38 All. 82

See PRIVY COUNCIL APPEALS.

See PROCEDURE.

———— **mode of valuation for**—

See CIVIL PROCEDURE CODE (ACT V OF 1908), s. 110. **I. L. R. 39 Mad. 843**

———— **whether lies from consent decree**—

See CIVIL PROCEDURE CODE, 1908, ss. 109 AND 110 . **5 Pat. L. J. 383**

———— **Consolidation** of—High Court has inherent powers to allow consolidation of cases for reasons other than those mentioned in Civil Procedure Code, 1908, O. XLV, r. 4. CHAUDHRY HARI PRASAD RAI *v.* BRIJ KISHOR DAS
3 Pat. L. J. 446

———— **Land Acquisition Act**—(*I of 1894*)—*Award of the Court—Appeal therefrom incompetent.* The Collector having made his award under the Land Acquisition Act, 1894, as to the value of the land which had been taken for public purposes, two Judges of the Chief Court affirmed it sitting as "the Court" which under the Act means "a principal Civil Court of Original jurisdiction," and also as the High Court, to which an appeal is given from the award of "the Court:" *Held,* that an appeal from the High Court was incompetent. It was not expressly given by the Act and could not be implied. RANGOON BOTATOUNG COMPANY, LD. *v.* THE COLLECTOR OF RANGOON (1912).
L. R. 39 I. A. 197
I. L. R. 40 Calc. 21

———— **Limitation**—*Period between the signing of the judgment and the decree, how far allowed to be calculated in saving limitation in filing Privy Council Appeal—Limitation Act* (*IX of 1908*), *ss. 5, 12, Sch. I, Art. 179.* Where the appellant to His Majesty in Council has failed to apply for a copy of the judgment and decree within the period allowed for filing the appeal he cannot be allowed to say that he was prevented from filing the application in time by reason of the decree not being signed; and he is not entitled to ask the Court under s. 12 of the Limitation Act to deduct the period between the signing of the judgment and the signing of the decree in computing the period of limitation for appeal to His Majesty in Council. *Bechi* v. *Ahsan-ullah Khan, I. L. R. 12 All. 461,* relied on. *Beni Madhab Mitter* v. *Matungini Dassi, I. L. R. 13 Calc. 104,* distinguished. HARISH CHANDRA TEWARY *v.* CHANDPUR COMPANY, LD. (1912).
I. L. R. 39 Calc. 766

———— **Provincial Insolvency Act**—*Right of appeal to Privy Council, on what it rests—Letters Patent of 1865, cl. 39—Civil Procedure Code* (*Act V of 1908*), *ss. 109, 110 and O. XLV, r. 3—Provincial Insolvency Act* (*III of 1907*), *ss. 46, 47.* The right of appeal from the High Court to the Privy Council rests on cl. 39 of the Letters Patent of 1865 read with ss. 109 and 110 and O. XLV, r. 3 of the Civil Procedure Code. The Provincial Insolvency Act does not interfere with any right of appeal to the Privy Council that may otherwise exist. *Bombay-Burmah Trading Corporation, Ltd.* v. *Dorabji Cursetji, Shroff, I. L. R. 27 Bom. 415,* referred to. Where an application for insolvency was dismissed under s. 15 of the Provincial Insolvency Act and an appeal was also dismissed in the High Court under O. XLI, r. 11: *Held,* that an appeal to the Privy Council was competent if the matter was appealable in other ways. CHATRAPAT SINGH DUGAR *v.* KHARAG SINGH LACHMIRAM (1913).
I. L. R. 40 Calc. 685

———— **Sales**—*Orders under ss. 311, 312 of the Civil Procedure Code, 1882, confirming or setting aside sales—Civil Procedure Code, 1882, ss. 588* (*16*), *594, 595, 596—Orders declared final by s. 588—Setting aside sale in execution of decree—Non-representation of minor—Irregularities in proclamation of sale—Civil Procedure Code, 1882, s. 287—Under-estimation of value of property—Rights of mother of minor as his natural guardian.* An appeal lies to His Majesty in Council from an order under ss. 311 and 312 setting aside of confirming a sale, notwithstanding the provisions as to such orders being final contained in s. 588 (*16*) of the Code. The definition of "decree" in s. 2 of the Code is not applicable to Chapter XLV (relating to appeals to His Majesty in Council). For the purposes of that Chapter a definition of "decree" has been therein adopted, which is special, and differs from the meaning it bears elsewhere in the Code. The word decree in that Chapter must be read as being equivalent to "decree, judgment or order." So read final orders may be appealed

APPEAL TO PRIVY COUNCIL—*contd.*

against to His Majesty in Council under s. 595, and that provision cannot be restricted by the provisions of s. 588 (*16*) that such orders passed in appeal "shall be final." In this case, which was

sale aside, it appeared that the judgment-debtor had died pending the proceedings for attachment and sale, leaving a widow and a minor son, and that the whole of the proceedings subsequent to his death were without notice to any one representing the minor; that the sale proclamation had not been properly made, and did not contain the particulars required by s. 287 of the Code of Civil Procedure, 1882, especially those as to the value of the property, which was grossly underestimated; that the property was sold for a very inadequate price; and that there was abundant evidence that the appellant had suffered substantial injury therefrom: *Held* (reversing the decision of the High Court), that there had been no proper representation of the minor, and that the above matters constituted material irregularities in publishing and conducting the sale within the meaning of s. 311 of the Code, which justified the sett

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conclusion. *Held*, that, inasmuch as the interests of the minor with regard to the property were not in fact it was oper to appear (, the proceedings, and his appeal was not rendered incompetent thereby. KRISHNA PERSAD SINGH *v.* MOTI CHAND (1913) . **I. L. R. 40 Calc. 635**

———— Penal Code—(*Act XLV of 1860*), *ss. 302, 109—Conviction when to be set aside on appeal—Violation of principles of natural justice or grave injustice done or disregard of legal process—Suspicion of guilt—Inadmissible and hearsay evidence admitted and used to grave prejudice of accused—Absence of reliable evidence.* When their Lordships are of opinion that by some disregard of the form of legal process, or by some violation of the principles of natural justice or otherwise some substantial and grave injustice has been done, then whatever doubts they may have of the appellant's innocence, or whatever suspicion they may entertain of his guilt or however great may be their reluctance to interfere with, or overrule the decisions of the Indian Courts in criminal matters, their Lordships think they are bound to advise His Majesty that the conviction should not be allowed to stand. *In re Dillet, 12 A. C. 459,* referred to and followed Their Lordships have come to the conclusion that injustice of the kind mentioned above has been done in this case by the admission of a vast body of wholly inadmissible, hearsay and other evidence and the evidence so admitted has been used to the grave prejudice of the accused, and that at the end of the hearing before the Sessions Judge there did not exist any reliable evidence upon which a capital conviction could be safely or justly based. VAITHI NATHA PILLAI *v.* THE KING-EMPEROR (1913) . . **I. L. R. 36 Mad. 501**

———— Review—*Civil Procedure Code (Act V of 1908), O. XLVII—Letters Patent, 1865, cls. 10, 39—Sanction for prosecution—Criminal Procedure Code (Act V of 1898), s. 195.* An order sanctioning prosecution made in the course of a disciplinary proceeding against an attorney under cl. 10 of the Letters Patent of 1865, is not governed by cl. 39 and therefore against such an order no leave to appeal to the Privy Council can be given. Clause 39 of the Letters Patent empowers the High Court to declare the fitness of an appeal to the Privy Council in any matter, not being of criminal jurisdiction, if it is a final judgment, decree, or order of the Court, made on appeal or in the exercise of original jurisdiction. A proceeding under cl. 10 is a disciplinary power which does not fall under any of the jurisdictions specified in the Letters Patent, and thus is not governed by cl. 39. IN THE MATTER OF AN ATTORNEY (1914).

I. L. R. 41 Calc. 734

———— Death of plaintiff—*Appellant—Suit to set aside adoption by widow as invalid and as affecting reversionary interest of plaintiff—Right of contingent reversioners to be joined as plaintiffs in presumptive reversioner's suit—Civil Procedure Code (Act V of 1908), O. I, r 1—Suit to set aside alienation by widow—Revivor of appeal—Substitution of parties on record—Survival of right to sue.* The appella

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and invalid under the Hindu Law, and for a declaration that it did not affect his interest in the ancestral estate of one *V* of whom he claimed to be the nearest reversionary heir. The suit was dismissed by both Courts in India, and the appellant filed an appeal to His Majesty in Council, pending which he died In an application by his grandson as the sole surviving member of his grandfather's family, and also on his death the next reversionary heir to the estate of *V* for an order that his name be substituted on the record for that of the appellant, and that the appeal be revived: *Held*, that the petitioner was entitled to the order asked for under O. I, r. 1 of the Civil Procedure Code (Act V of 1908) which declares the persons who may be jointed in one suit as plaintiffs. A suit to set aside an adoption is brought by the presumptive reversioner in a representative capacity and on behalf of all the reversioners. The act complained of is to their common detriment, just a the relief sought for is for their common benefit Under the above rule the contingent reversioner may be joined as plaintiff in the presumptive reversioner's suit, and, if so, it follows that on his death the "next presumable reversioner" is entitled to continue the suit begun by him. The two kinds of suits which the Indian law permits to be brought in the life-time of a female owner by reversioners for a declaration that an adoption made by her is invalid, or an alienation effected by her is not binding against the inheritance [see articles 118 and 125 of schedule I of the Limitation Act (IX of 1908)], although they differ in character, will be found to be the same in both

whether the contingent reversioner is entitled to continue the suit commenced by the presumptive reversioner. It is the common injury to the reversioners which entitles them to sue, and the [illegible]

APPEAL TO PRIVY COUNCIL—*contd.*

is whether the "right to sue survives" apart from any consideration whether or not the next presumable heir is the "legal representative" of the deceased presumptive reversioner. VENKATANARAYANA PILLAI *v.* SUBBAMMAL (1915).

I. L. R. 38 Mad. 406

———— **Civil Procedure Code (Act V of 1908), s. 109**—*Orders remanding not final orders so as to be appealable to Privy Council—Civil Procedure Code (Act V of 1908), s. 105.* Orders of the High Court reversing on appeal two decisions of the lower Court, and remanding the cases for trial, either on the ground that the lower Court was wrong in dismissing the suit for insufficiency of the pleadings, and the other on the ground that the lower Court was wrong in dismissing the suit on the plea of bar contained in s. 43 of the old Civil Procedure Code, are purely preliminary or interlocutory orders, which do not decide the respective rights of the parties, and are not *final* orders within the meaning of s 109, Civil Procedure Code, so as to be capable of being appealed against to the Privy Council. *Tirunarayana* v. *Gopalasami, I. L. R. 13 Mad. 349,* followed. *Saiyid Muzhar Hossein* v. *Bodha Bibi, I. L. R. 17 All. 112,* applied. *Forbes* v. *Ameeroonissa Begum, 10 Moo. I. A. 340, 359,* referred to. S. 105, Civil Procedure Code, does not apply to appeals to His Majesty in Council. VENKATARANGA ROW *v.* NARASIMHA RAO (1913).

I. L. R. 38 Mad. 509

———— **Letters Patent, Madras**—*cls. 10 and 39—Disciplinary proceedings under clause 10—Right to give leave to appeal to Privy Council.* Disciplinary proceedings under clause 10 of the Letters Patent are not appealable under clause 39; and the High Court has no power to give leave to appeal to the Privy Council from an order passed in the exercise of such jurisdiction. *In re an Attorney, I. L. R. 41 Calc. 734,* followed. *G. S. D.* v. *Government Pleader, I. L. R. 32 Bom. 106,* and *Tetley* v. *Jai Shankar, I. L. R. 1 All. 726,* referred to. *In re S. B. Sarbadhikary, 34 I. A. 41,* explained. RAMCHANDRA AYYAR *v.* THE PRESIDENT OF THE VAKILS' ASSOCIATION, HIGH COURT, MADRAS (1914).

I. L. R. 39 Mad. 128

———— **Appealable value**—*Contract—Breach alleged by both parties—Plaintiff's plea that counter-claim not admissible overruled—Point not raised in plaintiff's appeal against decree in defendant's favour if may be taken by plaintiff in the Privy Council on defendant's appeal against decree in plaintiff's favour in Appeal Court.* Where plaintiff and defendant each alleged breach of contract by the other party, making claims and counter-claims on that basis and the plaintiff's contention that the defendant's counter-claim was not admissible under the Code of Civil Procedure being overruled, decree was passed in defendant's favour, but the plaintiff did not reopen the question in the Appeal Court which reversed the first Court's decree and made a partial decree in favour of the plaintiff: *Held,* on defendant's appeal to the Privy Council, that the question of the admissibility of the counter-claim must be taken to have been decided between the parties in accordance with the contention of the defendant and the plaintiff could not be permitted to raise it for showing that defendant's claim on appeal could not come up to Rs. 10,000 in value. LESLIE & Co. *v.* N. GIRIAH CHETTIAR (1917).

22 C. W. N. 28

———— **Time for valuing of property**—*whether at date of institution of suit, or final decree—Whether plaintiff debarred from proving real value of property—Civil Procedure Code (Act V of 1908), s. 110.* The point of time to be considered (as to the value of the property) under the second paragraph of s. 110 of the Code of Civil Procedure, is the date of the judgment or final order under appeal to the Privy Council. *Allan* v. *Pratt, L. R. 13 A. C. 780, Macfarlane* v. *Leclaire, 15 Moo. P. C. C. 181, Mohideen* v. *Pitchey [1893] A. C. 193, Dalgleish* v. *Damodar Narain, I. L. R. 33 Calc. 1286, Bank of New South Wales* v. *Owston, L. R. 4 A. C. 270, Gooroopersad* v. *Juggut Chunder, 8 Moo. I. A. 166, Moti Chand* v. *Ganga Pershad, I. L. R. 24 All. 174; L. R. 29 I. A. 40,* and *Nand Kishore Singh* v. *Ram Gulam Sahu, I. L. R. 39 Calc. 1037,* referred to. The question whether a tenancy is to be regarded as one at will, or one of a permanent nature, is a matter in which a substantial question of law is involved. *Maharam* v. *Telamuddin, 15 C. L. J. 220,* and *Raja Mukund Deb* v. *Gopi Nath Sahu, 21 C. L. J. 45,* referred to. Where the plaintiff brought his suit in the Munsif's Court, and paid court-fees on the annual rental of Rs. 4-4, he is not debarred from subsequently raising the point that the property in dispute was in fact of the value of Rs. 11,400. SURENDRA NATH ROY *v.* DWARKA NATH CHAKRAVARTI (1916).

I. L. R. 44 Calc. 119

———— **Privy Council leave to appeal**—*Civil Procedure Code (Act V of 1908), ss. 109 (c), 110—Decree for declaration in first Court—Decree on appeal affirming same and awarding damages in addition—Decree, if of affirmance—Cross-suit by applicant in respect of same matter dismissed in both Courts and no substantial question of law involved—Certificate that case otherwise fit for appeal, made to avoid inconsistent decree.* *A* having erected a dam across a river sued *B* for a declaration of his right to put the dam across the river and for damages against the defendant for interfering therewith. *B* on the other hand sued *A* for a declaration that as riparian owner he was entitled to the use of the water of the river unimpeded by the erection of the dam and for damages in consequence of such erection. *A*'s suit was dismissed by both the lower Courts, but *B*'s suit was decreed in the first Court so far only as regards the declaration but the Appellate Court modified it by granting a further decree for damages for Rs. 5,000. *A* applied for leave to appeal to the Privy Council in both suits. The value of *A*'s claim in the Court of first instance as also upon appeal to the Privy Council was over Rs. 10,000 and the latter covered not merely the amount decreed to *B* as damages, but the declaration also: *Held,* that the appellate decree in *B*'s suit was one modifying and not affirming the decree of the Original Court, and *A* was entitled to leave as of right. That, though the decree in *A*'s suit was one of affirmance and no substantial question of law was involved in it, as the two suits were disposed of by the same judgment and involved to a material extent the same questions, in order to avoid incongruous decrees being made in the two suits, leave to appeal should be given in *A*'s suit also under s. 109 (*c*)

APPEAL TO PRIVY COUNCIL—*concld.*

of the Civil Procedure Code. LAGANDEO PROSAD SINGH *v.* D. J REID (1919) **23 C. W. N. 582**

———— **In formâ pauperis appeal whether maintainable**—The High Court cannot entertain applications for leave to appeal to the Privy Council *in formâ pauperis*. *Jagadanand Asram* v. *Rajendra Roy, 17 C. L J. 381,* and *Ramkishen Lal* v. *Manna Kumri, 3 P. L J. 179,* followed. AMBA *v.* SRINIVASA KAMATHI (1918).

I. L. R. 42 Mad. 32

———— **"Final order," meaning of**—*Order finally disposing of rights of parties—Contract, with arbitration clause—Arbitration Act (IX of 1899), s. 19—Civil Procedure Code, 1908, ss. 109, 110—Grant of certificate that value of matter in dispute exceeded Rs. 10,000.* The decision of the Court of Appeal in England as to what is a "final order" is that an order is final if it finally disposes of the rights of the parties. *Salaman* v *Warner, [1891] 1 Q. B. 734,* and *Bozson* v. *Altrincham Urban District Council, [1903] 1 K. B 547,* referred to. In a suit for damages for an alleged breach of contract for the sale of cotton, the contract contained an arbitration clause, and the defendant applied, under section 19 of the Indian Arbitration Act (IX of 1899), for a stay of proceedings, with a view to the issues being referred to arbitration under that section. The Trial Judge granted a stay, but on appeal the Court of the Judicial Commissioner of Sind reversed that order and refused to stay the proceedings. On an application to the Judicial Commissioner for a certificate under section 109 of the Civil Procedure Code, 1908, with a view to appeal to the Privy Council, the Court of the Judicial Commissioner being of opinion that the order refusing a stay was a "final order," granted a certificate, under section 110, that the value of the matter in dispute exceeded Rs. 10,000; and the appeal came to His Majesty in Council. On a preliminary objection by the respondent that the order refusing a stay was in fact not final and that the appeal did not lie: *Held,* that the order under appeal did not finally dispose of the rights of the parties, but left them to be determined by the Courts in the ordinary way. It was therefore not a "final order" within s. 109 of the Civil Pocedure Code, 1908, which relates to appeals to the Privy Council; and appeal was therefore dismissed. RAMCHAND MANJIMAL *v.* GOVERDHANDAS VISHANDAS RATANCHAND (1920).

I. L. R. 47 Calc. 918

proper case an appeal for such an order lies to the Privy Council. RAJ KISHORE DAS *v.* RAM GHULAM SAHU. **6 Pat. L. J. 171**

APPEAL UNDER LETTERS PATENT.

See INSOLVENCY IN PRESIDENCY TOWN.
I. L. R. 34 Mad. 121

———— *Appeal filed beyond time—Application for excuse of delay—Delay not excused by a single Judge—Appeal from the order. —Order amounts to judgment under cl. 15.* Where an appeal has been presented beyond the time allowed by law, and application to excuse the delay refused by a single Judge of the High Court, the order of refusal amounts to a judgment within the meaning of cl. 15 of the Amended Letters Patent, and can be appealed from under that clause. RAMCHANDRA GANGADHAR *v.* MAHADEV MORESHWAR (1917) . **I. L. R. 42 Bom. 260**

APPEARANCE.

See DISMISSAL FOR DEFAULT.
3 Pat. L. J. 355 & 481
5 Pat. L. J. 17

See EX PARTE DECREE.
I. L. R. 41 Calc. 951

See FOREIGN DECREE, EXECUTION OF.
I. L. R. 39 Mad. 24

———— **bond for**—

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), SS. 90, 501 AND 507.
I. L. R. 38 Mad. 1088

APPELLATE COURT.

See BOMBAY LAND REVENUE ACT, 1879, S. 135 . **I. L. R. 45 Bom. 1339**

See CIVIL PROCEDURE CODE, 1882, S. 568 . . **I. L. R. 36 Mad. 477**

See CIVIL PROCEDURE CODE, 1908—
O. XXIII, R. 1 **I. L. R. 37 All. 326**
O. XLI, R. 27 **I. L. R. 38 Bom. 665**
I. L. R. 38 Mad. 414

See COMPENSATION.
I. L. R. 39 Calc. 157

See PRACTICE . **I. L. R. 40 Calc. 371**

See REMAND . **I. L. R. 41 Calc. 108**

See CRIMINAL PROCEDURE CODE, S. 522
I. L. R. 39 Calc. 1050

———— **change of**—

See JURISDICTION
I. L. R. 38 Calc. 639

———— **Direction by to add parties**—

See REMAND . **I. L. R. 37 Calc. 171**

———— **duty of**—

See PRACTICE . **I. L. R. 40 Calc. 376**

———— **Judgment of**—

See JUDGMENT . **I. L. R. 2 Lah. 308**

———— **jurisdiction of**—

See ADDITIONAL EVIDENCE.
I. L. R. 42 Calc. 675

See CIVIL PROCEDURE CODE, 1908, O. XLI, R. 33. . **I. L. R. 43 All. 85**

See CRIMINAL PROCEDURE CODE 1898 S. 106 . **I. L. R. 37 Mad. 153**

———— **leave to withdraw suit by**—

See CIVIL PROCEDURE CODE (ACT V OF 1908), S. 107 (2) AND O. XXIII, R. 1.
I. L. R. 40 Mad. 259
I. L. R. 44 Bom. 598

See JURISDICTION.
I. L. R. 44 Calc. 367

APPELLATE COURT—*contd.*

——— power of—

See Civil Procedure Code, 1908.
O XLI r. r. 22 & 33. I. L. R. 1 Lah. 396
s. 107 . I. L. R. 42 All. 48

See Costs . I. L. R. 42 Calc. 451

See Criminal Procedure Code, s. 195, cl. (6) . . I. L. R. 37 All. 439

See Dacoity . I. L. R. 41 Calc. 35

See Hindu Law—Legal Necessity. I. L. R. 38 Calc. 721

See Remand . I. L. R. 44 Calc. 929

——— power of, to alter finding—

See Rioting . I. L. R. 39 Calc. 896

——— *Power to alter conviction under s. 147, Penal Code, to one under s. 323, when the common object charged was other than to cause hurt—Issue of rule and order for bail by the High Court—Duty of the Magistrate on receiving intimation of the same by telegram from Counsel—Delay in transmitting the bail orders—Criminal Procedure Code (Act V of 1898), s. 423.* The Appellate Court cannot alter a conviction of rioting under s. 147 of the Penal Code, with the common object to ejecting the complainants from their homestead lands, to one under s. 323 thereof. When a rule is issued by the High Court and the proceedings stayed, and, *à fortiori*, when an order for bail is made, the Magistrate, on receiving reliable information thereof, such as a telegram from the counsel in the case, is bound to act on it immediately, though he has not received the High Court's orders at the time. *Ratneswari Pershad* v. *Empress, 2. C. W. N. 498,* followed. All bail orders must be issued from the office of the High Court on the same day they are passed, irrespective of the written order on the record. Lal Mohan Mandal *v.* Kali Kishore Bhuimali (1910) . . . . I. L. R. 38 Calc. 293

——— *Discretion of Appellate Court in the consideration of evidence—Interference with findings of fact of Judge who sees and hears the witnesses, rule as to—Pronouncement of Trial Judge as to credibility of witnesses not to be set aside on a mere calculation of probabilities by Court of Appeal—Relevancy of cross-examination to credit—Trial Judge's opinion on evidence upheld.* Whilst it is doubtless true that on appeal the whole case, including the facts, is within the jurisdiction of the Appellate Court, it is, generally speaking, undesirable to interfere with the findings of fact of the Trial Judge who sees and hears the witnesses, and has the opportunity of noting their demeanour, especially in cases where the issue is simple, and depends on the credit which attaches to one or other of conflicting witnesses. Nor should the pronouncement of the Trial Judge with respect to their credibility be put aside on a mere calculation of probabilities by the Court of Appeal. Bombay Cotton Manufacturing Company *v.* Motilal Shivlal (1915).

I. L. R. 39 Bom. 386

——— *When should reverse trial Judge's estimate of evidence. Per* Richardson, *J.*—A Court of Appeal should in general be slow to differ from the trial Court on a question of fact depending on the credibility and veracity of witnesses. But there are cases where the trial Judge has approached the evidence from a wrong standpoint or has applied to that evidence wrong standards of probability or improbability. If a trial Judge says that a servant speaking for his master ought never to be believed, the appeal Court is not obliged to accept his estimate of the servant's evidence. In such a case the question is not merely a question of the credibility of the particular witness, the witness has not been given a fair chance. There are verdicts or findings which are contrary to the weight of evidence. Hem Chandra Roy *v.* Bepin Behary Saha Sardar . . . . . 24 C. W. N. 800

——— *Powers of—Remand for findings—Entire appeal whether open for consideration at final hearing—Inconsistent material facts in the pleadings—Relief in the alternative whether may be claimed—Alternative cases, how to be pleaded. R,* at a time when he was heavily indebted, gave some of his immoveable properties to his wife by a deed of gift and then was adjudged an insolvent. Subsequently when assets were needed to bring about a composition with the creditors, the wife executed a deed of gift covering most of the said properties in favour of the husband who thereafter died. In a suit by the wife for the cancellation of the second deed of gift alleging it to have been executed under undue influence, the Subordinate Judge gave a decree to the Plaintiff. On appeal, the High Court remanded the case to the lower Court for finding as to whether the first deed was a genuine transaction. The Subordinate Judge found it to be a *benami* transaction: *Held,* that the entire appeal was open for consideration by the High Court at the final disposal of the appeal. *Held,* on the evidence, that the first transaction was fictitious and the second genuine. Official Assignee of Bengal *v.* Bidya Sundari Dasi.

24 C. W. N. 145

——— Power of, to alter decree in favour of non-appealing party. Debendro Narayan Sinha *v.* Narendro Narayan Sinha . . . 24 C. W. N. 110

——— **When will upset Trial Courts decision in collision case**—*General principle that decision must be consistent with case made by parties—Cases where Courts of Appeal should not upset Trial Court's decision unless convinced that it is wrong.* It is absolutely necessary that the determination in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made. The fundamental principle that the plaintiff cannot be permitted to follow a line of attack which the defendant had no opportunity to meet is of special importance in collision cases, where the accident happens very often in an entirely unexpected manner and in an extremely short space of time. *Held,* on a consideration of the circumstances, that this was the class of cases where a Court of Appeal should in order to upset the decision of the Trial Court not merely entertain doubts whether the decision below was right but be convinced that it was wrong. The parties to the cause are entitled, as well on questions of fact as on questions of law, to demand the decision of the Court of Appeal, and that Court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind in deciding a point on which there is a conflict of

APPELLATE COURT—*concld.*

oral testimony that it has neither seen nor heard the witnesses and should consequently make due allowance in this respect. W. J. Rees *v.* John Young . . . . . . 25 C. W. N. 519

APPELLATE DECREE.

See Madras Estates Land Act (I of 1908), s. 192 **I. L. R. 38 Mad. 655**

APPELLATE FORMS.

See Jurisdiction.
I. L. R. 37 Mad. 477

APPELLATE SIDE RULES.

See Criminal Procedure Code (Act V of 1898), ss. 233, 421, 537.
I. L. R. 39 Mad. 527

APPLICATION.

See Sanction for Prosecution.
I. L. R. 41 Calc. 14

See Suit . . **I. L. R. 40 Calc. 428**

———— **for leave to appeal—**

See Leave to Appeal to Privy Council.
I. L. R. 42 Calc. 35

———— **for leave to sue—**

See Pauper Suit.
I. L. R. 46 Calc. 651

———— **to readmit appeal—**

See Civil Procedure Code, 1908, s. 151.
I. L. R. 45 Bom. 648

———— **to set aside Court sale—**

See Civil Procedure Code, s. 115.
I. L. R. 44 Mad. 554

———— **for which no express provision in the Code—**

See Civil Procedure Code, 1908, ss. 141, 151 and O. IX, r. 9.
I. L. R. 1 Lah. 339

———— **to a wrong court—**

See Insolvency, Proceedings in.
I. L. R. 39 Mad. 74

———— **verification of—**

See False Evidence.
I. L. R. 38 Calc. 368

APPOINTMENT.

See Stamp Act, 1899, s. 2, Sch. I, Art. 7.
I. L. R. 35 Bom. 444

———— **power of—**

See Hindu Law—Will.
I. L. R. 42 Calc. 561

See Lessor and Lessee.
I. L. R. 38 Mad. 86

APPORTIONMENT.

See Offerings to Deity.
I. L. R. 38 Calc. 387

See Land Acquisition—Compensation.
I. L. R. 40 Calc. 64

See Lessor and Lessee.
. **I. L. R. 38 Mad. 83**

See Land Acquisition Act (I of 1894), ss. 3 (*b*), 11 and 31 (*1*), (*2*)
I. L. R. 37 Bom. 76

APPORTIONMENT—*contd.*

———— **between zamindar and occupancy ryot—**

See Land Acquisition Act.
I. L. R. 36 Mad. 395

APPORTIONMENT OF COSTS.

See Punitive Police.
I. L. R. 40 Calc. 452

APPORTIONMENT OF RENT.

See Rent, suit for.
I. L. R. 43 Calc. 554

APPRAISEMENT

See Bengal Tenancy Act, 1885, ss. 69 and 75 . . **5 Pat. L. J. 76**

See Sanction for Prosecution.
I. L. R. 45 Calc. 336

———————— *Application for appraisement of produce rent—Order prohibiting removal of paddy till appraisement—Disobedience of order—Applicability of s. 188 of the Penal Code and of Order XXXIX, r. 2, of the Civil Procedure Code—Power to direct prosecution under s. 188 for such disobedience—Bengal Tenancy Act (VIII of 1885), s. 69—Penal Code (Act XLV of 1860), s. 188—Civil Procedure Code (Act V of 1908), s. 111, and O. XXXIX, r. 2—Criminal Procedure Code Act (V of 1898), ss. 195, 476.* The primary purpose of orders under s. 69 of the Bengal Tenancy Act (VIII of 1885) is to prevent breaches of the peace, and the disobedience of a prohibitory order under cl. (3) falls within the provisions of s. 188 of the Penal Code. The Subdivisional Magistrate is competent, as Collector, to act in such cases under s. 195 or s. 476 of the Criminal Procedure Code, and direct a prosecution for such disobedience. Lakshan Bor *v.* Nara Narain Hazrah, 1921). . . **I. L. R. 48 Calc. 1086**

APPRENTICE.

———— **unpaid if public servant—**

See Penal Code, s. 21.
15 C. W. N. 319

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See Contract Act (IX of 1872), ss. 59—61 . . **I. L. R. 37 All. 649**

See Vendor and Sub-Vendor.
I. L. R. 38 Calc. 127

———— **of payment—**

See Contract Act, ss. 59, 61.
15 C. W. N. 443

ss. 60 and 61 . **1 Pat. L. J. 474**

See Contract . **I. L. R. 48 Calc. 831**

See Sale for Arrears of [illegible].
I. L. R. 38 Calc. 537

See Re-sale . **I. L. R. 38 Calc. 538**

———— *to principal or* [illegible]—

See Payment by [illegible].
I. L. R. 48 Calc. 839

———————— [illegible] *is due which carries* [illegible] *and* [illegible] *received without a definite* [illegible] *on either side the money is first* [illegible] *to the payment of interest.* [illegible] Row *v.* Raja [illegible]

APPROVER.

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), s. 337, CL. (3).
I. L. R. 37 Bom. 146
19 C. W. N. 179, 295

See MUNICIPAL ELECTION.
I. L. R. 46 Calc. 119

See PARDON . I. L. R. 42 Calc. 856

———— whether Sessions Judge can order commitment of—to Sessions for trial—

See CRIMINAL PROCEDURE CODE, 1898. s. 339 I. L. R. 1 Lah. 218

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See PRE-EMPTION . 4 Pat. L. J. 420

ARABLE LAND.

See ASSESSMENT, EXEMPTION FROM.
I. L. R. 37 Calc. 697

———— no presumption of possession for title—

See POSSESSION 1 Pat. L. J. 146

ARAINS.

———— Ludhiana—Succession by daughter to self-acquired property—

See CUSTOM (SUCCESSION).
I. L. R. 1 Lah. 365

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See APPEAL . I. L. R. 45 Calc. 502

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See CIVIL PROCEDURE CODE, 1882, ss. 13, 525 AND 526.
I. L. R. 32 All. 484

See CIVIL PROCEDURE CODE (1908)—

s. 9, SCH. II.
I. L. R. 37 Bom. 442

ss. 89 AND 154, SCH. II.
I. L. R. 43 All. 108

ss. 99, 107 . I. L. R. 33 All. 645

s. 104 . . I. L. R. 38 All. 380
I. L. R. 42 All. 185

s. 105 . . I. L. R. 37 All 456

ss. 115, 151 I. L. R. 38 Bom. 638

ss. 115, SCH. II, PARA. 16.
I. L. R. 45 Bom. 832

O. XVII, R. 2 AND SCH. II.
I. L. R. 45 Bom. 1181

O. XXI, R. 3, O. XXIV, R. 4.
5 Pat. L. J. 672

O. XXXII, R. 7, SCH. II, (20), CL. (20)

O. XXXIII, R. 3., SCH. II.
I. L. R. 38 Bom. 687

See COMPANIES ACT (VI OF 1882), ss. 67, 96 AND 123 . I. L. R. 37 All. 273

See CRIMINAL PROCEDURE CODE, s. 145
3 Pat. L. J. 248
25 C. W. N. 719

See DEKKHAN AGRICULTURISTS' RELIEF ACT, s. 15B I. L. R. 35 Bom. 310

See BOMBAY. DISTRICT MUNICIPAL ACT (BOMBAY) s. 160.
I. L. R. 36 Bom. 47

ARBITRATION—*contd.*

See JURISDICTION OF CIVIL COURT.
I. L. R. 34 Bom. 13

See MAHOMEDAN LAW—HUSBAND AND WIFE . . I. L. R. 33 All. 683

See PARTNERSHIP. 14 C. W. N. 1106
18 C. W. N. 1025

See SPECIFIC RELIEF ACT (I OF 1877), s. 21 . . I. L. R. 33 All. 315

See STAMP-DUTY I. L. R. 39 Calc. 669

See UNITED PROVINCES LAND REVENUE ACT (III OF 1901), ss. 203 TO 207.
I. L. R. 39 All. 711

———— Award—not signed by all arbitrators at the same time and place —

See CIVIL PROCEDURE CODE, 1908, SCH. II, PARAS. 15 AND 16 1 P. L. J. 306

———— Decree in accordance with award—no appeal—

See CIVIL PROCEDURE CODE, 1908, SCH. II, PAR. 15. . . 1 Pat. L. J. 306

———— misconduct in—

See CIVIL PROCEDURE CODE (1908), SCH. II, CL. 11. I. L. R. 38 Bom. 60

I. REFERENCE TO ARBITRATION.

1. ———— *Letters Patent, 1865, cl. 15—Order of Judge refusing to decide whether arbitrators are going beyond scope of their authority—"Judgment"—Appeal—Construction of submission to arbitration—Insurance against fire—Liability of Company for further loss.* An order of a Judge dismissing a petition to revoke a submission to arbitration on the ground that the arbitrators are going beyond the scope of the reference is a "judgment" within the meaning of clause 15 of the Letters Patent and as such is appealable. Such an order compels a party to submit to the jurisdiction of arbitrators though he complains that no such jurisdiction exists. It decides a question of right, namely, whether or not he is by the terms of reference to arbitration deprived of his right at common law to have the dispute decided in the ordinary way in a Court of law. It goes to jurisdiction and is not passed as an exercise of discretion. The loss or damage by fire which is insured against in a policy of insurance cannot include loss caused by deterioration of the property insured consequent on neglect (if any) of the Insurance Companies to take care of it if they have taken possession. A loss so caused is not an inevitable or direct consequence of the mischief by fire. It is only where mischief arises from fire (in fire insurance cases) and from perils of the sea (in marine insurance cases) and the natural and almost inevitable consequence of that mischief is to create further mischievous results that underwriters become responsible for the further mischief so incurred. *Montoya* v. *London Assurance Company, 6 Ex. 451, 458,* referred to. The fact that a petition by nineteen different Companies was not signed by all the nineteen Companies, and that the appeal from the order of the Judge dismissing the petition was by but one of the nineteen Companies, and the other Companies were not parties to it, would have required serious consideration if the Court had to revoke the submission to arbitration but when the order which the Court passes is only an intimation to

APPROVER.

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), s. 337, CL. (3).
I. L. R. 37 Bom. 146
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O. XXXII, R. 7, SCH. II, (20), CL. (20)
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See SPECIFIC RELIEF ACT (I OF 1877), s. 21 . . I. L. R. 33 All. 315

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I. REFERENCE TO ARBITRATION.

1. ———————— *Letters Patent, 1865, cl: 15—Order of Judge refusing to decide whether arbitrators are going beyond scope of their authority—" Judgment "—Appeal—Construction of submission to arbitration—Insurance against fire—Liability of Company for further loss.* An order of a Judge dismissing a petition to revoke a submission to arbitration on the ground that the arbitrators are going beyond the scope of the reference is a "judgment" within the meaning of clause 15 of the Letters Patent and as such is appealable. Such an order compels a party to submit to the jurisdiction of arbitrators though he complains that no such jurisdiction exists. It decides a question of right, namely, whether or not he is by the terms of reference to arbitration deprived of his right at common law to have the dispute decided in the ordinary way in a Court of law. It goes to jurisdiction and is not passed as an exercise of discretion. The loss or damage by fire which is insured against in a policy of insurance cannot include loss caused by deterioration of the property insured consequent on neglect (if any) of the Insurance Companies to take care of it if they have taken possession. A loss so caused is not an inevitable or direct consequence of the mischief by fire. It is only where mischief arises from fire (in fire insurance cases) and from perils of the sea (in marine insurance cases) and the natural and almost inevitable consequence of that mischief is to create further mischievous results that underwriters become responsible for the further mischief so incurred. *Montoya* v. *London Assurance Company, 6 Ex. 451, 458,* referred to. The fact that a petition by nineteen different Companies was not signed by all the nineteen Companies, and that the appeal from the order of the Judge dismissing the petition was by but one of the nineteen Companies, and the other Companies were not parties to it, would have required serious consideration if the Court had to revoke the submission to arbitration but when the order which the Court passes is only an intimation to

ARBITRATION—*contd.*

1. REFERENCE TO ARBITRATION—*contd.*

the arbitrators of its opinion on the question of their jurisdiction it is immaterial whether all or some of the Companies are formally parties to the proceedings in appeal. As to the objection that even so far as the petition is by one Company, it is signed by one of its officers without any authorisation as required by law, the defect is a mere irregularity which can be cured, if necessary, by the Company putting in a power of attorney showing the authority given to a signatory. ATLAS ASSURANCE COMPANY, LIMITED *v.* AHMEDBHOY HABIBHOY (1908) . **I. L. R. 34 Bom. 1**

2. ——————— *Arbitration Act (I*[illegible]
— [illegible]
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tion clause in a contract was made to stay proceedings and refer matter in dispute to arbitration, and it was contended by the opposite party that for the original contract a new agreement had been substituted, inasmuch as both parties had agreed to an extension of time: *Held*, that a mere extension of time did not operate so as to rescind the original contract, but where a new term for the inspection of the goods before delivery had also been introduced, the original contract was replaced by the new agreement, to which the arbitration clause in the original contract could not apply, and the application must, therefore, be refused. In this case the acceptance of part-delivery out of time also indicated a new agreement between the parties LACHMINARAIN BHAREODAN *v.* HOARE, MILLER & Co (1913).
I. L. R. 41 Calc. 35

3. ——————— *Jurisdiction—Power of Court to supersede an arbitration proceeding under its orders before submission of award—Revision—Civil Procedure Code (1908), s. 115, sch. II, para. 15. Semble* · That the intention of the second schedule to the Code of Civil Procedure is that when once a reference to arbitartion has been made under the orders of the Court that reference should only be superseded for one of the reasons given in the schedule itself, and that allegations of corruption against the arbitrator should be dealt with under para 15, after the award has been received. Even if a Civil Court possesses inherent jurisdiction to supersede an arbitration proceeding under its orders, such jurisdiction should be cautiously and sparingly exercised, and an application invoking such jurisdiction should at least suggest grounds for supposing that the applicant will suffer some irreparable injury if prompt action is not taken. The High Court can interfere in revision when the inherent jurisdiction of a Court is exercised wrongly and with material irregularity. *Atlas Assurance Company* v. *Ahmedbhoy Habibhoy, I. L. R. 34 Bom. 1,* not followed. CHATARBHUJ *v.* RAGHUBAR DAYAL (1914) . . **I. L. R. 36 All. 354**

4. ——————— *Bengal Chamber of Commerce, arbitration by—Arbitration Act (IX of 1899), s. 14—Arbitration clause in a contract—Reference to an association—Rules of an Association for the conduct of arbitration proceedings referred to it, whether imported into the contract and binding on the parties thereto.* Where a contract contains an arbitration clause by which it is agreed that any dispute arising out of the contract shall be referred

ARBITRATION—*contd.*

1. REFERENCE TO ARBITRATION—*contd.*

to the arbitration of the Bengal Chamber of Commerce, the rules of the Association are imported into the contract and are binding on the parties. *Per* JENKINS, *C. J.* The decision in *Ganges Manufacturing Company, Ld.* v. *Indra Chand, I. L. R. 33 Calc 1169,* was binding on the learned Judge (of the Court of first instance) and should have been followed by him. CHAITRAM RAMBILAS *v* BRIDHICHAND KESRICHAND (1915).
I. L. R. 42 Calc. 1140

5. ——————— *Arbitrator refusing to act—Compromise of suit and decree in terms of compromise—Compromise stating matters in dispute and nominating arbitrators to decide them—Power of Court on arbitrator refusing to act—Civil Procedure Code, 1882, ss 375, 506, 508, 510—Court determining matters referred to arbitration.* S. 510 of the Code of Civil Procedure (Act XIV of 1882), which provides that "if an arbitrator refuses to act the Court may in its discretion appoint a new arbitrator....or make an order superseding the arbitration, and in such case shall proceed with the suit," is applicable even if the person appointed arbitrator has not accepted office before refusing to act. When he has been nominated by the parties his refusal to act is signified as clearly by his refusal to accept nomination as by any other course he could pursue; and any other construction would defeat the provisions of the Act. *Pugardin Ravutan* v. *Moidinsa Ravutan, I. L. R. 6 Mad. 414,* and *Bepin Behari Chowdhry* v. *Annoda Prosad Mullick, I L. R. 18 Calc. 324,* disapproved of In the present case the parties had compromised the suit, and had stated in the instrument of compromise the matters in dispute, and had each nominated therein a person as arbitrator to decide them. A decree in terms of the compromise was made by the Court and the matters were referred to the arbitrators named for their decision. One of them refused to act, and the party whose nominee he was declined to make another nomination. The District Judge in the exercise of his discretion under s. 510 of the Code thereupon himself determined the matters submitted to the arbitrators, thus practically superseding the arbitration. His decision was confirmed by the Court of the Judicial Commissioner. *Held* (reversing the decision of the Courts in India), that the District Judge should, under s. 510, have appointed a new arbitrator, which he had power to do notwithstanding that the arbitrator refusing to act had not first consented to do so, and he was not precluded from making such appointment by the fact that the party whose arbitrator had refused to act declined to assist the Court by suggesting another name. The Court could not "proceed with the suit," which had been put an end to by the compromise, the decree on which was final; and it had no power except by consent of parties to itself decide the matters referred to arbitration. That rights, having been remitted to one tribunal, had been decided by another, was a fatal objection to the procedure adopted. SADIQ HUSAIN *v.* NAZIR BEGAM (1911).
I. L. R. 33 All. 743

6. ——————— *Reference by parties to a suit—Application to stay proceedings—Arbitration Act (IX of 1899), s. 19.* S. 19 of the Arbitration Act only applies where there has been a

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1. REFERENCE TO ARBITRATION—*contd.*

an order for stay under s. 19 of the Indian Arbitration Act can be invoked, it must be established beyond all doubt that there is a valid submission. Where there is a submission, before an order can be made, the Court must be satisfied that there is no sufficient reason why the matters should not be referred in accordance with the submission and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration. This is manifestly a matter largely in the discretion of the Court, which, no doubt, must—be judicially exercised. But when the discretion has been exercised by the primary Court, a strong case must be made out to justify the interference of a Court of Appeal. *Freeman & Sons* v. *Chester*

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12. ———————— *Subsequent institution of suit—Position of arbitrators—Award—Stay of suit—Arbitration Act (IX of 1899), s. 19—Appeal—Discretionary order.* One of the parties to an Arbitration to the Bengal Chamber of Commerce under a clause in a contract, instituted a suit, pending the arbitration, on the same contract. After the institution of the suit an award was made but was set aside. Subsequently the defendant made an application for stay of the suit: *Held*, that the institution of the suit, though it made the arbitrators *functii officio*, could not affect the validity of the reference, which, when made, was in exact conformity with the agreement between the parties; and that portion of the arbitration proceedings which took place before the institution of the suit was not affected. *Held*, further, that when the suit is stayed, it would be competent to the Chamber of Commerce to substitute and appoint new arbitrators and the Court so re-constituted will be then able to proceed with the arbitration. *Doleman & Sons* v.

S. 526, Hodgson v. *Railway Passengers' Assurance Company, 9 Q. B. D. 188, Fox* v. *Railway Passengers' Assurance Company, 54 L. J. Q. B. 505, Denton* v. *Legge, 72 L. T. 626, Clough* v. *Country Livestock Insurance Association, 85 L. J. K. B. 1185*, referred to. JOKIRAM KAYA *v.* GHANESHAM DAS KEDARNATH (1920) **I. L. R. 47 Calc. 849**

13. ———————— *Reference without order of Court—Matters left undecided.* Where parties to a reference submit their differences to arbitration they cannot be allowed to revoke without any good cause. . **4 Pat. L. J. 394**

14. ———————— *Arbitration Act (III of 1899), s. 11—Reference to arbitration under contract—Contract denied or impeached—Interlocutory injunction restraining arbitration proceedings when may or may not be granted—Injunction if should be granted when proceedings would be nullity, although vexatious—The procedure to be followed by party denying contract.* When a con-

by the party denying the contract, indicated. The Court would not grant an interlocutory injunction restraining proceedings which are null and futile, although the same may be vexatious. SARDAR MULL JESSRAJ *v.* AGAR CHAND MEHTA & Co. (1919) . . . **23 C. W. N. 811**

15. ———————— *Civil Procedure Code (Act V of 1908), s. 11—Arbitration—Arbitrator not resigning or declining to act but arbitration not proceeding owing to practical difficulties—Court's jurisdiction to withdraw arbitration.* A suit was referred to arbitration but subsequently, although the arbitrator did not resign or decline to act, practical difficulties arose so as to prevent arbitration proceedings being taken in hand by the arbitrator and the Court cancelled the arbitration and ordered the suit to be proceeded with: *Held*, that s. 18, Sch. II, C. P. C., was not applicable to the circumstances of the present case. That the question whether the arbitration agreement and the proceedings had thereunder constituted a bar to the prosecution of the suit was to be decided in the suit itself on an issue raised for the purpose and the order of the lower Court should be vacated. SASHIMUKHI DEBI *v.* PARBATI SHANKAR ROY (1918) . **23 C. W. N. 293**

16. ———————— *Held* that a reference entitled arbiters to go into a question of forgery. ALIBHOY MAHOMED *v.* BAIJNATH KALOORAM. . . . . . . **24 C. W. N. 567**

17. ———————— It is open to parties to an appeal even after the matter has been referred to the High Court to settle matters by arbitration. RAM LAL *v.* DEO RAJ.

I. L. R. 44 All. 44

2. AWARD.

See AWARD.

1. ———————— *Award—Dispute,*

was no dispute between the parties, he having admitted his liability under the contract, though wanted a set-off against claims arising out of other transactions: *Held*, that the existence of a dispute was an essential condition for the arbitrator's jurisdiction; but the dispute might be either in the acknowledgment of the debt or as regards the mode and time of satisfying it. *Chandanmull* v. *Donald Campbell & Co. (1916)*, unreported, referred to. *Gordhan Das Benarasilal* v. *B. Nathmul & Co. (1918)*, unreported, and *Narendra Nath Basu* v. *Ram Narain Jailal (1917)*, unreported, distinguished: *Held*, also, that the arbitrators had jurisdiction to make an award as to interest. *Produce Brokers Co., Ld.* v. *Olympia Oil and Cable Co., Ld. [1916] A. C. 311*, referred to. UTTAM CHAND SALIGRAM *v.* JEWA MAMOOJI (1919) . . . . **I. L. R. 46 Calc. 534**

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1. REFERENCE TO ARBITRATION—*contd.*

submission to arbitration before the commencement of legal proceedings. *Ramjidas Poddar* v. *Howse, I. L. R. 35 Calc. 199*, followed. PERURI SURYANARAYAN & Co. *v.* GULLAPUDI CHINNA (1909) . . . . I. L. R. 34 Bom. 372

7. ——————— *Reference made out of Court—Refusal of arbitrator to continue the arbitration—Subsequent application to court to file the agreement to refer.* During the pendency of a suit the parties thereto agreed to refer the matters in dispute to arbitration, and the suit was withdrawn. Before the arbitrator had made his award, one of the parties to the reference died, and the arbitrator, believing himself to have no power to make the representatives of the deceased parties to the proceedings, refused to act any longer as arbitrator. *Held,* that in these circumstances, inasmuch as the arbitrator could not be compelled to act if he did not wish to do so, the Court could not accept an application to file the agreement of reference. AHMAD NUR KHAN *v.* ABDUR RAHMAN KHAN . I. L. R. 42 All. 191

8. ——————— *Civil Procedure Code (Act V of 1908), paras. 17 and 18 of the Second Schedule, and s. 104, sub-cl. (c)—Agreement to refer to arbitration—Breach of the agreement—Specific Relief Act (I of 1877), s. 21—Right of the party aggrieved—Application to stay suit—Appeal against order staying or refusing to stay suit.* Where for the determination of the controversy between the parties two competent tribunals are available, the Court and the arbitrators; and the plaintiff chooses the latter but *in fact* has recourse to the former; it is not open to his opponent to enforce pecific performance of the contract or to plead the contract as a conclusive bar to the suit, but he may apply to the Court to stay the suit in the exercise of its judicial discretion so as to enable either of the parties to obtain a reference to the arbitrators. When the Court is apprised that the suit has been instituted in contravention of an arbitration agreement, the Court has a discretion to stay the suit. The burden lies on the plaintiff to show that some sufficient reason exists why the matter should not be referred to arbitration and not on the defendant to show that no such reason exists; it is the *primâ facie* duty of the Court to act upon the agreement between the parties. *Lyon* v. *Johnson, 40 Ch. D. 579, Clegg* v. *Clegg, 44 Ch. D. 200, Hodgson* v. *Railway Passenger Assurance Co., 9 Q. B. D. 188, Willesford* v. *Watson, L. R. Ch. App. 473, Sheo Babu* v. *Udit Narayan, 12 A. L. J. 757*, and *Appavu* v. *Seeni, I. L. R. 41 Mad. 115*, approved. DINABANDHU JANA *v.* D. JANA . . . I. L. R. 46 Calc. 1041

9. ——————— *Application to stay legal proceedings commenced by party to submission—Order refusing to stay—" Step in the proceedings"—Appeal, right of—Judgment—Arbitration Act (IX of 1899), s. 19—Letters Patent, 1865, cl. 12.* The decision of the Court that the applicant was not in the circumstances of the case competent to avail himself of the benefit of the section by reason of steps taken by him in the proceedings in the suit determined that the controversy between the parties must be decided by the Court and not by arbitration and was a judgment within the meaning of the Letters Patent and as such was appealable under clause 15. *The Justices of the Peace for Calcutta* v. *The Oriental Gas Company, Limited, 8 B. L. R. 433, Hadjee Ismail Hadjee Hubbeb* v. *Hadjee Mahomed Hadjee Joosub, 13 B. L. R. 91, Mathura Sundari Dasi* v. *Haran Chandra Saha, I. L. R. 43 Calc. 857*, and *Budha Lall* v. *Challu Gope, I. L. R. 44 Calc. 804*, referred to. S. 19 of the Arbitration Act contemplates the institution of a suit, notwithstanding an agreement to refer to arbitration, and authorises the defendant in such suit to apply for stay before he has filed his written statement or taken any other step in the suit. Such an application for stay does not constitute taking a step in the proceedings within the meaning of s. 19 so as to operate as a bar. An appeal by the defendant, on certain grounds taken in his memorandum of appeal, against an order restraining him from proceeding with the arbitration does not constitute the taking of "a step in the proceedings" within the meaning of section 19. Such grounds, in order to constitute a bar, must be taken in the suit. *Adams* v. *Catley, 66 L. T. R. 687*, and *Ives & Barker* v. *Willans, [1894] 2 Ch. 478*, referred to. JOYLALL & Co. *v.* GOPIRAM BHOTICA (1920). I. L. R. 47 Calc. 611

10. ——————— *Clause in indent—Suit by seller against buyer on bills of exchange accepted by the latter—Whether buyer can ask foe stay of proceedings under Civil Procedure Coder Act V of 1908, Sch. II, r. 18—Negotiable Insturments Act, XXVI of 1881, ss. 32, 43.* The defendant Firm placed an indent for the purchase of 10 bales of white shirting of certain specified qualities with the plaintiff Firm. The plaintiff, after shipment of goods, drew two bills of exchange against the defendant at 60 days' sight. These were presented by the National Bank of India, Delhi, to the defendant who accepted them; but subsequently refused to pay them upon maturity. The plaintiff accordingly sued the defendant and based his claim upon the accepted but unpaid bills, and in the alteranative sued for the price of the goods and certain expenses. The indent contained a clause that if any claim or dispute arose in connection with the contract, it should be referred to arbitration; and the defendant relying on this clause applied for stay of the proceedings under r. 18, Sch II, of the Code of Civil Procedure. The indent also contained a clause to the effect that the bills drawn by the sellers on the buyers must be accepted and paid at maturity "notwithstanding any objection the latter may have regarding or on account of any variation whatever in the terms of the indent, such objection to be settled by arbitration." *Held,* that having regard to s. 32 of the Negotiable Instruments Act and the terms of the indent the suit on the bills of exchange was competent and defendant could not claim a stay of proceedings under r. 18, Sch. II, of the Code of Civil Procedure. *Ganesh Das Ishar Das* v. *Durga Dat Jagan Nath (I. L. R., 2 Lah. 19)*, distinguished. RADHA BEHARI DIWAN SINGH *v.* ALEXANDER.
I. L. R. 2 Lah. 335

11. ——————— *Motion to stay proceedings—Submission—Jurisdiction of Court—Discretion of primary Court—Interference of Court of appeal—Arbitration Act (IX of 1899), s. 19.* Before the jurisdiction of the Court to make

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1. REFERENCE TO ARBITRATION—*contd.*

an order for stay under s. 19 of the Indian Arbitration Act can be invoked, it must be established beyond all doubt that there is a valid submission. Where there is a submission, before an order can be made, the Court must be satisfied that there is no sufficient reason why the matters should not be referred in accordance with the submission and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration. This is manifestly a matter largely in the discretion of the Court, which, no doubt, must—be judicially exercised. But when the discretion has been exercised by the primary Court, a strong case must be made out to justify the interference of a Court of Appeal. *Freeman & Sons* v. *Chester Rural District Council,* [*1911*] *1 K. B. 783, Vawdrey* v. *Simpson,* [*1896*] *1 Ch. 166* and *Barnes* v. *Youngs,* [*1898*] *1 Ch. 414,* referred to. KEDARNATH BABULAL *v.* SUMPATRAM DOOGUR (1920).

I. L. R. 47 Calc. 1020

12. ———————— *Subsequent institution of suit—Position of arbitrators—Award—Stay of suit—Arbitration Act (IX of 1899), s. 19—Appeal—Discretionary order.* One of the parties to an Arbitration to the Bengal Chamber of Commerce under a clause in a contract, instituted a suit, pending the arbitration, on the same contract. After the institution of the suit an award [illegible]

made, was in exact conformity with the agreement between the parties; and that portion of the [illegible] before [illegible] *Held,* [illegible] would be competent to the Chamber of Commerce to substitute and appoint new arbitrators and the Court so re-constituted will be then able to proceed with the arbitration. *Doleman & Sons* v. *Ossett Corporation* [*1912*] *3 K. B. 257, Dinabandhu Jana* v. *Durga Prasad Jana, I. L. R. 46 Calc. 1041, Freeman* v. *Chester Rural District Council,* [*1911*] *1 K. B. 783, Vaudrey* v. *Simpson,* [*1896*] *1 Ch. 166, Barnes* v. *Youngs,* [*1898*] *1 Ch. 414, Willesford* v. *Watson, L. R. 8 Ch. App. 473, Law* v. *Garrett, 8 Ch. D. 26, Lyon* v. *Johnson, 40 Ch. D. 579, Clegg* v. *Clegg, 44 Ch. D. 200, Kitchen* v. *Turnbull, 25 W. R. (Eng.) 253, Mason* v. *Haddon, 6 C. B. N. S. 526, Hodgson* v. *Railway Passengers' Assurance Company, 9 Q. B. D. 188, Fox* v. *Railway Passengers' Assurance Company, 54 L. J. Q. B. 505, Denton* v. *Legge, 72 L. T. 626, Clough* v. *Country Livestock Insurance Association, 85 L. J. K. B. 1185,* referred to. JOKIRAM KAYA *v.* GHANESHAM DAS KEDARNATH (1920) **I. L. R. 47 Calc. 849**

13. ———————— *Reference without order of Court—Matters left undecided.* Where parties to a reference submit their differences to arbitration they cannot be allowed to revoke without any good cause. . **4 Pat. L. J. 394**

14. ———————— *Arbitration Act (III of 1899), s. 11—Reference to arbitration under contract—Contract denied or impeached—Interlocutory injunction restraining arbitration proceedings when may or may not be granted—Injunction if should be granted when proceedings would be nullity, although vexatious—The procedure to be followed by party denying contract.* When a contract is impeached on equitable grounds the Court may restrain arbitration proceedings commenced under it by issuing an injunction; but no such injunction should be granted when the contract is merely denied. The proper course to be followed by the party denying the contract, indicated. The Court would not grant an interlocutory injunction restraining proceedings which are null and futile, although the same may be vexatious. SARDAR MULL JESSRAJ *v.* AGAR CHAND MEHTA & Co. (1919) . . . . **23 C. W. N. 811**

15. ———————— *Civil Procedure Code (Act V of 1908), s. 11—Arbitration—Arbitrator not resigning or declining to act but arbitration not proceeding owing to practical difficulties—Court's jurisdiction to withdraw arbitration.* A suit was referred to arbitration but subsequently, although the arbitrator did not resign or decline to act, practical difficulties arose so as to prevent arbitration proceedings being taken in hand by the arbitrator and the Court cancelled the arbitration and ordered the suit to be proceeded with: *Held,* that s. 18, Sch. II, C. P. C., was not applicable to the circumstances of the present case. That the question whether the arbitration agreement and the proceedings had thereunder constituted a bar to the prosecution of the suit was to be decided in the suit itself on an issue raised for the purpose and the order of the lower Court should be vacated. SASHIMUKHI DEBI *v.* PARBATI SHANKAR ROY (1918) . **23 C. W. N. 293**

16. ———————— *Held* that a reference entitled arbiters to go into a question of forgery. ALIBHOY MAHOMED *v.* BAIJNATH KALOORAM. . . . . . **24 C. W. N. 567**

17. ———————— It is open to parties to an appeal even after the matter has been referred to the High Court to settle matters by arbitration. RAM LAL *v.* DEO RAJ.

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2. AWARD.

See AWARD.

1. ———————— *Award—Dispute, existence of—What is a dispute—Award as to interest.* [illegible] on the ground [illegible] letion as there [illegible] ties, he having admitted his liability under the contract, though wanted a set-off against claims arising out of other transactions: *Held,* that the existence of a dispute was an essential condition for the arbitrator's jurisdiction; but the dispute might be either in the acknowledgment of the debt or as regards the mode and time of satisfying it. *Chandanmull* v. *Donald Campbell & Co.* (*1916*), unreported, referred to. *Gordhan Das Benarsilal* v. *B. Nathmul & Co.* (*1918*), unreported, and *Narendra Nath Basu* v. *Ram Narain Jailal* (*1917*), unreported, distinguished: *Held,* also, that the arbitrators had jurisdiction to make an award as to interest. *Produce Brokers Co., Ld.* v. *Olympia Oil and Cable Co., Ld.* [*1916*] *A. C. 314,* referred to. UTTAM CHAND SALIGRAM *v.* JEWA MAMOOJI (1919) . . . . **I. L. R. 46 Calc. 534**

ARBITRATION—*contd.*

2. AWARD—*contd.*

2. ———————— *Award—Time for making award not specified by Court—Application to set aside award—Extension of time for making award—Jurisdiction of Court—Arbitration Act (IX of 1899), ss. 12, 13—Civil Procedure Code (Act V of 1908), O. XLI, r. 33.* The Bengal Chamber of Commerce made an award in an arbitration proceeding in favour of one of the parties to a certain contract. On the application of the aggrieved party the award was remitted on the 22nd July, 1918, by the High Court to the Bengal Chamber of Commerce for further consideration. The Chamber, thereupon, made a fresh award on the 24th October, 1918, again in favour of the same party as at first. Both parties obtained separate Rules from the High Court—the one aggrieved by the award, to show cause why the said award should not be set aside as having been made in contravention of s. 13 (2) of the Indian Arbitration Act; the other, in whose favour the award was made, to show cause why the time for making the award should not be enlarged till the 31st October, 1918: *Held,* that without deciding whether there was an appeal against the order refusing to extend the time, an appeal lay against the order setting aside the award and the Court, in considering that appeal, must consider the learned Judge's reasons for his decision, and if the Court came to the conclusion that the learned Judge's reasons were ill-founded and that he was wrong in holding that he had no power to extend the time and so make the award effective, this Court would have the power to make an order for extension of time under O. XLI, r. 33 of the Civil Procedure Code: *Held,* also, that this case depended upon the provisions of the Indian Arbitration Act and under s. 12 of that Act the Court had power to extend the time though the time for making the award had expired and even though the award had been in fact made. *Shib Krishna Dawn & Co.* v. *Satish Chunder Dutt, I. L. R. 38 Calc. 552,* and *Raja Har Narain Singh* v. *Chaudhrain Bhagwant Kuar, I. L. R. 13 All. 300,* distinguished. *Knowles & Sons, Ld.* v. *Bolton Corporation, [1900] 2 Q. B. 253,* approved. TEJPAL JAMUNADAS *v.* B. NATH MULL & Co. (1919) . **I. L. R. 46 Calc. 1059**

3. ———————— *Award, filing of—Time requisite for obtaining copy of a decree—"Submission to the Court" and "Filing in Court"—Exclusion of time between submission and filing—Limitation Act (IX of 1908), Sch. I, Art. 158—Civil Procedure Code (Act V of 1908), Sch. II s. 10—Rules and Orders of the High Court, Chapter XXIII, r. 1.* The arbitrator in a certain suit made his award on the 22nd August, 1917, and on the 3rd September, 1917, the plaintiff through his attorneys applied for a copy of the award. On the 10th October, 1917, the award was received by the Registrar. Owing to the Long Vacation, the Court was closed on that date and remained so till the 17th November, 1917. On the 22nd November, 1917, the defendants filed the award in Court. In pursuance of the above mentioned application, dated the 3rd September, 1917, a copy of the award was supplied to the plaintiff on the 27th November 1917. On the 6th December, 1917, the plaintiff applied to the Court for an order to set aside the award and the award was subsequently set aside. On appeal: *Held,* that it was not shown that it was the duty of the respondent to file the award and that he could and should have done so between the 17th and 22nd November: *Held,* also, that r. 1, Chapter XXIII (of the Rules and Orders of the High Court) did not appear to be in conformity with the provisions of r. 10, Sch. II of the Code of Civil Procedure: *Held,* also, that if time commenced to run either on the 10th October, or 22nd November, it did not appear that the application (of the 6th December) was barred. *Per* CURIAM: It seems that the word "Court" in Art. 118 of the Limitation Act means "Court" and not its Registrar and "submission" means "submission to the Court" which again, according to Sch. II, s. 10 of the Civil Procedure Code, is to be done by filing the award in Court. *Nabin Kally Dabee* v. *Ambica Churn Bannerjee, 5 C. W. N. 813,* doubted. SOVA CHAND BHUTORIA *v.* HURRY BUX DEORA (1918). **I. L. R. 46 Calc. 721**

4. ———————— *Agreement to refer to—Award made ex parte—Notice of arbitrator's intention to proceed ex parte—Non-appearance of party—Validity of award—Filing of award—Arbitration Act (IX of 1899), ss. 11 (2) and 15 (1).* Sub-section (2) of section 11 read with sub-section (1) of section 15 shows that the moment an award has been filed in Court by the arbitrator, it becomes enforceable as if it were a decree of the Court even before the arbitrator has notified to the parties the fact of its filing under section 11 (2). *Baijnath* v. *Ahmed Musaji Saleji, I. L. R. 40 Calc. 219,* referred to. There is no statutory rule that if an arbitrator proceeds *ex-parte* without giving notice of his intention to proceed in that manner, the award made by him must be set aside. Where an arbitrator has proceeded *ex parte* without giving notice of his intention to proceed in that manner, the true test is, has the complainant who takes exception to the validity of the award been in fact prejudiced by the omission of the arbitrator to serve the special notice on him. If it is established that, notwithstanding such warning, he would not have appeared before the arbitrator, he has really no grievance, and cannot invite the Court to set aside the award on account of the alleged defect in procedure. *Gladwin* v. *Chilcote, 9 Dowl. 550, Waller* v. *King, 9 Mod. 63, Wood* v. *Leake, 12 Ves. 412. In the matter of Hall* v. *Anderson, 8 Dowl. 326,* and *Scott* v. *Van Sandau, 6 Q. B. 237,* referred to. UDAICHAND PANNA LALL *v.* DEBIBUX JEWANRAM (1921). **I. L. R. 47 Calc. 951**

5. ———————— *Agreement to refer to—Reference made before suit—Award given during the pendency of the suit—No application for stay of suit—Validity of award—Jurisdiction of the Court.* Where an action has been commenced upon a contract which contains a provision for reference to arbitration, even if a reference to arbitration has been made before the commencement of the suit, the award is of no effect, unless the suit has been stayed pending the arbitration. If the Court has refused to stay an action, or if the defendant has abstained from asking it to do so, the Court has seisin of the dispute, and it is by its decision, and by its decision alone, that the rights of the parties are settled. *Doleman & Sons* v. *Ossett Corporation, [1912] 3 K. B 257, Dinabandhu Jana* v. *Durgaprasad Jana, I. L. R. 46 Calc. 1041; 29 C. L. J. 399; 23 C. W. N. 716,* and *Appavu*

ARBITRATION—*contd.*

2. AWARD—*contd.*

Rowther v. Seeni Rowther, I. L. R. 41 Mad. 115, referred to. RAM PROSAD SURAJMULL *v.* MOHAN LALL LACHMINARAIN (1920)

I. L. R. 47 Calc. 752

6. ——————— *Notice—Award against a firm—Arbitration Act (IX of 1899)—Jurisdiction.* It is the duty of the arbitrators, before they proceed *ex parte*, to see that the parties had sufficient notice to enable them to appear and put their case before the arbitrators. An award against a firm is not bad. The provisions which relate to the execution of a decree against a firm apply in the case of an award which has been filed, award being made against the firm. *Hardwary Mull v. Ahmed Musaji Saleji, 13 C. W. N. 63,* dissented from. LOUIS DREYFUS & CO. *v.* PURUSOTTAM DAS NARAIN DAS (1919).

I. L. R. 47 Calc. 29

7. ——————— *Dispute—Award upon an award—Jurisdiction of the arbitrator—Award determining the default and default price—Subsequent award determining the amount due, whether valid.* Disputes having arisen under contract for the sale of jute (in the terms of the London Jute Association, Contract Form No. 3, 1913) these were referred to arbitration under the arbitration clause contained therein. The arbitrator determined the default of the sellers and fixed the default prices. The sellers refused to pay the amount found due on the basis of the award. Thereupon the matter was again referred to arbitration and the second award fixed the amount due from the sellers: *Held,* the second award was valid. CHANDANMULL *v.* DONALD CAMPBELL & CO. (1916) . 23 C. W. N. 707

8. ——————— *Staying proceedings before arbitrator—Injunction—Wagering contract—Jurisdiction—Equitable grounds.* The plaintiff (appellant) and the defendants (respondents) entered into several contracts for the purchase of hessian cloth which were followed by settlement contracts. Disputes having arisen under the contracts the defendants referred the same to arbitration under the arbitration clause contained therein. Plaintiff brought the suit for, amongst other things, a declaration that the contracts were of a gambling and wagering nature and so void under the Contract Act and applied for a stay of the arbitration proceedings: *Held,* under the circumstances, the plaintiff had no equity which would entitle him to ask for an injunction restraining the arbitration proceedings. BAIJNATH *v.* MANSUKHRAI PANNALAL (1918).

I. L. R. 37 Mad. 258

9. ——————— *Award—Decree following award—Appeal, right of—Civil Procedure Code (Act V of 1908), second Schedule, rules 15 and 16—Letters Patent of 1865, cl. 15.* Where an application to set aside an award on the ground that it was made after the expiration of the period allowed by the Court has been refused, and subsequently judgment has been given according to the award, no appeal lies from such judgment on the same ground whether under the Letters Patent or under the Code of Civil Procedure. SHIB KRISTO DAW & CO. *v.* SATISH CHANDRA DUTT (1912) . . . . I. L. R. 39 Calc. 822

10. ——————— *Bengal Chamber of Commerce, arbitration by—Award, filing of—Arbitration Act (IX of 1899), ss. 11, 13, 14 and 15—Rules under the Indian Arbitration Act, 1899—Submission—Bought and sold notes—Stamp duty—Form of order—Costs.* Where bought and sold notes relating to a contract for the sale of goods contained an arbitration clause, and were stamped with one anna stamp: *Held,* that, on the materials before the Court, the practice of stamping such documents with one-anna stamp was not invalid, and the proceedings in arbitration were effectual. Under the provisions of the Indian Arbitration Act, an award is to be filed not on the application of the parties, but at the instance of the arbitrator; and when the award has been filed, the result is not that there is a suit in which a decree has been passed, but that there is an award which is enforceable as a decree. *Tribhuwandas Kalliandas Gajjar v. Jivanchand, I. L. R. 35 Bom. 196,* and *In re Bankruptcy Notice [1907], 1 K. B. 478,* referred to. Such of the rules of Court framed under the Indian Arbitration Act as are not in accordance with the Act are inoperative, and no effect can be given to them. BAIJNATH *v.* AHMED MUSAJI SALEJI (1912).

I. L. R. 40 Calc. 210

11. ——————— *Award—Party to the suit not made party to the submission to arbitration—Party so omitted not a necessary party to the suit. Held,* that an arbitration and an award made in the course of a suit would not be rendered invalid by the mere fact that a party whose name was in the record, but who was not a necessary party to the suit, was not made a party to the arbitration proceedings. SABTA PRASAD *v.* DHARAM KIRTI SARAN (1912) . I. L. R. 35 All. 107

12. ——————— *Legal misconduct of arbitrator—Award set aside—Remission of award—Arbitration Act (IX of 1899), ss. 13 and 14.* Where an award was set aside on the grounds of the legal (as distinguished from moral) misconduct of the arbitrator, and the indefiniteness of the award: *Held,* that the Court had the power to remit the award to the arbitrator for reconsideration. *Re Arbitration between Montgomery Jones & Co. and Liebenthal & Co., 78 L. T. 406,* and *Anning v. Hartley, 27 L. J. Exch. 145,* followed. *In re Keighley Maxsted & Co. and Bryan Durant & Co., [1893] 1 Q. B. 405,* referred to. CROMPTON & CO., LD. AND MOHAN LAL, *Re Arbitration between* (1913) . . . I. L. R. 41 Calc. 313

13. ——————— *Award—Misconduct of arbitrator—Application to file award and for a decree in accordance with it—Civil Procedure Code, 1908, sch. II, paras. 14, 15, 20—Arbitrator witness—Evidence of arbitrator where charges of dishonesty and partiality are made—Portion of award invalid, but separable—Arbitrator's notes. Held,* in this case, that an award which had been made in arbitration proceedings without the intervention of the Court, and in respect of which an application was made under paragraph 20 of the Civil Procedure Code, 1908, that the award should be filed in Court and a decree passed in accordance therewith, was not invalidated by anything done by the arbitrator in the arbitration proceedings, his acts not amounting to corruption or misconduct within the meaning of paragraph 15 of schedule II of the Code. If irregularities can be proved which would amount to no proper hearing of the matters in dispute there would be misconduct sufficient

ARBITRATION—*contd.*

2. AWARD—*contd.*

to vitiate the award without any imputation on the honesty or impartiality of the arbitrator, but no such irregularities were established by the appellant, on whom the onus of proving them lay. An arbitrator selected by the parties comes within the general obligation of being bound to give evidence, and where a charge of dishonesty or partiality is made, any relevant evidence he can give is without doubt properly admissible. It is, however, necessary to take care that evidence admitted as relevant on a charge of dishonesty or partiality is not used for a different purpose, namely, to scrutinize the decision of the arbitrator on matters within his jurisdiction and in which his decision is final. The limitations applicable to the evidence of an arbitrator as witness in a legal proceeding to enforce his award are stated in the case of *Buccleugh* v. *Metropolitan Board of Works, L. R. 5 H. L. 418,* but where charges of dishonesty are made the Court would reject no evidence of an arbitrator which could be of assistance in informing itself whether such charges were established. In this case the charges of dishonesty and partiality were *held* to have entirely failed. Where part of an award was found to be invalid as being in excess of the arbitrator's powers and it was separable from the rest, the remainder of the award being good was maintained. It is generally desirable that an arbitrator should make and retain for subsequent use, if necessary, notes of the proceedings before him; but there is no warrant for holding that in the absence of such notes an award should be set aside at the instance of one of the parties, who must be held to have known the general course of procedure, and who did not make any protest until after the making of the award with the terms of which she was not satisfied. AMIR BEGAM *v.* BADR-UD-DIN HUSAIN (1914) . . **I. L. R. 36 All. 336**

14. ———————— *Private award, if compulsorily registrable—Deed of partition and award, distinction between.* The word "award" in cl. (*b*) of s. 17 of the Indian Registration Act is not restricted to awards filed in Court and a private award is not compulsorily registrable. But a document which purports to be an award may amount to something more than an award; if the parties to the reference affix their signatures to the award in token of their acceptance of the decision of the arbitrators, the award may thereupon become a deed of partition and may as such become compulsorily registrable. TEK LAL SINGH *v.* SRIPATI CHOWDHURI (1913).

18 C. W .N. 475

15. ———————— *Award filed out of time—Agreement of parties not to dispute award—Civil Procedure Code (Act V of 1908), s. 148, sch. II, cls. 8, 15 and O. XXIII, r. 3.* Where the Court granted time till the 28th of February 1914 for "filing" the award, and the arbitrators made an award in the Hindi language on that date and also signed the same, but instead of filing it on that day had the same rendered into English and filed the same on the 2nd of March following: *Held,* that the word "filing" in the Court's orders was a clerical error and since the Hindi award was "made" within the time fixed by Court, it did not matter that the award rendered into English was prepared and filed two days later; the requirements of the law had been satisfied

ARBITRATION—*contd.*

2. AWARD—*contd.*

and the award was a good one. *Quære:* Whether *Shib Krishna* v. *Satish Chandra, I. L. R. 38 Calc. 522,* had been rightly decided having regard to the change in the law made by the wordings of s. 148 and sch. II, cls. 8 and 15 of the Code of Civil Procedure (Act V of 1908), which would seem to give the Court discretion to extend time even after the original time for making the award has expired. Whether having regard to the above changes in the law the decision of the Privy Council in *Rajah Har Narain* v. *Bhagwunt, I. L. R. 13 All. 300 ; s. c. L. R. 18 I. A. 55,* is of the same binding authority as before. *Semble:* As in this case while the award was being rendered into English the parties entered into a written agreement not to dispute the award, the plaintiff was precluded from questioning the award. The agreement might be regarded as amounting to a fresh submission and acceptance of the English award as an award binding on all the parties to the agreement, or it might be regarded as a lawful adjustment of the suit which might be enforced as a decree under O. XXIII, r. 3. SRI LAL *v.* ARJUN DAS (1914) . . **18 C. W. N. 1325**

16. ———————— *Award—Private award by arbitrators—Order of Court to file award—Appeal if competent after decree drawn up—Decree if subsists after order set aside—Capacity to refer—Executors if may refer question of construction of will—Arbitrators if may be empowered to alter will—Award so altered if valid—One party to reference if may object to legality—Estoppel—Award affecting persons not parties to reference, if enforcible.* The right to appeal against an order directing to be filed an award made by arbitrators without the intervention of the Court is not lost as soon as a decree is drawn up in accordance with the judgment pronounced on the basis of the award. The order does not merge in the decree. *It is* competent to a Court setting aside an order directing an award to be filed to declare that the decree based on the award has been vacated because the order on which it was based has been cancelled: *Kshetra Nath* v. *Ushabala, 18 C. W. N. 381.* Submission to arbitration is a contract; and the parties thereto must not only have a general legal capacity to contract, but they must also have such power in relation to the subject-matter of the submission as will enable them to carry into effect any order which could be legally and properly laid upon them by the award. Where a party's capacity to contract is restricted, the power of making a submission is in the same manner and to the same extent limited. An executor cannot make a reference to arbitration with the avowed purpose that the terms of the will may be modified and arrangements made for the management and distribution of the estate contrary to the directions of the testator. Questions of law including questions as to construction of a will may be validly referred to arbitrators. But they cannot add to, or alter, the terms of the will. A Court will not enforce an award to the detriment of persons not parties to a reference may take exception to the legality of the award. Submission to an arbitrator does not operate as a waiver of an extrinsic objection that the award is illegal because based on an illegal act or subject-matter. SOUDAMANI GHOSH *v.* GOPAL CHANDRA GHOSE (1914) . . . . **19 C. W. N. 948**

ARBITRATION—*contd.*

2. AWARD—*contd.*

17. ———————— *Order of reference authorising arbitrator to extend time made by consent of parties—Arbitrator extending time after the period originally fixed by Court had expired—Arbitrator after such time, if functus officio—Award submitted within such extended time, if must be set aside—* [illegible]

[illegible]

arbitrator under Sch II of the Code of Civil Procedure (Act V of 1908) fixed three months time for the submission of the award to Court and also empowered the arbitrator to extend the time for such submission from time to time by endorsement in the office copy of the order: *Held*, that when the Court had made the order by consent of the parties, there could be no objection to the functions of the Court with regard to the enlargement of time being delegated to the arbitrator if the parties so desired. But the arbitrator can only extend the time in such cases, before the time originally fixed for making the award had expired. If he did not do so, he was by reason of effusion of time *functus officio* and had no further jurisdiction in the matter. As in this case the arbitrator had extended the time after the three months originally fixed by Court had expired, the award must be set aside, although it was submitted within the time so extended by the arbitrator. If an arbitrator, unknown to one of the parties, has a personal interest in the subject-matter of the award, it would be improper that he should act as arbitrator. If, however, his interest is insignificant and unknown to himself so that it is impossible that it could have influenced his award in any way, the Court would not be disposed to set aside the award. CO-OPERATIVE HINDUSTHAN BANK, LD. *v.* BHOLA NATH BOROOAH (1914).

19 C. W. N. 165

18. ———————— *Private award in* [illegible] *point,* [illegible] *from* [illegible] *pass* [illegible] *narily but operative as contract.* Where the matter has been referred to arbitration without the intervention of the Court, under para. 21 of Sch. II of the Civil Procedure Code, the Court cannot proceed to file the award when any of the grounds mentioned in paras. 14 and 15 of the same Schedule is proved. Even when the portion of the award open to exception is separable from the rest, the Court cannot proceed to give effect to the portion which is valid in a summary proceeding under para. 21 of Sch. II of the Civil Procedure Code. The mere fact, however, that the award cannot be filed will not affect the validity of this portion of the award as a contract between the parties. A mistake of law on a legal point specifically referred to the arbitrators would not vitiate their award, but a decision on a question of succession not referred to them and patently contrary to law cannot be accepted by the Court. DINABANDHU JANA *v.* CHINTAMONI JANA (1914) . . . 19 C. W. N. 476

19. ———————— *Application of parties to Court for reference of suit to arbitration—Omission of guardian of minor party to sign application—Civil Procedure Code, 1908, ss. 111, 115, 121 and O. XLVII (1): Sch. II, ss. 1, 15 and 16 (1) (2)—Ground for setting aside award—Reversal by Officiating Chief Commissioner on review or order of Chief Commissioner refusing revision—Finality of decree of award. Held,* that Sch. II, s. 1 of the Civil Procedure Code, 1908, which provides that where the parties to a suit have agreed that the matter in difference shall be referred to arbitration they may apply in writing to the Court for an order of reference, does not require that the writing should necessarily be signed; and where the guardian *ad litem* of a minor party was in Court and assented to the application, the omission of the guardian to sign it was immaterial. *Held*, also (allowing the appeal) that in this case there was no defect on the face of the award, nor any misconduct of the arbitrators or umpire, nor any concealment of facts by any of the parties which would bring the case within those provisions in Sch. II which might enable the Court to set it aside; and that the officiating Chief Commissioner was, therefore, not justified in interfering in review with an order made by the Chief Commissioner refusing revision. UMED SINGH *v.* SETH SOBHAG MAL DHADRA (1915).

I. L. R. 43 Calc. 290

20. ———————— *Arbitration and award by Bengal Chamber of Commerce—Jurisdiction—Broker liable as principal—Custom and usage of Calcutta Gunny Market—S. 92, Prov. (5), Indian Evidence Act (I of 1872)—Evidence of custom or usage incidental to contract—Indian Contract Act (IX of 1872), ss. 230, and 236.* An award made by the Bengal Chamber of Commerce was sought to be set aside by defendants in Court on the [illegible] juris- [illegible] the [illegible] tract [illegible] ..kers although in fact the plaintiffs had no principals and the contract was not therefore enforceable. [illegible] custom in [illegible] and manu- [illegible] ..s are held liable upon such contracts and such custom being well-known to the Chamber, the award was properly made and valid. The Court allowed evidence of custom and usage to be given and held that there was such a custom and that the defendants knew of it. *Patiram Banerjee v. Kankinara Co., Ld., 19 C. W. N. 623,* distinguished. *Held,* that ss. 230 and 236 of the Indian Contract Act, the former of which deals with undisclosed principal and the latter with falsely contracting as agent, were not applicable to this case. *Held,* [illegible]

[illegible] followed. That the usage being known to the Chamber the matter was within their jurisdiction and the award was properly made. JOY LAL & CO. *v.* MONMOTHA NATH MULLIK (1916).

20 C. W. N. 335

21. ———————— *Arbitration giving evidence before colleagues, if improper—Application for reference to arbitration containing provision as to opinion of majority prevailing but reference to arbitration silent on the point—Award of majority, if bad, on this ground—*

ARBITRATION—*contd.*

2. AWARD—*contd.*

Award made in the absence of party who withdrew from the arbitration, if bad. A suit was referred to the arbitration of three persons, two of whom were witnesses in the case, one for the plaintiff and one for the defendant. The former of these gave evidence before the two other arbitrators at the instance of the plaintiff. Thereafter the defendant objected to the arbitration going on and intimated that he would not call any evidence before the arbitrators who concluded the arbitration and gave an award, two for the plaintiffs and one for the defendant. The application for reference to arbitration contained a provision that the opinion of the majority would prevail but the reference to arbitration did not provide for it. *Held,* that there was no impropriety on the part of the arbitrator who gave evidence before his colleagues. That the application for reference to arbitration having provided that the opinion of the majority would prevail, the award was not bad because of the absence of any such provision in the reference to arbitration. That the defendant having refused to call any evidence before the arbitrators, they were justified in continuing the hearing and giving their award in the absence of the defendant. HARIDAS DUTTA *v.* BAIDYANATH GHOSH (1917).

21 C. W. N. 895

22. ——————— *Civil Procedure Code (Act V of 1908), Sch. II, cls. 1 and 15—Award, when all parties interested did not agree to order of reference, validity of—Partners, some not appearing in a suit against members of the firm, if interested parties—Court, jurisdiction of, to set aside award when reference invalid—Award, if evidence of a separate agreement between the parties who agreed to the reference.* Where in a suit against the members of a partnership an order was made under cl. 1, Sch. II of the Civil Procedure Code, 1908, referring all the matters in difference between the parties to the suit to arbitration with the consent of all the parties, with the exception of two of the defendants who did not enter appearance, and an award was made thereon :—*Held,* that the order of reference was invalid not only against the parties who did not agree to the order of reference, but also against those who had agreed and the award must be set aside. SETH DOOLY CHAND *v.* MAMUJI MUSAJI (1916).

21 C. W. N. 387

23. ——————— *Suit, after submission, with respect to the subject-matter of the reference—Award given during the pendency of the suit, validity of—Power of Court to stay trial—Civil Procedure Code (Act V of 1908), Sch. II, s. 18.* A private reference to arbitration of a subject of a dispute does not prevent either party from filing a suit in a Court of law in respect of the same matter. The arbitrators thereupon become *functus officio* and any award by them is without jurisdiction. Where there is a previous agreement to refer a matter to arbitration and a suit is filed in respect of the subject-matter of that agreement, the Court has a discretion under s. 18 of the second schedule to the Civil Procedure Code to stay the re-trial of the suit. *Doleman & Sons* v. *Ossett Corporation, [1912] 3. K. B. 257,* and *Sheo Babu* v. *Udit Narain, 12 A. L. J. 757,* followed. *Rama Chandra Pal* v. *Krishna Lal Pal, 17 C. W. N. 351,* explained. Indian legislation on the subject historically reviewed. APPAVU *v.* SEENI (1917).

I. L. R. 41 Mad. 115

24. ——————— *Arbitration award proceedings provided for in contract—Stay of arbitration pending decision of suit, when party filed suit impeaching contract on equitable grounds.* In a contract of purchase and sale of goods between plaintiff and defendants there was the usual clause for referring disputes arising out of the contract to arbitration. Plaintiff repudiated the contract on the ground that the broker in the transaction did not disclose that he was a partner of the defendants' firm. Defendants maintained that plaintiff was still bound to take delivery of goods and on plaintiff's refusal referred to dispute to arbitrators mentioned in the contract. The plaintiff filed a suit for a declaration that the contract was not binding on him and obtained an order from Court restraining defendants from proceeding with the arbitration : *Held,* that as this was a case where the plaintiff was impeaching the contract on the ground of fraud, the Court below was right in staying the arbitration proceedings until the suit impeaching the contract was decided. GAJANAND MASKARA *v.* SHAIKH TALEB JALALUDDIN (1917). **22 C. W. N. 535**

25. ——————— *Limitation Act (IX of 1908), Sch. I, article 178—Publication of award, date of—Power of Court to remit matter left undecided.* The publication of a draft award is not publication of the award within the meaning of article 178 of Sch. 1 to the Limitation Act, 1908. Paragraph 21 of the 2nd Schedule to the Code of Civil Procedure, 1908, confers no power on the court to remit an award for the determination of matters left undecided by the arbitrators. If, therefore, any of the matters referred to in paragraph 14 are proved, the court has no option but to refuse to file the award. KUNJ LAL *v.* BANWARI LAL . **4 Pat. L. J. 394**

26. ——————— *Delay in filing award, effect of, when parties acquiesce in delay—Code of Civil Procedure (Act V of 1908), s. 115, Sch. II, rr. 8 and 15—Revision.* R. 15 of Sch. II of the Code of Civil Procedure, 1908, does not render an award made out of time *per se* a nullity but merely voidable, within ten days from the time when the award is filed, and it is binding upon the parties, if no action taken before them. Under r. 8 of Sch. II the Court may extend the time after the award has in fact been made even if made out of time and the parties can also agree to an extension and such agreement can be implied. In such a case the parties would be estopped from impeaching the award upon the ground that it was made out of time. If a Court, *bonâ fide* in the exercise of its jurisdiction, decides some matter of fact or law erroneously, even though such decision may involve a determination as to the regularity or irregularity of some method of procedure, this determination would not necessarily render applicable the provisions of s. 115. PATTO KUMARI *v.* UPENDRA NATH GHOSH.

4 Pat. L. J. 265

27. ——————— *Award—Non-appearance of plaintiff before arbitrator—Default—Arbitrator, power of, as Civil Court, if can deal under O. IX, r. 8, Civil Procedure Code (Act V of 1908),*

ARBITRATION—*contd.*

2. AWARD—*contd.*

Sch. II, cls. 14 and 16—Application under O. IX, r. 9—Award leaving matters referred to arbitration undetermined—S. 115—Jurisdiction of High Court—Remission of award to arbitrator by High Court in revisional jurisdiction—Procedure. A suit was referred to arbitration by a Court on the application of the parties. The terms of the reference provided that the arbitrator should determine the case after hearing the evidence and if one of the parties failed to appear before him he should have power to decide the case *ex parte.* On the date fixed for trial the defendant appeared with his witnesses but the plaintiff did not appear. The arbitrator did not take the evidence on behalf of the defendant but made an award by dismissing

an opinion that the ground alleged might be a good ground under O. IX, r. 9, Civil Procedure Code. Plaintiff thereafter applied to the Munsif under O. IX, r. 9, Civil Procedure Code, and then the Munsif set aside the award of the arbitrator and restored the suit to his file. The defendant moved the High Court against that order. *Held,* that the arbitrator had no power to deal with the matter under the provisions of O. IX, r. 8 of the Civil Procedure Code, and that he ought to have heard the evidence on behalf of the defendant; that the award made by the arbitrator should be held to have left undetermined the matters referred to him for arbitration, and that under the provisions of cl. 14 of the Second Schedule of the Code of Civil Procedure the Munsif ought to have remitted the award or the matters referred to arbitration

make in this case was that, the order of the Munsif being set aside, the High Court in the exercise of its revisional jurisdiction under s. 115, Civil Procedure Code, should remit the award in the matter referred to arbitration for reconsideration by the same arbitrator on the ground that the award had left undetermined the matters referred to arbitration. GOPAL CHANDRA DAS *v.* KHETRA MOHAN BHUNJA (1918). . **22 C. W. N. 933**

28. ——————— *Private reference —Award—Reference by some of the disputing parties, effect of—Civil Procedure Code (Act XIV of*

the defendants were parties: *Held,* that the award was binding as between those plaintiffs and the defendants who were parties to the reference. JADUNATH CHOWDHURY *v.* KAILAS CHANDRA BHATTACHARJEE (1909) . . **I. L. R. 37 Calc. 63**

29. ——————— *Award made after the death of one of the parties—Nunc pro tunc, whether applicable to the award—Submission to arbitration, revocation of, by the death of a party.* Where a submission to arbitration has been made a rule of Court, the death of one of the parties does not work a revocation. Where an agreement to refer having been filed in Court, the Court appointed an arbitrator who, after finishing his enquiries ... pleaders of the ... rd, and then ... at under the ... of the party did not make the award void and the doctrine of *nunc pro tunc* was applicable as in the case of judgment of Court. HARA KRISHNA MITRA *v.* RAM GOPAL MITRA (1910) . **14 C. W. N. 759**

30. ——————— *Award—Bonâ fide mistake of law committed by arbitrator—Minor party receiving a smaller share—Award binding upon the minor.* The arbitrators to whom a dispute was referred by parties, one of whom was a minor, took *bonâ fide* an erroneous view of law and ordered an unequal division of the property in dispute, awarding the smaller share to the minor. The lower Court set aside the award on the grounds that the arbitrators had taken an erroneous view of the law, and that as the minor had received a smaller share under the award it was not to his benefit, and therefore not binding upon him: *Held,* that the award was valid and binding upon the minor. The validity of the award must be determined according to the circumstances as they existed at its date; and not by what transpired some years after it had been passed by the

31. ——————— *Setting aside an award—Invalid contract—Award attacked on ground going to the root of the dispute—Whether a suit is maintainable to set aside the award—Indian Arbitration Act (IX of 1899), s. 14—Consent of counsel when free and fair—Civil Procedure Code*

the investigation and determination of the controversy according to the procedure prescribed by law. *Quære:* Whether a suit lies to set aside an award on a ground covered by s. 14 of the Indian Arbitration Act, 1899. The plaintiff (Appellant) filed this suit for a declaration that a contract for the sale of piece goods, alleged to have been entered into between him and the defendants, was invalid as the parties were not *ad idem* on a fundamental point and that an award made by the Bengal Chamber of Commerce in favour of the defendant for breach of the said contract was also void and inoperative. The plaintiff also charged the defendants with fraud inasmuch as they claimed damage for refusal to accept goods which they never offered and were indeed not in their possession. The plaintiff applied for an interlocutory injunction during the pendency of the suit restraining the defendants from executing the award. F... J., *held* that the suit did not lie and declined to entertain the hearing of the application

ARBITRATION—*contd.*

2. AWARD—*contd.*

on the basis that it be treated both as the trial of the action and as a petition under the Indian Arbitration Act." Being under the impression that Counsel on both sides consented to this course being adopted he heard the matter on affidavits and dismissed both the motion and the action with costs: *Held,* that under the circumstances, there was no consent by Counsel on both sides to the course adopted by RANKIN, *J.*: *Held*, further, that under the circumstances, even though there was consent on the part of the plaintiff's Counsel, it was not free and fair consent but constrained and involuntary acquiescence in a mode of trial which the Court had decided to adopt and so was not binding on the plaintiff: *Held, also,* that the suit was maintainable under s. 9 of the Civil Procedure Code, 1908, and there was nothing in the Indian Arbitration Act, 1899, which barred the suit. *Sardarmull* v. *Agarchand, 23 C. W. N. 811 (1919), Turnbull* v. *Brown, 5 B. N C. 384; 29 R. R. 275 (1826)* and *Worrall* v. *Deane, 2 Dowl. 261 (1883),* referred to. RADHA KISSEN KHETTRY *v.* LUKHMI CHAND JHAWAR.

24 C. W. N. 454

32. ——————— *Award made after expiry of time fixed by Court—Application for enlargement of time to file award—Civil Procedure Code (Act XIV of 1882), s. 521 (c); (Act V of 1908), s. 148, Sch. II, s. 15 (c).* An award was made after the time allowed by the Court had expired. On an application for enlarging the timing for making such award: *Held,* that the Court had no power to grant the application. *Raja Har Narain Singh* v. *Chaudhrain Bhagwant Kuar, I. L. R. 13 All. 300,* followed. *Held,* further, that where the time for making an award had expired, and no award had been made, s. 148 of the Civil Procedure Code (Act V of 1908) gives the Court power to extend the time for the making of the award, notwithstanding that it had expired at the time of the application; but that section does not enable the Court to extend the time for the doing of a particular act, when in truth and in fact the act had already been done. SHIB KRISHNA DAWN & CO. *v.* SATISH CHUNDER DUTT (1911).

L. R. 38 Calc. 522

33. ——————— *Agreement to abide by decision of majority, whether binding on Parties—whether appeal lies from order recording an award.* When the parties have agreed to abide by the decision of the majority of the arbitrators an award cannot be set aside on the ground that it has not been signed by all the arbitrators. No appeal lies from an order to record an award made by arbitrators. RAM NARAIN RAM *v.* PATI RAM TEWARI.

1 Pat. L. J. 90

34. ——————— An award made out of time is merely voidable under Sch. II, Cl. 15 of the Civil Procedure Code. PUTTO KUMARI *v.* UPENDRA NATH GHOSH.

4 Pat. L. J. 265

35. ——————— Some parties referred their disputes to certain *arbitrators* stipulating in the agreement that they and their heirs and representatives would be bound by the award. After the hearing of argument was closed it was brought to the notice of the arbitrators that two out of the parties had died and the arbitrators allowed time for filing fresh *achalnamahs* and for appointment of a guardian for the minor heir of one of the deceased parties, but nothing was done. The arbitrators then made their award and on application being made to Court, the Court made the order for filing the award: *Held,* that having regard to the subject-matter of the arbitartion and the terms of the reference the legal representatives of the deceased persons would be bound by the reference to arbitration made by their predecessors. BINAYAKDAS ACHARYA CHOWDHRY *v.* SASI BHUSAN CHOWDHRY

26 C. W. N. 804

36. ——————— *Successive awards —Contract for sale of goods deliverable by instalments —Arbitrators whether functus officio after one award—Dispute with regard to different instalments—Res judicata—Civil Procedure Code (Act V of 1908), s. 11, O. 11, r. 2, whether applicable to arbitration proceedings.* There may be as many awards as there are disputes arising out of the contract. The submission is not exhausted by reason of the mere fact that one award, final and complete in itself, has issued from it. *Chandanmul* v. *Donald Campbell & Co., 23 C. W. N. 707n (1916),* referred to. By a contract, dated 1st December 1917, the plaintiff agreed to sell to the defendant three lacs of yards of hessian, delivery to be given and taken in December 1917, each month's delivery to be treated as a distinct and separate contract. The contract also provided that any dispute whatever arising on or out of this contract shall be referred to the arbitration of the Bengal Chamber of Commerce. One-half lac yards of hessian were delivered to and accepted by the defendant, the balance was divided into three lots. Disputes having arisen with regard to the delivery of these three lots they were referred to the arbitration of the Bengal Chamber of Commerce by the defendant on 28th February, 9th April and 21st June, respectively all the disputes having arisen previous to 28th February. An award was made with respect to the first lot in favour of the defendant. The plaintiff filed this suit to stay the arbitration upon the second on grounds that arbitrators were *functus officio* having given one award: *Held,* they were not. BALMUKUND RINA *v.* GOPIRAM BHOTIKA

24 C. W. N. 775

36-A. ——————— *Award—Consent of parties—Insolvent defendant—Civil Procedure Code (Act V of 1908), Sch. II, r. 1.* In a redemption suit by a mortgagor, the insolvent mortgagee was made a party along with the Official Assignee. The matter was referred to arbitration by consent of parties other than the insolvent mortgagee, who did not appear: *Held,* that the Court had no jurisdiction to make the order of reference without his consent, consequently the award was invalid. LADHURAM NATHMULL *v.* NANDALAL KARURI (1919) . . **I. L. R. 47 Calc. 555**

37. ——————— *Setting aside an award —Forgery—Dispute arising on or out of the contract—Jurisdiction of the arbitrator to decide what was the contract—Difference between the question whether there was a contract, or whether the contract was forged or altered.* *A* and *B* entered into several contracts for the sale and purchase of hessian which were contained in Advice Notes. The

ARBITRATION—*contd.*

2. AWARD—*contd.*

advice Note No. 31 contained a writing upon it which stated that it was in settlement of Advice Note No. 28. The contracts provided that all disputes whatsoever arising on or out of the contract should be referred to arbitration. Disputes having arisen they were referred to arbitration and an award was given in favour of *B. A* applied to set aside the award on the ground that the said writing on the Advice Note No. 31 was forged and so the arbitrators had no jurisdiction to decide the question of forgery which went to the very root of the contract: *Held*, that it was competent for the arbitrators under the terms of the submission to decide whether or not this interpolation was in the contract as originally made. *Per* GREAVES, *J.*—There seems to be a difference between a dispute which raises the question whether, in fact *X* entered into a contract at all, or a question whether *X* was induced to enter into a contract by fraud, and a question such as the present whether a contract contained a particular term at the time it was made. ALIBHOY MOHAMMAD *v.* BAIJNATH KALOORAM **24 C. W. N. 567**

38. ——————— *Order to record—Agreement to abide by majority.* No appeal lies from an order to record an award made by arbitrators when parties have agreed to abide by the decision of a majority of arbitrators an award cannot be set aside on the ground it has not been signed by the minority. *I. L. R. 29 Calc. 167*, followed. RAM NARAIN RAM *v.* PATI RAM TEWARY . . . . . **1 Pat. L. J. 90**

39. ——————— *Private arbitrator not making his award within time—Notice issued to show cause why he should not be proceeded against for contempt of court. Semble*, that a court has no authority to compel a private arbitrator to arbitrate against his own will, as by issuing a notice to him to submit his award by a certain date or to explain or show cause why he should not be charged with contempt of court. *Shibcharan* v. *Ratiram, I. L. R. 7 All. 20*, referred to. BASDEO MAL, GOBIND PRASAD *v.* KANHAIYA LAL, LACHMI NARAIN . . . **I. L. R. 43 All. 101**

40. ——————— *Consent order for extension of time presented before award—Order signed after making of award—Validity of award—Application to set aside—Form of—Indian Limitation Act (IX of 1908), Sch. I, Art. 158—Civil Procedure Code (Act V. of 1908), Sch. II—Practice.* Both parties to a suit, which had been referred to arbitration, having consented to an order for the extension of time for making the award, the order was taken to the proper officer (*sc.* the Prothonotary) for signature. In the ordinary course of events the latter would have exercised his discretion to sign the order on the same day, but owing to pressure of work the order was not signed till some days later, the award itself having been made in the interval *Held*, that though the Prothonotary had actually exercised his discretion later, his decision must in the circumstances be thrown back to the day on which the order was presented for his signature, and, as the order ought to have been signed as of that day, the award was not invalid. The form which an application to set aside an award under the Second Schedule of the Civil Procedure Code should take

ARBITRATION—*contd.*

2. AWARD—*contd.*

is nowhere prescribed or indicated. It is sufficient [illegible]

VITHALJI . . . **I. L. R. 45 Bom. 1071**

41. ——————— *Mutation of names—Mutation proceedings referred to arbitration—Award based on finding as to title of one of the parties—Award no bar to suit for possession in a Civil Court.* The parties to proceedings for mutation of names in a Court of Revenue referred the matters in dispute between them to arbitration. The arbitrators made their award declaring a certain person to be entitled to mutation upon the finding that he was the adopted son of the last holder. *Held*, that this award was no bar to the other party to the mutation proceedings suing in a Civil Court to recover possession of the property upon the ground that the adoption of the defendant was not established. *Girdhari Chaube* v. *Ram Baran Misir, 1 A. L. J. 85*, followed. DALIP SINGH *v.* MAN KUNWAR . . . **I. L. R. 43 All. 381**

42. ——————— *Reference to by Court informally, while suit pending—Civil Procedure Code (Act V of 1908), s. 89, O. XXIII, r. 3—Second Schedule—Indian Arbitration Act (IX of 1899)—Reference to arbitration without intervention of Court, while suit pending—Award if enforceable.* Where, in a pending suit, the parties refer the matter to arbitration without the intervention of the Court, the award made cannot be enforced either under O XXIII, r. 3 of the Civil Procedure Code or under the provisions of the Indian Arbitration Act. THE DEKARI TEA CO., LTD. *v.* THE INDIA GENERAL STEAM NAVIGATION CO., LTD. . . . . . **25 C. W. N. 127**

43. ——————— *Contract to buy goods, between London and Madras merchants—Stipulation for arbitration in London—Award made in London—Suit on award—Defence that arbitrator having given no opportunity to Defendant to be heard, if may be taken in the suit—English Arbitration Act, 1889—Supreme Court Rules, O. 64, r. 14.—Irregularity not going to the root and not apparent on the face of award.* In a contract to purchase sheepskin of a specified quality by a merchant carrying on business in London from a merchant carrying on business in Madras, it was stipulated that any differences not amicably settled was to be submitted to arbitration in London in the usual way and the award of such arbitration was to be binding on both buyer and seller. The buyer having sued the seller in the Madras High Court for enforcement of an award made by an arbitrator in London, the seller objected that the award was not binding on him as the arbitrator had proceeded to arbitrate without giving him an opportunity to be heard: *Held*, that as the arbitration clause provided for an arbitration which was to take place in London and in accordance with English law and procedure, any objection to the award on the ground of misconduct or irregularity had to be taken by motion to set aside or remit the award, under the English Arbitration Act of 1899, within the time limited by O. 64, r. 14 of the rules of the Supreme Court. No such objection having been taken

ARBITRATION—*concld*

2 AWARD—*concld.*

the award became fully binding on both parties to it, as if it had been incorporated in the contract. Any defence going to the root of the award, *e.g.*, that the arbitrator had no jurisdiction or that the matter was tainted with fraud—could have been pleaded in the suit, but a defence on the ground of irregularity not appearing on the face of the award was excluded by the law by which both parties had agreed to be bound. L. OPPENHEIM & Co. *v.* HAJEE MAHOMED HANEEF SAHIB P. C.). . . . . 26 C. W. N. 642.

ARBITRATION ACT (IX OF 1899).

See ARBITRATION I. L. R. 47 Calc. 29

See CIVIL PROCEDURE CODE (ACT V OF 1908), s. 89; O. XXIII, r. 3.
I. L. R. 40 Bom. 386

———— *Reference to two arbitrators and an umpire—Subsequent addition, by consent of parties, of other arbitrators—Objections raised after the pronouncement of the award to the appointment of additional arbitrators—Estoppel* A reference to arbitration was made under Act No. IX of 1899. The reference was to two arbitrators and an umpire. Subsequently the parties agreed to appoint two more arbitrators on either side. The six arbitrators and the umpire proceeded with the arbitration and pronounced a unanimous award. One party then applied for the award to be filed and the other party took objection, *inter alia*, to the number of the arbitrators. *Held* that, though either side might have objected in the first instance to the appointment of additional arbitrators it was too late to do so when they had all along acquiesced in the appointment and after the arbitrators had pronounced their award. ABDUL SHAKUR *v.* MUHAMMAD YUSUF.
I. L. R. 43 All. 456

———— ss. 2, 5, 8, 9, 15, and 19—*Arbitration—"Submission" by three persons to refer dispute to three arbitrators—One of the parties filing a suit—Court has jurisdiction to stay the suit—Submission not outside the scope of the Act—Award passed under the submission may be filed under the Act—Court may give indirect assistance by staying a suit though it cannot give direct assistance to enforce the arbitration.* Under s. 19 of the Indian Arbitration Act, the Court has jurisdiction to stay a suit where the parties to the suit have by "submission" agreed to refer the matter in dispute to three arbitrators each party appointing his own arbitrator. A "submission" providing for a reference to three arbitrators is not outside the scope of the Indian Arbitration Act; and an award passed by three arbitrators may be filed and given the status of a decree under s. 15 of the Act. *Manchester Ship Canal Company* v. *S. Pearson and Son, Ltd.* [1900] *2 Q. B. 606* and *Gopalji Kuverji* v. *Morarji Jeram (1919) 43 Bom. 809*, referred to. The words "a submission to which this Act applies" in s. 19 are not limited to submissions which can be enforced under s. 8 or s. 9, but are intended to provide for the case where a suit is filed in an up-country Court in an area to which this Act has not been applied though part of the cause o f action has arisen in a Presidency own. That Court would have the power to stay the suit if the submission was one to which the Act applied or in other words if the suit could

ARBITRATION ACT (II OF 1899)—

———— ss. 2, 5, 8, 9, 15 and 19—*contd.*

with leave or otherwise have been filed in a Presidency town. *Ralli* v. *Noor Mahomed (1906), 31 Bom. 236*, dissented from. BARALDAS KHEM CHAND, *In re.* . . . I. L. R. 45 Bom. 1

———— s. 4—*Submissions inferred for several documents—Arbitrator acting outside limits of his jurisdiction.* A submission or agreement submit may be collected from several documents even though collected from parole evidence and signature of any document forming part of the agreement to sufficiently bind the person so signing. SUKHANAH BANSIDHAR *v.* BABU LAL KEDIA & CO.
I. L. R. 42 All. 525

———— ss. 4, 20—*Civil Procedure Code (1908), s. 104 (1) (f)—Award under Arbitration Act—Order refusing to file—Appeal.* The parties to a contract for the sale and purchase of cloth agreed to refer a dispute arising thereout to arbitration under the provisions of the Indian Arbitration Act, 1899. A reference was made, and an award was pronounced. One of the parties then applied to the District Judge for an order to file the award but on objection taken by the other party the District Judge refused to file it. *Held* that, in the absence of rules framed by the High Court under s. 20 of the Indian Arbitration Act, the procedure prescribed by the Code of Civil Procedure would apply, and an appeal against the order of the District Judge would lie under section 104 (1) (f) of the Code. *Campbell and Co.* v. *Jeshraj Girdhari Lall, I. L. R. 42 Calc. 502*, distinguished. The judgment of PIGGOTT, J., in *Sukhamal Bansidhar* v. *Babu Lal Kedia and Co., I. L. R. 425 All. 25*, referred to. NAINSUKH DAS, NAGAR MAL *v.* GAJANAND, SHYAM . I. L. R. 43 All. 348

———— ss. 8 (1) (a), (b), (c), (d) and (2), 9—*English Arbitration Act of 1889 (52 and 53 Vic. c. 49)—General Clauses Act (X of 1897), s. 13—Reference and submission to three named arbitrators who, acting for some time decline to proceed further—Application to Court to appoint fresh arbitrators—Jurisdiction.* In a case of submission to three named arbitrators all of whom after acting have declined to proceed any further, the Court has no jurisdiction to appoint fresh arbitrators in their place under the Indian Arbitration Act. *Per* SCOTT, *C. J.* S. 8 (*1*) (*b*) of the Indian Arbitration Act does not apply to the case of independent appointments of two arbitrators. In such a case when a vacancy occurs it would ordinarily be filled by the original appointor as contemplated in s. 9. S. 8 (*1*) (*b*) only applies in terms to a single vacancy to be supplied by the *parties.* S. 8 nowhere seems to contemplate the case of two original arbitrators appointed jointly by the parties *plus* a third of the same class appointed by the two already jointly appointed or by the parties. In short, s. 8 only applies to certain cases of failure to appoint jointly. Where choosers should but do not concur, the Court is enabled to assist them by the selection and appointment of an individual falling in one of the following categories—an (*i.e.*, one) arbitrator; an umpire; a third arbitrator in the special sense in which that term is used. *Per* HAYWARD, *J.* It is not in my opinion open to us to extend this special jurisdiction to special contracts not clearly contemplated and expressly mentioned by the Act. *In re Smith and Service and Nelson and Sons, 25*

ARBITRATION ACT (IX OF 1899)—*contd.*

——— s. 8—*contd.*

Q. B. D. 545 and *Manchester Ship Canal Company* v. *S. Pearson and Sons, Limited,* [*1900*] *2. Q. B. 606,* referred to. GOPALJI KUVERJI v. MORARJI JERAM (1919) . . **I. L. R. 43 Bom. 809**

——— s. 9—*Appointment of arbitrators—Notice by one party to the other to appoint his arbitrator—No appointment by the former of his own arbitrator before giving notice—Default by latter to name his arbitrator on notice—Right of former to appoint both arbitrators under the contract—s. 9 of the Act, whether applicable—Proviso to s. 9, whether*

of s. 9 (*b*) of the Indian Arbitration Act, 1899, do not apply to a case where by the contract between the parties a different course is provided for the

Court to set aside the appointment, does not apply to an appointment made under the contract. Where the arbitrators, appointed under the contract and not under s. 9 of the Act, refused to grant an adjournment so as to enable one of the parties to apply to the Court to set aside their appointment, they were not guilty of misconduct, and the award was not liable to be set aside. SHAW WALLACE & CO. v. SURBDER SONS.
I. L. R. 44 Mad. 406

——— s. 10—

See INSURANCE **I. L. R. 37 Bom. 183**

——— *Arbitration—Statement of special case for opinion of Court—Appeal from order of Court—Civil Procedure Code (Act V of 1908), s. 104, and Sch. II, r. 11.* In a suit filed for partition of joint family property, the parties agreed to refer the matter to arbitration, and a consent order of reference was taken. A similar agreement referred to the same arbitrators questions as to the partition of such immoveable pro-

in the form of a special case for the opinion of the Court. In doing so they purported to act under the provisions of the Civil Procedure Code (Act V of 1908), Sch. II, r. 11, and of the Indian Arbitration

appeal lay. Inasmuch as the special case was in no sense an award, it did not come within the Civil Procedure Code (Act V of 1908), Sch. II, r. 11, but, in so far as it related to the agreement which was not the subject of the Court's order, it fell under the Indian Arbitration Act (IX of 1899), s. 10 (*b*). PURSHOTUMDAS RAMGOPAL v. RAMGOPAL HIRALAL (1910) **I. L. R. 35 Bom. 130**

——— s. 11—

See APPEAL . **I. L. R. 45 Calc. 502**

——— ss. 11, 13 to 15.

See ARBITRATION.
I. L. R. 40 Calc. 219

ARBITRATION ACT (IX OF 1899)—*contd.*

——— 11, 15—

See ARBITRATION.
. **I. L. R. 47 Calc. 951**

——— "*Award*"—*Civil Procedure Code* (*Act V of 1908*), *Sch. I, O. XXI, r. 29.* An award filed in Court under s 11 of the Indian Arbitration Act (IX of 1899) is nothing more than an award, although it is enforceable as if it were a decree. Execution of such an award cannot be stayed under O. XXI, r. 29 of the Civil Procedure Code (Act V of 1908). TRIBHUWANDAS KALLIANDAS GAJJAR v. JIVANCHAND LALLUBHAI & Co. (1910) . . **I. L. R. 35 Bom. 196**

——— ss. 12, 13—

See ARBITRATION
I. L. R. 46 Calc. 1059

——— ss. 13, 14—

See ARBITRATION **I. L. R. 41 Calc. 313**
I. L. R. 42 Calc. 1140

——— s. 14—

See AWARD . **I. L. R. 47 Calc. 806**

——— s. 19—

See ARBITRATION.
I. L. R. 41 Calc. 35
I. L. R. 47 Calc. 611, 752, 849, 1020

See APPEAL TO PRIVY COUNCIL.
I. L. R. 47 Calc. 91

——— *Arbitration—Effect of order staying suit—'Court.'* *Held,* on a construction of s. 19 of the Indian Arbitration Act, 1890, that "the Court" therein mentioned is not necessarily the Court of the District Judge, but the court before which the suit or other legal proceeding which it is sought to refer to arbitration is instituted. *Held* also, that a stay order passed under s. 19 is not a mere temporary injunction, but a final order which disposes of the suit. SITA RAM NATH MAL v. SHUSHIL CHANDRA DAS.
I. L. R. 43 All. 553

——— *Subject-matter of pending suit referred to arbitration—Order under s. 19 staying suit—Arbitration ending in an award—Formal order revoking stay and dismissing suit unnecessary.* Ordinarily, a stay order passed by a court under s. 19 of the Indian Arbitration Act, 1899, when the matters in dispute in a suit before it have been referred to arbitration is permanent, and when the arbitration is completed there is no necessity for the court to revoke the stay order and pass a formal order dismissing the suit. *Sheo Babu* v. *Udit Narain, 12 A. L. J. 757,* referred to. STRAUSS AND COMPANY v. RAGHUBAR DAYAL, DURGA PRASAD . . **I. L. R. 43 All. 279**

——— *Taking grounds in a memorandum of appeal, if a step in the proceedings—S. 19—Order refusing stay of proceedings, if a judgment within cl. 15 of the Letters Patent.* The order that the applicant was not competent to avail himself of the benefit of s. 19, Arbitration Act, by reason of steps taken by him in the proceeding in the suit is a judgment within the meaning of cl. 15, Letters Patent, and is appealable. *Justices of the Peace for Calcutta* v. *Oriental Gas Co., 8 B. L. R. 433 (1872), Hadjee Ismail Hadjee Hubeeb* v. *Hadjee Mahomed Hadjee Joosub,*

ARBITRATION ACT (IX OF 1899)—*concld.*

——— s. 19—*contd.*

13 B. L. R. 91 (1874), Mathura v. *Haran, I. L. R. 43 Cal. 857 ; s. c. 20 C. W. N. 594 (1915)*, and *Budhu* v. *Chatu, I. L. R. 44 Cal. 804, s. c. 21 C. W. N. 269 (1916)*, referred to. Taking grounds in a memorandum of appeal against an adverse order does not constitute the taking of a step in the proceedings within the meaning of s. 19, Arbitration Act. *Adams* v. *Calloy, (1892) 66 L. T. Rep. 687*, distinguished. JOYLALL & Co. v. GOPI RAM BHATICA . . **24 C. W. N. 612**

ARBITRATION AWARD.

See ARBITRATION.

——— *Reference authorising majority award—Award by majority without consulting others, if valid.* An award made by a majority of arbitrators appointed by the parties without consulting the others is not a valid award, even when the reference authorises the arbitrators to make a majority award. ABU HAMID ZAHIRA ALA v. GOLAM SARWAR (1916).
22 C. W. N. 301

ARBITRATION BY COURT.

——— *Submission of the questions in dispute to Court for determination—Award—Review—Appeal—Jurisdiction—Civil Procedure Codes (Act XIV of 1882) s. 622 : (Act V of 1908), s. 115.* When, after the hearing of a suit had commenced before a Munsif, both parties agreed to leave the questions in dispute between them to the determination of the Court after the Court had made a local inspection, and also agreed not to raise any objection to the same, or to prefer an appeal: *Held*, that the decision of the Munsif was in the nature of an award and that he could not alter the award when once made, or review his own decision. *Dutto Singh* v. *Dosad Bahadur Singh, I. L. R. 9 Calc. 575*, referred to. *Held*, further, that no appeal lay to the District Judge, and the order of the District Judge in entertaining the appeal and making the order of remand was without jurisdiction. *Sayad Zain* v. *Kalabhai, I. L. R. 23 Bom. 752*, followed. *Held*, further, that no appeal lay from the decision of the District Judge to this Court, but the High Court could interfere *suo motu* under s. 622 of the Civil Procedure Code (Act XIV of 1882) corresponding with s. 115 of the new Code (Act V of 1908). BAIKANTA NATH GOSWAMI v. SITA NATH GOSWAMI (1911) . . . **I. L. R. 38 Calc. 421**

ARBITRATION CLAUSE.

See CONTRACT **I. L. R. 47 Calc. 799**

———, contract with—

See APPEAL TO PRIVY COUNCIL.
I. L. R. 47 Calc. 918

——— Proceedings on—

See INJUNCTION **I. L. R. 47 Calc. 733**

ARBITRATION IN LONDON.

See ARBITRATION (AWARD 43).
26 C. W. N. 642

See CONTRACT **I. L. R. 43 Calc. 77**

ARBITRATOR.

See ARBITRATION ACT (IX OF 1899), ss. 8 (1) (a), (b), (c), (d) AND (2), 9.
I. L. R. 43 Bom. 809

See CONTRACT . . **15 C. W. N. 981**

——— distinction between—and valuer—

See RESUMPTION.
I. L. R. 42 Bom. 668

——— duties of—

See CIVIL PROCEDURE CODE (1908), s. 104 (f) . . **I. L. R. 38 All. 380**

——— jurisdiction to award damages to defaulting seller—

See AWARD . **I. L. R. 44 Bom. 780**

——— power of—

See CONTRACT ACT (IX OF 1872), ss. 1, 118 . . **I. L. R. 41 Bom. 518**

ARCHAKA.

See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXIII, r. 3.
I. L. R. 38 Mad. 850

AREA.

See MEASUREMENT.
I. L. R. 47 Calc. 266

——— deficiency in—

See BENGAL TENANCY.
I. L. R. 48 Calc. 473

See KABULIYAT **I. L. R. 41 Calc. 493**

ARMS.

See ARMS ACT (XI OF 1878), s. 4.
I. L. R. 32 All. 152

——— joint possession of—

See MISJOINDER OF CHARGES.
I. L. R. 42 Calc. 1153

——— purchase of—

See FORGERY . **I. L. R. 43 Calc. 421**

——— What are—

See ARMS ACT, 1878. s. 20 . . **I. L. R. 2 Lah. 290**

——— *Possession of a gun by the servant of a licensee in order to take to a Magistrate for renewal of the license without intention to use the same—Arms Act (XI of 1878), s. 19 (f).* A servant of the holder of a gun-license who is merely carrying it to a Magistrate with the expiring license for renewal thereof, but without any intention to use the gun, is not liable to conviction under s. 19 (f) of the Arms Act. *Queen-Empress* v. *Tota Ram, I. L. R. 16 All. 276*, and *Prabhat Chandra Chowdhury* v. *Emperor, I. L. R. 35 Calc. 219*, followed. CHARU CHANDRA GHOSE v. EMPEROR (1913) . . **I. L. R. 41 Calc. 11**

ARMS ACT (XI OF 1878).

——— s. 4—*Definition—Ammunition—Empty cartridge-cases.* *Held*, that Indian empty cartridge cases are ammunition within the meaning of s. 4 of the Indian Arms Act, 1878. *King-Emperor* v. *Ibrahim, 7 Bom. L. R. 474*, followed. EMPEROR v. BALDEO SINGH (1909) . **I. L. R. 32 All. 152**

——— ss. 4, 5, 14, 19(a), (f), 20—

See MISJOINDER OF CHARGES.
I. L. R. 42 Calc. 1153

ARMS ACT (XI OF 1878)—*contd.*

——— s. 19, cl.(*b*)—*Gun found in room equally accessible to several persons, if to be considered as in the possession of any one of them.* A gun was found in an abandoned room of the house belonging to the accused in which the accused who were members of a joint family and others resided. It appeared from the evidence that the room was accessible from outside. The accused were convicted under s. 19 (*b*) of the Indian Arms Act.

21 C. W. N. 839

——— s. 19 (*c*)—

——— *Intention not necessary to constitute offence.* An offence under s. 19 (*c*) of the Arms Act is committed when a person enters British India with a weapon he is not lawfully entitled to possess in this country. It is not necessary that there should be any particular intention in the mind of the offender to complete the offence. *Re* MAHOMED ISMAIL ROWTHER (1912).

I. L. R. 35 Mad. 596

——— *Servant, temporary possession of gun by, on behalf of master.* The petitioner was carrying a gun on behalf of his master with the license to the Magistrate for the purpose of a renewal of the license It was admitted that the object of the petitioner was merely to carry the gun to the Magistrate. The petitioner was convicted under s. 19 (*f*) of the Act for possessing a gun in contravention of the provisions of the Act: *Held*, that the conviction of the petitioner cannot be upheld ... *I. L. R.* 16 ... *I. L. R.* 35 ... CHARU CH. ... (1913)

17 C. W. N. 979

——— s. 19 (*e*) — *Arms—Gun — License—Going armed without license—Servant fetching gun for his master—Liability of servant.* The accused was sent to an adjacent village by his master, who was licensed to bear arms, to fetch a gun which he (the master) had left there. While so returning with the gun, the accused was arrested for going armed in contravention of the provisions of s. 13 of the Indian Arms Act (XI of 1878). He was convicted and sentenced under s. 19 (*e*) of the Act. *Held*, acquitting the accused, that the mere temporary possession, without a license, of arms for purposes other than their use was not

(1912) . . . I. L. R. 37 Bom. 181

——— s. 19 (*f*)—

See ARMS . I. L. R. 41 Calc. 11

and her minor son, a young man of some 17 years of age, lived together in the family house. In their house was a small collection of arms of various kinds which had belonged to the father, who as an honorary magistrate, was exempt from the operation of the Arms Act. There was evidence that the arms were kept clean and that the son at all events took a certain amount of interest in them. *Held*, that a finding that the son was in possession of these arms, and, not having a license for them, was liable to conviction for an offence under s. 19 (*f*) of the Indian Arms Act, 1878, was not open to objection. EMPEROR *v.* GHULAM HUSAIN (1918) . . I. L. R. 40 All. 420

ARMS ACT (XI OF 1878)—*contd.*

——— s. 19(*f*)—*contd.*

——— *Accused not in present possession if may be convicted—Person liable to punishment under cl. (f) of s. 19.* Where the petitioner having ... time made it c... person in wh... a license: *Hel*... convicted of an offence under s. 19, cl. (*f*) of the Indian Arms Act. The only person who can be punished under cl. (*f*) is the person who has in his possession or under his control any arm in contravention of the provisions of ss. 14 and 15. AKHIL NATH DIT *v.* EMPEROR (1910) 15 C. W. N. 440

——— s. 20—Dang *and detachable blade—whether an instrument falls within the expression "Arms" depends upon the circumstances of the case.* Appellant was found carrying a bamboo ... consideration the nature of the instrument, the fact that the blade could be readily slipped on and off the stick, and the fact that it was found detached from the stick and hidden in the appellant's loin cloth shewed that it was possessed by him, not for ordinary domestic purposes, but for purposes of offence or defence, and that it was therefore included in the term "Arms" used in the Arms Act. Whether or not any particular instrument is included in the expression "Arms" used in the Arms Act depends on the circumstances of the ...

I. L. R. 2 Lah. 290

——— s. 25—

See TRESPASS . I. L. R. 39 Calc. 953

——— ss. 25 and 28—

See CRIMINAL PROCEDURE CODE, s. 195.
I. L. R. 42 Mad. 96

ARMY ACT, 1881 (44 & 45 VICT., c. 58).

——— s. 136—

See ATTACHMENT.
I. L. R. 43 Bom. 716

See CIVIL PROCEDURE CODE (ACT V OF 1908), s. 60, CL. (2) (*b*).
I. L. R. 38 Bom. 667

——— ss. 145, 190—*Army (Amendment No. 2), Act 5 and 6 Geo. V. c. 58, s. 4—First Class Warrant Officer of the British Army—Soldier—Decree for alimony and maintenance—Order by Commander-in-Chief for payment of alimony and*

ARMY ACT, 1881 (44 & 45 VICT., C 58)—*contd.*

———— **ss. 145, 190**—*contd.*

maintenance—Civil Court cannot attach salary in execution of decree—Civil Procedure Code (Act V of 1908), ss. 4, 60 (2) (b), O. XXI, r. 48—Repeal of s. 60 (2) (b) by the Repealing and Amending Act (X of 1914). In a suit for dissolution of marriage the defendant, who was a First Class Warrant Officer of the British Army, was ordered to pay permanent alimony to his wife (plaintiff), and maintenance to his children by her. Later, the Court having fixed the amount of Rs. 65 as payable on each account, the plaintiff applied to the Court for attachment of the defendant's salary and allowance, under the provisions of O. XXI, r. 48 of the Civil Procedure Code, 1908. The application was dismissed under s. 136 of the Army Act. The plaintiff having appealed, it was contended for the defendant that in view of an order made by the Commander-in-Chief directing that a certain sum be deducted from the defendant's salary for payment to the plantiff under s. 145 (2) of the Army Act (44 and 45 Vict. c. 58), on the footing that the defendant was a soldier, his pay could not be attached under the provisions of the Civil Procedure Code, 1908: *Held,* upholding the contention, that s. 145 of the Army Act prevailed over the provisions of the Civil Procedure Code in spite of the repeal of clause (*b*) from sub-s. (2) of s. 60 by the Repealing and Amending Act of 1914: *Held,* also, that the terms of s. 4 of the Civil Procedure Code compelled the Court to apply the special rule of procedure provided by s. 145 of the Army Act in preference to the general provisions of the Code. DUCKWORTH *v.* DUCKWORTH (1918) . . **I. L. R. 43 Bom. 368**

ARREARS OF RENT.

See PATNI SALE. **I. L. R. 47 Calc. 337**

See PATNA TALUK **I. L. R. 48 Calc. 454**

See PUTNI TENURE. **I. L. R. 37 Calc. 747**

See INTEREST. **I. L. R. 41 Calc. 342**

See CHOTA NAGPUR ENCUMBERED ESTATES ACT, APPLICATION OF. **I. L. R. 46 Calc. 1**

———— **suit for**—

See ILLEGAL CESS. **I. L. R. 45 Calc. 259**

ARREARS OF REVENUE.

See COMMISSIONER, POWER OF. **I. L. R. 40 Calc. 552**

———— *Surplus sale-proceeds—Recorded proprietors, assignee of right to receive—Revenue Sale Law (Act XI of 1859), s. 31—Declaratory suit, maintainability of—Time, running of, from denial of such right—Limitation Act (IX of 1908), Sch. 1, Art. 120.* Under s. 31 of Act XI of 1859, an assignee of the recorded proprietors is not their representative, so that the Collector is justified in refusing to pay to such assignee, *claiming on his own behalf,* the money held in deposit on account of the recorded proprietors. *Secretary of State for India* v. *Marjum Hosein Khan, I. L. R. 11 Calc. 359,* followed. But the assignee is nevertheless entitled to a declaration in the Civil Court as against the recorded proprietors that he is entitled to the estate at the time of the sale, and, consequent thereto, to the surplus sale-proceeds; the assignee is at liberty to apply to the Collector on the basis of this decree for payment of the surplus sale-proceeds. In such a suit time should run against the assignee (under Art. 120 of the First Schedule to the Indian Limitation Act) from the date when the right to obtain relief by way of declaration had been denied in a dispute amongst the parties entitled to the money. BIJOY LAL SEAL *v.* NAYAN MUNJARI DASSI (1919). **I. L. R. 47 Calc. 331**

ARREST.

See ARREST BY PRIVATE PERSON.

See CIVIL PROCEDURE CODE, 1882, SS. 341 AND 349 . **I. L. R. 33 All. 279**

See CIVIL PROCEDURE CODE, 1908, SS. 47, 96, 104 (*b*), 135 (2). **I. L. R. 32 All. 3**

See CRIMINAL PROCEDURE CODE.
s. 188 . **I. L. R. 35 Bom. 225**
Ss. 55, 56, AND 110. **I. L. R. 35 All. 407**
ss. 110 167 **I. L. R. 43 All. 186**

See HABEAS CORPUS. **I. L. R. 39 Calc. 164**
I. L. R. 44 Calc. 76

See PENAL CODE (ACT XLV OF 1860), s. 225B . . **I. L. R. 38 All. 506**

See RESCUE FROM LAWFUL CUSTODY. **I. L. R. 43 Calc. 1161**

See WARRANT OF ARREST. **3 Pat. L. J. 493**

———— **by Excise Inspector**—

See RIOTING . **I. L. R. 41 Calc. 836**

———— **By Private Person**—

See PENAL CODE, s. 107. **5 Pat. L. J. 129**

———— **of Indian subject in railway land of Gwalior State**—

See JURISDICTION OF CRIMINEL COURTS. **I. L. R. 1 Lah. 406**

———— **order declining to**—

See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XLIII, R. 1 (*r*) AND O. XXXIX, R. 2, CL. (*3*). **I. L. R. 39 Mad. 907**

———— **powers of**—

See CRIMINAL PROCEDURE CODE, s. 54 (*1*) **I. L. R. 36 All. 6**

———— **warrant to**—

See HABEAS CORPUS. **I. L. R. 44 Calc. 459**

———— **without warrant**—

See RIOTING . **I. L. R. 41 Calc. 836**

ARREST AND SEARCH.

See CONSPIRACY.

I. L. R. 40 Calc. 898

ARREST BY PRIVATE PERSON.

See ARREST.

See CRIMINAL PROCEDURE CODE, s. 107.

5 Pat. L. J. 129

See PENAL CODE, s. 107. **5 Pat. L. J. 129**

———— *Private person making offender over to a choukidar to be taken to the thana —Escape of the offender—Legality of the chowkidar's custody—Criminal Procedure Code (Act V of 1898), s. 59—Penal Code (Act XLV of 1860), ss. 224,* $\frac{224}{109}$. Where a private person has lawfully arrested an offender under s. 59 of the Criminal Procedure Code but made him over to a chowkidar to be taken to the thana, the custody of the latter is not lawful, within ss. 224 and $\frac{224}{109}$ of the Penal Code, inasmuch as he is not a police-officer within the meaning of the term in s. 59 of the Criminal Procedure Code. *Kalai* v. *Kalu Chowkidar, I. L. R. 27 Calc. 366*, followed. PURNA CHANDRA KUNDU *v.* EMPEROR (1913).

I. L. R. 41 Calc. 17

ARREST OF SHIP.

———— *Trespass—Absence of Notice—Cause of action—Admiralty jurisdiction—Letters Patent, 1865, cl. 32—Letters Patent, 1862, cl. 31—Charter of the Supreme Court, 1774, cl 26—Admiralty Court Act, 1840 (3 and 4 Vict. c. 65)—Admiralty Court Act, 1861 (24 Vict. c. 10), s. 5—Colonial Courts of Admiralty Act, 1890 (53 and 54 Vict. c. 27), ss. 2 (3) (a), 35—Interpretation Act, 1889 (52 and 53 Vict. c. 63), s. 18 (2)—Maritime necessaries—Action in rem—Wrongful seizure—Limitation Act (IX of 1908), Sch. I. Arts. 29, 36, 49—Pleadings.* On the 4th June 1910, the respondent company instituted a suit *in rem* against the *Clan Mackintosh* in this Court as a Colonial Court of Admiralty for an amount alleged to be due to them for maritime necessaries, and obtained a warrant of arrest. The ship was arrested on the

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were the appellant company, who had their office in Burma. On the 14th June 1912, the appellant company instituted the present suit in the ordinary original civil jurisdiction of this Court against the respondent company for the wrongful arrest of the ship. The suit as framed was based on malice or its equivalent, but at the hearing the appellant company proceeded on the footing of the suit being one for mere trespass. *Held,* that in the absence of proof of malice or its equivalent, a suit for simple trespass will not lie for the arrest of a ship. *The Walter D. Wallet, [1893] P. 202, Xenos* v. *Aldersley, The Evangelismos, 12 Moo. P. C. 352,* and *The Strathnaver, L. R. 1 A. C. 58,* referred to. The arrestment of the ship was a judicial act of the Court, and an ordinary step in an action *in rem*. Under the arrest, the custody and possession

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pondent company but to the law's delay. *Peruvian Guano Co.* v. *Dreyfus, [1892] A. C. 166,*

ARREST OF SHIP—*contd.*

followed. The foundation of the Admiralty jurisdiction of the High Court, more especially in respect of maritime necessaries discussed. *The "Two Ellens," L. R. 4 P. C. 161, The Henrich Bjorn, L. R. 11 A. C. 270, Murray* v. *Longford, 1 Fulton 95, The Asia, 5 Bom. H. C. (O. C.) 64,*

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acquire jurisdiction over maritime necessaries by any previous enactment, such jurisdiction would now rest on the Colonial Courts of Admiralty Act, 1890, which vests in it the powers described in s. 5 of the Admiralty Act, 1861. To oust the jurisdiction of this Court under s. 5, it is not enough that the owners of the ship should be infact domiciled in India or Burma; this domicile has to be proved to the satisfaction of the Court. *Ex parte Michael, L. R. 7 Q. B. 658,* followed. Inasmuch as such proof was not produced before the Court, when the order for arrest was made, the order for arrest cannot be treated as *coram non judice* or a nullity. Assuming that an action would lie in the absence of proof of malice or its equivalent, the action would be for wrongful seizure under legal process and would be barred by Art.

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(1914) . . . . . **I. L. R. 42 Calc. 85**

ARTICLES OF ASSOCIATION.

See COMPANIES ACT (VI OF 1882), ss. 76, 77 . . . **I. L. R. 36 All. 416**

See MORTGAGE **I. L. R. 39 Calc. 810**

ARTICLE IN NEWSPAPER.

See SEDITION . **I. L. R. 38 Calc. 253**

ARTIFICIAL CHANNEL.

See MADRAS IRRIGATION CESS.

L. R. 44 I. A. 166 and 302

ASCETICS.

See HINDU LAW—INHERITANCE.

I. L. R. 40 Calc. 545

———— **sudra, inheritance by—**

See HINDU LAW—ADOPTION.

I. L. R. 40 Mad. 846

ASSAM FOREST REGULATION (VII OF 1891).

———— **ss. 4 to 17, 25—**

See RESERVED FOREST.

I. L. R. 47 Calc. 889

———— s. 17—*Declaration of reserved forest—Disposal of claim as condition precedent to validity of final order.* Where after the issue of the preliminary notification under s. 5 of the Assam Forest Regulation, the Petitioner filed a claim before the Forest Settlement Officer who held that he

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reserved forest was made. *Held,* that the Petitioner's claim was not undisposed of within the meaning of s. 17 of the Regulation and the final notification was not invalid. KHANDKAR HEDAYATULLA *v.* KING-EMPEROR . **24 C. W. N. 645**

ASSAM LABOUR AND EMIGRATION ACT (VI OF 1901).

——— ss. 2, 152, 162, 164—*Illegal recruitment of cooly—Repatriation at the expense of the employer—Jurisdiction of Magistrate.* In a case under s. 164 of the Assam Labour and Emigration Act for illegal recruitment of coolies the Sub-Deputy Magistrate while acquitting the accused, made an order that the proprietor of the garden should deposit the expenses of repatriation of the coolies in question: *Held*, that the Sub-Deputy Magistrate not being appointed by the Local Government within the meaning of s. 2 of the Act, his order was *ultra vires*. That the order was also bad on the ground that the Sub-Deputy Magistrate did not call upon the employer to show cause against the order, there being an acquittal of the accused and nothing to show undue influence or coercion. KING-EMPEROR *v.* RIHE CHAMAR (1914) . . . **18 C. W. N. 1143**

——— ss. 20, 164—

See EMIGRATION. **I. L. R. 37 Calc. 27**

——— "Emigration" within the meaning of the Act must be with the idea that "the object to be attained or kept in view" by the emigrant is arrival in a labour district and labouring there. MANIK RAM AHIR *v.* KING-EMPEROR . . . **1 Pat. L. J. 388**

——— ss. 2 (1) and 164—"*Interpretation clauses, construction of.*" Cl. (*c*) of sub-s. (1) of s. 2 of the Assam Labour and Emigration Act, 1901, does not purport to be a definition of the word "emigrate," and cannot, therefore, be construed, in too literal a sense as if it were a positive enactment. The clause is merely descriptive. To constitute emigration within the meaning of the Act all that is necessary is (*a*) that the points of departure and destination should be as required by the Act, *i.e.*, the departure should be from any part of the territories in which the Act for the time being is in force and the destination should be a labour district; (*b*) that the emigrant should be sixteen years of age or upwards; and (*c*) that the emigrant is to labour for hire in a labour district otherwise than as a domestic servant. There is nothing in clause (*c*) to indicate that, in order to constitute emigration within the meaning of s. 164, there must be a personal intention present to the mind of the person recruited, when he is recruited, to go to a labour district to work there for hire. *Manik Ram Ahir* v. *King Emperor, 1 P. L. J. 388*, not followed. *Faiz Ali* v. *Emperor, I. L. R. 37 Calc. 27 referred to* . . **2 Pat. L. J. 91**

——— s. 91—

See SECRETARY OF STATE. **I. L. R. 37 Mad. 55**

ASSAM LAND AND REVENUE REGULATION (I OF 1886).

——— ss. 3, 96, 97, 154—

See PARTITION. **I. L. R. 47 Calc. 354**

——— s. 6—*Assam Land and Revenue Regulation (I of 1886), s. 6, r. 80 (i) of the Government Rules—Settlement of land, first applicant if entitled—Jurisdiction of Civil Court.* R. 80, cl. (*i*) of the rules framed under Regulation I of 1886 of the Assam Land and Revenue Regulation lays down a principle for the guidance of Settlement Officers and does not confer a right on the first applicant to a settlement. It directs that in cases where settlement is not made with the first applicant the reasons therefor should be stated in writing. It does not follow from this that if the reasons are not recorded the first applicant is entitled to a settlement. *Madhab Nath* v. *Myarani Madhi, I. L. R. 17 Calc. 819*; *Patan Maria* v. *Bhabiram Datt, I. L. R. 21 Calc. 239*, distinguished. Under s. 6 (*a*) of the Regulation no right to settlement arises merely by reason of the fact that the plaintiff was the first applicant. ANANDA KISORE SEN *v.* SECRETARY OF STATE FOR INDIA (1910). **14 C. W. N. 930**

ASSAM LAND AND REVENUE REGULATION (I OF 1886)—*contd.*

——— s. 6—*contd.*

——— s. 12—

——— *R. 57 of the Rules framed by the Chief Commissioner under s. 12—Re-settlement of land previously settled by lease—Jurisdiction of Civil Court to examine if Collector had in mind while making settlement the instruction in Rule as to person to whom preference to be given.* Under r. 57 of the rules framed by the Chief Commissioner under s. 12 of the Assam Land and Revenue Regulation the previous settlement-holder is to be ordinarily given preference in resettling a land previously settled by a lease. In a suit by the previous settlement-holder of land for declaration of his right to settlement, the Civil Court has jurisdiction to see whether r. 57 has been complied with. It is not open to the Civil Court to go into the question of correctness or sufficiency of the reasons and once it appears that the revenue authorities took into their consideration the fact that preference should ordinarily be given to the settlement-holder they have a discretion in the matter. The Civil Court has power to see whether the Collector has found anything for excluding the plaintiff from the settlement, and the reasons for such exclusion may appear not only in the Collector's order but in the office-report and even in the petition of the parties or in other settlement papers. JOY GOBINDO HAJAM *v.* MUSSIT HAZIRA BIBI. **24 C. W. N. 149**

——— s. 28, proviso 2 and 4—

See ASSESSMENT **I. L. R. 43 Calc. 973**

——— ss. 63, 67, 85—

See SALE FOR ARREARS OF REVENUE. **I. L. R. 44 Calc. 412**

——— ss. 70, 71—

See SALE FOR ARREARS OF REVENUE. **I. L. R. 43 Calc. 779**

——— *Suit to recover possession from person registered under the Regulation, if lies—Jurisdiction of Civil Court.* The plaintiff sued for recovery of possession of land upon declaration of title. The plaintiffs purchased the land in suit from the defendants but notwithstanding this rule the defendants got themselves registered under the Assam Land and Revenue Regulation and kept the plaintiffs out of possession: *Held*, that it was competent to the Civil Court not only to declare the title of the plaintiffs but also to place them in possession of the disputed property by ejectment of the defendants. ASKAR MIAN *v.* SABAD ALI BORA (1915). **23 C. W. N. 540**

ASSAM LAND AND REVENUE REGULATION (I OF 1886)—*contd.*

———— ss. 96, 97, 154 (e)—

See PARTITION I. L. R. 46 Calc. 236

———— s. 97—*Held,* that s. 97 confers on every recorded proprietor of permanently settled land the right to claim partition subject to certain qualifications. YASIM ALI MIRDHA *v.* RADHAGOBINDA. 26 C. W. N. 381

———— s. 154—*if bars suit for declaration of title and possession by Co-sharer.* S. 154 of the Assam Land and Revenue Regulation which provides that no Civil Court shall exercise jurisdiction in the distribution of land or allotment of revenue on partition is no bar to an unrecorded co-sharer, who was not allowed to intervene in partition, when the partition proceedings before the Revenue authorities had not yet been completed. HABIRAM DAS *v.* HEM NATH SARMA (1915). 19 C. W. N. 1068

ASSAULT.

See CRIMINAL PROCEDURE CODE, ss. 345 AND 439 . I. L. R. 37 All. 419

See MISJOINDER OF PARTIES. I. L. R. 42 Calc. 760

See PENAL CODE (ACT XLV OF 1860), ss. 323 AND 332. I. L. R. 37 All. 353

See RAILWAY PASSENGER. I. L. R. 44 Calc. 279

See TORT . I. L. R. 43 Bom. 103

———— threat to—

See PROVINCIAL SMALL CAUSES COURTS ACT, SCH. II. CL. 35 (ii). I. L. R. 36 Bom. 443

ASSEMBLING WITH ARMS.

See DACOITY . I. L. R. 41 Calc. 350

ASSESSED LAND.

———— suit for land and trees, valuation of—

See COURT-FEES ACT (VII OF 1870), s. 7, CL. (v), (b) AND (c). I. L. R. 40 Mad. 824

ASSESSMENT.

See BOMBAY LAND REVENUE CODE—
s. 3 . . I. L. R. 35 Bom. 462
s. 48 . . I. L. R. 34 Bom. 239
ss. 56 AND 214 I. L. R. 36 Bom. 91

See CALCUTTA MUNICIPAL ACT, s. 151, CL. (b). . . . 15 C. W. N. 84

See CANTONMENTS ACT (III OF 1880), s. 22 . . I. L. R. 38 Bom. 293

See CHAUKIDARI CHAKRAN LANDS. I. L. R. 42 Calc. 710

See COMPENSATION. I. L. R. 44 Calc. 67

See INAMDAR . I. L. R. 41 Bom. 159

———— failure to pay—

See BOMBAY LAND REVENUE CODE (BOMBAY). s. 56 . . I. L. R. 37 Bom. 692

ASSESSMENT—*contd.*

———— of Kazi Inam lands—

See BOMBAY REVENUE JURISDICTION ACT (BOMBAY), s. 4 (a), PROV. (l). I. L. R. 44 Bom. 120 and 130

———— method of—

See LAND ACQUISITION—COMPENSATION I. L. R. 40 Calc. 64

See MACHINERY I. L. R. 48 Calc. 910

See MUNICIPALITY I. L. R. 46 Calc. 784

See SUMMARY SETTLEMENT ACT (BOM. ACT VII OF 1863). I. L. R. 43 Bom. 583

———— penal, levy of—

See MADRAS LAND ENCROACHMENT ACT (III OF 1905), ss. 5, 6, 7, 14. I. L. R. 39 Mad. 727

———— Powers of the Collector to increase or alter assessment—

See INCOME-TAX ACT (II OF 1886), ss. 14 AND 50 . I. L. R. 44 Bom. 234

———— principle of—

See MUNICIPAL ASSESSMENT. I. L. R. 39 Calc. 141

See MUNICIPALITY. I. L. R. 41 Calc. 168

———— Right of Inamdar to enhance assessment at the end of the period of settlement—

See BOMBAY LAND REVENUE CODE (BOM. ACT V OF 1879), s. 217. I. L. R. 44 Bom. 110

———— *Rateable value—Salt-works—Method of assessment—Assessing authority to consider what an hypothetical tenant would pay—Premises to be valued for rateable purposes "rebus sic stantibus"—Valuation for assessment based upon a method applied to salt pans in a different country at different times—Method of valuation wrong and illegal—Aden Act (II of 1864), s. 8* The principles on which property is assessed to the rates are, first, that in assessing any particular property the assessing authority must consider what a tenant from year to year with a reasonable prospect of the continuation of his lease would give for the premises and in considering this, the assessing authority must regard the then occupier as a likely tenant; secondly, that the premises must be valued for rateable purposes "*rebus sic stantibus,*" i.e., as they exist at the date of the valuation. *The Queen* v. *School Board for London,* 17 *Q. B. D.* 738, *London County Council* v. *Church Wardens, etc., of Parish of Erith and Assessment Committee of Dartford Union,* [1893] *A. C.* 562, *Great Central Railway* v. *Banbury Union,* [1905] *A. C.* 315, *Davies* v. *Seisdon Union,* [1909] *A. C.* 78, *The Queen* v. *Fletton,* 3 *E. & E.* 450, 465, referred to. In 1900, the plaintiffs obtained from Government a lease of certain lands at Aden for the purpose of constructing salt-works thereon at the annual rental of R7,000 for the land and a royalty of 8 annas per ton of salt exported. They erected a factory for crushing salt on the land and the works first commenced to yield salt in 1911. The defendants were the assessing authority for

ASSAM LABOUR AND EMIGRATION ACT (VI OF 1901).

——— ss. 2, 152, 162, 164—*Illegal recruitment of cooly—Repatriation at the expense of the employer—Jurisdiction of Magistrate.* In a case under s. 164 of the Assam Labour and Emigration Act for illegal recruitment of coolies the Sub-Deputy Magistrate while acquitting the accused, made an order that the proprietor of the garden should deposit the expenses of repatriation of the coolies in question; *Held*, that the Sub-Deputy Magistrate not being appointed by the Local Government within the meaning of s. 2 of the Act, his order was *ultra vires*. That the order was also bad on the ground that the Sub-Deputy Magistrate did not call upon the employer to show cause against the order, there being an acquittal of the accused and nothing to show undue influence or coercion. KING-EMPEROR *v.* RUHU CHAMAR (1914) . . . 18 C. W. N. 1143

——— ss. 20, 164—

See EMIGRATION. I. L. R. 37 Calc. 27

——— "Emigration" within the meaning of the Act must be with the idea that "the object to be attained or kept in view" by the emigrant is arrival in a labour district and labouring there. MANIK RAM AHIR *v.* KING-EMPEROR . . . 1 Pat. L. J. 388

——— ss. 2 (1) and 164—"*Interpretation clauses, construction of.*" Cl. (*e*) of sub-s. (1) of s. 2 of the Assam Labour and Emigration Act, 1901, does not purport to be a definition of the word "emigrate," and cannot, therefore, be construed, in too literal a sense as if it were a positive enactment. The clause is merely descriptive. To constitute emigration within the meaning of the Act all that is necessary is (*a*) that the points of departure and destination should be as required by the Act, *i.e.*, the departure should be from any part of the territories in which the Act for the time being is in force and the destination should be a labour district; (*b*) that the emigrant should be sixteen years of age or upwards; and (*c*) that the emigrant is to labour for hire in a labour district otherwise than as a domestic servant. There is nothing in clause (*c*) to indicate that, in order to constitute emigration within the meaning of s. 164, there must be a personal intention present to the mind of the person recruited, when he is recruited, to go to a labour district to work there for hire. *Manik Ram Ahir* v. *King Emperor, 1 P. L. J. 388*, not followed. *Faiz Ali* v. *Emperor, I. L. R. 37 Calc. 27 referred to* . . 2 Pat. L. J. 91

——— s. 91—

See SECRETARY OF STATE. I. L. R. 37 Mad. 55

ASSAM LAND AND REVENUE REGULATION (I OF 1886).

——— ss. 3, 96, 97, 154—

See PARTITION. I. L. R. 47 Calc. 354

——— s. 6—*Assam Land and Revenue Regulation (I of 1886), s. 6, r. 80 (i) of the Government Rules—Settlement of land, first applicant if entitled—Jurisdiction of Civil Court.* R. 80, cl. (*i*) of the rules framed under Regulation I of 1886 of the Assam Land and Revenue Regulation lays down a principle for the guidance of Settlement Officers and does not confer a right on the first applicant to a settlement. It directs that in cases where settlement is not made with the first applicant the reasons therefor should be stated in writing. It does not follow from this that if the reasons are not recorded the first applicant is entitled to a settlement. *Madhab Nath* v. *Myarani Madhi, I. L. R. 17 Calc. 819*; *Patan Maria* v. *Bhabiram Datt, I. L. R. 24 Calc. 239*, distinguished. Under s. 6 (*a*) of the Regulation no right to settlement arises merely by reason of the fact that the plaintiff was the first applicant. ANANDA KISORE SEN *v.* SECRETARY OF STATE FOR INDIA (1910). 14 C. W. N. 930

——— s. 12—

——— *R. 57 of the Rules framed by the Chief Commissioner under s. 12—Re-settlement of land previously settled by lease—Jurisdiction of Civil Court to examine if Collector had in mind while making settlement the instruction in Rule as to person to whom preference to be given.* Under r. 57 of the rules framed by the Chief Commissioner under s. 12 of the Assam Land and Revenue Regulation the previous settlement-holder is to be ordinarily given preference in resettling a land previously settled by a lease. In a suit by the previous settlement-holder of land for declaration of his right to settlement, the Civil Court has jurisdiction to see whether r. 57 has been complied with. It is not open to the Civil Court to go into the question of correctness or sufficiency of the reasons and once it appears that the revenue authorities took into their consideration the fact that preference should ordinarily be given to the settlement-holder they have a discretion in the matter. The Civil Court has power to see whether the Collector has found anything for excluding the plaintiff from the settlement, and the reasons for such exclusion may appear not only in the Collector's order but in the office-report and even in the petition of the parties or in other settlement papers. JOY GOBINDO HAJAM *v.* MUSSIT HAZIRA BIBI. 24 C. W. N. 149

——— s. 28, proviso 2 and 4—

See ASSESSMENT I. L. R. 43 Calc. 973

——— ss. 63, 67, 85—

See SALE FOR ARREARS OF REVENUE. I. L. R. 44 Calc. 412

——— ss. 70, 71—

See SALE FOR ARREARS OF REVENUE. I. L. R. 43 Calc. 779

——— *Suit to recover possession from person registered under the Regulation, if lies—Jurisdiction of Civil Court.* The plaintiff sued for recovery of possession of land upon declaration of title. The plaintiffs purchased the land in suit from the defendants but notwithstanding this rule the defendants got themselves registered under the Assam Land and Revenue Regulation and kept the plaintiffs out of possession: *Held*, that it was competent to the Civil Court not only to declare the title of the plaintiffs but also to place them in possession of the disputed property by ejectment of the defendants. ASKAR MIAN *v.* SABAD ALI BORA (1915). 23 C. W. N. 540

ASSAM LAND AND REVENUE REGULATION (I OF 1886)—*contd.*

——— ss. 96, 97, 154 (e)—

See PARTITION **I. L. R. 46 Calc. 236**

——— s. 97—*Held*, that s. 97 confers on every recorded proprietor of permanently settled land the right to claim partition subject to certain qualifications. YASIM ALI MIRDHA *v.* RADHA-GOBINDA. **26 C. W. N. 381**

——— s. 154—*if bars suit for declaration of title and possession by Co-sharer.* S. 154 of the Assam Land and Revenue Regulation which provides that no Civil Court shall exercise jurisdiction in the distribution of land or allotment of revenue on partition is no bar to an unrecorded co-sharer, who was not allowed to intervene in partition proceedings before the Revenue authorities, instituting a suit for a declaration of his title to a share of the estate and for confirmation of possession, when the partition proceedings before the Revenue authorities had not yet been completed. HABIRAM DAS *v.* HEM NATH SARMA (1915). **19 C. W. N. 1068**

ASSAULT.

See CRIMINAL PROCEDURE CODE, SS. 345 AND 439 . **I. L. R. 37 All. 419**

See MISJOINDER OF PARTIES. **I. L. R. 42 Calc. 760**

See PENAL CODE (ACT XLV OF 1 860), SS. 323 AND 332. **I. L. R. 37 All. 353**

See RAILWAY PASSENGER. **I. L. R. 44 Calc. 279**

See TORT . **I. L. R. 43 Bom. 103**

——— threat to—

See PROVINCIAL SMALL CAUSES COURTS ACT, SCH. II, CL. 35 (*l*). **I. L. R. 36 Bom. 443**

ASSEMBLING WITH ARMS.

See DACOITY . **I. L. R. 41 Calc. 350**

ASSESSED LAND.

——— suit for land and trees, valuation of—

See COURT-FEES ACT (VII OF 1870), S. 7, CL. (V), (B) AND (C). **I. L. R. 40 Mad. 824**

ASSESSMENT.

See BOMBAY LAND REVENUE CODE—
s. 3 . . **I. L. R. 35 Bom. 462**
s. 48 . . **I. L. R. 34 Bom. 239**
ss. 56 AND 214 **I. L. R. 36 Bom. 91**

See CALCUTTA MUNICIPAL ACT, S. 151, CL. (*b*). . . . **15 C. W. N. 84**

See CANTONMENTS ACT (III OF 1880), S. 22 . . **I. L. R. 38 Bom. 293**

See CHAUKIDARI CHAKRAN LANDS. **I. L. R. 42 Calc. 710**

See COMPENSATION. **I. L. R. 44 Calc. 87**

See INAMDAR . **I. L. R. 41 Bom. 159**

——— failure to pay—

See BOMBAY LAND REVENUE CODE (BOMBAY). S. 56 . . **I. L. R. 37 Bom. 692**

ASSESSMENT—*contd.*

——— of Kazi Inam lands—

See BOMBAY REVENUE JURISDICTION ACT (BOMBAY), S. 4 (*a*), PROV. (*k*). **I. L. R. 44 Bom. 120 and 130**

——— method of—

See LAND ACQUISITION—COMPENSATION **I. L. R. 40 Calc. 64**

See MACHINERY **I. L. R. 46 Calc. 910**

See MUNICIPALITY **I. L. R. 46 Calc. 784**

See SUMMARY SETTLEMENT ACT (BOM. ACT VII OF 1863). **I. L. R. 43 Bom. 583**

——— penal, levy of—

See MADRAS LAND ENCROACHMENT ACT (III OF 1905), SS. 5, 6, 7, 14. **I. L. R. 39 Mad. 727**

——— Powers of the Collector to increase or alter assessment—

See INCOME-TAX ACT (II OF 1886), SS. 14 AND 50 . **I. L. R. 44 Bom. 234**

——— principle of—

See MUNICIPAL ASSESSMENT. **I. L. R. 39 Calc. 141**

See MUNICIPALITY. **I. L. R. 41 Calc. 168**

——— Right of Inamdar to enhance assessment at the end of the period of settlement—

See BOMBAY LAND REVENUE CODE (BOM. ACT V OF 1879), S. 217. **I. L. R. 44 Bom. 110**

——— *Rateable value—Salt-works—Method of assessment—Assessing authority to consider what an hypothetical tenant would pay—Premises to be valued for rateable purposes "rebus sic stantibus"—Valuation for assessment based upon a method applied to salt pans in a different country at different times—Method of valuation wrong and illegal—Aden Act (II of 1864), s. 8* The principles on which property is assessed to the rates are, first, that in assessing any particular property the assessing authority must consider what a tenant from year to year with a reasonable prospect of the continuation of his lease would give for the premises and in considering this, the assessing authority must regard the then occupier as a likely tenant; secondly, that the premises must be valued for rateable purposes "*rebus sic stantibus*," *i.e.*, as they exist at the date of the valuation. *The Queen* v. *School Board for London, 17 Q. B. D. 738, London County Council* v. *Church Wardens, etc., of Parish of Erith and Assessment Committee of Dartford Union, [1893] A. C. 562, Great Central Railway* v. *Banbury Union, [1908] A. C. 315, Davies* v. *Seisdon Union, [1909] A. C. 78, The Queen* v. *Fletton, 3 E. & E. 450, 465,* referred to. In 1909, the plaintiffs obtained from Government a lease of certain lands at Aden for the purpose of constructing salt-works thereon at the annual rental of R7,000 for the land and a royalty of 8 annas per ton of salt exported. They erected a factory for crushing salt on the land and the works first commenced to yield salt in 1911. The defendants were the assessing authority for

ASSESSMENT—*contd.*

the Aden Settlement. For the year 1909 and 1910 the defendants had, under the powers conferred upon them by Government Notifications, assessed the plaintiffs in the annual rent of R7,000 payable by them under the lease. In the year 1911, the defendants adopted a different basis of assessment. They assessed the plaintiffs on the basis of half the produce of works less 10 per cent. landlord's deductions. In support of this method of assessment the defendants relied upon a method of valuation considered to have been in vogue for salt-pans in Bombay in the year 18 ; and upon a decision which they had obtained in their favour from the Resident's Court at Aden in 1909 in respect of other salt-works at Aden to which the alleged Bombay method of assessment was applied. A question being raised whether the mode of assessment adopted by the defendants in the year 1911 was wrong and illegal. *Held*, that the mode of assessment was wrong and illegal as the defendants made no attempt to value the particular salt-works in question or to say whether the method they applied was such as to result in the assessment that the hypothetical tenant of these premises would pay for them. ABDULLABHOY LALJI *v.* THE EXECUTIVE COMMITTEE, ADEN SETTLEMENT (1918) . **I. L. R. 42 Bom. 692**

——————— *Arable land—Exemption from—Bengal Municipal Act (Beng. III of 1884), s. 6, cls. 3, 85—"Holding"——Bengal Municipal (Amendment) Act of 1894, s. 36.* The word "holding" in the Bengal Municipal Act, 1884, is wide enough to cover arable land, which is, therefore, liable to be assessed under the provisions of the Act. MAHADEB AON *v.* CHAIRMAN OF THE HOWRAH MUNICIPALITY (1910) . **I. L. R. 37 Calc. 697**

——————— *Jurisdiction of Civil Court—Bengal Municipal Act (Beng.III of 1884), s. 116—Ultra vires.* Under s. 116 of the Bengal Municipal Act, the decision of the Objection Committee in matters regarding the amount of assessment is final, and the Civil Court has no jurisdiction to interfere in such matters. It can only interfere when the assessment is *ultra vires*. *Manessur Dass* v. *The Collector and Municipal Commissioners of Chapra, I. L. R. 1 Calc. 409*, referred to. *Navadip Chandra Pal* v. *Purnananda Saha, 3 C. W. N. 73*, and *Kameshwar Pershed* v. *The Chairman of the Bhabua Municipality, I. L. R. 27 Calc. 849*, distinguished. CHAIRMAN, MUNICIPAL BOARD, CHAPRA *v.* BASUDEO NARAIN SINGH (1910). **I. L. R. 37 Calc. 374**

——————— *Sovereign right—Limitation—Resump[illegible] Right of Government to assess revenue on land [illegible]ed to be lakheraj—Divesting of such right, effect [illegible] Bengal Regulation (II of 1805), s. 2, sub-s. (2)—Assam Regulation (I of 1886), s. 28, provisos 2 and 4—Legislation when retrospective.* Though the Government's right to assess land revenue is a sovereign right and hence not subject to the Statute of Limitation under ordinary circumstances, there is nothing to prevent the Government from divesting itself of such right by making regulations for assessment and collection of revenue which might under certain circumstances give exemption from assessment of land revenue. *Boddupalli Jagannadham* v. *The Secretary of State for India, I. L. R. 27 Mad. 16*, distinguished. The effect of proviso 4 to s. 28 of the Assam Regulation (I of 1886), which is based on s. 2 of the Bengal Regulation (II of 1805), is to exempt land

ASSESSMENT—*concld.*

from assessment if the owner can prove 60 years' possession of it without payment of any revenue during that period and thus to introduce the rule of 60 years' limitation. Proviso 2 of that Regulation merely authorises assessment of lands excepted from the Permanent Settlement if they do not fall under any of the saving clauses. A statute is not retrospective simply because a part of the requisites for its action is drawn from a time antecedent to its passing. *Queen* v. *St. Mary Whitechapel, 12 Q. B. 120*, followed. ANANDA KUMAR BHATTACHARJEE *v.* SECRETARY OF STATE FOR INDIA (1916). . . **I. L. R. 43 Calc. 973**

——————— *Bengal Municipal Act (Beng. III of 1884), ss. 85, 87.—"Circumstances and property within the Municipality," meaning of.* It is now settled law that the words "within the municipality" in s. 85 of Bengal Municipal Act (Beng. III of 1884) govern both "circumstances" and "property" and that the word "circumstances" is in substance the equivalent of 'means" *Deb Narain Dutt* v. *Chairman of the Baruipur Municipality, I. L. R. 39 Calc. 141* and *I. L. R. 41 Calc. 168, Chairman of Giridih Municipality* v. *Srish Chandra Mozumdar, I. L. R. 35 Calc. 859, 12 C. W. N. 709*, referred to. Income brought to be spent and enjoyed within the municipality in which the rate-payer is resident becomes part of the means or circumstances within that municipality and liable to assessment thereunder s. 85 of the Bengal Municipal Act (Beng. III of 1884). *Kameshwar Pershad* v. *Babua Municipality, I. L. R. 27 Calc. 849*, distinguished. CHAIRMAN JAYNAGAR MUNICIPALITY *v.* SAILABALA DUTT (1920). **I. L. R. 48 Calc. 443**

ASSESSMENT OF RENT.

See ASSESSMENT.

——————— **by Collector—**

See CHAUKIDARI CHAKRAN LAND. **I. L. R. 37 Calc. 598**

——————— **by Settlement Officer—**

See BOMBAY, LAND REVENUE CODE (BOM.), ss. 144 AND 160. **I. L. R. 43 Bom. 6**

See RENT . **I. L. R. 38 Calc. 278**

See SARANJAM **I. L. R. 40 Bom. 606**

See TRANSFER OF PROPERTY ACT. s. 55 . **I. L. R. 34 Bom. 387**

ASSESSORS.

See CRIMINAL PROCEDURE CODE, 1898,
s. 238 . . **I. L. R. 45 Bom. 619**
ss. 268 AND 537 **I. L. R. 43 All. 125**
s. 284. **I. L. R. 35 All. 570**
3 Pat. L. J. 141

See DACOITY. . **I. L. R. 41 Calc. 350**

See PRIVATE DEFENCE **3 Pat. L. J. 653**

——————— **appointment of—**

See BENGAL MUNICIPAL ACT (BENG. ACT III OF 1884) . . **I. L. R. 37 Calc. 44**

——————— **opinion of—**

See MAGISTRATE. **I. L. R. 39 Calc. 119**

——————— *Examination of Assessors—Re-trial—Criminal Procedure Code (Act V of 1898), ss. 309, 403, 423, 439—Assessors not to be questioned until their opinions delivered and recorded—Rioting—Right of private defence—Practice.* S. 309 of the Code of Criminal Procedure

ASSESSORS—*contd.*

gives the Judge a discretion to sum up the evidence for the benefit of the assessors if he thinks necessary, but it gives him no power to question them until they have delivered their opinions orally and he has recorded such opinions. When a conviction is set aside and a re-trial ordered, the whole case is re-opened and the accused must be tried again on all the charges originally framed, and having regard to the provisions of s. 423 of the Code of Criminal Procedure, the provisions of s. 403 in that respect cannot apply. *Krishna Dhan Mandal* v. *Queen-Empress, I. L. R. 22 Calc. 377*, and *Queen-Empress* v. *Jebarulla, I. L. R. 23 Calc. 975*, referred to. NAZIMUDDIN *v.* EMPEROR (1912) . . . . I. L. R. 40 Calc. 163

ASSETS.

See ADMINISTRATOR-GENERAL'S ACT (II OF 1874), ss. 28, 34, 35.
I. L. R. 38 Mad. 509

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), ss. 276 AND 295.
I. L. R. 37 Bom. 138

—— held by Court—

See CIVIL PROCEDURE CODE, O. XXI, r. 52 . . I. L. R. 44 Mad. 109

—— rateable distribution of—

See CIVIL PROCEDURE CODE, 1908, s. 73.
15 C. W. N. 872

ASSIGNEE.

—— addition of, as plaintiff—

See LIMITATION ACT (XV OF 1877), s. 22.
I. L. R. 40 Mad. 722

See EXECUTION OF DECREE.
I. L. R. 47 Calc. 515

—— from subscriber to kuri—

See SPECIFIC RELIEF ACT (I OF 1877), s. 42 . . I. L. R. 29 Mad. 80

—— of promissory note—

See TRANSFER OF PROPERTY ACT (IV OF 1882), ss. 130 AND 134.
I. L. R. 38 Mad. 297

—— right of, to apportionment—

See LESSOR AND LESSEE.
I. L. R. 38 Mad. 86

See SUCCESSION CERTIFICATE ACT (VII OF 1889), s. 4 I. L. R. 38 All. 474

—— right of, to a charge—

See INAMDAR . I. L. R. 40 Mad. 93

—— *Decree reversed in appeal—Assignee not a party to the appeal—Money realised by assignee in execution—Application by judgment-debtor for restitution—Objection by assignee to application—Suit by judgment debtor against assignee—Fraud and collusion between judgment-debtor and original decree-holder, effect of—Civil Procedure Code (Act XIV of 1882), s. 583—*[illegible]. A judgment-debtor, from whom the assignee of a money-decree has realised the decretal amount in execution is entitled to recover it back from him when the decree is afterwards reversed in appeal even if the assignee of the original decree was not brought on the record in the appeal. Neither the fact that the assignment was made before the appeal was filed, nor the fact that the judgment-debtor had knowledge of the assign-

ASSIGNEE—*contd.*

ment before he filed his appeal, makes any difference. Where the decree of the Appellate Court was the result of fraud and collusion between the judgment-debtor and the original decree-holder, it is possible that such a plea if made and proved would be a sufficient answer to a suit by the judgment-debtor against the assignee of the decree. Money realised under an invalid process of Court must be treated as money had and received to the use of the person from whom it was realised. A suit for restitution by the judgment-debtor was maintainable, where he had sought his remedy for restitution by an application made to the Court which executed the decree and it was on the objection of the defendant (assignee of the decree) that he was driven to institute the suit; the defendant cannot now be heard to say that the procedure to which he himself successfully objected was the proper procedure. *[illegible]* v. *[illegible] Goundan, I. L. R. [illegible] Mad. [illegible]*, and *[illegible] Ayyar* v. *[illegible] Ayyar, I. L. R. [illegible] Mad. [illegible]*, followed. *[illegible]* v. *[illegible], I. L. R. [illegible] Mad. [illegible]*, referred to. *[illegible]* v. *[illegible], I. L. R. 24 All. [illegible]*, dissented from. [illegible] v. [illegible] ([illegible]).
I. L. R. [illegible] Mad. [illegible]

ASSIGNEE OF DECREE.

See LANDLORD AND TENANT.
I. L. R. 41 Calc. [illegible]

ASSIGNEE OF MORTGAGEE.

—— suit by—

See MORTGAGE I. L. R. 47 Calc. [illegible]

—— Purchaser—

See TITLE . I. L. R. 47 Calc. [illegible]

ASSIGNMENT.

See ADMINISTRATION BOND.
I. L. R. [illegible]

See CHAMPERTY AND MAINTENANCE.
I. L. R. [illegible]

See CIVIL PROCEDURE CODE, [illegible] XXI, r. 16 . I. L. R. [illegible]

See CONTRACT . I. L. R. [illegible]

See EQUITABLE ASSIGNMENT.

See TRADE MARK.
I. L. R. [illegible]
I. L. R. [illegible]

See [illegible]
I. L. R. [illegible]

—— [illegible]

See TRANSFER OF PROPERTY [illegible]
I. L. R. [illegible]

—— [illegible]

See [illegible]
I. L. R. [illegible]

—— [illegible]

See [illegible]
I. L. R. [illegible]

See [illegible]
I. L. R. [illegible]

—— [illegible]

See [illegible]

See [illegible] I. L. R. [illegible]

ASSIGNMENT—*contd.*

See SUCCESSION CERTIFICATE ACT, 1889, s. 4. . . I. L. R. 36 All. 21
I. L. R. 38 All. 474

——————— *Deposit of money—Stakeholder—Valid assignment by depositor to his creditor—Neglect of the creditor to recover—Creditor chargeable with the amount.* Where money deposited with a stakeholder was validly assigned by the depositor to his creditor in satisfaction of his debt and the creditor, being able to recover the amount so assigned, neglected to do so he was chargeable with the amount. GANPATRAO BALKRISHNA BHIDE *v.* MAHARAJA MADHAVRAO SINDE SARKAR (1910) . I. L. R. 35 Bom. 1

——————— The fact that the person entitled to sue on a mortgage happens by assignment to be a Parsee cannot affect the (Hindu) mortgagor's right to claim the advantage of the rule of damdupat if it existed when the mortgage was entered into. JEEWANBAI *v.* MANORDAS LACHMANDAS . . . I. L. R. 35 Bom. 199

ASSIGNMENT OF DECREE.

See CIVIL PROCEDURE CODE, 1908, O. XXI, R. 16 . . 5 Pat. L. J. 390

See EXECUTION OF DECREE.
I. L. R. 34 All. 518

See MAINTENANCE.
I. L. R. 38 Calc. 13

See REGISTRATION ACT (XVI OF 1908), ss. 17 (*b*), 49 . I. L. R. 36 All. 524

——————— to defeat creditors—

See DECREE . I. L. R. 37 Mad. 227

ASSIGNMENT OF EQUITY OF REDEMPTION.

See MORTGAGE . I. L. R. 45 Calc. 702

ASSIGNMENT OF JODI.

——————— by Government—

See INAMDAR . I. L. R. 40 Mad. 93

ASSISTANT COLLECTOR.

——————— jurisdiction of—

See CIVIL PROCEDURE CODE (1908), ss. 68 AND 70, SCH. III.
I. L. R. 37 All. 334

ASSISTANT JUDGE.

See BOMBAY CIVIL COURTS ACT (XIV OF 1869), s. 16 . I. L. R. 37 All. 136

ASSISTANT SESSIONS JUDGE.

See CRIMINAL PROCEDURE CODE, s. 408 (*b*) . . I. L. R. 37 All. 471

ASURA FORM.

See TRUSTS ACT (II OF 1882), s. 88.
I. L. R. 43 Bom. 173

——————— of marriage—

See HINDU LAW—MARRIAGE.
I. L. R. 37 Bom. 295

ATTACHED PROPERTY.

——————— claims to—

See VOLUNTARY PAYMENT.
I. L. R. 40 Calc. 598

ATTACHING CREDITOR.

See ATTORNEY I. L. R. 43 Calc. 932

——————— withdrawal by—

See DEPOSIT IN COURT.
I. L. R. 43 Calc. 269

ATTACHMENT.

See AGRA TENANCY ACT (II OF 1901), s. 124 . . I. L. R. 38 All. 40

See APPEAL . I. L. R. 41 Calc. 160

See ARMY ACT (44 & 45 VICT. c. 58), ss. 145, 190. . I. L. R. 43 Bom. 368

See ATTACHMENT BEFORE JUDGMENT.

See ATTACHMENT OF DEBT.

See BENGAL MUNICIPAL ACT, s. 321.
15 C. W. N. 519

See BENGAL TENANCY ACT, s. 170.
15 C. W. N. 820

See BOMBAY LAND REVENUE CODE (BOM.), ss. 144, 160.
I. L. R. 43 Bom. 6

See CIVIL PROCEDURE CODE, 1882—
ss. 265, 274 . I. L. R. 35 Bom. 288
ss. 276, 295. I. L. R. 37 Bom. 138
ss. 278, 279 280, 281.
I. L. R. 34 All. 365
ss. 282, 287 . I. L. R. 35 Bom. 275
ss. 287, 293 . I. L. R. 36 Bom. 329
s. 325A. . I. L. R. 36 Bom. 510

See CIVIL PROCEDURE CODE (1908)—
s. 50; O. XXII, R. 12.
I. L. R. 42 All. 570
s. 60, CL. (2) (*b*) I. L. R. 33 All. 529
I. L. R. 37 Bom. 26, 415, 471
I. L. R. 35 All. 307
I. L. R. 38 Bom. 667
I. L. R. 39 All. 308
I. L. R. 40 Mad. 302
I. L. R. 41 Bom. 475
s. 64 . . I. L. R. 43 All. 399
ss. 47, 73, O. XXI, RR. 54, 55.
I. L. R. 36 Bom. 156
s 115 . . I. L. R. 45 Bom. 360
s. 151 . . I. L. R. 34 Bom. 135
O. XXI, R. 16 I. L. R. 36 Bom. 58
O. XXI, R. 58 I. L. R. 45 Bom. 561
O. XXI, R. 57 I. L. R. 34 All. 490
O. XXXIV, R. 14.
I. L. R. 35 Bom. 248

See CONTRACT ACT (IX OF 1872), s. 70.
I. L. R. 42 Bom. 556

See CONTRIBUTION I. L. R. 32 All. 479

See CO-OPERATIVE SOCIETY ACT, ss. 19, 20 . I. L. R. 42 Calc. 377

See CRIMINAL PROCEDURE CODE, s. 146.
15 C. W. N. 163

See DISPUTE CONCERNING LAND.
I. L. R. 37 Calc. 331

See EXECUTION OF DECREE.
I. L. R. 33 All. 482
I. L. R. 48 All. 658
I. L. R. 38 Calc. 482

ATTACHMENT—*contd.*

See Execution of Decree—*contd.*
I. L. R. 42 All. 394
I. L. R. 46 Calc. 962

See Ghatwali Tenure.
I. L. R. 39 Calc. 1010

See Insolvency **I. L. R. 40 Calc. 78**

See Jalkar . **I. L. R. 39 Calc. 469**

See Limitation **I. L. R. 45 Calc. 285**
I. L. R. 42 Calc. 72, 289

See Limitation Act (XV of 1877), *Sch. II, Art.* 120.
I. L. R. 36 Mad. 383

See Maintenance.
I. L. R. 38 Calc. 13

See Mortgage . **I. L. R. 38 Bom. 10**
I. L. R. 46 Calc. 245

See Occupancy Holding.
I. L. R. 44 Calc. 720

See Provincial Insolvency Act (III of 1907), ss. 18, 22 and 23.
I. L. R. 40 All. 86, 197, 582

See BombayRevenue Jurisdiction Act (Bom.) . **I. L. R. 37 Bom. 542**

See Sale for Arrears of Revenue.
14 C. W. N. 677

———— **by creditor—**

See Insolvency.
I. L. R. 44 Calc. 1016

———— **cancelling of—**

See Court Fees Act (VII of 1870), Sch. II, Art. 17 . **I. L. R. 39 Mad. 602**

———— **effect of—**

See Civil Procedure Code (1908), s. 73, O. XXXVIII, rr. 5, 8 and 10; O. XXI, rr. 52 and 63.
I. L. R. 37 All. 575

———— **for arrears of revenue—**

See Contract Act (IX of 1872), ss. 69 and 70. . **I. L. R. 39 Mad. 795**

———— **of alienated property—**

See Fraudulent Conveyance.
I. L. R. 41 Mad. 612

———— **of British army officer's pay—**

See Civil Procedure Code (Act V of 1908), s. 60, cl. (2) (*b*).
I. L. R. 37 Bom. 26

———— **of debt—**

See Civil Procedure Code, 1882, ss. 268, 278 and 283.
I. L. R. 38 Bom. 631

See Execution of Decree.
I. L. R. 38 Bom. 631

See Limitation Act, 1908, Sch. II, Art. 29, 62, 120 . **I. L. R. 38 Mad. 972**

———— **of mortgaged property—**

See Civil Procedure Code (Act XIV of 1882), ss. 278, 282, 283, 287.
I. L. R. 41 Bom. 64

———— **of moveables—**

See Jurisdiction.
I. L. R. 46 Calc. 520

ATTACHMENT—*contd.*

See Sanction for Prosecution.
I. L. R. 47 Calc. 741

———— **of property in widow's hands—**

See Hindu Law—Widow.
I. L. R. 39 Mad. 565

———— **of property in custody of Court—**

See Civil Procedure Code, 1908, O. XXI, r. 52 . **I. L. R. 44 Mad. 100**

———— **prayer for—**

See Execution Petition.
I. L. R. 41 Mad. 251

———— **where maintenance charge on the property—**

See Civil Procedure Code (Act V of 1908), O. XXI, r 60.
I. L. R. 44 Bom. 860

———— **withdrawal of—**

See Civil Procedure Code (1882).
I. L. R. 37 All. 542

1. ———— *Civil Procedure Code (Act XIV of 1882), ss. 256, 488 and 490—*

as an attachment in execution proceedings. An omission on the part of the defendant to take

Malo *v.* Kattyayani Debi (1911).
I. L. R. 38 Calc. 448

2. ———— *Criminal Procedure Code (Act V of 1898), ss. 146 and 148—Refusal to grant time—Duties of the Magistrate—Practice.* It is only when the Magistrate decides that none of the parties was in possession or is unable to satisfy himself as to which of them is in possession that he can attach property under s. 146 of the Criminal Procedure Code He cannot say that

Bhagwat Pandey (1912).
I. L. R. 40 Calc. 105

3. ———— *Warrant—Penal Code(Act XLV of 1860), s. 147—Nazir's power of delegation—"Bailiff"—Civil Procedure Code (Act V of 1908), O. XXI, r. 25.* Where a nazir directed a peon to attach property and fixed a time within which the attachment was to take place and the peon executed the warrant of attachment after the expiration of the time so fixed: *Held*, that the peon, deriving his authority from the Court to make the seizure, could lawfully make the seizure even after the time fixed by the nazir for the execution had expired. The nazir and bailiff are not the same person. The officer to whom O. XXI, r. 25 of the Civil Procedure Code refers is not the nazir, but the *Dharam*

ATTACHMENT—*contd.*

Queen Empress, I. L. R. 22 Calc. 996, distinguished. SUBED ALI *v.* EMPEROR (1913).
I. L. R. 40 Calc. 849

4. ———————— *If creates lien or title.* It is well settled that attachment creates no charge or lien upon the attached property: it merely prevents private alienation. It does not confer any title on the attaching creditor. MOHIUDDIN *v.* PIRTHICHAND LAL CHOWDHURY (1914).
19 C. W. N. 1159

5. ———————— *Alienation by judgment-debtor alleged to be pending the attachment and a fraudulent transfer to a creditor other than decree-holder—Transfer of Property Act (IV of 1882), s. 53—Judgment-debtor preferring one creditor before others—Civil Procedure Code, 1882, ss. 240, 276, 295—Contest between private alienee and decree-holder—Continuance of attachment.* The question in this case was which of two titles to the property in suit was to be preferred, that of the appellant under two deeds of sale executed in her favour on 15th July, 1907, by the judgment-debtor, or that of the respondent (decree-holder) who purchased the property at an auction sale on 23rd August, 1907, in execution proceedings under a decree, dated 3rd January, 1901, which were instituted by an application for attachment on 16th July, 1907. There were two decrees of the High Court at Calcutta, Original Side, against the judgment-debtor, of 24th August, 1896, and 3rd January, 1901, and the respondent was transferee of both decrees, which were sent to the District Court at Murshidabad for execution. On 13th June, 1902, application was made for execution of the decree of 1896, and the proceedings became execution case 8 of 1902; and the execution of the decree of 1901 commenced as above as execution case 16 of 1907. *Held* by the Judicial Committee (reversing the decision of the High Court), that on the evidence, and under the circumstances of the case, the appellant (plaintiff) had the better title. The deeds in her favour were not ante-dated as alleged, and there was no fraudulent transfer to her within the meaning of s. 53 of the Transfer of Property Act (IV of 1882). The preferring of one creditor to another by the judgment debtor did not make the transfer a fraudulent one. A debtor, for all that is contained in s. 53, may pay his debts in any order he pleases, and may prefer any creditor he chooses. Nor was the private alienation to the appellant void under s. 276 of the Civil Procedure Code, 1882, as having been made during the continuance of an attachment. The respondent's title rested entirely on the attachment in the execution case 16 of 1907, and that alone was the attachment the continuance of which could avoid the appellant's private alienation; but on the facts it did not do so. The respondent could not invoke the attachment in execution case 8 of 1902 to defeat the alienation to the appellant which was made in different execution proceedings. Nor could he with its aid rely on s. 295 of the Civil Procedure Code, 1882, as entitling him to the benefit of s. 276. There were no assets in Court which was essential if s. 295 were invoked, and the only attachment within the meaning of s. 276 was that in execution case 16 of 1907 which he could not employ against the appellant. *Sorabji Edulji Warden v. Gobind Ramji, I. L. R. 16 Bom. 91*, referred to. MINA KUMARI BIBI *v.* BIJOY SINGH DUDHURIA (1916) **I. L. R. 44 Calc. 662**

6. ———————— *The pay of a British Officer in the Indian Army is liable to attachment—Civil Procedure Code (Act V of 1908), ss. 2 (17), 60 (1) (i) and O. XXI, r. 48—Repealing and Amending Act X of 1914—Army Act, 1881 (44 and 45 Vict. c. 58), ss. 136, 190 (8)—Army (Annual) Act, 1895, s. 4—Government of India Act, 1915, ss. 33, 65 (1) (d) and (2)—Chamber Summons.* A British Officer in the Indian Army is a 'Public Officer' within the meaning of s. 2 (17) of the Civil Procedure Code, 1908, and as such public officer he is liable to have half his pay or salary attached under s. 60 (1) (i) and O. XXI, r. 48 of that Code, inasmuch as that attachment is a deduction authorised by a law (*viz.*, the Civil Procedure Code) passed by the Governor-General of India in Council within the meaning of s. 136 of the Army Act, 1881, as amended by s. 4 of the Army (Annual) Act, 1895. The proviso in s. 60 (2) (b) of the Code of Civil Procedure, 1908, having been repealed by the Repealing and Amending Act X of 1914, must be regarded as unnecessary or dead law. *H. F. B. D. Hay* v. *Ram Chandar, I. L. R. 39 All. 308*, followed. *Calcutta Trades Association* v. *Ryland, I. L. R. 24 Calc. 102*, and *Watson v. Lloyd, I. L. R. 25 Mad. 402*, referred to. *Duckworth* v. *Duckworth, I. L. R. 43 Bom. 368*, distinguished. *Colonel Lecky* v. *Bank of Upper India, Limited, I. L. R. 33 All. 529*; *Velchand* v. *Bourchier, I. L. R. 37 Bom. 26*, and *King, King & Co.* v. *Major Davidson, I. L. R. 38 Bom. 667* regarded as obsolete owing to the repeal of the proviso in s. 60 (2) (b) of the Civil Procedure Code, 1908. KERING, RUPCHAND & Co. *v.* MURRAY (1918) . . . . **I. L. R. 43 Bom. 716**

7. ———————— *Attachment raised by order of the lower court—Subsequent order of the High Court restoring the attachment—Retrospective effect of High Court's order. Held*, that an order of the High Court restoring an attachment which has been raised by an order of an inferior court relates back to the date when the attachment was first made, and its effect will be to invalidate a sale made when on the face of the record there was no subsisting attachment of the property sold. *Ali Ahmad Khan* v. *Bansidhar, 6 A. L. J., 434, Aziz Bakhsh* v. *Kaniz Fatima Bibi, I. L. R. 34 All., 490, Mahomed Warris* v. *Pitambur Sen, 21 W. R. C. R. 435, Bonomali Rai* v. *Prosunno Narain Chowdhury, I. L. R. 23 Calc., 829*, and *Ram Chandra Marwari* v. *Mudheshwar Singh, I. L. R., 33 Calc., 1153*, referred to. GOPAL PRASAD *v.* KASHI.
I. L. R. 42 All. 39

8. ———————— *Sale set aside on the ground of value of property not having been properly stated in sale proclamation—Subsequent application for attachment, whether revives previous attachment—Code of Civil Procedure (Act V of 1908), O. XXI, r. 57.* Where an execution sale is set aside for any reason other than default on the part of the decree-holder the attachment which had been obtained prior to the first sale revives to support a subsequent application for execution, and no fresh attachment is necessary. MAHABHARAT DUTTA *v.* SURJA KANTA DE . . . . . . **3 Pat. L. J. 310**

9. ———————— *Decree—Execution—Claim to property—Burden of proof on the claimant—Adverse possession—Indian Limitation Act (IX of 1908), s. 28.* A claimant in attachment proceedings must prove that he himself had an interest in the attached property. If he fails to do that, then he has no further interest in the pro-

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ceedings. An owner of property does not lose his right to property merely because he happens not to be in possession of it for twelve years. Under s. 28 of the Indian Limitation Act, 1908, his right is only extinguished at the determination of the period limited by the Act to him for instituting a suit for possession of property; that period cannot be determined unless it has commenced to run, and the period will not commence to run until the owner is aware that some one else in possession is holding adversely to himself. SWAMIRAO SHRINIWAS *v.* BHIMABAI (1920).

I. L. R. 45 Bom. 1020

ATTACHMENT AND SALE.

——— **of moveables**—

See LIMITATION ACT (IX OF 1908), SCH. I, ART. 11 . **I. L. R. 40 Mad. 733**

ATTACHMENT BEFORE JUDGMENT.

See ATTACHMENT **I. L. R. 38 Cal. 448**

See CIVIL PROCEDURE CODE (ACT V OF 1908)—

O. XXXVIII, R. 5.

See LIMITATION ACT (IX OF 1908), SCH. I, ART. 13 . **I. L. R. 41 Mad. 23**

See TRANSFER OF PROPERTY ACT (IV OF 1882), S 52 . **I. L. R. 40 Mad. 955**

——— **Divorce Act (IV of 1869), ss. 7, 45**—*Civil Procedure Code (Act V of 1908), o. XXXVIII, rr. 5, 6—Relief.* An order for attachment before judgment will not be made in divorce proceedings. Attachment before judgment being a matter of relief and not of procedure, is governed by s. 7 of the Divorce Act and the principles and rules of the English Divorce Court, and not by s. 45 of the Divorce Act and the Civil Procedure Code. Order XXXVIII, rules 5 and 6, have no application in divorce proceedings. PHILLIPS *v.* PHILLIPS (1910) . . **I. L. R. 37 Calc. 613**

——— **Maliciously procuring**—*No right of suit for damages therefor.* Procuring an order for attachment before judgment, however maliciously, does not of itself *afford* a cause of action for damages, as damage does not necessarily and naturally flow from an application for attachment before judgment. *Semble:* Petitions for adjudications in bankruptcy and for winding up of companies stand on a different footing. RAMA AYYAR *v.* GOVINDA PILLAI (1915).

I. L. R. 39 Mad. 952

——— **Termination of on appeal**—*Private sale—Sale in execution of decree—Jurisdiction—Civil Procedure Code (Act V of 1908), s. 115, O. XXXVIII, rr. 9 and 11.* The Court should when dismissing a suit at the same time make the order directing attachment before [illegible]

Meherban Khan, 13 C. L. J. 243, and *Ram Chand v. Pitam Mal, I. L. R. 10 All. 506,* referred to. Where the District Judge has directed property not under attachment to be sold without being first attached, the question raised is one which falls within the scope of s. 155 of the Civil Procedure Code. ABDUL RAHMAN *v.* AMIN SHARIF (1918).

I. L. R. 45 Calc. 730

ATTACHMENT BEFORE JUDGMENT—*contd.*

——— **of money payable out of jurisdiction** *by non-resident judgment-debtor, if legal—Court realising money by usurpation of jurisdiction and paying it out—Order, if may be maintained as right on the merits—Recovery of money paid illegally by Court of its own motion by execution.* It is not competent to a Court in execution of a decree for money to attach at the [illegible] payable to the [illegible]isdiction by a [illegible]isdiction of the [illegible]id to the Court as a result of such attachment, the order of the Court directing payment of the money should be cancelled and the parties restored to the position which they occupied before the illegal intervention of the Court. Order passed by Court by usurpation of jurisdiction, cannot be allowed to stand on a consideration that a similar order would have been made on the merits by a Court of competent jurisdiction. It is the policy of the law, as a question of public order, to keep inferior Courts strictly within their proper sphere of jurisdiction. It is imperative that money which has been paid out of Court under an illegal order made without jurisdiction must be brought back into court. If the money is not returned to Court by the party who took it out, the Court should of its own motion proceed to realise it by attachment and sale of his properties and by attachment of his person if necessary. SURENDRA NATH GOSWAMI *v.* BANSI BADAN GOSWAMI (1916). . **22 C. W. N. 160**

——— **Omission of, Court to order withdrawal of when dismissing suit**—*Suit decree by Appellate Court—Attachment, if remains in force—Civil Procedure Code (Act V of 1908), O. XXXVIII, rr. 9 and 11.* Where the trial Court made an order for attachment before judgment and after trial dismissed the suit but omitted to make an order in terms of O. XXXVIII, r. 9, withdrawing the attachment and the suit was eventually decreed by the Appellate Court. *Held,* that the attachment did not subsist and fell with the dismissal of the suit in spite of the Court's failure to make the formal order withdrawing the attachment when dismissing the suit. Effect of O. XXXVIII, r. 11, considered. AZIZUR RAHMAN *v.* AMIN SHARIFF (1918). . **22 C. W. N. 927**

——— **Moveables**—*Power of the Provincial Small Cause Court—Civil Prorcedure Code (Act V of 1908), ss. 7 (b), 94.* For the purpose of interpreting cl. (*b*) of s. 7 of the Civil Procedure Code, an attachment before judgment is not one of the interlocutory orders there referred to. The only orders excluded are those specifically mentioned in s. 94 as injunctions or interlocutory orders, that is to say, orders under cl. (*c*) or cl. (*e*) of s. 94. A Provincial Small Cause Court has the power to attach movables before judgment. S. 7, cl. (*b*) and s. 94 of the Civil Procedure Code interpreted. KUMUD BIHARY PAL *v.* HARI CHARAN SARDAR (1918)

I. L. R. 46 Calc. 717

ATTACHMENT IN EXECUTION OF A MONEY-DECREE.

[illegible]

right to redeem—Attachment whether constituting lis

ATTACHMENT IN EXECUTION OF A MONEY-DECREE—*contd.*

pendens—*Suit on Mortgage—Attaching creditor, whether proper party—Subsequent agreement to sell to another by judgment-debtor pending application for re-attachment but without notice—Order to re-attach whether* res Judicata *against person agreeing to buy—Execution sale under Money-decree—whether conveying also the right of attaching creditor to redeem —Ss. 85 and 91. Transfer of Property Act (IV of 1882).* A Court sale of the judgment-debtor's interest in attached property puts an end to the attachment and incidentally to the attaching creditor's right of redemption under s. 91 of the Transfer of Property Act. It makes no difference that the Court sale was in execution of a mortgage decree and that the attaching creditor was not a party to the suit on the mortgage. An attaching creditor is not a proper party to such a suit. A private sale pursuant to an agreement entered into after an application for attachment but before notice is good as against the auction purchaser in the Court sale held pursuant to the attachment. After such agreement, the private purchaser is not represented by the judgment-debtor and is not bound by the order of sale made against him. *Held*, further that a purchaser in execution of a money-decree obtained only the right, title and interest of the judgment-debtor and not also any right of the attaching decree-holder which was purely personal to him, *e.g.*, a right to redeem. *Kashy Nath Roy Chbudhry* v. *Sunbanand Shaha*, *(1886)*, *I. L. R. 12 Calc. 317*, followed. *Venkata SeetharaMayya* v. *Venkataramayya*, *(1914)*, *I. L. R. 37 Mad., 418*, dissented from. *Held*, further by WALLIS, *C.J.* (SESHAGIRI AYYAR, *J.*, dissenting) that a purchaser in execution of a money-decree was not entitled to sue for redemption without setting aside the prior sale of the same properties held in execution of a mortgage decree. *Lala Ganpat Lal* v. *Bindbasini Prasad Narayan Singh*, *(1920)*, *47 I. A., 91* ; s.c., *39 M. L. J., 108 (P. C.)*, discussed. *Held*, also by WALLIS, *C.J.* (SESHAGIRI AYYAR, *J.*, [illegible]) that, in the circumstances of the case, [illegible]nt effected by the holder of the money-[illegible] must be deemed to have been abandoned [illegible] was not subsisting on the date of the Court [illegible] CHAMIYAPPA THARAKUN *v.* RANA AYYAR. I. L. R. 44 Mad. 232

ON POLITICAL PARTY.

See SEDITION . I. L. R. 38 Calc. 253

ATTEMPT.

See PENAL CODE (ACT XLV OF 1860), ss. 457, 511 . I. L. R. 37 Bom. 553

ATTENDANCE.

——— enforcement of—

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ATTESTATION.

See MORTGAGE BOND. I. L. R. 46 Calc. 522

See MORTGAGE. I. L. R. 45 Calc. 747

See STAMP ACT, 1899, s. 60. 2 Pat. L. J. 686

ATTESTATION—*contd.*

See TRANSFER OF PROPERTY ACT (IV OF 1882), s. 59. . I. L. R. 37 All. 474
I. L. R. 38 All. 461
I. L. R. 36 Bom. 617
I. L. R. 41 Bom. 384

ss. 59, 100. . I. L. R. 35 All. 164

See USUFRUCTUARY MORTGAGE. I. L. R. 39 Calc. 227

See WILL . I. L. R. 47 Calc. 1043

——— by mortgagor—

See MORTGAGE BY MINOR. I. L. R. 38 Mad. 1071

——— Gift—

See TRANSFER OF PROPERTY ACT (IV OF 1882), s. 123 . I. L. R. 44 Bom. 231

——— of instrument—

See AGRA TENANCY ACT (II OF 1901) s. 97 . . I. L. R. 37 All. 59

——— of mortgage deed—

See PARDANASHIN LADY. I. L. R. 45 Calc. 748

——— Proof of whether necessary when execution admitted—

See PURDANASHIN . 6 Pat. L. J. 465

——— Scribe, whether an attesting witness—

See EVIDENCE ACT, 1872, s. 68. 1 Pat. L. J. 129

See TRANSFER OF PROPERTY ACT (IV OF 1882), s. 59. . I. L. R. 44 Bom. 405

——— *Witness how far affected with knowledge of contents.* The mere attestation of an instrument by a person does not necessarily import concurrence by him in the transaction evidenced thereby. *Raj Lukhee Dabia* v. *Gakool Chunder Chowdhury, 13 Moo. I. A. 209*, referred to. The question whether attestation of document should be held to imply assent is a question of fact and must be determined with reference to the circumstances of each case and the High Court cannot entertain it in second appeal. *Deno Nath Das* v. *Kotiswar Bhattacharya, 21 Indian Cases 367*, and *Mewa Singh* v. *Bhagwant Singh, 5 Indian Cases 252*, referred to. LAKHPATI *v.* RAMBODH SINGH (1915) . . . . I. L. R. 37 All. 350

——— *Person signing in a capacity other than that of a witness, effect of.* Where a deed was executed by 2 Pardanashin ladies in the presence of their husband and the latter afterwards also signed below but not in the place where other witnesses had signed and apparently to evidence his approval. *Held* that the husband was not an attesting witness. RAMBAHADUR SINGH v. *Ajodhya Singh, 1 Pat. L. J. 129*, followed. SRIMATI BAR KUARIN, ALAH MANJARI KUARI *v.* SIRCAR BARNARD & CO. . 6 Pat. L. J. 473

——— *Document, execution of —Attesting Witness—Transfer of Property Act (IV of 1882), s. 59—Whether one joint executant of a deed can be treated as an attesting witness to the signature of the other—Purdanashin lady whether an attesting witness should actually see the signature made, or the mark affixed by.* When a document is

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jointly executed by more than one person in the presence of each other, each executant can not be treated as an attesting witness in respect of the signature of every other executant. For the purpose of valid attestation under s. 59 of the Transfer of Property Act, it is not essential that the witnesses should actually see the signature made, or the mark, seal or thumb impression affixed, but it would be sufficient if the execution took place in presence of the witnesses, although the executants were screened off from the gaze of the witnesses themselves. SARUR JIGAR BEGUM *v.* BARADA KANTA MITTER (1910) . . **I. L. R. 37 Calc. 526**

ATTESTATION AND RATIFICATION.

See LIMITATION ACT (XV OF 1877), SCH. II, ARTS. 120 AND 125.
I. L. R. 38 Mad. 396

ATTESTING WITNESS.

See ATTESTATION. **I. L. R. 37 Calc. 526**

See MORTGAGE . **14 C. W. N. 1046**
4 Pat. L. J. 511

See EVIDENCE ACT (I OF 1872), s. 68.
I. L. R. 35 All. 254
1 Pat. L. J. 369

See STAMP ACT, 1899, s. 2.
26 C. W. N. 585

See WILL . **I. L. R. 47 Calc. 1043**

———— *Mortgage bond—Transfer of Property Act (IV of 1882), s. 9—Evidence Act (I of 1872), s. 68.* A person who is present and witnesses the execution of a mortgage bond and whose name appears on the document, though he is therein described merely as the writer of the

Behari Kupur, 7 C. W. N. 160, followed. *Badri Prasad* v. *Abdul Karim, I. L. R. 35 All. 254, Ram Bahadur Singh* v. *Ajodhya Singh, 20 C. W. N. 699,* not followed. *Shamu Patter* v. *Abdul Kader Ravuthan, I. L. R. 35 Mad. 607,* referred to and distinguished. An "attesting witness" in s. 68 of the Evidence Act (I of 1872) has the same meaning as
an
of
v.
I. L. R. 48 Calc. 61

ATTORNEY.

See LEGAL PRACTITIONER.

See POWER OF ATTORNEY.

See PROFESSIONAL MISCONDUCT.
I. L. R. 41 Calc. 113

See SANCTION FOR PROSECUTION.
I. L. R. 41 Calc. 446

———— **Right of audience—**

See PRESIDENCY TOWNS I
(III OF 1919), ss. 6, 27
I. L. R.

———— *Adm*

if binds client. An admission by unless satisfactorily explained cogent evidence against the client. CHURAN BANERJEE *v.* SARAT KUMARI (1916) . . . . . **20 C. W.**

———— *Application by for discharge—Notice to client, sufficiency*

ATTORNEY—*contd.*

an attorney wishes to withdraw from a case even for good grounds, he must give his client reasonable notice of his intention so that the client may have a reasonable opportunity of getting other advice and making arrangements before the hearing of the application of the attorney for obtaining his discharge. When an attorney gave notice to the client on the day previous to his making application before Court for obtaining his discharge and obtained the order: *Held,* on appeal, that the order must be set aside for insufficiency of notice. PRABHU LAL *v.* KUMAR KRISHNA DUTT (1916)
20 C. W. N. 442

———— *Attorney discharging himself, if may detain clients' papers, pending suit—Lien in such case how secured—When discharged by client, except for misconduct, if may detain papers.* SANDERSON, C J. (WOODROFFE, J., agreeing). Where an attorney, who had been acting for his client in the ordinary way, refused to go on acting for him unless his out-of-pocket expenses were paid, that amounted to a discharge of the attorney by himself and he could not claim to retain the papers when they were wanted by his former client for continuing the litigation. He would, at most, be entitled to have his lien protected by an undertaking by the new attorney. The same rule would apply where it was part of the original retainer of the solicitor that he should only be bound to act as long as the money should be supplied from time to time for the necessary out-goings. *Bluck* v. *Lovering & Co., 35 W. R. 232,* and *Robins* v. *Goldingham, L. R. 13 Eq. 440; 22 W. R. 277,* followed. MOOKERJEE, J. If a solicitor is discharged by his clients, otherwise than for misconduct, he cannot, so long as his costs are unpaid, be compelled to produce or hand over the papers: but if he discharges himself he may be ordered to hand over the papers to the new solicitor on the latter undertaking to hold them without prejudice to his lien. A solicitor could not be treated as finally discharged till the leave of the Court had been obtained. *Atul Chandra Ghosh* v. *Lakshman Chandra Sen, I. L. R. 36 Calc. 609.* PRABHU LAL *v.* KUMAR KRISHNA DUTT (1916) . . . . **20 C. W. N. 437**

———— *Practice—Set-off—Attaching creditors.* Where on an application by the defendant that satisfaction of a decree obtained against them by the plaintiff should be entered by setting-off a decree upon an award in their favour against the plaintiff, it appeared that a prohibitory order had been made against the plaintiff in execution of a decree obtained by a third party, and the attorney for the plaintiff claimed a lien for costs on such decree: *Held,* that the defendants' application to set-off was proper, but that this was not a case in which the Court to hold that the solicitor's lien claimed. *Edwards* v. v. *Lathem. 41 C*

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pendens—*Suit on Mortgage—Attaching creditor, whether proper party—Subsequent agreement to sell to another by judgment-debtor pending application for re-attachment but without notice—Order to re-attach whether* res Judicata *against person agreeing to buy—Execution sale under Money-decree—whether conveying also the right of attaching creditor to redeem —Ss. 85 and 91. Transfer of Property Act (IV of 1882).* A Court sale of the judgment-debtor's interest in attached property puts an end to the attachment and incidentally to the attaching creditor's right of redemption under s. 91 of the Transfer of Property Act. It makes no difference that the Court sale was in execution of a mortgage decree and that the attaching creditor was not a party to the suit on the mortgage. An attaching creditor is not a proper party to such a suit. A private sale pursuant to an agreement entered into after an application for attachment but before notice is good as against the auction purchaser in the Court sale held pursuant to the attachment. After such agreement, the private purchaser is not represented by the judgment-debtor and is not bound by the order of sale made against him. *Held,* further that a purchaser in execution of a money-decree obtained only the right, title and interest of the judgment-debtor and not also any right of the attaching decree-holder which was purely personal to him, *e.g.*, a right to redeem. *Kashy Nath Roy Chbudhry* v. *Sunbanand Shaha, (1886), I. L. R. 12 Calc. 317,* followed. *Venkata SeetharaMayya* v. *Venkataramayya, (1914), I. L. R. 37 Mad., 418,* dissented from. *Held,* further by WALLIS, *C.J.* (SESHAGIRI AYYAR, *J.*, dissenting) that a purchaser in execution of a money-decree was not entitled to sue for redemption without setting aside the prior sale of the same properties held in execution of a mortgage decree. *Lala Ganpat Lal* v. *Bindbasini Prasad Narayan Singh, (1920), 47 I. A., 91 ; s.c., 39 M. L. J., 108 (P. C.),* discussed. *Held,* also by WALLIS, *C.J.* (SESHAGIRI AYYAR, *J.*, dissenting) that, in the circumstances of the case, the attachment effected by the holder of the money-decree must be deemed to have been abandoned and was not subsisting on the date of the Court sale. CHAMIYAPPA THARAKUN *v.* RANA AYYAR.
I. L. R. 44 Mad. 232

ATTACK ON POLITICAL PARTY.

See SEDITION . I. L. R. 38 Calc. 253

ATTEMPT.

See PENAL CODE (ACT XLV OF 1860), ss. 457, 511 . I. L. R. 37 Bom. 553

ATTENDANCE.

——— enforcement of—

See WITNESS . I. L. R. 47 Calc. 758

ATTESTATION.

See MORTGAGE BOND.
I. L. R. 46 Calc. 522

See MORTGAGE.
I. L. R. 45 Calc. 747

See STAMP ACT, 1899, s. 60.
2 Pat. L. J. 686

ATTESTATION—*contd.*

See TRANSFER OF PROPERTY ACT (IV OF 1882), s. 59. . I. L. R. 37 All. 474
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See USUFRUCTUARY MORTGAGE.
I. L. R. 39 Calc. 227

See WILL . I. L. R. 47 Calc. 1043

——— by mortgagor—

See MORTGAGE BY MINOR.
I. L. R. 38 Mad. 1071

——— Gift—

See TRANSFER OF PROPERTY ACT (IV OF 1882), s. 123 . I. L. R. 44 Bom. 231

——— of instrument—

See AGRA TENANCY ACT (II OF 1901) s. 97 . . I. L. R. 37 All. 59

——— of mortgage deed—

See PARDANASHIN LADY.
I. L. R. 45 Calc. 748

——— Proof of whether necessary when execution admitted—

See PURDANASHIN . 6 Pat. L. J. 465

——— Scribe, whether an attesting witness—

See EVIDENCE ACT, 1872, s. 68.
1 Pat. L. J. 129

See TRANSFER OF PROPERTY ACT (IV OF 1882), s. 59. . I. L. R. 44 Bom. 405

——— *Witness how far affected with knowledge of contents.* The mere attestation of an instrument by a person does not necessarily import concurrence by him in the transaction evidenced thereby. *Raj Lukhee Dabia* v. *Gokool Chunder Chowdhury, 13 Moo. I. A. 209,* referred to. The question whether attestation of document should be held to imply assent is a question of fact and must be determined with reference to the circumstances of each case and the High Court cannot entertain it in second appeal. *Deno Nath Das* v. *Kotiswar Bhattacharya, 21 Indian Cases 367,* and *Mewa Singh* v. *Bhagwant Singh, 5 Indian Cases 252,* referred to. LAKHPATI *v.* RAMBODH SINGH (1915) . . . . I. L. R. 37 All. 350

——— *Person signing in a capacity other than that of a witness, effect of.* Where a deed was executed by 2 Pardanashin ladies in the presence of their husband and the latter afterwards also signed below but not in the place where other witnesses had signed and apparently to evidence his approval. *Held* that the husband was not an attesting witness. RAMBAHADUR SINGH v. *Ajodhya Singh, 1 Pat. L. J. 129,* followed. SRIMATI BAR KUARIN, ALAH MANJARI KUARI *v.* SIRCAR BARNARD & CO. . 6 Pat. L. J. 473

——— *Document, execution of —Attesting Witness—Transfer of Property Act (IV of 1882), s. 59—Whether one joint executant of a deed can be treated as an attesting witness to the signature of the other—Purdanashin lady whether an attesting witness should actually see the signature made, or the mark affixed by.* When a document is

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jointly executed by more than one person in the presence of each other, each executant can not be treated as an attesting witness in respect of the signature of every other executant. For the purpose of valid attestation under s. 59 of the Transfer

screened off from the gaze of the witnesses themselves. SABUR JIGAR BEGUM *v.* BARADA KANTA MITTER (1910) . . **I. L. R. 37 Calc. 526**

ATTESTATION AND RATIFICATION.

See LIMITATION ACT (XV OF 1877), SCH. II, ARTS. 120 AND 125.
I. L. R. 38 Mad. 396

ATTESTING WITNESS.

See ATTESTATION. **I. L. R. 37 Calc. 526**

See MORTGAGE . **14 C. W. N. 1046**
4 Pat. L. J. 511

See EVIDENCE ACT (I OF 1872), s. 68.
I. L. R. 35 All. 254
1 Pat. L. J. 369

See STAMP ACT, 1899, s. 2.
26 C. W. N. 585

See WILL . **I. L. R. 47 Calc. 1043**

———— *Mortgage bond—Transfer of Property Act (IV of 1882), s. 9—Evidence Act (I of 1872), s. 68.* A person who is present and witnesses the execution of a mortgage bond and whose name appears on the document, though he is therein described merely as the writer of the

Bahadur Singh v. *Ajodhya Singh, 20 C. W. N. 699,* not followed. *Shamu Patter* v. *Abdul Kader Ravuthan, I. L. R. 35 Mad. 607,* referred to and distinguished. An "attesting witness" in s. 68 of the Evidence Act (I of 1872) has the same meaning as an "attesting witness" under s. 59 of the Transfer of Property Act (IV of 1882). JAGANNATH KHAN *v.* BAJRANG DAS AGARWALA (1920).
I. L. R. 48 Calc. 61

ATTORNEY.

See LEGAL PRACTITIONER.

See POWER OF ATTORNEY.

See PROFESSIONAL MISCONDUCT.
I. L. R. 41 Calc. 113

See SANCTION FOR PROSECUTION.
I. L. R. 41 Calc. 446

———— **Right of audience—**

See PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1919), ss. 6, 27, 36 AND 121.
I. L. R. 37 Bom. 464

———— *Admission by attorney if binds client.* An admission by an attorney, unless satisfactorily explained away, furnishes cogent evidence against the client. KETOKEY CHURAN BANERJEE *v.* SARAT KUMARI DABEE (1916) . . . . . **20 C. W. N. 995**

———— *Application by attorney for discharge—Notice to client, sufficiency of.* If

ATTORNEY—*contd.*

an attorney wishes to withdraw from a case even for good grounds, he must give his client reasonable notice of his intention so that the client may have a reasonable opportunity of getting other advice and making arrangements before the hearing of the application of the attorney for obtaining his discharge. When an attorney gave notice to the client on the day previous to his making application before Court for obtaining his discharge and obtained the order: *Held,* on appeal, that the order must be set aside for insufficiency of notice. PRABHU LAL *v.* KUMAR KRISHNA DUTT (1916)
20 C. W. N. 442

———— *Attorney discharging himself, if may detain clients' papers, pending suit—Lien in such case how secured—When discharged by client, except for misconduct, if may detain papers.* SANDERSON, *C J.* (WOODROFFE, *J.,* agreeing) Where an attorney, who had been acting for his client in the ordinary way, refused to go on acting for him unless his out-of-pocket expenses were paid, that amounted to a discharge of the attorney by himself and he could not claim to retain the papers when they were wanted by his former client for continuing the litigation. He would, at most, be entitled to have his lien protected by an undertaking by the new attorney. The same rule would apply where it was part of the original retainer of the solicitor that he should only be bound to act as long as the money should be supplied from time to time for the necessary out-goings. *Bluck* v. *Lovering & Co., 35 W. R. 232,* and *Robins* v. *Goldingham, L. R. 13 Eq. 440; 22 W. R. 277,* followed. MOOKERJEE, *J.* If a solicitor is discharged by his clients, otherwise than for misconduct, he cannot, so long as his costs are unpaid, be compelled to produce or hand over the papers: but if he discharges himself he may be ordered to hand over the papers to the

609, PRABHU LAL *v.* KUMAR KRISHNA DUTT (1916) . . . . **20 C. W. N. 437**

———— *Practice—Set-off—Attaching creditors.* Where on an application by the defendant that satisfaction of a decree obtained against them by the plaintiff should be entered by

the attorney for the plaintiff claimed a lien for costs on such decree: *Held,* that the defendants' application to set-off was proper, but that this was not a case in which the Court ought to hold that the solicitor's lien intercepts the set-off claimed. *Edwards* v. *Hope, 14 Q. B. D. 922, Blakey* v. *Lathem, 41 Ch. D. 518, Nawab Nazim of Bengal* v. *Heera Lall Seal, 10 B. L. R. 444, Supra-*

BHOSE *v.* E. D. SASOON & CO. (1916).
I. L. R. 43 Calc. 932

———— *Attorney, if may claim lien on his client's (plaintiff's) decree as against defendant's prior decree against plaintiff—Equities between attorney, client, and others interested in pro-*

ATTORNEY—*concld.*

perly. The defendants had obtained a decree against the plaintiffs in a prior suit for Rs. 1,451-9-0, including costs, and the plaintiffs in a subsequent suit obtained a decree for Rs. 1,431-8-0 and thereupon the defendants applied that the satisfaction of the plaintiff's decree might be entered but the attorney of the plaintiffs made an application claiming a lien on the decretal amount of his client. *Held,* that the attorney could not claim any lien on the decree obtained by his client in preference to the claim of the defendants in respect of their prior decree. An attorney's lien is subject to all the equities between the client and the parties interested in the property. Meaning of attorney's lien discussed. *In the matter of* RASIK LAL MULLIK (1916) . . . . . **21 C. W. N. 106**

——— *Bill of costs—High Court Original Side Rules, Ch. XXXVIII, r. 67—Limitation Summary procedure.* When an application by an attorney for realisation of costs, under the High Court Original Side Rules, Chapter XXXVIII, r. 67, involves an enquiry, it should not be dealt with in a summary manner. Art. 84 of the Limitation Act (Act IX of 1908) applies to such applications. *Wadia, Gandhy & Co.* v. *Purshotam Sivji, I. L. R. 32 Bom. 1, Chand Monee* v. *Santo Monee, I. L. R. 24 Calc. 707, Abba Haji Ishmail* v. *Abba Thara, I. L. R. 1 Bom. 253,* referred to. LAKHIMANI DASSI *v.* DWIJENDRA NATH MUKERJEE (1918) . **I. L. R. 46 Calc. 249**

——— *Held* on the unchallenged evidence of the attorney there might be cases where the Court would exercise its discretion under r. 59 of Ch. XXXVIII of the High Court Rules in ordering payment of costs even if a claim for them was time-barred. NARENDRA LAL KHAN *v.* TARUBALA DASI . . **I. L. R. 48 Calc. 817**

——— *Practice—Refusal of attorney to proceed until payment of costs already incurred—Discharge by Attorney—Acceptance of discharge by client—Order for change of attorney—Payment of costs.* A firm of attorneys refused to proceed further in the conduct of a suit, unless their clients paid them as promised a certain sum on account of costs incurred: *Held,* that by so doing the attorneys discharged themselves, and the clients were entitled to an order for change of attorney without first paying the costs already incurred to the attorneys on the record. *Held,* further, that the mere fact that after the attorneys' refusal the clients instructed them to brief counsel to apply for an adjournment of the suit, which instruction the attorneys declined to accept, did not amount to a refusal on the client's part to recognize the discharge of the attorneys. *Basanta Kumar Mitter* v. *Kusum Kumar Mitter, 4 C. W. N. 767,* and *Atul Chandra Mukerjee* v. *Shosee Bhusan Mukerjee, 6 C. W. N. 215,* followed. MAHESHPUR COAL COMPANY, LTD. *v.* JATINDRA NATH GUPTA (1912) . **I. L. R. 40 Calc. 386**

AUCTION-PURCHASER.

See CIVIL PROCEDURE CODE, 1882.

ss. 244 252, 647. **I. L. R. 34 Bom. 546**

ss. 282, 287 . **I. L. R. 35 Bom. 275**

See EXECUTION OF DECREE.

I. L. R. 38 Calc. 622

I. L. R. 39 Calc. 687

——— dispossession of—

See LIMITATION . **I. L. R. 41 Calc. 52**

AUCTION-PURCHASER—*contd.*

——— fraud of—

See CIVIL PROCEDURE CODE (ACT V OF 1908), SS. 47 AND 50.

I. L. R. 38 Mad. 1076

——— liability of—

See SALE FOR ARREARS OF REVENUE.

I. L. R. 38 Calc. 537

——— must be made parties to appeal against order confirming sale—

See APPEAL . **I. L. R. 1 Lah. 21**

——— rights of, before and after confirmation of sale—

See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXI, R. 66.

I. L. R. 38 Mad. 387

——— suit by—

See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXI, R. 91.

I. L. R. 35 Bom. 29

——— Resistance to taking of possession—

See CIVIL PROCEDURE CODE (ACT V OF 1908), s. 47 . **I. L. R. 44 Bom. 977**

——— suit by, to recover purchase-money—

See LIMITATION **I. L. R. 40 Calc. 187**

——— title of—

See ADVERSE POSSESSION.

I. L. R. 40 Calc. 173

——— whether a representative of decree-holder—

See CIVIL PROCEDURE CODE (ACT V OF 1908), SS. 144 AND 151 AND O. XXI, R. 90. . **I. L. R. 41 Mad. 467**

——— whether a representative of the judgment-debtor—

See CIVIL PROCEDURE CODE (ACT V OF 1908), s. 47 . **I. L. R. 42 Bom. 411**

——— *Suit by, to set aside sale on account of mortgage not notified.* It is not open to an auction-purchaser to impugn the validity of his own purchase except on the ground that the judgment-debtor had no saleable interest. He buys with eyes open and if as in this case it transpires that the property is subject to a mortgage he has his remedy against the decree-holder by a suit for damage. KHETRO MOHAN DUTTA *v.* SHEIKH DILWAR . . **3 Pat. L. J. 516**

AUCTION SALE.

See BENAMI . **I. L. R. 43 Calc. 20**

See CIVIL PROCEDURE CODE, 1882, SS. 287, 293 . **I. L. R. 36 Bom. 329**

See CIVIL PROCEDURE CODE (ACT V OF 1908)—s. 68, O. XXI, R. 100.

I. L. R. 37 Bom. 488

s. 115, O. XXI, R. 89.

I. L. R. 43 Bom. 735

O. XXI, R. 89.

I. L. R. 37 Bom. 387

——— Effect of Application to the Mamlatdar to set aside sale—

See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXI, R. 89.

I. L. R. 44 Bom. 50

AUCTION SALE—*contd.*

——— **Effect of Application to Collector to set aside sale—**

See Civil Procedure Code (Act V of 1908), *s. 47, O. XXI, r. 92 (1).*
I. L. R. 44 Bom. 551

——— **Suit to set aside—**

See Auction Purchaser.
8 Pat. L. J. 516

AURASA SON.

See Hindu Law—Partition.
I. L. R. 40 Mad. 632

AUTHORITY TO ADOPT.

See Hindu Law—Widow's Estate.
L. R. 46 I. A. 259

See Registration Act, 1877, s. 17.
I. L. R. 44 Mad. 733

AUTREFOIS ACQUIT.

See Criminal Procedure Code (Act V of 1898), s. 107.
I. L. R. 36 Mad. 315

See Criminal Procedure Code, s. 403 *(1)* . **I. L. R. 36 Mad. 308**

See Rioting . **I. L. R. 48 Calc. 78**

——— *Acquitted by jury of some charges and disagreement as to the others—Retrial on the latter—Acquittal of murder—Subsequent trial for culpable homicide not amounting to murder charged at the previous trial—Acquittal of constructive murder by direction of the Judge on a point of law, effect of—Retrial for abetment previously charged—"Tried again," meaning of—Retrial after discharge of jury on disagreement, whether a second trial or continuation of the previous one—Double pleas of "not guilty" and "autrefois acquit," validity of—When plea of previous acquittal or conviction may be taken—Applicability of Englih law as to pleas in India—Criminal Procedure Code (Act V of 1898), ss. 271, 272, 308, 403—Constructive murder—Criminal act by one and not all charged therewith—Abetment when abettor present or absent—Instigation and aid by presence at the place of occurrence—Difference between English and Indian law—Penal Code (Act XLV of 1860), ss. 34, 109, 114—Verdict on facts against the direction of the Judge.* S. 403 of the Criminal Procedure Code protects an accused against a subsequent trial for the same offence, and on the same facts, for any other offence for

criminal sessions for murder and abetment of the murder of a police officer, under ss $\frac{302}{34}$, $\frac{302}{114}$, and $\frac{302}{109}$, and also for murder and culpable homicide of another person, under ss. 302, and 304 of the Penal Code, and the jury returned a unanimous verdict of acquittal under ss. $\frac{302}{34}$ by the direction of the Judge in the first case and of acquittal under s. 302, in the second case, but differed as to the remaining charges by 5 to 4 and were discharged: *Held*, that s. 403 of the Criminal Procedure Code did not prevent a retrial on the latter charges.

AUTREFOIS ACQUIT—*contd.*

Where a prisoner is unanimously acquitted of some of the charges, and the jury are divided as to the rest and discharged, and he is "retried" under s. 308 of the Criminal Procedure

passed on all the counts. S. 403 of the Criminal Procedure Code has nothing to do with pleading, being in terms a limitation on the jurisdiction of the Court, and is not to be construed with reference to the English law of criminal pleading. Ss. 271 and 272 contain all that is necessary as to pleading without reference to the English rules. Under s. 271 the accused can only plead "guilty," or claim to be tried, or he can refuse to plead, but the plea of "not guilty" is intentionally not recognized by the Code. If an accused claims to be tried he can, subject to special provisions, take any objection to his trial or conviction before the verdict of the jury and in any form. A defence under s. 403 may, therefore, be set up at any time before verdict and in any form, and the question must be decided solely according to the terms of the section irrespective of the English law. The question is one of law to be decided by the Judge without reference to the jury. *Semble:* That if the case was governed by English law, (*i*) the prisoner having, at the commencement of the retrial, made a plea of "not guilty." which was still awaiting adjudication, could not at the same time plead *autrefois acquit*, and that the second plea was, therefore, unnecessary and of no effect. *Rex* v. *Banks*, [1911] *2 K. B. 1095*, referred to; (ii) that the proper course would under that law, have been to take a verdict from the jury at once on the plea. *Rex* v. *Parry, 7 C. & P. 836*, referred to; (iii) that under the same law, a verdict on one count and disagreement on the others would not, in the case of a retrial, affect the trial on the latter. *Reg.* v. *Grimwood, 60 J. P. 809*, not followed. S. 34 of the Penal Code must be read according to its own terms without reference to the doctrine of the English law, and applies only where a criminal act is done by several persons of whom the accused charged thereunder is one, and not where the act is done by some person other than the latter. Where, therefore, two persons fire at another and only one actually hits

Namasudra v. *Emperor, I. L. R. 36 Calc. 659*, not followed. There is no reason for saying that a person must be absent in order to abet under s. 109 of the Penal Code. The instigation of the unknown murderer by accompanying him to the place of occurrence and by aiding him in his flight afterwards might have taken place though the accused was not present at the murder. But when the evidence shows that he was so present, s. 114 applies. Ss. 109 and 114 of the

Where the Judge has directed an acquittal under ss. $\frac{302}{34}$ of the Penal Code on [illegible] grounds,

AUTREFOIS ACQUIT—*concld.*

verdict of the jury to that effect has not determined any question of fact, and the acquittal has no effect on the trial of charges under ss. $\frac{302}{109}$ and $\frac{302}{114}$. Where the Judge expresses an opinion that if the facts given in evidence are believed, the accused is guilty of murder, the jury have a right to disagree with his view and acquit the prisoner of the offence. EMPEROR *v.* NIRMAL KANTA ROY (1914) . . . . **I. L. R. 41 Calc. 1072**

———— *Charge framed—Further inquiry ordered—Criminal Procedure Code (Act V of 1898), ss. 253 (2), 350 and 437.* Where a Magistrate framed charges against an accused person and was succeeded by another Magistrate who recommenced the case under s. 350, Criminal Procedure Code, and upon examining the complainant, discharged the accused under s. 253 (*2*), Criminal Procedure Code: *Held,* that the accused was *autrefois acquit* and that no further inquiry could be held into the case. *Per* AYLING, *J.*—Where the proceedings recommenced under s. 350 are only an inquiry, they are recommenced as an inquiry; where they have developed into the trial stage they are recommenced as a trial, *i.e.*, proceedings in which a charge has been framed. The second Magistrate cannot ignore the charge framed by his predecessor; his order must be viewed as one of acquittal. SRIRAMULU *v.* VEERASALINGAM (1914)

I. L. R. 38 Mad. 585

———— *Trial for theft and receiving stolen property charged in the alternative—Acquittal by High Court—Subsequent trial under s. 54 A. of the Calcutta Police Act (Beng. IV of 1866) relating to the same act or series of acts—Act or possession punishable under s. 54A whether an offence—Criminal Procedure Code (Act V of 1898), ss. 4 (1) (o), 236, 237 and 403 (1).* Under s. 403 (*1*) of the Criminal Procedure Code an acquittal of offences under s. 380 and s. 411 of the Penal Code charged in the alternative, bars a subsequent trial for an offence under s. 54A of the Calcutta Police Act (Beng. IV of 1866) in respect of the same act, or series of acts which formed the subject of the previous trial; the case falling within *Illustration* (*a*) of s. 236 and the *illustration* attached to s. 237 of the Criminal Procedure Code. *Queen-Empress* v. *Croft, I. L. R. 23 Calc. 174,* distinguished. An act or possession punishable under s. 54A of the Calcutta Police Act is an "*offence*" within s. 4 (*1*) (*o*) of the Code. MANHARI CHOWDHURI *v.* EMPEROR (1917) . . . . **I. L. R. 45 Calc. 727**

AVYAVAHARIKA.

———— meaning of—

See HINDU LAW—DEBT.
I. L. R. 37 Mad. 458

AWARD.

See ARBITRATION.

See ARBITRATION ACT.

See ARBITRATION AWARD.

See ARBITRATION BY COURT.
I. L. R. 38 Calc. 421

See APPEAL . **I. L. R. 39 Calc. 393**
I. L. R. 45 Calc. 502

AWARD—*contd.*

See CIVIL PROCEDURE CODE, 1908—

s. 9, SCH. II, s. 20.
I. L. R. 37 Bom. 442

s. 42, O. XXI, RR. 6 AND 50.
I. L. R. 43 All. 394

s. 89, O. XXIII, R. 3.
I. L. R. 37 Bom. 639
I. L. R. 40 Bom. 386

ss. 96, 100 . **I. L. R. 36 Bom. 360**

s. 105 . . **I. L. R. 43 All. 305**

s. 115 . **I. L. R. 36 Bom. 105**

O. XXXII, R. 7, SCH. II. CL. (*20*).
I. L. R. 43 Bom. 258

SCH. II.

See COMPROMISE **I. L. R. 47 Calc. 932**

See COURT-FEE. **I. L. R. 39 Calc. 906**

See DEKKHAN AGRICULTURISTS' RELIEF ACT, s. 15B . **I. L. R. 35 Bom. 310**

See HINDU LAW, PARTITION.
I. L. R. 48 Calc. 1059

See LAND ACQUISITION.
I. L. R. 38 Calc. 230

See LAND ACQUISITION ACT (I OF 1894).

s. 18 . . **I. L. R. 35 Bom. 146**

s. 6 . . **I. L. R. 44 Bom. 797**

ss. 9 AND 11 **I. L. R. 48 Calc. 892**

See MOHAMEDAN LAW, HUSBAND AND WIFE . . **I. L. R. 33 All. 683**

See SPECIFIC RELIEF ACT (I OF 1877), s. 30 . . **I. L. R. 34 All. 43**

———— against a Firm—

See ARBITRATION **I. L. R. 47 Calc. 29**

———— agreement to abide by decision of majority—

See ARBITRATION . **1 Pat. L. J. 90**

———— application to file—

See CIVIL PROCEDURE CODE (1908), s. 104 (*f*) . . **I. L. R. 38 All. 380**

———— Due in accordance with—whether appealable—

See CIVIL PROCEDURE CODE, 1908, SCH. II, PART 15. **1 Pat. L. J. 306**

———— Decree in terms of, passed by consent of minor's mother (not appointed guardian ad litem)—

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), s. 443 **I. L. R. 44 Bom. 202**

———— during suit—

See ARBITRATION.
I. L. R. 47 Calc. 752

———— ex-parte—

See ARBITRATION.
I. L. R. 47 Calc. 951

———— filing of—

See ARBITRATION.
I. L. R. 46 Calc. 721
I. L. R. 40 Calc. 219
I. L. R. 47 Calc. 951

AWARD—*contd.*

See Appeal . **I. L. R. 38 Calc. 143**

——— **made after expiry of time**—

See Arbitration.

I. L. R. 38 Calc. 522

——— **of arbitrators cannot be filed in Court if lost**—

See Civil Procedure Code, 1908 (23).

Sch. II, Para. 20 .

I. L. R. 1 Lah. 45

——— **remission of**—

See Arbitration.

I. L. R. 41 Calc. 313

——— **Setting aside of**—

See Arbitration . **24 C. W. N. 454**

——— *Indian Arbitration Act (IX of 1899), ss. 11 and 15—Civil Procedure Code (Act V of 1908), Sch. I, O. XXI, r. 29.* An award filed in Court under s. 11 of the Indian Arbitration Act (IX of 1899) is nothing more than an award, although it is enforceable as if it were a decree. Execution of such an award cannot be stayed under O. XXI, r. 29 of the Civil Procedure Code (Act V of 1908). Tribhuwandas Kalliandas Gajjar *v.* Jivanchand Lallubhai and Co. (1910) . . . . **I. L. R. 35 Bom. 196**

——— *Refusal of Court to file a private award—Subsequent suit to enforce terms of award—Res judicata. Held,* that the refusal of a Court to file a private award will not operate as *res judicata* in respect of a subsequent suit brought to enforce the award. *Kunji Lal* v. *Durga Prasad, I. L. R. 32 All. 484,* followed. *Basant Lal* v. *Kunji Lal, I. L. R. 28 All. 21,* referred to. Shib Chandra Das *v.* Ram Chandra Sarup (1911) . . . . **I. L. R. 33 All. 490**

——— *Judgment and decree in accor... Procedure Code ... 16—Revision, ... edure Code (Act ... n necessary for re... n a decree whicl... ard except* upon grounds mentioned in clause 16 (2) of the second schedule to the Civil Procedure Code (Act V of 1908). This was also the law under the old Civil Procedure Code (Act XIV of 1882) and it is *à fortiori* under the new Civil Procedure Code according to which an application could be made under clause 15 (c) to set aside an award on the new ground ... rather invalid." ... *21 Mad. L. J.* ... *inga Naik* v. ... *d. 510,* referred ... to set aside an award but refused and a judgment is pronounced according to the award, the judgmnt so pronounced is final under clause 16 (2). A revision petition to set aside an award is more objectionable than an appeal. *Ghulam Khan* v. *Muhammad Hassan, I. L. R. 29 Calc. 167,* followed. *Velu Pillai* v. *Appasami Pandaram, 1 Mad. W. N. 141,* distinguished *Obiter:* If an application is made to set aside an award but refused, it would be open to the Court to pronounce judgment even though the ten days allowed for such an application had not expired. The words "after the time for making such application had expired" apply only where there has been no application made to set aside the award. If the application is made after the period of limitation, *viz.*, ten days, the Court can refuse to set aside the award. A formal

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——— *Petition to set aside an award—Error of law patent on the face of the award—Contract of sale and purchase of cotton—The Bombay Cotton Trade Association, Rules 13 and 52—Seller committing breach of contract cannot claim damages against buyer—Arbitrators have no jurisdiction to award damages to defaulting seller—Illegality of the award.* The respondents agreed to sell to the appellants 200 bales of cotton of specified sample under two contracts which were subject to the Rules and Regulations of the Bombay Cotton Trade Association, Ltd. The respondents tendered cotton against the said

...

ance of Rs. 10-8-0 per candy. The arbitrator's award was confirmed on appeal by the Appeal Committee. Rule 52 of the Association provided that if the final award for inferiority of quality be in excess of Rs. 5 per candy, "the buyer shall have the option either to take the cotton at the allowance fixed by the arbitrators or the Appeal Committee, or upon giving notice in writing to the seller and original tenderer to refuse the same, in which latter case he may either buy in the market at a reasonable rate on account, risk and expense of the seller, or invoice it back to the seller at the market rate of the day upon which the final award shall have been made." The appellants accordingly gave the respondents notice that they refused the cotton tendered, but did not exercise either

...

when the cotton was rejected. The appellants repudiated their liability as the breach was committed by the respondents. The respondents proposed to the appellants that the matter should be referred to the arbitration of the Association under Rule 13. The appellants protested that the matter could not be referred to arbitration, and in spite of this protest the Association appointed two arbitrators under the rules to decide the claim preferred by the respondents. The appellants submitted their contentions in writing to the arbitrators who, however, awarded the respondents' claim on the contracts and directed the appellants to pay Rs. 25,000 to the respondents. The award was confirmed by the Appeal Board. The appellants thereupon filed a petition to set aside the award contending that the arbitrators had no jurisdiction in the matter as the matter was not referable to arbitration under rule 13 and that accordingly there was an error of law patent on the face of the award. The trial Judge dismissed the application holding that there was no error of law patent on the face of the award, and that the error, if any, was latent which could not vitiate the award. On appeal, *Held*, reversing the decision of the trial Judge, (1) that the award of the arbitrators was based upon the erroneous construction of the terms of the contract and Rule 52 of the Rules of the Association; (2) that upon

AWARD—*concld.*

the proper construction of Rule 52 the buyer would not be liable to pay any sum of money as damages or compensation to the seller after he has rightly rejected the cotton tendered, there being no compulsion upon him to invoice the cotton back to the seller if the market had fallen; (3) that the liability imposed on the appellants by the arbitrators in spite of the breach committed by the respondents was opposed to the general provisions of the Contract Act and to the Common Law; (4) that the award should be set aside as there was an error of law patent on the face of it. *Landauer* v. *Asser* [1905] 2 *K. B. 184*, referred to. JIVRAJ BALOO SPINNING AND WEAVING CO. *v.* CHAMPSEY BHARA & CO. **I. L. R. 44 Bom. 780**

———— *Setting aside of—Arbitration Act (IX of 1899), s. 14—Practice.* When an award is challenged on the ground that there was no submission to arbitration by the parties, the remedy lies in a regular suit, and not in an application under s. 14 of the Arbitration Act (IX of 1899). MATULAL DALMIA *v.* RAMKISSENDAS MADAN GOPAL (1920). **I. L. R. 47 Calc. 806**

AWARD DECREE.

———— against widow—

See HINDU LAW—WIDOW. **I. L. R. 43 Bom. 249**

———— validity of—

See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXXII, R. 7. **I. L. R. 39 Mad. 853**

AWARD OF COURT.

See ANCIENT MONUMENTS PRESERVATION ACT (VII OF 1904), SS. 10, 21. **I. L. R. 42 Bom. 100**

B

"BABUANA" AND SOHAG GRANT.

See HINDU LAW—CUSTOM. **I. L. R. 42 Calc. 582**

1. ———— *Darbhanga Raj—Government revenue and cesses whether payable to Raj—Revenue not paid to Raj—Debt, whether a joint family debt—Mitakshara family—Decree against father personally—Debt not proved to be illegal or immoral—Whether the interest of the sons passes.* Holders of *babuana* property in the Darbhanga Raj are liable to pay Government revenue and cesses to the Raj. Where the income of the *babuana* property was appropriated by members of the family, and the Government revenue and cesses payable were not paid, the liability to pay the Government revenue and cesses should be considered as a joint family debt and not the personal debt of the holder for the time being. Even if it were considered to be a personal debt of the father, in execution of a decree against the father alone the entire family property could be sold and not merely the personal interest of the father, as the debt could not be attached as an immoral debt. Every debt incurred by the father in a Mitakshara family not for illegal or immoral

"BABUANA" AND SOHAG GRANT—*contd.*

purposes is of a nature to support a sale of the entirety of the family property. In execution of a money-decree against the father alone for a personal debt of the father, the whole family property may be sold, if the debt was not contracted for immoral purposes and it is not absolutely necessary that the son should be a party either to the suit itself or to the proceedings in execution. Where it appears from the form of the suit or of the execution proceedings or from the description of the property put up for sale that only the interest of the father in the property was intended to be sold and was put up for sale, the interest of the sons would not pass by such a sale, and in such a case, the absence of the sons from the suit or execution proceedings would be a material element for consideration. Where, on the other hand, the proceedings show that the intention was to sell the entire property and the same was sold and bargained for, then the purchaser would be entitled to the whole, and the sons, though not parties to the proceedings cannot, claim their shares against the purchaser except by proving that the debt was contracted for immoral purposes. The words "right title and interest" of the judgment-debtor may either mean the share which the father might have sold to satisfy his debt or the share which he would have obtained on partition, and the question what was intended to be sold or was sold in each case will depend upon its own circumstances. Where in the sale proclamation the property to be sold at an auction sale was described as "7 as. 8 gds. 3 karas of Pandaul . . . Touzi No. 6473 . . .," *i.e.*, the entire family property, and the property was purchased by the decree-holder for Rs. 55,000, and an application for setting aside the sale was rejected on the ground that the evidence in proof of the insufficiency of price could not be deemed good and satisfactory, and the sale was confirmed with the following order: "Whereas *M* purchased for 55,000 the rights and interests in the properties specified below, and thirty days have expired, and an application for setting aside the sale has been rejected the sale is hereby confirmed;" but in the certificate of sale, the description of the property was to the same effect as that in the sale proclamation, and, finally, it was not suggested that the price paid was not the full value of the property purchased. *Held*, that the words "rights and interests" in the order confirming the sale do not raise any ambiguity, or induce the Court to hold that only the personal interest of the father was sold and that under the circumstances the entire family property passed to the purchaser. *Deendyal* v. *Jugdeep*, *L. R. 4 I. A. 247*, *Suraj Bansi Koer* v. *Sheo Prasad Singh*, *L. R. 6 I. A. 88*, explained. *Baijun Doobey* v. *Brij Bhookun*, *L. R. 2 I. A. 275 : s. c. I. L. R. 1 Calc. 133*, *Shimboo* v. *Golap*, *L. R. 14 I. A. 77 : s. c. I. L. R. 14 Calc. 573*, *Hari Narain* v. *Rudar*, *I. L. R. 10 Calc. 626*, referred to. *Muddun Thakoor* v. *Kantoo Lal*, *L. R. 1 I. A. 321*, *Minakshi* v. *Immudi*, *L. R. 16 I. A. 1 : s. c. I. L. R. 12 Mad. 142*, *Nanomi Babuasin* v. *Modun*, *L. R. 13 I. A. 1*, *Bhagbut* v. *Girija*, *I. L. R. 15 Calc. 717*, *Daulat* v. *Mehr*, *I. L. R. 15 Calc. 70*, *Mahabir* v. *Meheswar*, *I. L. R. 17 Calc. 584*, *Kagal* v. *Manjappa*, *I. L. R. 12 Bom. 691*, followed. *Held*, further, that the words "rights and interests" in the order confirming the sale could not override the terms of the sale proclamation. HITENDRA SINGH *v.* RAMESHUR SINGH (1913). **18 C. W. N. 42**

"BABUANA" AND SOHAG GRANT—*contd.*

2. ———— *Darbhanga Raj* ... *revenue and cesses if* ... *rtition by two sons* ... *subject to condition* ... *be sold for arrears after sale-proceeds of defaulting share found insufficient—Condition if creates a charge—Suit for arrears of one share—Death of owner thereof—Substitution of the other co-sharer as representative and widow not admitted as party at plaintiff's instance—Decree against other co-sharer only—Civil Procedure Code (Act XIV of 1882), ss. 367, 368—Plaintiff to choose representative of deceased defendant at his own risk—Claim to represent by person other than plaintiff's nominee—Proper procedure—Suit thereon, against estate in widow's possession, if maintainable—Limitation—Limitation Act (XV of 1877), Sch. II, Arts. 122, 132.* The condition in a *babuana* grant to a junior member of the Darbhanga Raj family that the grantee shall regularly pay the Government revenue and cesses due from the portion of the estate given in *babuana* to the Raj treasury, does not create a charge in favour of the Raj in respect of overdue arrears of revenue and cesses upon the property granted. Where on the grantee's death his two sons, with the concurrence of the holder of the Raj, divided the estate equally and separate accounts of their liabilities were opened, subject however to the condition that on default by either the Raj would be entitled to join the other in a suit to recover the arrears, and that execution of the decree obtained, the defaulter's share was to be put up for sale first and only on the proceeds proving insufficient the share of the other would be sold for the balance. *Held*, that the arrears payable by the defaulting co-sharer were not by this agreement made a charge on any ...

... instituted against the two co-sharers to recover ...

... could not be proceeded against under the agreement until the other share was sold, the Raja instituted a suit for a declaration that the share in the widow's possession was liable to pay the arrears covered by the decree in the previous suit and that the arrears were a charge on that share. *Held*, ...

... *Ramaswami Chettiar* v. *Oppilamani Chetti*, ... *33 Mad. 6, Kadir Mohideen Maraklayar* v. *Muthu Krishna Ayyar, I. L. R. 26 Mad. 230, Prosunna Chunder Bhattacharjee* v. *Kristo Chytunno Pal, I. L. R. 4 Calc. 342*, distinguished. That as the arrears in question were not a charge on the share, the suit could not be treated as one to enforce a charge and the 12 years' limitation applicable to such a suit also did not apply. RAMESHWAR SINGH *v.* JANESHWARI (1913) **18 C. W. N. 129**

BAD LIVELIHOOD.

See PREVIOUS CONVICTIONS, EVIDENCE OF
I. L. R. 38 Calc. 408

BAI-BIL-WAFA.

See CONSTRUCTION OF DOCUMENT.
I. L. R. 42 All. 437

BAIL.

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), s. 107, CL. (4).
I. L. R. 36 Mad. 474

See EXTRADITION ACT, 1879, s. 14.
15 C. W. N. 736

See EXTRADITION.
I. L. R. 46 Calc. 31

See EXTRADITION ACT (XV OF 1903), ss. 7, 8, 8A, 18.
I. L. R. 43 Bom. 310

See SUICIDE. **I. L. R. 37 Mad. 156**

———— **application for**—

See HABEAS CORPUS
I. L. R. 44 Calc. 459

———— **delay in transmitting bail orders**—

See APPELLATE COURT.
I. L. R. 38 Calc. 293

———— **grounds of**—

See BAIL. **I. L. R. 37 Calc. 412**

1. ———— **High Court, jurisdiction of to grant bail**—*Grounds of bail—Sufficient cause for further inquiry into guilt of accused —Undue delay—Taking cognizance—Application of special procedure to the case—Power of the Lieutenant-Governor—Criminal Procedure Code (Act V of 1898), ss. 190, 497, 498—Criminal Law Amendment Act (XIV of 1908), ss. 212, 14 (1).* The power of the High Court to grant bail "*in any case*" under ...

... the provisions of Part I to the case :—*Held*, that the latter Magistrate had taken cognizance, and that the Lieutenant-Governor had power to make the order. EMPEROR *v.* SOURINDRA MOHAN CHUCKERBUTTY (1910) . **I. L. R. 37 Calc. 412**

2. ———— **Power of Sessions Judge to grant bail**— *Cases to which special procedure has been applied—Criminal Procedure Code (Act V of 1898), ss. 497, 498—Criminal Law Amendment Act (XIV of 1908), ss. 12, 14 (1).* The power of the Sessions Judge to grant bail under s. 498 of the Criminal Procedure Code is, in cases to which

BAIL—*contd.*

the provisions of Part I of Act XIV of 1908 have been applied by s. 2 thereof, abrogated by s. 14 of that Act. EMPEROR *v.* LALIT KUMAR CHATTERJEE (1910) . . **I. L. R. 37 Calc. 439**

3. ——————— *Grounds of admission to bail—Confession of a co-prisoner materially corroborated as to applicant—Relative powers of the High Court and Subordinate Courts to grant bail—Criminal Procedure Code (Act V of 1898), ss. 497, 498.* S. 497 of the Criminal Procedure Code contains a rule founded on justice and equity, and should be followed by the High Court, unless anything appears to the contrary. The extended powers given to the latter by s. 498 are not to be used to get rid of the reasonable and proper provision of the law laid down in s. 497. The High Court refused bail where a confession by a co-accused implicating himself and the petitioners was materially corroborated as to the latter by other evidence taken at the preliminary enquiry into offences under ss. 307 and 337 of the Penal Code. ASHRAF ALI *v.* EMPEROR (1914)

I. L. R. 42 Calc. 25

BAILABLE OFFENCE.

——————— *Information to village Magistrate—Report to the police—Institution of complaint by police thereon.* A man who complains to a village Magistrate of a bailable offence knowing that the latter must in the ordinary course of his duty report the substance of the complaint to the police gives information to the police just as effectively as if he went in person to the police station and made a complaint; and if the police charge the case, it is a case instituted on information given to a police officer within the meaning of s. 250, Criminal Procedure Code. *The Sessions Judge of Tinnevelly* v. *Sivan Chetti, I. L. R. 32 Mad. 258,* followed. NACHIMUTHU CHETTI *v.* MUTHUSAMI CHETTI (1914) . . **I. L. R. 39 Mad. 1006**

BAIL-BOND.

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), s. 514 (5)

I. L. R. 37 Mad. 156

——————— *Suicide of prisoner if discharges sureties.* When a person who has been let out on bail commits suicide, the sureties are discharged from their obligation to produce him. NRISHINGHA DEB CHATTERJEE *v.* THE KING-EMPEROR (1912) . . **16 C. W. N. 550**

BAILIFF.

See ATTACHMENT.

I. L. R. 40 Calc. 849

——————— *Writ or warrant authorising him to give possession of immoveable property—Use by bailiff of reasonable degree of force to effect removal of person refusing to vacate—Practice of bailiffs taking strangers as assistants—Time of delivery of writ of possession for execution—Piecemeal trial of lengthy cases by Magistrates—Penal Code (Act XLV of 1860), s. 323—Presidency Small Cause Courts Act (XV of 1882), ss. 43, 48—Civil Procedure Code (Act V of 1908) O. XXI, rr. 35, 97 and First Schedule, App. E., Form No. 11—Practice.* A bailiff of the Presidency Small Cause Court in the execution of a writ, issued under s. 43 of the Presidency Small Cause Courts Act, requiring or authorizing him "to give possession" of certain premises to the applicant,

BAILIFF—*contd.*

may use a reasonable degree of force in order to effect the removal of persons bound by the decree and refusing to vacate the same, notwithstanding the omission in the writ of words expressly authorizing their removal. *Quære:* Whether the English Common Law or the Civil Procedure Code applies to the writ or warrant in question. In a writ of possession under the former, words expressly authorizing forcible removal are not inserted, but an order "to give possession" authorizes such removal if need be: and, if the Code applies, the omission of such words is immaterial. O. XXI, r. 97 of the Civil Procedure Code merely provides an additional or alternative remedy. Where the bailiff proceeded to the premises, and on the occupant's wife refusing to vacate, pulled or dragged her out of the house, and the force used for the purpose caused her, when released, to fall on the ground whereby she received slight injuries. *Held,* that he was legally justified in the employment of such amount of force, and could not be convicted therefor under s. 323 of the Penal Code. In such cases it is impossible to calculate or apply with the utmost nicety the degree of force necessary and yet not more than sufficient. Observations as to the practice of bailiffs taking with them as assistants persons unconnected with the Court, and as to the time of delivery to them of writs for execution. Piecemeal conduct of trials by Magistrates condemned. MEREDITH *v.* SANJIBANI DASI (1914) . . . **I. L. R. 42 Calc. 313**

BAILMENT.

See CARRIER.

See CONTRACT ACT.

I. L. R. 45 Bom. 1017

See LIMITATION ACT (IX OF 1908), SCH. I, ARTS. 49, 60, 145.

I. L. R. 41 All. 643

——————— **Rights of Bailor and Bailee against 3rd party interfering—**

See PARTNERSHIP.

I. L. R. 43 Calc. 733

——————— *Pledge of cotton by warehouseman to whom it had been entrusted—Pledge to Bank and return of cotton to person who pledged it—No notice by Bank of any other claim—Conversion, action for—Contract Act (IX of 1872), s. 178—Admissibility of evidence raising defence not pleaded.* The respondent (plaintiff) purchased certain bales of cotton, and entrusted them to the second defendant as a muccadam (or warehouseman) who pledged them to the appellant Bank (first defendant) in whose godowns they remained until they were sold by the second defendant in the course of his business with the Bank, withdrawn from the godowns, and passed out to the second defendant or to his order. In a suit for the cotton, the plaintiff claimed delivery of the bales or their value, charged the Bank with conversion of the goods, and in the alternative, if it was held that he was not entitled to such relief, he claimed to stand in the shoes of the second defendant, and asked that his rights should be ascertained and declared, and that the securities deposited by the second defendant with the Bank should be marshalled in his favour. *Held* (reversing the decision of the High Court, and restoring the order of the Trial Judge of the same Court), that the fact that the Bank parted with the cotton

BAILMENT—*contd*

deposited with them to, or to the order of, the person by whom it was deposited without notice of any claim by any other person afforded a complete defence to the action. In this view their Lordships deemed it unnecessary to express any opinion on the construction of s 178 of the Contract Act (IX of 1872), on which the Courts below had differed, the first Court holding that it protected the [illegible] ton was valid, [illegible] to the contra[illegible] ales had been returned had not been pleaded by the Bank in their written statement, but the fact was established during the cross-examination of the second defendant as a witness for the plaintiff, and proved by the inspection of his books. Objection was taken to the Banks raising the defence, and an application to amend the written statement was refused by the first Court. But later on the case evidence of the return of the cotton was held to be admissible in regard to the alternative claim of the plaintiff. *Held*, that the evidence was rightly admitted having regard to the claim of the plaintiff to marshall securities, and that if properly admitted it was admissible for all purposes. BANK OF BOMBAY *v.* NANDLAL THAKERSEY DAS (1912) . **I. L. R. 37 Bom. 122**

BAIRAGI.

See HINDU LAW—SUCCESSION.
I. L. R. 39 Bom. 168

BALANCE OF MORTGAGE-MONEY.

———— **suit for—**

See SPECIFIC PERFORMANCE.
I. L. R. 43 Calc. 59

BALANCE SHEET.

See COMPANY. . **I. L. R. 45 Calc. 486**

BALLAVACHARYA GOSSAINS.

See HINDU LAW—ENDOWMENT.
I. L. R. 35 All. 283

BANDHUS.

See HINDU LAW—BANDHUS.
I. L. R. 37 All. 583

See HINDU LAW—INHERITANCE.
I. L. R. 42 Calc. 384
I. L. R. 44 Mad. 114 and 121

See HINDU LAW—SUCCESSION.
I. L. R. 32 All. 640
I. L. R. 38 All. 416
I. L. R. 45 Bom. 768, 353
I. L. R. 44 Mad. 753

BANDSMAN.

See WORKMAN'S BREACH OF CONTRACT ACT (XIII OF 1859)
I. L. R. 38 Mad. 551

———— *Bankati brit of Oudh —Birtias, if have under-proprietary right.* In Oudh, there exist various kinds of *birts*, the incidents of each of which differ from those of others. The *pottah* of the *birtias* in this case expressly [illegible]

jungle, making the land fit for cultivation and bringing in raiyats which carried with it the duty of sinking wells. The birt-holder was to enjoy

BANDSMAN—*contd.*

it free for five or six years. A comparatively small but gradually ascending rent was fixed for the years 1210 to 1214 in proportion to the increasing productiveness of the soil. After 1214, he was to pay the revenue to the *sarkar* prevalent in the Taluqa and take the *daswant* prevalent in the Taluqa, the *daswant* being a deduction in the nature of a rebate. The rent of the tenure could not be capriciously enhanced by the Taluqdar as the assessment of the *jama* was to be in accordance with the rate prevalent in the Taluqa: *Held* in view of the above and other circumstances of the case, that the Judicial Commissioners were right in holding that the grantees had under-proprietary rights in the village. RAJA MOHAMED ABDUL HASAN KHAN *v.* LACHMI NARAIN (P. C.),
26 C. W. N. 249

BANK MEMORANDUM.

See STAMP ACT (II OF 1899), s. 57.
I. L. R. 38 Mad. 349

BANKER AND CUSTOMER.

See INSOLVENCY.
I. L. R. 34 Mad. 125

See SALE OF GOODS
I. L. R. 42 Bom. 16

See SUCCESSION ACT (X OF 1865), s. 190.
I. L. R. 38 Bom. 618

See TRUSTEE . **I. L. R. 35 Mad. 712**

———— **Government Treasury whether a—**

See NEGOTIABLE INSTRUMENTS ACT, 1881, ss. 5 AND 6.
I. L. R. 43 Mad. 817

———— *Payment to with instructions as to disposal, effect of.* When *A* paid money into a bank with instructions to pay over the same to *B* who had no account with the bank and the bank wrote to *B* stating that they had [illegible]

B in respect of such money. *Per* ABDUR RAHIM, *J.*—That the relationship between the bank and *B* was not that of debtors and creditor and that the bank held the money in a fiduciary capacity as bailee or agent. *Official Assignee of Madras* v. *Smith, I. L. R. 32 Mad. 68,* dissented from. OFFICIAL ASSIGNEE OF MADRAS *v.* RAJAM AIYAR (1909) . . . . **I. L. R. 38 Mad. 299**

———— *Interest on overdrafts—* [illegible]

pondents were their Bankers. From 1906, the Bank had allowed the appellants' firm to overdraw their accounts under an agreement between the parties consisting of a letter in a printed form signed and given by the appellants to the respondents on 1st December annually, and providing that interest should be charged at 7 per cent. per annum, and be calculated on the daily balance due in respect of the overdraft, pledging as security the cotton stored by them in the godowns of the Bank. The practice of the Bank as to interest was to strike a balance of each of its customers' accounts on the last day of each month, and charge

BANKER AND CUSTOMER—*contd.*

interest on the amount of the balance, in fact compound interest with monthly rests; but the appellants though they knew it was done never objected until after 1st August 1914. In a suit by the Bank to recover a balance due by the appellants the latter counterclaimed for damages for the dishonouring of two of their cheques. *Held*, that the acquiescence of the appellants for 9 years in the mode of charging interest entitled the respondents to set up an implied agreement on the appellants' part to pay it in that way, and there was nothing in s. 92 of the Evidence Act to prevent such an agreement being proved. It was found by all the Courts that the respondents were justified under the circumstances at the time in not increasing the appellants' overdraft by honouring the cheques, and had rightly refused to do so. HARIDAS RANCHORDAS *v.* MERCANTILE BANK OF INDIA (1919) . . **I. L. R. 44 Bom. 474**

———— *Fiduciary relationship —Demand for repayment—Effect of.* Money held by a banker after his customer has demanded repayment is not held by him in a fiduciary capacity. A creditor cannot transform his debtor into a trustee by merely demanding repayment of the debt. OFFICIAL ASSIGNEE OF MADRAS *v.* KRISHNA BHATTA (1910) **I. L. R. 34 Mad. 128**

———— *Effect of a blank draft which is not addressed to any specific banker—Negligence of customer leading to payment of forged cheque by banker—Effect of negligence when not the proximate cause of payment.* The plaintiffs were a Banking Corporation with their head office at Lahore and branch offices at Amritsar and elsewhere. The defendants were a Banking Corporation having a branch at Bombay. In 1904 the plaintiffs opened a current account with the defendants and sent the defendants a list of the officers of the plaintiffs authorized to sign for the plaintiffs including the name of Madho Ram, the manager of the Amritsar office. Madho Ram had acted on occasions previous to this date as the manager of the Lahore office. It was the custom of Madho Ram when leaving the Bank premises for a short time both when acting as manager at Lahore and afterwards when manager at Amritsar to leave with the Accountant blank draft and blank letters of advice ready signed by him for use as occasion occurred. These drafts were not destroyed after his return. On the 2nd of October the defendants cashed a draft presented to them for payment for Rs. 10,000 purporting to have been signed by Madho Ram. The defendants had previously received a letter of advice also purporting to have been signed by Madho Ram. The defendants debited the plaintiffs with the payment. The plaintiffs repudiated the draft as a forgery and sued to recover Rs. 10,000 from the defendants. The defendants denied that the draft was a forgery. In the alternative they submitted that the forged draft had been paid by them owing to the negligence of the plaintiffs, and that the latter were not entitled to recover the amount of the draft from them. *Held*, that it was probable that the draft was one left by Madho Ram when acting as manager of the Lahore office of the plaintiffs, but that the plaintiffs were not estopped from contending that the draft was not the draft of the plaintiffs. *Held*, further, that it was not incumbent on the plaintiffs to contemplate the perpetration of such a crime as forgery or theft and that the negligent act of Madho Ram was not

BANKER AND CUSTOMER—*concld.*

the proximate cause of the draft being cashed by the defendants and that the plaintiffs were therefore entitled to recover. *Société Générale* v. *The Metropolitan Bank, 27 L. T. 849*, *Swan* v. *North British Australasian Co., 32 L. J. Exch. 273*, *Smith* v. *Prosser, [1907] 2 K. B. 735*, and *Baxendale* v. *Bennett, 3 Q. B. D. 525* followed. PANJAB NATIONAL BANK, LD. *v.* THE MERCANTILE BANK OF INDIA, LD. (1991). . **I. L. R. 36 Bom. 455**

———— *Payment to Bank with instructions as to disposal, effect of—"In suspense account," meaning of.* When *A* paid money into a bank with instructions to pay over the same to *B* who had no account with the bank, and the bank wrote to *B* stating that they had received the money and held the same in suspense account pending instructions from *B*. *Held*, on appeal from *The Official Assignee of Madras* v. *Rajam Ayyar, I. L. R. 33 Mad. 299*, by MILLER and MUNRO, *JJ.*, that the bank held the amount as agents of *A* for remittance to *B*, and not as bankers either of *A* or *B*. The *Official Assignee of Madras* v. *Smith, I. L. R. 32 Mad. 68*, distinguished. *Per* ABDUR RAHIM, *J.* That the relationship between the bank and *B* was not that of debtor and creditor and that the bank held the money in a fiduciary capacity as bailee or agent. A banker holding money of a person "in suspense" does not treat it like an ordinary customer's money. *The Official Assignee of Madras* v. *Smith, I. L. R. 32 Mad. 68, 69*, dissented from. OFFICIAL ASSIGNEE OF MADRAS *v.* RAJAM AYYAR (1913)
I. L. R. 36 Mad. 499

BANKING COMPANY.

See COMPANY. **I. L. R. 42 Bom. 264**

BANKRUPTCY.

See UNDISCHARGED BANKRUPT.
I. L. R. 37 Calc. 961

———— *Straits Settlements Bankruptcy Ordinance—Debt contracted by a Hindu in Singapore—Adjudication of bankruptcy and discharge by the Singapore Court operating to discharge debt—Non-maintainability of a suit in India for the balance of the debt against the bankrupt or his undivided son—Liability of an undivided Hindu son, not a joint liability.* A Hindu who was domiciled in India, but who carried on trade in Singapore, was adjudicated a bankrupt by the Supreme Court at Singapore for debts incurred at Singapore and he eventually obtained at Singapore an order of discharge under the Straits Settlements Bankruptcy Ordinance. The plaintiffs who, as one of the creditors, proved his debt and received two of the dividends due to him, was a party to the order of discharge. Under the above Ordinance a discharge operated as an extinguishment of the debt. *Held*, that the extinguishment of the debt by the Bankruptcy Laws of Singapore operated as a discharge of it everywhere and the creditor had no right to sue in India the debtor and his undivided sons for the balance of the debt as if it was still subsisting. Under the Hindu Law a Hindu son is not "jointly bound" with his father to pay the debts contracted by the father. Hence the said Ordinance under which a discharge of a bankrupt does not discharge a person "jointly bound" with him does not affect the undivided son. NARAYANAN *v.* VEERAPPA (1916)
I. L. R. 40 Mad. 581

BANKRUPTCY ACT, 1883 (46 & 47 VICT., C. 52).

——— **ss. 27, 118—**

See INSOLVENCY. **I. L. R. 38 Calc. 542**

——— **ss. 33, 102—**

See MINOR. . **I. L. R. 42 Calc. 225**

See PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), ss. 7, 36 AND 90.
I. L. R. 40 Mad. 810

——— **s. 40—**

See INSOLVENCY. **I. L. R. 42 Calc. 289**

BARADARAN JAGIR (ORISSA).

See RENT. . **I. L. R. 38 Calc. 278**

BARBER.

——— **Right to officiate on ceremonial occasions—**

See VATANDAR BARBERS.
I. L. R. 44 Bom. 733

BAR-COUNCIL, RESOLUTIONS OF.

——— *Etiquette affecting Counsel—Counsel as witness—Retainer, acceptance of—Professional ethics.* The following resolutions of the Bar-Council approved :—"(*a*) If counsel knows or has reason to believe that he will be an important witness in a case, he ought not to accept a retainer therein. (*b*) If he accepts a retainer not knowing or having reason to believe that he w[illegible] or at any [illegible] cluded it [illegible] on a mat[illegible] continue to appear in the case unless he cannot retire without jeopardising the interest of his client. (*c*) If counsel knows or has reason to believe that his own professional conduct on matters out of which the action arises is likely to be impugned in the case, he ought not to accept a retainer. (*d*) If he accepts a retainer not knowing or having reason to believe that his own professional conduct in such matters is likely to be impugned, but finds in the course of the case that it is so impugned, he ought to adopt the same course of conduct as is mentioned in clause (*b*) *ante.* (*e*) In either of the cases mentioned in clauses (*b*) and (*d*), there is no rule of professional ethics which debars counsel, if he continues to act as counsel in the case, from going into the [illegible]" [illegible] Bar-Council [illegible] Bar-Council is the recognised authority on matters of professional conduct and etiquette affecting counsel [illegible]

[illegible] [1909] *A. C. 549 ; 14 C. W. N. 86, Nundo Lal Bose* v. *Nistarini Dassi, I. L. R. 27 Calc. 428,* referred to. *Curry* v. *Walter, 1 Esp. 456,* distinguished. As a general practice, however, it is undesirable when the matter to which counsel depose is other than formal, that they should testify either for or against the party whose case they are conducting. Under s. 118 of the Evidence Act, counsel although they may be engaged in the case, are competent to testify whether the facts in respect of which they give their evidence occur before or after their retainer. *Cobbett* v. *Hudson, 1 E. & B. 11,* referred to. WESTON AND OTHERS *v.* PEARY MOHAN DASS (1912)
I. L. R. 40 Calc. 898

BARRISTER.

See LIMITATION ACT (IX OF 1908), s. 5.
I. L. R. 37 All. 267

——— *Counsel receiving instructions direct from client—Non-return of fees for professional work not performed—Usage and etiquette of the profession—Duties of counsel—Nomination of juniors by seniors and of seniors by juniors, practice of—Practice.* The usage of the profession of a barrister that counsel should take his instructions only from an attorney in respect of any professional work on the Original Side of the High Court is a most beneficial one from the point of [illegible] instructions for him to appear at the trial on behalf of a party and was paid the consultation fee and the fee for attending the trial which were marked thereon. Counsel attended the consultation and subsequently left Calcutta to attend to an urgent professional call, having previously returned the brief to the attorney, but not the fees. *Held,* that counsel should have returned the whole fee (both for consultation and for attending the trial). It was given to him for the purpose of attending the trial, and the consultation was held with a view to his so doing. The practice for seniors to name their juniors, or for juniors to nominate their seniors, is contrary to the traditions of the profession and to its best interests, and such a practice ought to be discouraged. It is, however, quite legitimate for a senior to ask a junior to hold brief for him when he is temporarily unable to attend to a case. *In re* AN ADVOCATE (1917) . **I. L. R. 44 Calc. 741**

——— *English barristers practising both as barrister and solicitor at Shanghai—Partnership between them, if contrary to etiquette and law—Sale by partner of share of business to co-partner—Covenant not to practice for a reasonable time—Suits by the other partner for injunction—Agreement by solicitor to pay a share of proceeds of business to clerk, if unprofessional.* There [illegible] no [illegible]

[illegible] **17 C. W. N. [illegible]**

BARGA KABULIYAT.

——— *Agreement to pay rent in kind mentioning equivalent amount in money in case of default—Landlord, if can claim current value of stipulated quantity of produce—Evidence Act (I of 1872), s. 92—Admissibility of oral evidence to modify significance of terms in kabuliyat* The

BARGA KABULIYAT—*contd.*

defendant had executed a *kabuliyat* in favour of the plaintiff, which was headed, as a "*barga kabuliyat*," and in the body of the *kabuliyat* he agreed that if he failed to deliver half the crops he would pay Rs. 25 yearly. The plaintiff sued for *barga* rents claiming price of half the produce; defendant pleaded that the plaintiff was entitled to only Rs. 25 yearly according to the *kabuliyat*. *Held*, on a construction of the *kabuliyat*, that if the tenant made default in giving half the crops the landlord is entitled to recover only the fixed sum of Rs. 25 mentioned in the *kabuliyat*, and that under s. 92 of the Evidence Act, oral evidence is not admissible to show that the sum of Rs. 25 was mentioned in the *kabuliyat* for purposes of registration only. BASIRUDDIN CHOWDHURY *v.* AFSARUNESSA BIBI (1916) . **21 C. W. N. 860**

BARGAIN.

——— **onerous but not unconscionable—**

See SPECIFIC PERFORMANCE.
I. L. R. 38 Calc. 805

BARODA COURT.

——— **decree in—**

See CIVIL PROCEDURE CODE (ACT V OF 1908), s. 48, AND SCH. I, O. XXI.
I. L. R. 35 Bom. 103

See DECREE. . **I. L. R. 39 Bom. 34**
I. L. R. 40 Bom. 504

BARKI SERVICE.

——— **grant for—**

See GRANT. . **I. L. R. 39 Bom. 68**

BED OF RIVER.

——— **right to—**

See NAVIGABLE RIVER.
I. L. R. 46 Calc. 390

BELCHAMBERS' RULES AND ORDERS.

——— **r. 370—**

See REVIVOR. . **I. L. R. 43 Calc. 903**

BEMIADI PUTTAH.

——— *Held* to be a lease without a term and not a permanent lease even where it recites that the Lessee and his heirs and successors should hold possession of the property and have rights in the minerals. MUSSAMAT PARSHAN KUER *v.* MUSSAMAT TULSHI KUER
2 Pat. L. J. 180

——— *Held* that although it does not necessarily convey a permanent heritable right it may do so. KANGALI CHARAN MUKHARJI *v.* SURJA NARAIN SAH. **6 Pat. L. J. 687**

BENAMI.

See CIVIL PROCEDURE CODE, 1882, s. 317;
I. L. R. 35 Bom. 342

See CIVIL PROCEDURE CODE, 1908, s. 66
I. L. R. 35 All. 138
I. L. R. 43 All. 416

See DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1789).
I. L. R. 40 Bom. 483

See PUTNI. . . **15 C. W. N. 5**

BENAMI—*contd.*

See RELIGIOUS ENDOWMENT.
I. L. R. 43 Calc. 1019

See SALE FOR ARREARS OF REVENUE.
I. L. R. 44 Calc. 573

See SALE IN EXECUTION **15 C. W. N. 648**

See SECOND APPEAL.
I. L. R. 33 All. 122

See TITLE . **I. L. R. 47 Calc. 1108**

——— PROOF OF—*Circumstantial evidence sufficient*—Direct evidence to prove a transaction *benami*, cannot be expected, since the whole object of such a transaction is to suppress evidence of the real facts. The true facts can be proved by circumstantial evidence. SAMBHO KUOR *v.* HARIHAR PERSHAD (1914) . . **18 C. W. N. 1071**

——— *Benami purchase, allegation of—Proof —Subsequent conduct—Surrounding circumstances—Motive—Suspicion only, if sufficient to justify finding of benami—Loan given by executor to person who succeeds him as executor after his death—Limitation—Previous statements, use of.* Subsequent conduct of the parties affords valuable evidence as to whether the person in whose name a conveyance is taken is intended to be the beneficial owner or a mere *benamidar*. In cases of alleged *benami* purchaser, the decision of the Court ought not to be rested on mere suspicion. Reliance in such a case must be largely placed not only upon the surrounding circumstances and the position of the parties and their relation to one another, but also upon the motives which could govern their actions and their subsequent conduct. Previous statements, unless used to contradict or discount the evidence of a witness given in the suit, cannot be legitimately used, and even then the particular matter or point must be placed before the witness as one for explanation in view of its discrepancy with the evidence tendered. The principle that the effect of the appointment of a debtor to the office of the executor is that the debt due from the debtor-executor is considered to have been paid to him by himself and that the executor is accountable for the amount of his debt as assets is not applicable where the alleged loan was by a former executor to one who subsequently to his death was appointed executor and the loan was already time-barred at the latter date and there was nothing to show that the debt was kept alive up to that date. The principle that the grant of probate operates retrospectively from the date of the death of the testator did not apply here where there was an intermediate executor who created the debt for which the executor who followed him was sought to be made liable as debtor. In a suit for the construction of a will, and for the administration of the estate left by the testator, the costs, in the absence of grounds established in favour of a departure, should ordinarily be paid out of the estate. UPENDRO NATH NAG *v.* PURENDRO NATH NAG (1915) . . . **21 C. W. N. 280**

——— *Purchaser at a benami sale depositing putni rent, before sale set aside, from money belonging to his beneficiary—Suit to recover, if lies.* Defendant No. 7 made a *benami* purchase at an auction sale of property belonging to defendants Nos. 1 to 7 in the name of plaintiff. The sale was subsequently set aside, but before the date the plaintiff deposited a sum of money in order to save the property from a sale under the

BENAMI—*contd.*

Putni Regulation. In a suit by plaintiff the money so deposited was found to have been defendant No. 7's. Defendant No. 7, however, made no claim to it: *Held,* that the plaintiff was entitled to recover the amount deposited. SATYA CHARAN MUKHERJI *v.* DINANATH BISWAS (1916) . . . . **21 C. W. N. 1130**

———— *Auction sale—Civil Procedure Code (Act V of 1908), s. 66—Object of the section.* S. 66 of the Code of Civil Procedure, 1908, lays down that no suit shall be maintained against any person claiming title under a purchase certified by the Court, on the ground that the purchase was made on behalf of the plaintiff or some one through whom the plaintiff claims. The section is clearly aimed at *benami* purchases at execution sales. The clear intention of the section is to stop *benami* purchases by making it impossible for the real owner to question the *benamidar's* title. *Bhishan Dial* v. *Ghazi-ud-din, I. L. R. 23 All. 175,* referred to. *Sasti Churn Nundi* v. *Annopurna, I. L. R. 23 Calc. 699,* doubted. HANUMAN PERSHAD THAKUR *v.* JADU NANDAN THAKUR (1915) . . **I. L. R. 43 Calc. 20**

———— *Right of benamidar to sue in his own name—Position of beneficial*

has long been a common practice in the country: there is nothing inherently wrong in it, and it accords, within its legitimate scope, with the ideas and habits of the people. So far, therefore, as a benami transaction does not contravene the provisions of the law the Courts are bound to give it effect. The statement of the rule applicable to such transactions given in *Bilas Kunwar* v. *Desraj Ranjit Singh, I. L. R. 37 All. 557 ; L. R. 42 I. A. 242* followed. The benamidar, though he has no beneficial interest in the property or business standing in his name, represents in fact the real owner, and is, so far as their relative legal position is concerned, a mere trustee for him. *Held,* (reversing the decision of the High Court), that an action could be maintained in the name of the benamidar in respect of the property, though the beneficial owner is not a party to it, the latter being fully affected by the rules of *res judicata.* It was open to him to apply to be joined in the action, but, whether or not he is made a party, a proceeding by or against his representative is in its ultimate result fully binding on him. A suit

perty to the predecessors of the defendants, by one *M* in conjunction with her daughter *B,* and her grandson *H* while *M* was in possession of the property by virtue of her right of succession to her son *S* who died in infancy in 1852. *H* was a predecessor in title of the plaintiffs to whom in 1895 after the death of *M,* the then nearest reversioners conveyed all their right, title and interest in the property now in suit. It was contended by the

the alienation, were estopped and the High lge, decided in

favour of that contention relying on the general doctrine of equitable estoppel embodied in s. 115 of the Evidence Act; and also were of opinion that *H*'s purchase from the reversioners accrued to the benefit of *M's* vendees in consequence of the fact that he had joined with her in conveying the property to the defendants' predecessors, resting their judgment on the equitable doctrine of "feeding the estoppel" and on the provisions of s. 43 of the Transfer of Property Act. *Held* (reversing those decisions), that s. 115 of the Evidence Act did not apply, there being absolutely no evidence that the vendees were induced to alter their position in consequence of *H*'s representation contained in the deed of conveyance, *H* was merely a passive instrument in the hands of his elders, and his statement could not have materially influenced either the vendors' or vendees' conduct in the matter. The theory that *H*'s subsequent purchase of that property in 1895 from the reversioners should accrue to the benefit of the purchaser from *M,* was based on the assumption that what happened in 1880 created an estoppel against *H,* but that was not the case. Moreover, *H* did not acquire the property as a contingent reversioner to *M*, the title on which the plaintiffs brought the suit was based on an independent purchase by *H,* from the rightful heirs. GUR NARAYAN *v.* SHEOLAL SINGH (1918) **I. L. R. 46 Calc. 566**

———— *Purchase, onus—Benami purchase, allegation by decree-holder of—Burden of proof—Suspicion and proof, difference between.* Where a decree-holder sued for a declaration as against a purchaser from his judgment-debtor that the purchase was merely a *benami* conveyance: *Held,* that the burden of proof lay

of the Court rests not upon suspicion, but upon legal grounds established by legal testimony. *Sreemanchundar Dev* v. *Gopaulchunder Chuckerbutty, 11 M. I. A. 29, 43 (1896),* referred to. SETH MANIKLAL MANSUKHLAL *v.* RAJA BIJOY SINGH DUDHORIA (P. C.). . **25 C. W. N. 409**

———— *Proof that transfer is benami—Onus.* In regard to *benami* transactions, Courts of law should not approach them with that scrupulous rigour which in other systems of jurisprudence may demand the existence of the clearest positive evidence that the *ex facie* owner of a property is a trustee for or holds the same for the interest of another. *Benami* transactions are very familiar in Indian practice and even a slight quantity of evidence to show that it was a sham transaction will suffice for the purpose. Still, such a transfer cannot be considered as nothing. The person who impugnes its apparent character must show something or other to establish that it is a *benami* or sham transaction. The decision of the Court should rest not upon suspicion but upon legal grounds established by legal testimony. MAHBUB ALI KHAN *v* BHARAT INDU (1918) . . . **23 C. W. N. 321**

———— *Hindu with wives and a Muhammadan mistress—Purchase with his own funds in name of mistress and registration of deed in her name—Property treated as his own, and no possession or use of it by mistress—Landlord and tenant—Estoppel as to denial of title by tenant—*

BENAMI—*concld.*

Evidence Act (I of 1872), s. 116 —No inference against litigant as to contents of documents he considers irrelevant—Omission of opposing litigant to put them in evidence in proper way. A Hindu taluqdar who had two wives and a Muhammadan mistress and had already made substantial provision for the latter, purchased a house with his own money in the name of the mistress, and registered the deed also in her name. He treated the house, however, as his own during his life-time, living in it, paying for repairs and taxes, and receiving rent for it when let, as did his senior widow after his death: and the mistress had no possession or use of the house. In a suit by the senior widow to eject, after due notice to quit, a tenant to whom she had let the house, whose defence was a denial of the plaintiff's title, and an assertion that he held under the Muhammadan mistress who claimed title under the deed of sale in her name of which she had obtained possession. *Held* (reversing the decision of the High Court and restoring that of the Subordinate Judge), that on the evidence in, and under the circumstances of, the case the deed of sale was, and had remained throughout, a *benami* transaction. The general rule in India, in the absence of all other relevant circumstances, laid down in *Dhurm Das Pandey* v. *Shama Soondri Dibiah, 3 Moo. I. A. 229,* that "the criterion in these cases is to consider from what source the money comes with which the purchase money is paid" followed. It is open to a litigant to refrain from producing any documents which he considers irrelevant; and if the opposing litigant is dissatisfied, it is for him to apply for an affidavit of documents and he can so obtain inspection and production of all that appear to him in such affidavit to be relevant and proper. If he fails to do so, neither he, nor the Court at his suggestion, is entitled to draw any inference as to the contents of any such documents. It is for the litigant who desires to rely on the contents of documents to put them in evidence in the usual and proper way; if he fails to do so, no inference in his favour can be drawn as to the contents of them. A tenant who has been let into possession cannot deny his landlord's title, however defective it may be, so long as he has not openly restored possession by surrender to his landlord. BILAS KUNWAR *v.* DESRAJ RANJIT SINGH (1915)

I. L. R. 37 All. 557

——— Court represents admit contention that a transaction regarding immoveable property was part genuine and part *benami.* APPA DHOND *v.* BABAJI KRISHNAJI.

I. L. R. 46 Bom. 85

BENAMIDAR.

See CIVIL PROCEDURE CODE (1908), s. 11.
I. L. R. 36 All. 446

See EXECUTION OF DECREE.
14 C. W. N. 774

See LIMITATION ACT (IX OF 1908), SCH. I, ARTS. 91 AND 120.
I. L. R. 35 All. 149

See RESULTING TRUST.
I. L. R. 48 Calc. 260

See TRANSFER OF PROPERTY ACT (IV OF 1882), s. 89. **I. L. R. 37 All. 414**

See VENDOR AND PURCHASER.
I. L. R. 35 Bom. 269

BENAMIDAR—*contd.*

——— **right of—**

See EX PARTE DECREE.
I. L. R. 45 Calc. 920

——— **right of, to sue—**

See BENAMI.
I. L. R. 46 Calc. 566

——— **transferee from right of suit of—**

See MORTGAGE **I. L. R. 41 Mad. 403**

1. ——— *beneficiary taking mokurari from, and mortgaging it, how far bound by the mortgage.* A, a wife of a Mahomedan K, in whose *benami* K purchased a certain property, purported on K's death to grant to KK who on K's death would inherit 5 as. 14 gds. 15 cowries of K's estate a *mokurari* interest in 8 as. 6 gds. of the property. A mortgagee of this interest, obtained a decree for sale of a 5 as. 15 gds. of the *mokurari* in a suit in which KK was made a party and the plaintiff purchased the same at the sale. *Held,* that persons representing KK could not oppose the plaintiff's suit to recover possession of a *mokurari* interest in KK's 5 as. 14 gds. 15 cowries share. BASAR KHAN *v.* MOULVI SYED LEAKAT HOSSEIN (1919)

23 C. W. N. 841

2. ——— *Benamidar, if may sue on mortgage—Sons, if may object to benamidar's decree against father.* A usual mortgage decree was obtained by mortgagee who put it into execution and the sale of the mortgaged property was notified to take place on a certain date when the sons of the mortgagor brought a suit for declaration that they were not bound by the mortgage or by the decree made on the basis thereof on the ground that the decree-holder was not the real mortgagee, but only the ostensible mortgagee for the benefit of a real creditor and consequently he was not entitled to enforce the security though it stood in his name. *Held,* that the person named in the mortgage-deed was entitled to sue on it and it was not competent to the mortgagor to dispute that the ostensible mortgagee was entitled to maintain the suit and the sons of the mortgagor were bound by the mortgage-bond equally with the executant and did not stand in any better position. KIRTIBAS DAS *v.* GOPAL JIU (1913) . **18 C. W. N. 814**

3. ——— *Right of suit. Held,* on suit for sale on a mortgage, that the facts that the mortgagee named in the bond is only a *benamidar* and that the real owner of the bond is known to the Court are no bar to the maintenance of the suit by the person named in the bond as mortgagee. *Yad Ram* v. *Umrao Singh, I. L. R. 23 All. 380,* referred to. PARMESHWAR DAT *v.* ANARDAN DAT (1914) . **I. L. R. 37 All. 113**

4. ——— The view taken in *Ram Behari Sarkar* v. *Surendra Nath Ghose, 19 C. L. J. 34,* that a *benamidar* defendant in a mortgage suit represents the interests of the persons beneficially entitled, approved. KANAI LAL JALAN *v.* RASIK LAL SADHUKHAN (1914)

19 C. W. N. 361

5. ——— *Suit on mortgage by, maintainability of—Real owner, whether a necessary party to. Held,* by the Full Bench, that a person who is not the real mortgagee but only a benamidar for him can institute a suit to enforce the mortgage and that the real mortgagee need not be a party. *Choudhri Gur Narayan* v. *Sheo*

BENAMIDAR—*contd.*

Lal Singh, 36 Mad. L. J. 68 ; 46 I. A., 1, followed. VAITHESWARA AIYER *v.* SRINIVASA RAGHAVA IYENGAR (1918). . . **I. L. R. 42 Mad. 348**

6. ———————— *Partition—Joint immoveable property, suit for partition of.* A *benamidar* cannot maintain a suit for partition of joint immoveable property. ATRABANNESSA BIBI *v.* SAFATULLAH MIA (1915) **I. L. R. 43 Calc. 504**

6 (A) ———————— *Appellant*

benamidar. *Held* that the rights of the parties were to be determined according to the law to be applied by the English Court of Chancery. Whereby there was a rebutable presumption that the transaction was intended for her advancement. KERWICK *v.* KERWICK. **L. R. 47 I. A. 275**

7. ———————— *Decree against benamidar. Sale of property held in benami in exe-*

not affected by it. *Quære.* Whether when a money-decree has been obtained against the *benamidar,* the beneficiary is necessarily bound by the sale of the property held in *benami* in execution of the decree. SATISH CHANDRA SARKAR *v.* BROJO GOPAL DUTTA (1918) . . . **22 C. W. N. 807**

BENCH OF MAGISTRATES.

See MAGISTRATES, BENCH OF.

———— **Absence of one (whether trial valid)—**

See CRIMINAL PROCEDURE CODE, s. 16. **I. L. R. 44 Bom. 400**

s. 350. . **I. L R. 2 Lah. 237**

BENEFIT.

———— **to donor's family—**

See MAHOMEDAN LAW—WAKF. **L. R. 44 I. A. 21**

BENEFITS OF DECREE.

———— **suit for—**

See PRINCIPAL AND AGENT. **I. L. R. 40 Calc. 335**

BENGAL ACTS.

———— **1825—XI.**

See BENGAL ALLUVION ACT.

———— **1847—IX.**

See BENGAL ALLUVION AND DELUVION ACT.

———— **1859—X.**

See BENGAL RENT ACT.

XI.

See SALE FOR ARREARS OF REVENUE.

———— **1865—VIII.**

See BENGAL RENT ACT.

See RENT RECOVERY ACT.

BENGAL ACTS—*contd.*

———— **1866—II.**

See CALCUTTA SUBURBAN POLICE ACT.

IV.

See CALCUTTA POLICE ACT.

———— **1868—VII.**

See BENGAL LAND REVENUE SALES ACT.

See SALE FOR ARREARS OF REVENUE.

See REVENUE SALES ACT.

———— **1869—VIII.**

See BENGAL RENT ACT.

———— **1870—VI.**

See VILLAGE CHAUKIDARI ACT.

See CHAUKIDARI CHAKRAN LANDS.

———— **1875—V.**

See BENGAL SURVEY ACT.

———— **1876—VI.**

See CHOTA NAGPUR ENCUMBERED ESTATES ACT.

VII.

See LAND REGISTRATION ACT (BENGAL).

VIII.

See ESTATES PARTITION ACT

———— **—1878—VII.**

See BENGAL EXCISE ACT

———— **1879—I.**

See CHOTA NAGPUR LANDLORD AND TENANT PROCEDURE ACT.

VIII.

See RENT SETTLEMENT ACT.

IX.

See BENGAL COURT OF WARDS ACT.

See COURT OF WARDS ACT (BENGAL.)

———— **1880—VI.**

See BENGAL DRAINAGE ACT.

IX.

See BENGAL CESS ACT.

———— **1882—II.**

See BENGAL EMBANKMENT ACT.

———— **1884—III.**

See BENGAL MUNICIPAL ACT.

———— **1885—I.**

See BENGAL FERRIES ACT.

III.

See BENGAL LOCAL SELF-GOVERNMENT ACT.

See LOCAL SELF-GOVERNMENT ACT.

———— **1887—XII.**

See BENGAL, AGRA AND ASSAM CIVIL COURTS ACT.

See BENGAL, N.-W. P. AND ASSAM COURTS ACT.

See CIVIL COURTS ACT.

———— **1890—IX.**

See CALCUTTA PORT ACT.

BENGAL ACTS—*concld.*

——— 1894—IV.

See BENGAL MUNICIPAL (AMENDMENT) ACT.

——— 1895—I.

See PUBLIC DEMANDS RECOVERY ACT.

V.

See BENGAL SURVEY ACT.

——— 1897—V.

See ESTATES PARTITION ACT.

——— 1899—III.

See CALCUTTA MUNICIPAL ACT.

I.

See BENGAL GENERAL CLAUSES ACT.

——— 1903—III.

See BENGAL MOTOR CAR ACT.

——— 1906—IV.

See CENTRAL PROVINCES LAND REVENUE AMENDMENT ACT.

——— 1907—II.

See EASTERN BENGAL AND ASSAM DISORDERLY HOUSES ACT.

——— 1908—VI.

See CHOTA NAGPUR TENANCY ACT.

——— 1909—III.

See CHOTA NAGPUR ENCUMBERED ESTATES AMENDMENT ACT.

——— 1909—V.

See BENGAL EXCISE ACT.

——— 1911—V.

See CALCUTTA IMPROVEMENT ACT.

——— 1914—VI.

See BENGAL MEDICAL ACT.

——— 1920—III.

See CALCUTTA RENT ACT.

BENGAL, AGRA AND ASSAM CIVIL COURTS ACT (XII OF 1887).

——— ss. 8 and 21—

See BENGAL, N.-W. P. AND ASSAM COURTS ACT.

——— Where the value of a suit is less than Rs. 5,000 and the first Court dismisses the claim or awards less than Rs. 5,000 and the appeal court thinks Rs. 5,000 should be awarded it has power to award it. The Right to specifically enforce an agreement for a lease is barred after three years. SATYA KINKAR SAHANA *v.* RAJA SRI SRI SHIBA PRASAD SINGH. 4 Pat. L. J. 447

——— s. 21—An appeal lies to the High Court and not the District Court for an order refusing to set aside an *exparte* decree where the suit for Court fee is valued at more than Rs. 5,000. RAGHU SINGH *v.* USUF ALI. 4 Pat. L. J. 202

BENGAL ALLUVION AND DILUVION REGULATION (XI OF 1825).

See ALLUVION.

See DILUVION . 24 C. W. N. 211

BENGAL ALLUVION AND DILUVION REGULATION (XI OF 1825)—*contd.*

See FISHERY . I. L. R. 42 Calc. 489

See LANDLORD AND TENANT. I. L. R. 41 Calc. 683

See NAVIGABLE RIVER. I. L. R. 46 Calc. 390

See REGULATION XI OF 1825. 1 Pat. L. J. 536

——— Whether accretion must be slow and imperceptible. *Held* it is not the extent of the land formed which decides whether newly formed land is an accretion, but the manner in which the formation takes place. LALA LACHMI NARAIN LAL *v.* MAHARAJA KESHO PRASAD SINGH . . . . . . 5 Pat. L. J. 1

——— Land submerged and reformed *in situ*. *Held* that the Act did not apply to land which has been washed away and which reforms on its old site and is identifiable as land belonging to the owner of the site. GAJADHAR PRASHAD *v.* DULHIN GULAB KUER 5 Pat. L. J. 632

BENGAL ALLUVION AND DILUVION ACT (IX OF 1847).

See RECORD-OF-RIGHTS. 5 Pat. L. J. 681

——— *not applicable to Sunderban lands not paying revenue directly to Government—Bengal Alluvion and Diluvion Regulation (XI of 1825), applicability of, to such lands—Lease of Sunderban lands by Government as owner—No distinction between "rent" and "revenue" in the lease—Relation of lessor and lessee, regulated by contract, subject to the provisions of Reg. XI of 1825—Diara proceedings confirmed by Board of Revenue for assessment with revenue under s. 6 of Act IX of 1847—Suit in Civil Court for declaration that such proceedings are a nullity, if governed by s. 10, cl. (3) of Reg. III of 1828 and if to be treated as a regular appeal from the decision of the Board of Revenue—Proof—Onus on the Secretary of State to show addition to original lands—River boundary—Riparian owner's right to the middle of the stream.* Under Act IX of 1847 (B. C.) it must be shown that land has been added to any estate paying revenue directly to Government. Where the Government as "owner" of the Sunderbans granted a lease of certain lands for a certain term with a covenant for perpetual renewal on a progressive rental and, in the lease there was no distinction between "rent" and "revenue" and the relation created by it was that of a lessor and lessee, and the lessee was not allowed to claim an abatement of rent on the ground of diluvion, and in addition to his lease-hold interest his other properties moveable and immoveable were liable to be sold in the event of the accrual of the arrears of the *jama* reserved by the lease: *Held*—That having regard to the position of the Government as owner of the Sunderbans and to the terms and the conditions of the lease, the lessee in the present case was not the holder of an "estate paying revenue directly to Government," and as such Act IX of 1847 was not applicable, and that the relation between the parties was regulated by the contract between them, subject to the provisions of Reg. XI of 1825. The entire proceedings confirmed by the Board of Revenue assessing the lands with revenue in the present case under s. 6 of Act IX of 1847 were

BENGAL ALLUVION AND DILUVION ACT (IX OF 1847)—*contd.*

declared a nullity. In the present case the onus lay on the grantor, *i.e.*, The Secretary of State for India to shew addition to original lands. The present suit being one for a declaration that the proceedings under Act IX of 1847 were a nullity, it could not be dealt with as if it were a regular appeal from the decision of the Board of Revenue under s. 10 cl. (3) of Reg. III of 1828. Having regard to the boundaries of the land demised in this case and in the absence of evidence to show

two rivers. *The Secretary of State for India in Council* v. *Bijoy Chand Mahatab, 22 C. W. N. 872 (1918)*, referred to. SECRETARY OF STATE FOR INDIA *v.* JATINDRA NATH CHOWDHURY
24 C. W. N. 737

BENGAL CESS ACT (IX OF 1880).

See CESS ACT.

See ROAD CESS ACT.

See ROAD-CESS RETURNS.
I. L. R. 39 Calc. 1005

See TEISHKHANA PAPER.
I. L. R. 39 Calc. 995

———— In a suit for rent claim of tenant's share of cess was disallowed on ground that there was no provision for payment of cess when rent was payable in kind. JOGESH CHANDRA ROY *v.* ANNADA CHARAN CHOWDHURY . . . . **26 C. W. N. 368**

BENGAL CHAMBER OF COMMERCE.

See ARBITRATION.
I. L. R. 40 Calc. 219
I. L. R. 42 Calc. 1140
20 C. W. N. 365

See STAMP DUTY.
I. L. R. 39 Calc. 669

BENGAL COURT OF WARDS ACT (IX OF 1879).

See COURT OF WARDS.

———— **s. 6 (a)**—*Debtor's widow made Ward of Court—Suit to recover debt from widow without making manager of Court party as her guardian, if maintainable, when whole estate not taken over* Where

assets left by her husband, without describing her

taken over only after the lower Court had passed a decree against the lady in the suit as framed. *Dhanipal Das* v. *Raja Maneshar Singh, L. R. 33*

DEBI *v.* DURGA MOHAN CHUCKERBUTTY (1915)
20 C. W. N. 31

BENGAL COURT OF WARDS ACT (IX OF 1879)—*contd.*

———— **s. 6(a)**—*contd.*

———— **ss. 11, 13A, 51, 55**—*Estate retained by Court after some co-sharers ceased to be disqualified,*

Estate released pending appeal from order dismissing application—Effect. Some properties of the judgment-debtors, whose estate was in charge of the Court of Wards, was sold in execution of a decree on 15th April 1912. As the Court of Wards would not apply to set aside the sale, the judgment-

estate was released by the Court of Wards on the 18th June 1914, before the appeal was heard. One of the judgment-debtors, *B*, had ceased to be disqualified before the sale, but as there were unpaid debts of the estate, the Court of Wards under s. 13A of the Court of Wards Act, was authorised to retain possession of the estate. *Held*, that under s. 55 of the Court of Wards Act the application to set aside the sale was incompetent. That the release of the estate did not give a fresh start to limitation, as the judgment-debtor *B* not being a minor at the time the right to apply accrued, was not entitled to claim the benefit of s. 7 of the Limitation Act. UMAKANTA SEN CHOWDHURY *v.* HIRA LAL RAY (1916) . . **20 C. W. N. 852**

———— **s. 14**—

See CIVIL PROCEDURE CODE, 1882.

———— **s. 375.**
25 C. W. N. 797

———— **s. 18**—

See LIMITATION . **I. L. R. 43 Calc. 211**

———— **ss. 18, 51**—

See COMPROMISE . **I. L. R. 44 Calc. 829**

———— **ss. 48, 60A**—*Decree obtained against ward before estate taken over, if may be executed in*

Wards in the usual manner under the provisions of the Civil Procedure Code without reference to the order, in which, under s. 48 of the Court of Wards Act, the manager is directed to satisfy the ward's liabilities out of the free funds at the manager's disposal. UPENDRANATH SEN ROY CHOWDHURY *v.* BIMALA KANTA SEN CHOWDHURY (1914)
18 C. W. N. 1055

in anticipation of sanction sought and obtained from the Court of Wards: *Held*, that having regard to the difficulty of fixing the precise time when any *char* appeared above water and formed into land, the suit was not wrongly instituted simply because it was later on found that there was still some time before the period of limitation actually expired, but the manager should, after instituting the suit, have had all proceedings. there

BENGAL COURT OF WARDS ACT (IX OF 1879)—*contd.*

——— s. 55—*contd.*

in stayed until sanction was duly obtained. That all proceedings which took place before sanction was obtained must be set aside and the su t tried *de novo.* DIGENDRO CHANDRA SEN *v.* NRITYA GOPAL BISWAS (1917) . **22 C. W. N. 419**

——— *Institution of suit by manager to save limitation—Subsequent filing of sanction of Court of Wards after conclusion of hearing but before judgment—Suit for balances of "sale price" of "garh" if suit for rent—Bengal Tenancy Act (VIII of 1885), s. 193.* A manager of an estate under the Court of Wards instituted a suit to have limitation. The suit was for recovery of the balance of the sale price of a "*garh*" or forest and was based on a document described as an agreement for settlement of a reserved "*garh*" for a certain period at a "*thicca jammah*" providing for instalments for payment of rent and giving the defendants among others the right to cut down and sell valuable trees and to grant sub-leases of such right. The sanction of the Court of Wards was filed after evidence on both sides had been recorded and arguments heard in part: *Held,* that s. 55 of Act IX of 1879, which simply lays down that if a manager files a suit to save limitation, he shall not proceed with it without the sanction of the Court of Wards, is intended for the guidance of managers. It is not a question of jurisdiction of the Court in which the suit has been instituted, but it seeks to control the action of the manager, and there is nothing in the section which prevents the defendants from waiving the stay. To proceed with such a suit is not an assumption of jurisdiction which the trial Court does not possess, but is at most an irregularity which does not vitiate the proceedings. That the suit in the present case was a suit for arrears of rent and as such was excepted under s. 55 and was maintainable, being authorised by the manager. The expression "rent" has a more extensive meaning than the definition given to it in the Bengal Tenancy Act. JOY CHURN DUTTA *v.* SARAJUBALA DEBI (1919) . **23 C. W. N. 876**

BENGAL DISTRICT GAZETTEER.

——— reference to—

See SIMANADARS. **I. L. R. 43 Calc. 227**

BENGAL DRAINAGE ACT (BENG. VI OF 1880).

——— ss. 32, 35, 42(b), 44, sub-ss. (1) and (2)—*Drainage charges, suit by landholder to recover, from tenant—Plaintiff, if must prove land to have been benefited—Commissioners' report apportioning liability, if admissible to prove benefit—Tenants' liability, if must be determined by Collector—Notice on tenant, if necessary—Jurisdiction of Civil Court—Second Appeal—Civil Procedure Code (Act XIV of 1882), s. 586.* A sum payable by a tenant to a landholder under cl. (*b*) of s. 42 of the Bengal Drainage Act (Beng. VI of 1880) being recoverable under the provisions of sub-s. (*1*) of s. 44 of that Act as if the same were an arrear of rent, a suit to recover the same comes under cl. (*8*) of Sch. II of the Small Cause Courts Act and is not a suit of a Small Cause Court nature within the meaning of s. 586 of the Civil Procedure Code of 1882. The mere fact of a sum of money having been declared under the Act to be payable by a landholder in respect of any land is not sufficient to make a tenant of the land liable to contribute towards it. Cl. (*b*) of s. 42 of the Act requires that the landholder should show in the first instance that the land of any particular tenant, against whom a claim has been made has been benefited by any scheme or works. The Commissioners' report under s. 32 of the Act cannot be treated as *primâ facie* evidence in favour of the landlord in a suit to recover drainage charges against tenants. *Quære*: Whether the power of determining any question as to the amount which any tenant is to pay in respect of drainage charges is not intended to be exclusively vested in the Collector, and whether a notice under sub-s. (*2*) of s. 44 would not therefore be a necessary preliminary to the maintainability of a suit to recover such charges from a tenant. BASANTA KUMAR RAI *v.* RAM CHANDRA ROY CHAUDHURY (1903) **17 C. W. N 499**

——— ss. 36, 36A, 38—*Costs of drainage construction—Apportionment—Person made liable, engagement to pay in instalments by—Recovery by certificate from purchaser.* The Provisions of the Public Demands Recovery Act for summarily recovering the amount due from a landholder under an engagement entered into under s. 38 of the Bengal Drainage Act can only be put in force against the person who gave it. They cannot be enforced against a person who has subsequently purchased his properties and who has not been made liable for the costs of construction under s. 36A of the Bengal Drainage Act. NAGENDRA BALA CHOWDHURANI *v.* THE SECRETARY OF STATE FOR INDIA (1914) . . . **18 C. W. N. 944**

BENGAL EMBANKMENT ACT (BENG. II OF 1882).

See SALES FOR ARREARS OF REVENUE. **I. L. R. 42 Calc. 765**

——— ss. 6, 76 (b), 79, 80—

See EMBANKMENT. **I. L. R. 46 Calc. 825**

——— ss. 54 to 59, 68, 74—

See EMBANKMENT. **I. L. R. 41 Calc. 130**

——— s. 76, cls. (a) (b)—

See EMBANKMENT. **I. L. R. 38 Calc. 413**

BENGAL ESTATES PARTITION ACT.

See ESTATES PARTITION ACT.

BENGAL EXCISE ACT (BENG. VII OF 1878).

——— r. 16—Sanction for prosecution—*Criminal Procedure Code (Act V of 1898), s. 195—Statement not necessarily false—License, if personal.* Under the excise law, the holder of an excise license is forbidden to sub-let his shop or transfer his license, or allow anybody to sell liquor under his license. Where, therefore, a licensee made a statement in a criminal case that a wine shop was exclusively owned by him while it was found in a civil suit that he had a dormant partner and the decision in that suit was under appeal:—*Held,* that as the interest claimed by the alleged

BENGAL EXCISE ACT (BENG. VII OF 1878) —*contd.*

——— r. 16—*contd.*

partner may be without legal justification, the licensee in making the statement may have unconsciously deviated into the truth, and that, in these circumstances, no sanction to prosecute the licensee for perjury should be granted. RAKHAL CHANDRA SHAHA *v.* DAMODUR SHAHA (1909)
15 C. W. N. 169

BENGAL EXCISE ACT (V OF 1909).

See EXCISABLE ARTICLE.

——— ss. 2 (12), 46 (a), 52, 61—

See COCAINE.
I. L. R. 41 Calc. 537, 545

——— ss. 2, 46, 48, 75, 81, 84—

See EXCISE . **I. L. R. 41 Calc. 694**

——— s. 19, cl. (4)—*Government Notification —Possession of cocaine.* A notification issued by Government under s. 19, cl. (*4*) of the Excise Act has the force of law, and under the notification, dated the 20th November 1911, it is an offence for any person other than those specified to have any cocaine at all, except with a medical man's prescription and then only 5 grains. In all cases, the burden of proof to show under what authority he obtained cocaine lies on the accused. EMPEROR *v.* MUKUND SAHU (1914) . **18 C. W. N. 1023**

——— ss. 46, 52, 55, 57—

See EXCISABLE ARTICLES.
I. L. R. 39 Calc. 1053

——— ss. 2 (7), (14), 46 (a)—

AS AMENDED BY BENG. ACT VII OF 1911:

See EXCISABLE ARTICLE.
I. L. R. 45 Calc. 82

——— ss. 2, 46, 52 and 61—

See COCAINE . **I. L. R. 41 Calc. 537**

——— s. 2 (14)—*Liquor, meaning of.* Liquor as defined in s. 2 (*14*) of the Bengal Excise Act must be intoxicating liquor, and the enumeration of all the liquids that follow does not make them liquor unless they are intoxicating. EMPEROR *v.* MOTI LAL CHANDER (1912)
I. L. R. 39 Calc. 1053
16 C. W. N. 785

——— s. 2 (20)—*Cocoanut, milk of, if excisable.* The expression "juice drawn from any cocoanut" in s. 2 (*20*) of the Excise Act does not mean the milk of the cocoanut, but the juice of the tree. EMPEROR *v.* MOTI LAL CHANDER (1912)
16 C. W. N. 785

——— ss. 46, 52, 56, 57—*Illegal transport and possession of excisable article—Taking orders to supply if abatement of transport.* Where medicinal drugs containing spirit which had been manufactured in Chandernagar within French territories were consigned from Chandernagore station by rail to Howrah and from there taken to a Calcutta shop in pursuance of orders given to the manufacturer by the manager of the Calcutta shop: *Held,* that assuming that the articles were excisable, after they had passed undetected by the customs authorities, no charge could be framed at the instance of the Excise authorities against persons concerned in the transaction of importing excisable articles, but the Excise authorities could proceed for illegal transport or export or possession of the articles imported. *Held,* on the evidence, that delivery of the articles to the Calcutta firm had taken place before the transport of the same commenced and the mere fact of the persons who despatched them from French territory having arranged that an agent of theirs should be present at the Calcutta shop to see that the goods were in order when opened did not prevent possession passing to the Calcutta firm and they were not liable to conviction for illegal transport or possession of excisable articles. Taking an order for foreign goods which are excisable may constitute abetment of their import, but not of their transport. EMPEROR *v.* MOTI LAL CHANDER (1912)
16 C. W. N. 785

——— ss. 46 (a), 56—

See MASTER AND SERVANT.
I. L. R. 39 Calc. 344

——— ss. 67, 70—

See RIOTING . **I. L. R. 41 Calc. 836**

BENGAL FERRIES ACT (BENG. I OF 1885).

——— ss. 6, 16, 28—

See FERRY . **I. L. R. 37 Calc. 543**

——— s. 11—*Held,* that a District Magistrate had no power to establish a subsidiary ferry more than 2 miles from a Public Ferry and that the right to establish a ferry over the property of another is a right of easement within s. 26 of the Limitation Act, 1908. PARDIP SINGH *v.* SECRETARY OF STATE . . . **5 Pat. L. J. 500**

BENGAL GENERAL CLAUSES ACT (BENG. I OF 1899).

See EXECUTION OF DECREE.
I. L. R. 40 Calc. 623

BENGAL LAND REVENUE SALES ACT (XI OF 1859).

See PROVINCIAL SMALL CAUSE COURTS ACT, 1887 SS. 25 AND 23.
5 Pat. L. J. 248

See SALES FOR EXCESS OF REVENUE.

——— When the Proprietor himself makes a settlement under the Regulation of 1822 he is not entitled under s. 8 to an extra 10 per cent. on the Government Revenue. SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* KHAJA MAHOMED JAN . . **2 Pat. L. J. 266**

——— *Held,* that the permanent settlement referred to in this section is that of 1793. LALJIT UPADHYAY *v.* MUSSAMAT WAJIHUNISSA BEGAM . . **5 Pat. L. J. 79**

BENGAL LAND REVENUE SALES ACT (BENG. VII OF 1868).

——— s. 8—

See REVENUE SALE.
I. L. R. 41 Calc. 276

BENGAL LAND REVENUE SETTLEMENT REGULATION, 1822.

——— Where the Proprietor himself takes settlement of an estate under the

BENGAL MUNICIPAL ACT (III OF 1884)—*contd.*

———— s. 45—

See BENGAL LICENSED WAREHOUSE ACT **25 C. W. N. 960**

———— **ss. 46, 112, 113, 114 and 351A**—*Appointment of a paid Assessor at a meeting of the Commissioners within six months from the date of a lost amendment at a previous meeting, effect of—Assessment by such an officer, confirmed by the Appeal Committee, whether impeachable—Rule 33 of the Model Rules under s. 351A of the Act.* The question of appointing a paid assessor under s. 46 of the Bengal Municipal Act (Beng. III of 1884) was raised at a meeting of Municipal Commissioners, as an amendment to a substantive motion; the amendment was lost; but the same question was again raised as a substantive proposition within six months from the date of the first meeting; the proposal being carried, an assessor was appointed who revised the assessment of the plaintiff. The plaintiff applied for a review under s. 113, but the assessment was confirmed under s. 114 of the Act:—*Held,* that the appointment of the paid assessor was not *ultra vires,* inasmuch as the subject of the appointment of an assessor had not been finally disposed of at the first meeting, and therefore its re-consideration was permissible; and that, whether the assessor was or was not legally qualified to make any assessment, the validity of such an assessment when once confirmed by the Appeal Committee under s. 114 of the Act, could not be impeached. CHAIRMAN OF CHITTAGONG MUNICIPALITY *v.* JOGESH CHANDRA RAI (1909) . . . **I. L. R. 37 Calc. 44**

———— s. 61—*Sale of holding, when owner unknown, for arrears of rates—Purchaser's title, if superior to mortgagee's.* The purchaser of a holding sold under s. 361 of the Bengal Municipal Act does not acquire it free from incumbrances, there being no provision in the Act creating any charge or other preferential right in favour of the purchaser. MOHAMMED SOLEMAN *v.* RAGHUNATH DUTTA (1917) . . . **21 C. W. N. 425**

———— s. 85—*Held,* that income derived from property situate outside the municipality does not come within the phrase "circumstances and property within the municipality" in this section, and is not liable to assessment. CHAIRMAN OF THE MUNICIPALITY OF BIHAR *v.* MAHANT RUMDEO DAS **4 Pat. L. J. 673**

———— The term "cess" and "property" of a person depends on what he got and spent while in a Municipality. CHAIRMAN, JALPAIGURI MUNICIPALITY *v.* JALPAIGURI TEA CO. . . . . **26 C. W. N. 311**

———— *Taxing power of Municipality, if limited to circumstances and property within the Municipality.* Under s. 85, cl. (*a*) for the purpose of assessment the Municipality cannot take into account the circumstances and property of the assessee outside the Municipality but must restrict itself to the circumstances and property, that is, the means and property within the Municipality and further to measure the means and property within the Municipality the test is not what is spent but what is earned within the Municipality. DEBENDRA NATH RAI CHOUDHURI *v.* CHAIRMAN, TAKI MUNICIPALITY

25 C. W. N. 45

BENGAL MUNICIPAL ACT (III OF 1884)—*contd.*

———— ss. 85, 87—*Assessment—Tax on persons—"Circumstances and property within the Municipality" as used in s. 85, cl. (a), meaning of—"Circumstances", if include income earned by resident tax payers from outside the local limits of a Municipality, and if liable to assessment.* The word "circumstances" as used in cl. (*a*) of s. 85 of the Bengal Municipal Act is not restricted to income earned or accruing from sources within the Municipality but includes income earned by resident tax-payers from outside the local limits of the Municipality and such income brought from outside to be spent and enjoyed within the Municipality becomes a part of the "circumstances" of the resident tax-payers within that Municipality and is liable to assessment there under s. 85. *Kameshwar Pershad* v. *Bhabua Municipality I. L. R. 27 Calc. 849 (1900),* explained and distinguished. The words "within the Municipality" as used in cl. (*a*) of s. 85 of the Bengal Municipal Act govern both "circumstances" and "property", and the word "circumstances" must be interpreted to be in substance the equivalent of "means." *Deb Narain Dutt* v. *Chairman of Baruipur Municipality, I. L. R. 39 Calc. 141 (1901), Deb Narayan Dutt* v. *Chairman of Baruipur Municipality, I. L. R. 41 Calc. 168 : s.c. 17 C. W. N. 1230 (1913)* and *Chairman of Giridih Municipality* v. *Srish Chandra Mozumdar, I. L. R. 35 Calc. 859 : s.c. 12 C. W. N. 709 (1908),* referred to. CHAIRMAN, JAYNAGAR MUNICIPALITY *v.* SAILABALA DUTTA.

25 C. W. N. 47

———— ss. 85 and 86—

See ASSESSMENT . **I. L. R. 48 Calc. 443**

———— **ss. 85, 113, 114, 116**—*Assessment of property outside the Municipality whether* ultra vires—*Civil Court whether can modify the assessment.* The defendant had property within the jurisdiction of the plaintiff Municipality, the annual value of which was only Rs. 76. The circumstances and property of the defendant outside the Municipality were taken into consideration by the Commissioners in assessing the defendant with a tax of Rs. 9: *Held,* that it is only the circumstances and property within the Municipality and not circumstances and property outside the Municipality that are to be considered. The assessment of tax with reference to the circumstances and property outside the Municipality is *ultra vires.* The defendant objected to the assessment and under s. 113 of the Bengal Municipal Act (III, B. C., of 1884) applied to the Commissioners to review the amount of assessment; the application was heard by a Committee under s. 114 and disallowed. It was urged that the Civil Court had no jurisdiction to modify the assessment under s. 116: *Held,* that if the question relates to the amount of assessment according to the circumstances and property within the Municipality then the decision of the Commissioners under s. 114 is final and the Civil Court has no power to reopen the question of assessment. Here the assessment being made with respect to the circumstances and property not only within the Municipality but also outside it, the assessment was *ultra vires.* RAJPUR MUNICIPALITY *v.* NAGENDRO NATH BAGCHI (1919).

23 C. W. N. 475

BENGAL MUNICIPAL ACT (III OF 1884)— *contd.*

———— **ss. 85, 114.—**

See MUNICIPAL ASSESSMENT.

I. L. R. 39 Calc. 141

———— **ss. 85, 116**—*Principle of assessment —Valuation of property, basis of—Appeal—Committee—Bengal Municipal Act (Ben. III of 1884), ss 85, 114.* In assessing tax upon persons under cl. (*a*) of s. 85 of the Bengal Municipal Act, both the "circumstances" and the "property" referred to in the section must be within the municipality in question. S. 114 of the Bengal Municipal Act does not lay down that application shall be heard and determined by all the Commissioners appointed as members of the Appeal Committee. DEB NARAIN DUTT *v.* CHAIRMAN OF THE BARUIPUR MUNICIPALITY (1911) . **I. L. R. 39 Calc. 141**

———— *Assessment of tax on "circumstances and property"—"Circumstances," meaning of—Valuation of "circumstances and pro-* [illegible] *Civil* [illegible] *cir-* [illegible] *are* [illegible] *basis of assessment—Non-disclosure, presumption from.* The "circumstances and property within the Municipality," "according to" which a tax upon persons occupying holdings within the Municipality is authorised to be imposed by s. 85 of the Bengal Municipal Act, signify the "means and property" of the person in question within the Municipality. *Chairman of Giridhi Municipality* v. *Suresh Chunder Mazumdar, I. L. R. 35 Calc. 859, 12 C. W. N. 709,* followed. It is not open to the Courts to assess the value of the "circumstances and property" for the purposes of s. 85. Where in a suit brought to question the legality of a tax imposed upon the plaintiff under s. 85, the defendant Municipality averred that the tax had been imposed upon "the circumstances and property" of the plaintiff within the Municipality but in the evidence did not disclose the facts showing that this was done, and the lower Appellate Court found facts inconsistent with the case that only the "circumstances and property" within the Municipality were considered: *Held,* that the presumption in s. 106 of the Evidence Act applied, and the plaintiff must be taken to have made out his case that the assessment was not according to the plaintiff's circumstances and property" within the Municipality. DEBNARAIN DUTT *v.* CHAIRMAN OF THE BARUIPUR MUNICIPALITY (1913) . . . **17 C. W. N. 1230**

———— ***s. 101—***

———— *"Machinery", meaning of—Balancing tank of Calcutta Municipality with supporting structure, at its pumping station, if machinery and exempted from assessment as such. Held* that neither the balancing tank at No. 1, Khelat Babu's Lane, within the Cossipore and Chitpore Municipality (which is used to regulate the supply of water at the Calcutta Corporation) not its supporting structure, nor both combined are "machin- [illegible]

in any special sense differing from its ordinary sense. CORPORATION OF CALCUTTA *v.* CHAIRMAN, COSSIPORE AND CHITPORE MUNICIPALITY.

26 C. W. N. 761

BENGAL MUNICIPAL ACT (III OF 1884)— *contd*

———— **s. 116—**

See ASSESSMENT **I. L. R. 37 Calc. 374**

———— **s. 155**—*The two-mile limit within which private ferry-boats may not ply, if a radius of two miles from Municipal ferry or two miles along the bank—Reference to another Statute when provision not ambiguous—Construction of Statute.—Interpretation of penal provision.* The distance of two miles above and below the Municipal ferry within which private persons are prohibited from keeping a ferry-boat for the purpose of plying for [illegible]

having regard specially to s. 4 of that Act. *Per* RICHARDSON, *J.*—To come within the prohibition of that section the *terminus a quo* and the *terminus ad quem* of the unlicensed boat must both be within the prescribed area. KASIM ALI *v.* CHAIRMAN OF THE MUNICIPAL COMMISSIONERS OF CHITTAGONG (1916) . . . **21 C. W. N. 601**

———— **ss. 176, 177, 235, 237, 238, 239 and 240A**—*"erect or re-erect"—material alteration.* Where permission was given to the plaintiff under s. 237 of the Bengal Municipal Act, 1884, to repair the roof and certain walls of his house, and in order to effect such repairs, he found it necessary to renew some of the walls or parts of the walls of the upper storey and also to renew some of the wood work of a balcony which he was thus obliged to pull down and put up again: *Held,* that there was neither an erection nor a re-erection of a house within the meaning of s 240 of the Act, nor was there any material alteration of the house within the meaning of the same section *Per* CHAMIER, *C. J.*—The addition of a second storey to a house is a material alteration or enlargement of the house within the meaning of s. 240. The Chairman or Vice-Chairman of a Municipality is the proper authority to dispose of objections raised by a person served with a notice under s. 238. CHAIRMAN OF GAYA MUNICIPALITY *v.* SHAM LAL GUPTA . . . **3 Pat. L. J. 33**

———— **ss. 178, 179**—*Procedure preliminary prosecution—s. 218.* The accused was served with a notice by the Municipality requiring him to remove a fence which was said to be an obstruction. The accused preferred an objection, whereupon the Chairman passed an order to move the District Magistrate for the prosecution of the accused. He was then tried and convicted under s. 218: *Held,* that there was a compliance with ss. 175, 176 of the Act but not with ss. 178, 179. There being thus a failure to observe the essential preliminary steps before an application could be made to the Magistrate under s. 202 the proceedings were without jurisdiction. NOBIN CHANDRA AICH *v.* NOAKHALI MUNICIPALITY (1916).

21 C. W. N. 470

———— **s. 259—**

See CREMATION . **14 C. W. N. 1057**

———— **s. 260A**—Where a Municipality granted, under s. 260A of Bengal Municipal Act, a license which created in favour of the defendant No. 2 an exclusive right to employment as a cremation priest and to sell fuel in the burning ground. *Held,* that the action of the Municipality was *ultra vires.* S. 260 of the Bengal Municipal Act

BENGAL MUNICIPAL ACT (III OF 1884)— *contd.*

——— s. 230A—*contd.*

was never intended to be so applied as to enable the Municipal Commissioners to create an exclusive right in favour of any person to sell fuels for burning dead bodies. GOUR MONI DEBI *v.* CHAIRMAN OF PANIHATI MUNICIPALITY (1910).

14 C. W. N. 1057

——— ss. 261, 273, cl. (2)—*Carrying on offensive or dangerous trade—Scope of s. 261—Fixing of local limits a condition precedent to prosecution under s. 273—Proceedings of Municipal bodies how to be proved—Presumption as to the regular performance of official acts, if applies to supply deficiency in proof—Evidence Act (I of 1872), ss. 78 (5), 114, illustration* (*e*). Where the petitioner was convicted under *cl. (2)* of s. 273 of the Bengal Municipal Act for having used without a license certain premises within the Cuttack Municipality for the purpose of storing hides in contravention of s. 261 of the Act, but no resolution passed by the Commissioners at a meeting fixing the local limits within which licenses should be required under s. 261 for offensive or dangerous trades was on the record, nor was there any secondary evidence of any such resolution: *Held,* that the conviction must be set aside, as the prosecution had failed to prove the existence of the resolution and if from other circumstances it were assumed that such a resolution was passed, the prosecution had failed to prove its purport in the manner required by law. The presumption that official acts have been regularly performed [s. 114, Evidence Act, illustration (*e*)] cannot supply the deficiency in the proof. As a rule the contents of documents cannot be proved inferentially. A legitimate way of proving the proceedings of a Municipal body in British India, is by a copy of such proceedings certified by the legal keeper thereof or by a printed book purporting to be published by the authority of such body as laid down in cl. 5 of s. 78 of the Evidence Act. The language used in s. 261 of the Bengal Municipal Act is wide enough to enable the Commissioners of a Municipality to apply the section to all places within Municipal limits or the entire area within the Municipal boundaries. *Quære*: Whether the penultimate clause of s. 261 empowers the Commissioners to do more than withhold the license in individual cases, each case being considered on its own merits. MOKRAM ALI *v.* THE CUTTACK MUNICIPALITY (1913) . **17 C. W. N. 531**

——— ss. 261, 273 (2)—*Carrying on offensive or dangerous trade—Scope of s. 261—Fixing of local limits a condition precedent to prosecution under s. 273—Proceedings of Municipal bodies how to be proved—Presumption as to the regular performance of official acts, if applies to supply deficiency in proof—Evidence Act. (I of 1872), ss. 78 (5), 114, illustration (e).* Where the petitioner was convicted under cl. 2 of s. 273 of the Bengal Municipal Act for having used without a license certain premises within the Cuttack Municipality for the purpose of storing hides in contravention of s. 261 of the Act, but no resolution passed by the Commissioners at a meeting fixing the local limits within which licenses should be required under s. 261 for offensive or dangerous trades was on the record, no was there any secondary evidence of any such resolution: *Held,* that the conviction must be set aside, a the prosecution had failed

BENGAL MUNICIPAL ACT (III OF 1884)— *contd.*

——— s. 261—*contd.*

to prove the existence of the resolution, and if from other circumstances it were assumed that such a resolution was passed, the prosecution had failed to prove its purport in the manner required by law. The presumption that official acts have been regularly performed [s. 114, Evidence Act, illustration (*e*)] cannot supply the deficiency in the proof. As a rule the contents of documents cannot be proved inferentially. A legitimate way of proving the proceedings of a Municipal body in British India is by a copy of such proceedings certified by the legal keeper thereof or by a printed book purporting to be published by the authority of such body as laid down in cl. (*5*) of s. 78 of the Evidence Act. The language used in s. 261 of the Bengal Municipal Act is wide enough to enable the Commissioners of a Municipality to apply the section to all places within Municipal limits or the entire area within the Municipal boundaries. *Quære*: Whether the penultimate clause of s. 261 empowers the Commissioners to do more than withhold the license in individual cases, each case being considered *on its own merits.* SYED MOKRAM ALI *v.* THE CUTTACK MUNICIPALITY (1913).

17 C. W. N. 531

——— ss. 279, 86, 322, 86—*Co-owner not residing on premises, if "occupier"—Rateable occupation, what is.* Bare ownership does not constitute rateable occupation. In order to constitute rateable occupation there must be a use and enjoyment which is or is capable of being beneficial. *Held,* that when four only out of five co-owners of a municipal holding were residing on the premises, the other, merely because he was a co-owner, was not liable for the water rate and the latrine fee payable for the holding by the "occupiers" under the provisions of the Bengal Municipal Act. KHAJA SHAMSUDDIN *v.* CHAIRMAN, DACCA MUNICIPALITY . **25 C. W. N. 282**

——— Expression "using a place as a kiln for making bricks" defined. SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS *v.* TRAILAKHYA NATH CHATTERJEE.

26 C. W. N. 926

——— ss. 290 to 297—

See MUNICIPALITY.

I. L. R. 47 Calc. 425

——— s. 321—*Bengal Municipal Act* (*III of 1884*), *ss. 321, 522—Latrine tax, assessment when* ultra vires—*Valuation of premises for purposes of assessment.* The assessment and levy of latrine tax when no scale for the levy thereof has been fixed by the Commissioners at a meeting as enjoined by s. 321 of the Bengal Municipal Act could be *ultra vires.* The meaning of the Proviso to s. 322 of the Act is that when a shop-keeper lives elsewhere, and pays latrine tax for his house he shall not be made to pay again for his shop unless the shop contains a privy or cess-pool. Where the owner of the house lived in the upper storey thereof and let out eight shops in the verandah of the ground floor, *none of which were thus occupied* by himself.: *Held,* that he could not claim exemption under the proviso to s. 322, and the house including the shops was liable to be valued for the purpose of the assessment of latrine tax. BECHU RAM *v.* THE CHAIRMAN, CHAPRA MUNICIPALITY (1911) . . . . **15 C. W. N. 519**

BENGAL MUNICIPAL ACT (III OF 1884)—*contd.*

———— s. 321—*contd.*

———— *Thakurbari, where pilgrims found shelter for three days at a time, if a dwelling-house.* A Municipal holding contained a *Thakurbari* where pilgrims who did not find shelter elsewhere remained for up to three days at a time during festivals and received *prosad* from the *Thakurbari.* There were no privies on the premises and the pilgrims used privies in the houses of the *shebaits* and there was no evidence as to what action the Municipality took for the purposes of conservancy within the holding:

v. Gour Chandra Goswami.
25 C. W. N. 827

———— ss. 321, 322 (4)—"*Dwelling house," what is.* To "dwell" is "to live and occupy for all the purposes of life." A house in which a person occupied rooms, though he was absent occasionally on duty, might be properly described as his "dwelling house." Where, however, all that was found was that a holding was used as a place of business, but the owner used the place for residence while he was in a state of unsound mind, it was not his "dwelling house" though there was a cookshed or cowshed on the property, for there may be a cookshed or a cowshed on a property which is not a dwelling house, but merely a place of business. *Ford* v. *Barnes, 55 L. J. Q. B. 24,* and *Riley* v. *Read, 48 L J. Exch. 437 ; L. R. 4 Exch. Div. 100,* referred to. *Lawson* v. *Fraser, 8 L. R.* (Ir.) *55,* distinguished. Semble. The provisions of the proviso to sub-s. (4) to s 322 of the Bengal Municipal Act have been made superfluous by the amendment by Beng. Act IV of 1894 and Beng. Act II of 1896 of s. 321. Radha Gobinda Mojumdar *v.* Kumarkhali Municipality (1914) . . **19 C. W. N. 1027**

———— s. 345—It is necessary for a conviction under s. 345 of the Bengal Municipal Act to prove that the Magistrate on the application of the Commissioners had ordered the land to be closed as a market-place and had taken order to prevent such land being so used. Puti Kabarini *v.* Vice-Chairman, Berhampur Municipality (1916).
20 C. W. N. 1015

———— s. 353—*Municipal offence, prosecution for—Consent of the Commissioners to prosecution, how to be evidenced—Sanction of prosecution by public authority, if should be in writing signed and sealed by the authority.* The only evidence of a public authority is a writing under the seal and signature of that authority. Where the Vice-Chairman of a Municipality in starting two prosecutions against the accused under s. 217 of the Bengal Municipal Act and Municipal Bye-law No. 50, respectively, merely signed two "Forms," called "Forms of prosecution," in the remarks column of one of which was written "I have seen myself" and in that of other "prosecute:" *Held,* that neither of these documents disclosed any authority, written or otherwise, showing the consent of the Commissioners or the Vice-Chairman on their behalf to a prosecution. Rasul Buksh *v.* Municipal Board of Chapra (1912).
16 C. W. N. 934

BENGAL MUNICIPAL ACT (III OF 1884)—*contd.*

———— s. 363—*scope of—Notice required by section—"Done under the Act."* The Defendant as Vice-Chairman of the local Municipality served the Plaintiff with a notice of demand for dues claimed as fees payable for removal of filth from a receptacle in his house, and subsequently a bailiff under the orders of the Vice-Chairman entered the house of the Plaintiff and attempted to execute a distress warrant as no payment had been made in response to the notice of demand. The Plaintiff sued the Defendant for damages alleging that the proceedings taken by him were malicious : *Held*—That s. 363 requires the service of notice upon the Commissioners in every instance and also upon the person concerned if the suit is intended to be brought against an officer of the Commissioners or any person acting under their direction. An act is to be regarded as "done under" a Statute, if the doer had a reasonable and *bona fide* belief that he was so acting. Sashanka Sekhar Banerjee *v.* Sudhansu Mohan Ganguly . . . **24 C. W. N. 891**

BENGAL MUNICIPAL (AMENDMENT) ACT (IV OF 1894).

———— s. 36—

See Assessment, exemption from.
I. L. R. 37 Calc. 697

BENGAL MUNICIPAL ELECTION RULES.

———— *R. 4, register of voters—R. 7, application for removal of name of a voter from the register—Rr. 6 and 10, application by the said voter for inclusion of his name in the register, if lies when his name was already in the register—R. 29, District Magistrate's powers.* A certain name was entered in the Register of voters prepared under r. 4 of the Bengal Municipal Election Rules. Several applications were made to the Chairman of the Municipality under r. 7 for removal of his name, and the said voter too made

name of the said voter was already on the register when he made the application under r. 6 for inclusion of his name therein : *Held* that the Chairman could not have dealt with the application of the voter in question before he had decided the applications under s. 7, and he had not rejected the application of the said voter as premature.

In that view the Magistrate had power under r. 10 to make an order for the insertion of the name in the register. Besides, r. 29, gives a general power to the Magistrate to decide all disputes arising under the Rules, so the Magistrate had power to decide the point under r. 29. Syam Chand Basak *v.* Nagendra Nath Basak.
26 C. W. N. 147

BENGAL, N. W. P. AND ASSAM CIVIL COURTS ACT (XII OF 1887).

See BENGAL AGRA AND ASSAM CIVIL COURT ACT.

See CIVIL PROCEDURE CODE.
6 Pat. L. J. 54

See CIVIL COURTS ACT.

———— s. 8—

See JURISDICTION.
I. L. R. 41 Calc. 806

See TRANSFER . I. L. R. 42 Calc. 842

———— ss. 8, 20—*Act No. III of 1907 (Provincial Insolvency Act), ss. 43, 46, 3—Appeal—Jurisdiction—Effect of order of District Judge assigning work to Additional Judge.* Where an Additional District Judge sentenced an applicant for insolvency under s. 43 of the Provincial Insolvency Act, 1907, acting in the matter under an order of the District Judge assigning the particular class of work to him under s. 8 of the Bengal, North-Western Provinces and Assam Civil Courts Act, 1887, it was *held* that an appeal from the Additional Judge's order lay to the High Court and not to the District Judge. MAKHAN LAL *v.* SRI LAL (1912).
I. L. R. 34 All. 383

———— ss. 8 (2), 21 (3)—*Assignment to Additional Judge of cases coming from a particular district—Jurisdiction.* A District Judge has power not merely to make over appeals to an Additional Judge for hearing, but to direct that all appeals and other cases coming from a particular area within the judicial division shall be filed in his Court. MUTSADDI LAL *v.* MULE MAL (1912). . . . I. L. R. 34 All. 205

———— s. 11—*Held,* that on an appeal from a decree for less than Rs. 5,000 the Appeal Court can increase the award. SATYA KINKAR SAHANA *v.* RAJA SRI SRI SHIBA PRASAD SINGH
4 Pat. L. J. 447

———— s. 18—

See CENTRAL PROVINCES LAND REVENUE ACT, 1881 s. 136. 1 Pat. L. J. 290

———— s. 21—

See JURISDICTION.
I. L. R. 41 Calc. 915

———— *Act No. VII of 1870 (Court Fees Act), s. 11—Valuation of suit—Appeal—Jurisdiction.* So long as there has been no order accepted by the plaintiff to make good a deficiency in Court fees, the original value assigned by the plaintiff must be taken as the value of the suit for the purpose of regulating the jurisdiction of the Appellate Court; but when there has been such an order made and accepted by the plaintiff, from that moment the value of the suit must be taken as being in accordance with the fee actually paid by the plaintiff. *Ijjatulla Bhuyan* v. *Chandra Mohan Banerjee, I. L. R. 34 Calc. 954,* followed. *Madho Das* v. *Ramji Patak, I. L. R. 16 All. 286,* distinguished. GOSWAMI SRI RAMAN LALJI MAHARAJ v. BOHRA DESRAJ (1910).
I. L. R. 32 All. 222

———— *Held,* that an appeal lies to the High Court and not to the District Court from an order refusing to set aside an *ex-parte* decree where the suit for the purposes of a Court fee is valued at not more than Rs. 5,000. RAGHU SINGH *v.* USAFALI 4 Pat. L. J. 202

BENGAL, N.W. P. AND ASSAM CIVIL COURTS ACT (XII OF 1887)—*contd.*

———— s. 19—

See CIVIL PROCEDURE CODE, 1908, s. 24
5 Pat. L. J. 588

———— ss. 21, 22—*Notification by the High Court authorizing appeals from Munsifs to be "preferred to" Subordinate Judges—Jurisdiction. Held,* that where the High Court in the exercise of powers conferred upon it by section 21 (*4*) issued a notification that appeals from the decree of any particular Munsif should be "preferred to" the Court of Subordinate Judge named or designated therein, the Subordinate Judge in question had power not merely to receive such appeals, but also to hear and decide them. *Sohan Lal* v. *Baldeo Pershad,* 7 Oudh Cases, 321, approved. SHEO HARAKH *v.* RAM CHANDRA (1914) . . . . I. L. R. 37 All. 76

———— s. 22, cl. (3)—*Agra Tenancy Act, (II of 1901), s. 197—Transfer of an appeal in a suit cognizable by a Revenue Court to a Subordinate Judge—Powers exercisable by the latter. Held,* that where, under section 22, clause (*1*), of Act XII of 1887, a District Judge transfers an appeal to a Subordinate Judge, the latter may, if the section be applicable, exercise any of the powers vested in the Appellate Court by section 197 of the Agra Tenancy Act. *Babu Nandan Prasad* v. *Changur, I. L. R. 16 All. 360,* followed. AFZAL SHAH *v.* MUHAMMAD ABDUL KARIM (1915) . . I. L. R. 37 All. 232

BENGAL POLICE MANUAL, 1911.

———— rule 124—

See REGISTER OF DEATHS.
I. L. R. 46 Calc. 152

BENGAL REGULATIONS.

See REGULATION.

———— 1793—I, s. 8, cl. (4)—

See CHAUKIDARI CHAKARAN LANDS.
I. L. R. 44 Calc. 841

XV—

———— *Mortgage—Redemption—Limitation—Act No. XIV of 1859. (Limitation Act), s. 1 (12)—Accounts.* A usufructuary mortgage was executed in the year 1852, in a place to which the provisions of Bengal Regulation XV of 1793 applied. It provided that the mortgagees should enter into possession and collect the rent and pay the Government revenue and defray collection charges, etc., therefrom and retain the balance in lieu of interest. There was to be no accounting on either side and the mortgagor was to be entitled to redeem on payment of the principal sum of Rs. 252: *Held,* on suit by the representative of the mortgagor to redeem, brought within 60 years from the date of the mortgagee, that the suit was within time; that the *mortgagee could not* be considered as redeemed in the strict sense of the term from the moment when the profits received by the mortgagees became equal to the amount due to them for principal and interest, and that the mortgagor was, notwithstanding anything contained in the deed, entitled to an account of the profits received by the mortgagees. *Sudarshan Das Shastri* v

BENGAL REGULATIONS—*contd.*

XV—*contd.*

Ram Prasad, I. L. R. 33 All. 97, followed. Shaf [illegible]

[illegible]

I. L. R. 34 All. 261

XXXVII, s. 15—

See JAGIR . **I. L. R. 46 Calc. 683**

———— **1805—II, s. 2** (*2*)—

See ASSESSMENT **I. L. R. 43 Calc. 973**

———— **1816—XIX, s. 9—**

See NAVIGABLE RIVER

I. L. R. 46 Calc. 390

———— **1819—VIII—**

See CHOTA NAGPUR ENCUMBERED ESTATES ACT, APPLICATION OF.

I. L. R. 46 Calc. 1

———— **ss. 8 and 14—**

See LIMITATION . **I. L. R. 46 Calc. 670**

See LANDLORD AND TENANT.

I. L. R. 41 Calc. 493 and 926

———— **1822—VII.**

See BENGAL LAND REVENUE SETTLEMENT REGULATION.

———— **1825—VI, s. 2**—*Joint Magistrate—Jurisdiction—Criminal Procedure Code, s. 435—Power of Sessions Judge to make reference.* It is only the Collector who can take action and impose a fine under Bengal Regulation VI of 1825. A Joint Magistrate has no jurisdiction under s. 2 of the Regulation, even though the case may have been made over to him by the District Magistrate. EMPEROR *v.* MUHAMMAD ALAM (1910)

I. L. R. 33 All. 84

———— **1828—III, s. 10.**

See RIVER BED . **24 C. W. N. 813**

———— **1829—X—**

See EVIDENCE. . **I. L. R. 38 All. 494**

———— **1872—III.**

See JURISDICTION.

I. L. R. 42 Calc. 116

BENGAL RENT ACT (X OF 1859).

———— **s. 6—**

See BENGAL TENANCY.

I. L. R. 48 Calc. 443

———— **s. 10—**

See ILLEGAL CESS.

I. L. R. 45 Calc. 259

———— **s. 21**—*Held,* that a usage of payment of rent by instalment is only relevant when there is no written agreement. MANINDRA CHANDRA NANDI *v.* DURGA SUNDARI DASIA

20 C. W. N. 680

———— *Landlord and Tenant Procedure Act (VIII, B. C., of 1869) s. 6—Raiyat, meaning of—Distinction between raiyat and under-raiyat, if recognised before the Bengal Tenancy Act (VIII of 1885)—Under-tenant holding under a raiyat, if himself can be a raiyat and if can acquire occupancy right—Ejectment.* The distinction between a raiyat and an under-raiyat was recognised from before the passing of the Bengal Tenancy Act (VIII of 1885); Act X of 1859 and Act VIII, B. C., of 1869, contemplate the existence of an under-raiyat. *Dhunpat Singh* v. *Gooman Singh, (1864) W. R. Gap No. Act X Ruling p. 61. Kalee Kishore Chatterji* v. *Ram Churn Saha, 9 W. R. 344 (1868),* and *Kali Charan Singh* v. *Ameeroodden 9 W. R. 579 (1868),* referred to. *Held,* in a case governed by Act VIII, B. C. of 1869, that an under-tenant who holds under a raiyat cannot be a raiyat and cannot acquire a right of occupancy. KAMINI SUNDARI DASI *v.* PROSONNO KUMAR SIL

24 C. W. N. 685

———— **s. 23** (**6**)—*Tenant dispossessed by landlord—Possessory suit in Civil Court if lies—Specific Relief Act (I of 1877), s. 9—"Illegal ejectment," meaning of. Per* CURIAM (N. R. CHATTERJEA, *J. contra*). So long as the relation of landlord and tenant is subsisting between the parties, the tenant, if forcibly dispossessed of his land by the landlord, is precluded by cl. (*6*) of s. 23 of Act X of 1859 from suing under s 9 of the Specific Relief Act in areas where Act X of 1859 applies. No distinction can be drawn between the words "forcible dispossession" as used in s. 9 of the Specific Relief Act and the words "illegal ejectment" as used in s. 23, cl. (*6*) of Act X of 1859. *Per* N. R. CHATTERJEA, *J.*—Illegal ejectment which gives rise to a cause of action under s. 23 (*6*) of Act X of 1859 is ejectment nominally in conformity with, but really in contravention of, the provisions of the rent law for the ejectment of tenants by landlords. Where therefore a tenant who has been dispossessed by his landlord sues to recover possession on the strength of his previous possession, s. 23 (*6*) of Act X of 1859, is no bar to such a suit under s. 9 of the Specific Relief Act. *Janardan Acharjee* v. *Haradhan Acharjee 9 W. R. 513,* referred to. *Khettra Nath Ghattak* v. *Peru Bauri, 15 C. W. N. 387,* distinguished. JAMLA SINGH *v.* E. J. KINGSLEY (1913)

17 C. W. N. 1201

———— **ss. 27, 105 to 110—**

See UNDER-TENURE, SALE OF.

I. L. R. 37 Calc. 823

———— **s. 82—**

See UNDER-RAIYAT . **1 Pat. L. J. 543**

———— **s. 108**—*Sale of under-tenure in contravention of—Suit to set aside sale*—Bona fide *purchaser, if protected when sale without jurisdiction—Civil Procedure Code (Act XIV of 1882), ss. 244, 311, if apply.* Ss. 244 and 311 of the Civil Procedure Code (Act XIV of 1882) have no application to cases arising under Act X of 1859. Where, therefore, an under-tenure was sold in contravention of the provisions of s. 108 of that Act, without execution having been taken out against the moveable properties of the judgment-debtor: *Held,* that a suit lay to set aside the sale as being without jurisdiction notwithstanding that the purchaser might have been a stranger. *Zain-ul-abdin* v. *Ashgar, L. R. 15 I. A. 12,* distinguished. DAMOODAR MISRA *v.* ISWAR CHANDRA CHOUDHURI.

15 C. W. N. 78

See JURISDICTION OF HIGH COURT.

I. L. R. 38 Calc. 832

———— **s. 109**—*Execution against immoveable property of one of several judgment-debtors—Moveable property of all, if must be first exhausted—Arrest of judgment-debtor, if a condition precedent—Decree-holder, if must proceed*

BENGAL RENT ACT (X OF 1859)—*contd.*

——— s. 109—*contd.*

against moveables first, even when insufficient to satisfy decree. S. 109 of Act X of 1859 contemplates the case of a single execution creditor and a single judgment-debtor; it does not specifically refer to the case of a joint and several decree against a number of judgment-debtors. Where, therefore, a joint and several decree has been passed against several judgment-debtors and the decree-holder elects to proceed against some only of them, he is bound to proceed against their person and moveable property before he can apply for execution against their immoveable property. But he is not bound before so applying to proceed against the persons and moveable properties of the other judgment-debtors. The decree-holder must first take out execution against the moveable property of the judgment-debtor against whom he wishes to proceed even when the moveable property of the judgment-debtor is insufficient to satisfy the decree in full. When once the moveable property of the judgment-debtor has been exhausted, the decree-holder can proceed against his immoveable property, and he is free to do so in successive applications, and it is not obligatory on him to seek out and proceed, upon each of such applications, against such moveable properties as may have come into the judgment-debtor's possession in the interval. An application for the arrest of the judgment-debtor is not a condition precedent to the decree-holder's proceedings against the immoveable property of the judgment-debtor. BHIKARI SUKUL *v.* GADADHAR RAMANUJ DAS (1912) . **17 C. W. N. 87**

BENGAL RENT ACT (VIII OF 1865).

——— Non-transferable occupancy holding in Sylhet where Act VIII of 1869 is in force can be sold in execution of a rent decree obtained by the sixteen annas landlords. NRIPENDRA KUMAR DUTTA *v.* NADIR KHAN. **25 C. W. N. 554**

——— s. 3—

See SALE FOR ARREARS OF RENT. **I. L. R. 44 Calc. 715**

——— s. 11—

See CHOTA NAGPUR TENANCY ACT, 1908, ss. 208, 209 . **5 Pat. L. J. 101**

——— s. 13—*Under-tenant, meaning of—Sarbarakari tenure-holder, whether is an under-tenant—Bengal Rent Recovery (Under tenures) Act VIII of 1865.* The word under-tenant in s. 13 of the Bengal Rent Act, 1859, is not used in the technical sense in which it is used in English Statutes, *i.e.*, in the sense of a tenant holding under another tenant, but in the sense of a tenure-holder or tenant holding directly under the proprietor. BRAJMOHAN PATTASINGH *v.* CHOUDHURI BAMDEB DAS . . . . . **2 Pat. L. J. 75**

——— s. 22—

See OCCUPANCY HOLDING. **5 Pat. L. J. 302**

——— ss. 46 and 158—

See RENT DECREE . **5 Pat. L. J. 641**

——— s. 21—*Interest—Registered kabuliyat containing stipulation for interest at 300 per cent. per annum—Imposition practised on tenants by giving them to understand that they would not have to pay the stipulated rate—Whether there was*

BENGAL RENT ACT (VIII OF 1865)—*contd.*

——— s. 21—*contd.*

a valid contract with regard to interest under s. 21. Where the first Court found that the interest in the registered *kabuliyat* at 300 per cent. per annum was extortionate and unconscionable and gave the plaintiff a decree for interest at 12 per cent. per annum under s. 21 of Act VIII of 1869 (B. C.), and the lower Appellate Court concurred with the first Court in holding that the interest was extortionate and unconscionable but awarded interest at 75 per cent. by way of compensation under s. 74 of the Contract Act, finding at the same time that there must have been some sort of imposition practised on the defendants by giving them to understand that they would not have to pay at the stipulated rate: *Held*, that there was no contract which, so far as the interest was concerned, was capable of being enforced and therefore it cannot be said that this was a matter provided for by a written agreement in terms of the provisions of s. 21 of Act VIII of 1869 (B. C.). JAGAT CHANDRA SAHA *v.* BIRENDRA NATH DATTA CHOWDHURY (1918) . . **23 C. W. N. 291**

——— s. 52—*Transferee of a portion of non-transferable holding, whether can make deposit under s. 52.* Where in execution of a decree for rent the landlord decree-holder proposed to eject the tenant of a non-transferable holding under the provisions of s. 52 of the Bengal Act VIII of 1869, and to avoid the ejectment, a third person claiming to be a transferee from the tenant, sought to make the deposit provided for by the section: *Held*, that having regard to the principles laid down in the Full Bench case of *Dayamoyi* v. *Ananda Mohan, I. L. R. 42 Calc. 172; s. c. 18 C. W. N. 971*, the transferee could make the deposit. KALI KISHORE DAS *v.* GOPAL RAM SHAHA (1918) . . **23 C. W. N. 132**

——— ss. 59, 64, 65—*Bengal Tenancy Act (VIII of 1885), sale of non-transferable holding in execution of a decree for rent, if permissible under, in Sylhet District—Bengal Act VIII of 1869, ss. 59, 64 and 65 whether govern such cases.* The respondents, who are 8-annas co-sharer landlords of a jote in the District of Sylhet, obtained a decree for rent in a suit in which the other co-sharer landlords were parties, and applied for execution of the decree by sale of the non-transferable jote of the judgment-debtors. The lower Courts treated the case as one falling under the provisions of the Bengal Tenancy Act: *Held*, that the case is governed by the provisions of Bengal Act VIII of 1869 and not the Bengal Tenancy Act. As the holding is not transferable, the decree-holder cannot obtain satisfaction of his decree by the attachment and sale of the non-transferable holding of the judgment-debtors under the provisions of s. 59, or s. 64 or s. 65 of the Bengal Act VIII of 1869. ALOK CHANDRA PAL *v.* JALURAM NAMASUT (1918) **22 C. W. N. 566**

——— s. 158—

See OCCUPANCY RAIYAT. **5 Pat. L. J. 406**

See RENT DECREE . **5 Pat. L. J. 641**

BENGAL SURVEY ACT (BENG. V OF 1875).

——— ss. 4, 5, 6 and 45—*Publication of notice prior to demarcation, whether necessary—Resistance to amin—Penal Code (Act XLV of 1860), ss. 147, 149 and 353.* An *amin* was directed to survey

BENGAL SURVEY ACT (BENG. V OF 1875)— *contd.*

———— **ss. 4, 5, 6 and 45**—*contd.*

certain land under s. 45 of the Bengal Survey Act, 1875, and he was given a notice stating that the survey was to be completed by the 27th June, 1915. Subsequently this time was extended by the Collector. The *amin* proceeded to the land on the 23rd December, 1915, and showed the accused the notice which stated that the survey was to be completed by the 27th June. They forcibly resisted him and were eventually convicted of an offence under s. 147 of the Penal Code. *Held,* that the accused were not entitled to resist the *amin* merely because the time which appeared upon his warrant had expired. *Held, also,* that the law did not require the *amin* to show any notice to the petitioners. The latter part of s. 45 of the Bengal Survey Act, 1875, does not require the publication of a proclamation previous to the demarcation of land under that section. The proclamation required by s 6 refers only to a survey carried on under ss. 4 and 5 of the Act. JUDAGI RAUT *v.* KING-EMPEROR . **2 Pat. L. J. 18**

———— **s 41—**

See DISPUTE CONCERNING LAND.
I. L. R. 37 Calc. 331

See LIMITATION ACT, 1908, SCH I, ART. 142 . . . **6 Pat. L. J. 51**

———— **ss. 41, 62**—*Order—Effect of—Suit for confirmation of possession—Relief inconsistent with plaint.* S. 62 of the Survey Act is a bar to a suit by a plaintiff, against whom an order determining a boundary dispute has been made under the Survey Act, for confirmation of possession on the allegation that he has been in continuous possession from before the order, such an order having, under s. 41 of that Act, the effect of a Civil Court decree, which is binding on the parties as regards the question of possession. When the plaintiff sues for confirmation of possession on declaration of title, alleging that he is in possession, and proves his title but fails to prove possession, the Court ought not to award him recovery of possession, unless on the facts alleged in the plaint the action amounts to one for restoration of possession. *Amir Hossein* v. *Imambandi, 11 C. L. R. 113,* and *Champa Dai* v. *Uma Dai, 11 C. L. R. 451,* distinguished. BISSESSURI KOERI *v.* RAM PURTAP SINGH (1903) . . . **14 C. W. N. 366**

———— **ss. 41, 63**—*Register kept in Survey Office showing what are daripin lands—Admissibility.* An order under s. 41 of the Bengal Survey Act does not bind the Civil Court upon the question of title and does not preclude it from finding that during a period anterior to that order the party against whom the order was passed was in possession. GRAHAM *v.* PHANINDRA NATH MITRA (1915)
19 C. W. N. 1038

BENGAL TENANCY.

———— *Deficiency of area of tenure—Reduction of rent—Statutory right—Contracting out—Land in Sundarbans—"Permanently-settled area"—Bengal Tenancy Act (VIII of 1885), s. 52, sub-s. 1 (b). s. 179.* The respondents were tenants of land in the Sundarbans, holding from the deceased appellant under a permanent mukarrari lease. They claimed a reduction of the agreed rent under s. 52, sub-s. (*1*) (*b*) of the Bengal Tenancy Act (VIII of 1885) on the ground that a part of the land leased had been washed away. The appellant denied their right to a reduction, relying

which pro-
be deemed
permanent

tenure in a permanently-settled area from granting a permanent mukarrari lease on any terms agreed between him and the tenant." The land was granted by the Government in 1880 to the appellant's predecessor at a rent increasing for a period of years after which it was liable to survey and re-assessment, and the proprietary right in the grant was to be "under conditions generally applicable to owners of estates not permanently-settled"—*Held,* that the appellant had failed to establish that the land was in a permanently-settled area, and that consequently the respondents were entitled to a reduction of rent under s. 52, sub-s. (*1*) (*b*) KHETRAMONI DASI *v.* JIBAN KRISHNA KUNDU AND OTHERS (1920)
I. L. R. 48 Calc. 473

———— *Occupancy right—Construction of patta—Jote Res judicata—Issue deter-*

zamindar creating a jote of it and fixing Rs. 1,300 as the yearly rent should include it in the *ijara* rent, that after the expiry of eight years a fair rent should be settled in the zamindar's *nij* share; that, until a fair rent was settled, the yearly rent of Rs. 1,300 should continue. In 1912, occupation of the *chur* land having continued without a fresh rent being settled, the zamindar after notice to the appellants sued them for possession :—*Held* that upon the true construction of the *ijara* the appellants had not a permanent right of occupation of the *chur* land, and the zamindar was entitled to possession. *Jardine, Skinner & Co.* v. *Surat Soondari Debi, L. R. 5 I. A. 164,* followed. A "jote" is a general term and is not necessarily

attempt having been made to settle a fresh rent.

that there was no occupancy right :—*Held,* that the absence of an occupancy right was not a *res judicata* against the appellants since the tenants had succeeded upon the other plea, but that it created a paramount duty on the appellants to replace the finding and that they had failed to perform that duty. MIDNAPUR ZAMINDARI COMPANY, LD. *v.* NARESH NARAYAN ROY (1920)
I. L. R. 48 Calc. 460

BENGAL TENANCY ACT (VIII OF 1885).

See SALE. **I. L. R. 45 Calc. 294**

——— when character of Tenancy changes—

See EJECTMENT.

26 C. W. N. 389

——— Rule 40 under—

See JUDICIAL PROCEEDINGS.

I. L. R. 37 Calc. 52

——— suit under—

See SPECIAL OR SECOND APPEAL.

I. L. R. 46 Calc. 189

——— *Raiyat, person inducted on land subject to agreement as to rent to be concluded in future but never concluded in fact—His status.* Where in a suit for ejectment it was found that the defendant had been permitted by the plaintiff to enter upon the land subject to an agreement to be afterwards arrived at "as to the rent, etc." but no concluded agreement was ever come to: *Held,* that the defendant did not come within the definition of "raiyat" in the Bengal Tenancy Act because he had not acquired a right as against the plaintiff to hold the land for the purpose of cultivating it. His possession was permissive. At the highest his position was that of a person known in England as a tenant-at-will or a tenant by sufferance. He is subject to eviction at the mere will of the plaintiff though doubtless he is entitled to reasonable time to remove his effects. BEPIN CHANDRA SIRKAR *v.* BASANTO KUMAR CHAKRAVARTI (1918) **23 C. W. N. 773**

——— A suit for a mere declaration is not one under the Bengal Tenancy Act, 1885. Even when a suit is not one under the Bengal Tenancy Act, 1885, evidence of long payment at an unchanged rate is relevant as showing that the plaintiff has a holding at fixed rates. The proposition that evidence of payment anterior to the publication of the Record-of-Rights, is not admissible to show that the plaintiff has a holding at fixed rates, is erroneous. PIRTHI CHAND LALL CHOUDHARY *v.* SHEIKH MOHAMED TAHIR

1 Pat. L. J. 67

——— *Hindu joint family, whether manager of, can sue under the Act, as representing the whole family.* The head of a joint Hindu family governed by the *Mitakshara* law is competent to sue, as managing member of the family, a person who has trespassed on the waste lands of the family. *Query,*—Whether such a manager can sue, as representing the whole family, in a suit under the Bengal Tenancy Act, 1885? MUHAMMED SADIK *v.* KHEDAN LALL

1 Pat. L. J. 154

——— *Bengal Rent Act (VIII of 1869)—Annulment of under-tenure—Erroneous rulings, effect of.* A tenure was sold after the Bengal Tenancy Act had come into operation in execution of a decree passed before that Act was enforced. It was at that time erroneously held by Courts that the provisions of the Bengal Rent Act (VIII of 1869) and not those of the Bengal Tenancy Act governed such sales and the plaintiff had annulled the under-tenures in a manner sufficient under the old Rent Act though not by a formal notice as required by the Bengal Tenancy Act. In a suit by an under-tenure-holder for declaration of title and recovery of possession of his under-tenure: *Held,* that the

BENGAL TENANCY ACT (VIII OF 1885)— *contd.*

provisions of the Bengal Tenancy Act would govern the annulment of under-tenures and that the under-tenure not having been annulled under the provisions of the Bengal Tenancy Act, this annulment was inoperative though based on erroneous decisions of Courts. BIRENDRA KISHORE MANIKYA *v.* AHAMMAD ALI (1912)

17 C. W. N. 619

——— s. 1—*Land in suburb of Calcutta let out in 1898 for 5 years—Lessee holding on till sued in ejectment in 1910—Status of lessee, non-occupancy raiyat—"Town of Calcutta," extension of, by amending Act—Limitation—Bengal Tenancy Act, Sch. III, Art. 1 (a).* Defendant on 16th December 1898 took a five years' lease from plaintiff of an agricultural holding situated within the present Municipal limits of Calcutta but beyond the limits of the town of Calcutta as determined by the proclamation of the Governor-General in Council dated the 10th September 1794, issued under s. 159 of statute 33, Geo., III, c. 52. Plaintiff on 9th November 1910 having sued to eject the defendant: *Held,* that until the Bengal Tenancy Amendment Act of 1907 came into force, the Bengal Tenancy Act applied to the case and defendant had in consequence acquired the status of a non-occupancy raiyat when the Amendment Act came into force, and this status was not affected by the provisions of s. 3 of the Amendment Act which gave a new definition of the expression "Town of Calcutta" as used in s. 1 of the Bengal Tenancy Act, making it co-extensive in area with the present municipal limits of Calcutta. The explanation added to sub-s. (*3*) of s. 1 of the Bengal Tenancy Act by s. 3 of Act I, B. C. of 1907 is an amending statute and not merely one of a declaratory character and cannot therefore be given *retrospective operation. Held,* that the suit was barred by Art. 1 (*a*) to Sch. III of the Bengal Tenancy Act. JOTIRAM KHAN *v.* JONAKI NATH GHOSE (1914)

20 C. W. N. 258

——— ss. 2 (12), 52 (1) (b), 179—*Suit by tenant for reduction of rent on account of reduction of area—Stipulation in lease precluding such reduction, not enforcable—"Permanently settled area," meaning of.* By the terms of the lease the plaintiffs (tenants) were precluded from denying their obligation to pay to the defendant (landlord) the full rent thereby fixed on the ground of flood or diluviation. A large portion of the holding having been washed away the plaintiffs sued for reduction of rent under s. 52 (1) (*b*) of the Bengal Tenancy Act. The terms of the grant from Government under which defendant held the land within which the tenure was situated were not such as to render the land to which it referred "a permanently settled area." The settlement by Government with the defendant was not "permanent settlement" as defined in s. 2 (12) of the Act: *Held,* that the lease to the plaintiff was not excepted from the operation of s. 52 (1) (*b*) of the Bengal Tenancy Act, s. 179 not applying to it. KHETROMONI DASI *v.* JIBAN KRISHNA KUNDU (P. C.) . . . . **25 C. W. N. 366**

——— Cess whether 'rent'—Money payable under the Bengal Drainage Act is 'rent' MANMATHA NATH MITTER *v.* ANATH BANDHU PAL . . . **23 C. W. N. 201**

BENGAL TENANCY ACT (VIII OF 1885)— *contd.*

———— **ss. 3 (3), 4, 116, Sch. III, Art. 1(a)—** Khamat *land, tenant of, for a term—Suit to eject after expiry of term—Limitation—Tenant if non-occupancy raiyat—Effect of repeal of s. 45.* It is only under Chap. VI of the Bengal Tenancy Act that the status and rights of a non-occupancy raiyat can be acquired, and as that chapter does not apply to the private lands of a proprietor, a tenant of such land for a term of 9 years did not acquire the status of a non-occupancy raiyat, and, at the expiry of his term, became liable to be ejected as a trespasser. Art. I (*a*) of Sch. III of the Bengal Tenancy Act did not apply to the landlord's suit to eject such a person. Art. I (*a*) of Sch. III of the Act did not extend the limitation of six months to suits to eject persons who had not been non-occupancy raiyats within the meaning of the repealed s. 45. S. 3 (3) is merely a definition and s. 4 merely a section specifying the classes of tenants to which the Act applied. Ss. 3 (3) and 4 did not separately or conjointly create or confer upon any one any status or any right. JAGARNATH DASS *v.* JANKI SINGH (P. C.).

26 C. W. N. 833

———— **ss. 3 (5), 104, 107—**

See RENT . **I. L. R. 38 Calc. 278**

———— **ss. 3, cl. (9), 30—***Holding, meaning of—Suit to enhance rent of undivided share of land* [illegible]

for enhancement of rent under s. 30 of the said Act did not lie in respect of such undivided share. The law is the same whether the undivided interest is created by a co-sharer landlord or a sole landlord, or where, as in the present case, the original tenancy has not been proved and is based on the result of settlement proceedings under the Bengal Tenancy Act. *Harnanandan Rai* v. *Maharaja Kesho Prasad Singh, 2 P. L. J. 553 ; 1 P. L. W. 798 (1917)*, referred to. BINAYAK DAS ACHARJI CHOWDHURY *v.* SOMINUDDI *alias* SAKI MATBAR *(1919)* . . . . . **24 C. W. N. 1022**

———— **ss. 3 (16), 58 (3)—**

See COLLECTOR **I. L. R. 40 Calc. 465**

———— **s. 4—**

See S. 3 .

See MORTGAGE . **2 Pat. L. J. 353**

[illegible]

land. The description of a sub-lease [illegible]anted by an occupancy *raiyat* as "*sthayee ka*[illegible] *kabuliyat*" did not necessarily imply th[illegible] the grantee was intended to have a pe[illegible]nent heritable interest—an interest which [illegible] *raiyat* was not authorised to create by l[illegible] The interest of an under-raiyat is not [illegible]ble. *Arip Mondal* v. *Ramratan Mond*[illegible] *L. R. 31 Calc. 757 :* 8 *C. W. N. 479*, [illegible] to. MEHER ALI *v.* KALAI KHALASI (1915) [illegible] **19 C. W. N. 1129**

BENGAL TENANCY ACT (VIII OF 1885)— *contd.*

———— **ss. 4, 5, 20, 44, 45, 116, 180—**

See NON-OCCUPANCY RIGHTS.

3 Pat. L. J. 1

———— **ss. 4, 49, 113, 183—**

See OCCUPANCY RIGHT.

I. L. R. 46 Calc. 43

———— **s. 5—**

See LAND TENURE IN BENGAL.

L. R. 45 I. A. 193

See NON-OCCUPANCY RIGHTS.

3 Pat. L. J. 1

———— *Tenure-holder or raiyat—Original terms, when unambiguous, if may be altered by conduct.* Where the terms of the original lease are not ambiguous the question whether the tenant is a tenure-holder or a raiyat must be determined from those terms and without reference to the subsequent conduct of the parties. The nature of the tenancy cannot be altered by the subsequent conduct of the parties to the detriment of under-tenants. PROMOTHO NATH KUMAR *v.* NILMANI KUMAR (1911) . . . . . **15 C. W. N. 902**

———— *Erroneous entry in Settlement Rent Roll as to tenant's status—Suit by tenant for declaration of status—Limitation—Tenure-holder or raiyat, tenant whether—Original purpose ascertained, evidence of subsequent conduct and surrounding circumstances to show change of purpose whether admissible—Change of status by agreement—Area, presumption from—Rebuttal. Held,* that the tenant who was admittedly in occupation of 1,815 bighas of land had succeeded in rebutting the presumption under s. 5 (5) of the Bengal Tenancy Act and established that he was an occupancy raiyat. *Per* N. CHATTERJEA, *J.*—It is only in cases where the terms of the lease creating the tenancy are ambiguous or in cases where there is no written lease and it is not clear what the original purpose of the tenancy was, that the Court should look into the subsequent conduct of the parties and surrounding circumstances to determine the nature of the tenancy. Once, however, the original grant is clearly shown to be raiyati by a lease unambiguous in its terms, or by other evidence where there is no written lease [illegible] suble [illegible] of tl [illegible] the [illegible] existe [illegible] original nature of the tenancy by agreement, and there may possibly be cases where subsequent conduct may be set up as evidence of such agreement. But where no such agreement is set up and it is clearly [illegible] acquired by the [illegible] or by hired serv[illegible] the character o[illegible] the mere fact that the land was subsequently let out to tenants. *Midnapur Zemindary Co., Ld.* v. *Sham Lal Miller, 15 C. W. N. 218*, explained. PROMODA NATH ROY *v.* ASIRUDDIN MANDAL *(1911)* . . . . **15 C. W. N. 893**

———— *Tenure-holder or raiyat* [illegible] In deciding [illegible] holding not [illegible] the subse-

BENGAL TENANCY ACT (VIII OF 1885)— *contd.*

——————— s. 5—*contd.*

quent conduct of the parties should be taken into consideration. Where the original area of the lands taken was considerably more than what could be cultivated by the tenant himself or by members of his family or by hired servants or with the aid of partners, and the tenant himself was not a member of the cultivating class and where subsequent settlements were also of large areas and the total area held by the tenants exceeded 1,300 bighas :—*Held*, that these circumstances led to the conclusion that these lands were taken for the purpose of settling tenants on them and that the lease was a tenure. Where a lease stated " you shall enjoy the jungle lands on bringing the same under cultivation and on causing the same to be held in jote by other persons :" *Held*, that there was nothing in these words to render it improbable that it was intended that the land should be brought under cultivation by establishing tenants thereon. MIDNAPUR ZEMINDARY CO., LD., *v.* SHAM LAL MITTER (1910) . **15 C. W. N. 218**

——————— *Tenure-holder or raiyat—Reclamation lease if necessarily raiyati lease—"Raiyat" used loosely for all tenants—"Korfa" if means "under-raiyat only"—Suit to establish plaintiff's status as raiyat—Under-tenant if necessary party.* Casual mention of the tenants as "raiyats" in judgments in suits in which no issue had been framed or question raised as to the status of the tenants cannot be regarded as the recognition by Courts of the tenants' status as raiyats. The word "raiyat" is sometimes used in official documents to mean tenants in general. A "korfa" tenant is not necessarily an under-tenant of a raiyat. He is a sub-lessee, whether of a *talukdar* or of a raiyat. The reservation by the *chakdars* of certain portions of the land for their own cultivation did not militate against the conclusion that they were tenure-holders. The definition of "tenure-holder" in s. 5 (*1*) of the Bengal Tenancy Act merely formulates the pre-existing law and the insertion of the words "bringing it (the land) under cultivation by establishing tenants in it" introduced no change in the law. The section subject to s. 195 applies to tenancies created before, as well as after, the Bengal Tenancy Act. In a suit to establish the status of the plaintiffs as raiyats the under-tenants are proper, but not necessary, parties. Reclamation lease, if necessarily raiyati lease, considered. SECRETARY OF STATE FOR INDIA *v.* JADAV CHANDRA MISRA (1916) . . . **21 C. W. N. 452**

——————— **s. 5, (*1*), (*1*) (b), (*5*), s. 103B**—*Status of tenant, whether tenure-holder or raiyat—Purpose for which land was acquired and extent of holding or tenure—Mode of determining status—Presumption of correctness of entry in Record of Rights—Rebuttal of, by proof of attendant circumstances showing incorrectness.* The defendant held more than 250 acres of land in a village which formed part of the plaintiff's zemindari in the district of Cuttack under a lease granted by the plaintiff's predecessor in title in 1891 to a person who assigned it to the defendant in [illegible]. In proceedings taken to prepare the "Record of Rights" for the land covered by the lease, the defendant was entered as a tenure-holder, but on his objection the Assistant Settlement Officer recorded him as a "settled raiyat at a fixed rent."

BENGAL TENANCY ACT (VIII OF 1885)— *contd.*

——————— **s. 5, (*1*), (*1*) (b), (*5*), s. 103B**—*contd.*

The lease was an ordinary reclamation lease of the land permanently to the lessee at a fixed rent "to make it fit for cultivation according to your will and you shall hold the same by cultivating it or having it cultivated, and you shall be competent to make such other arrangements or adopt such other convenient steps as you consider necessary for cultivating the same." In a suit brought under the provisions of s. 106 of the Bengal Tenancy Act (VIII of 1885) for rectification of the entry by recording the defendant as tenure-holder: *Held*, on the construction of the Act, that in determining the status of a tenant, whether he is a tenure-holder or a raiyat, what has to be considered is (*a*) the purpose for which the land was acquired, and (*b*) the extent of the tenure or holding. Fixity of rent was no criterion for the determination of that question, for a tenure may be held at a fixed rent equally with a raiyati holding. The statutory presumption under s. 5, sub-s. (*5*) applied to the defendant as holding more than 100 acres, and the purpose appeared to be that the land should not be cultivated by the personal agency of the defendant himself. Here the land was leased to a man of means, a resident of another place, for the purpose of reclaiming the land, and rendering it fit for cultivation, the agency to be employed for cultivating it being left to his discretion. The Courts were right in looking at the attendant circumstances to judge of the purpose for which the lease was acquired and to determine the status of the defendant. The presumption under s. 103-B that an entry in a "Record of Rights" finally published "shall be presumed to be correct until it is proved by evidence to be incorrect," was fully rebutted by the circumstances referred to by the majority of the Courts in India in arriving at the conclusion that the defendant was a tenure-holder and not a raiyat. DEBENDRA NATH DAS *v.* BIBUDHENDRA MANSINGH BHRAMARBAR ROY (1918) . . . **I. L. R. 45 Calc. 805**

——————— **ss. 5 (*1*), (*2*), (*5*), 10**—*Lease before the Act—Land partly cultivated by tenant, if necessarily raiyati—Reclaiming lease, land taken to be cultivated by settling tenants area exceeding 100 bighas—Evidence of conduct if admissible when lease unambiguous—Tenant recorded "raiyat" without contest.* S. 5 (5) of the Bengal Tenancy Act applies to tenancies created before the Act. The Bengal Tenancy Act which was intended to regulate the relations of the various classes of the agricultural community, applies and was intended to apply to tenancies in respect of agricultural land whether created before or after the passing of the Act. Where a *prajapattan* settlement was made of land in area far in excess of what is usually held by a raiyat, and the full rent was payable after a period—a term which usually finds place in leases of tenures: *Held*, that the word "*praja*" means a tenant and the presumption that the lease was a tenure applied and was not negatived by the fact that by the terms of the lease the lessee undertook to reclaim jungle "in the hope of acquiring a [illegible] right in future" and was to "[illegible] to hold and enjoy the lands from heirs to heirs by bringing the land under cultivation by settling tenants." The definition of a tenure as [illegible]

BENGAL TENANCY ACT (VIII OF 1885)— *contd.*

——— **ss. 5 (*1*), (*2*), (*5*), 19**—*contd.*

in the Bengal Tenancy Act (s. 5, sub-s. (*1*)) intro- [illegible]

sistent only with the interest granted thereby being a tenure, evidence of the subsequent conduct of the parties was inadmissible. The rule is that evidence may be given to explain but not to contradict documents the meaning of which is doubtful and such evidence may consist of proof of the mode in which property has been held and enjoyed thereunder. But where the meaning of the words in the document is unambiguous the subsequent acts of the parties are not admissible to construe it whether the document be ancient or modern. Where in a proceeding under Reg. VII of 1822 held in 1877 it was clear that there was no dispute as to the status of the tenant within s. 14 and no official proceedings were incorporated in the *rubekari* of settlement, the mere fact that the tenant was recorded as a raiyat does not preclude the Government from contesting his claim as such, especially as at the time of the record the sharp distinction which now exists between raiyats and tenure-holders was not so well recognized SECRETARY OF STATE FOR INDIA *v.* GOVIND PRASHAD BARIK (1916) . . . **21 C. W. N. 505**

——— **s. 5 (*2*)**—

See PASTURE LANDS.

14 C. W. N. 372

——— **ss. 5 (*2*), 20 (*3*), 44 and 82**—

See NON-OCCUPANCY RIGHT.

I. L. R. 41 Calc. 1108

——— **s. 5 (*5*)**—

See OCCUPANCY RAIYAT.

I. L. R. 46 Calc. 160

——— *Its effect—Presumption applicable to a tenancy existing before the commencement of the Bengal Tenancy Act.* Cl. (*5*) of s 5 does not create any new rights or purport to affect any right created before the commencement of the Bengal Tenancy Act. It simply furnishes a mode of proof of the character of tenancies of certain descriptions. If the area held by a tenant exceeds 100 standard bighas, and a question arises as to the status of such a tenant the Legislature lays down that the tenancy is to be presumed to be that of a tenure-holder, but the presumption thus raised is rebuttable. The clause is, consequently, a provision not of substantive, but of adjective, law. It lays down a presumption and changes the burden of proof. Whereas in the absence of the presumption the party who affirmed that the tenancy was of particular description would have to give evidence in support of his contention; the presumption, where it applies, relieves the party relying thereon from the obligation to furnish such proof in the first instance. There is no valid reason why the presumption should not be applied to a tenancy which existed before the commencement of the Bengal Tenancy Act. The presumption embodied in s. 5, clause (*5*) does not incorporate a novel principle into our law but merely codifies what had been a recognized doctrine under the old law. The only difference caused by the adoption of the presumption is

BENGAL TENANCY ACT (VIII OF 1885)— *contd.*

——— **s. 5 (*5*)**—*contd.*

that we have now a definite rule of evidence, a crystallized mode of proof. *Dhanput Singh* v. *Gooman Singh (1864), W. R. Gap., Act X, 61 Gopee Mohan* v. *Sibchunder, 1 W. R. 68, Sara Chandra* v. *Ratubuddin, 16 C. L. J. 271, Cogdel* v. *Railway Co., 132 N. C 852,* followed. The fact that a tenancy had been sub-divided into two tenancies before the Bengal Tenancy Act would not prevent the application of sub-s. (*5*) of s. 5 in determining the character of the tenancy. The tenure was divisible, and the fact of subdivision was not a breach of its continuity. Each fragment carved out of the original tenure retained its incident. *Adit* v. *Sukhraj, 17 C. L. J. 435, Chandra Kanta* v. *Ram Krishna, 20 C. W. N. 1002,* followed. Proof of the purpose of the original grant determines the real nature of the tenancy. *Durga* v. *Kalidas, 9 C. L. R 449, Promotho Nath Kumar* v *Nilmoni Kumar, 14 C. L. J. 38, Promoda Nath Roy* v. *Asir-uddin Mandal, 15 C. W. N. 896,* followed *Mahabir* v. *Fox, 9 C. L. J. 467, Buzlul Karim* v. *Satish Chandra, 13 C. L. J. 418, Nityananda* v. *Nanda Kumar, 13 C. L. J. 415,* In re *School Board Election for Parish of Pulborough [1894], 1 Q. B. 725,* In re *Athlumney [1898], 2 Q B. 547, Main* v. *Stark, 15 App Cas. 384, Reynolds* v. *Attorney-General [1896], A. C. 240, Bengal Indigo Company* v. *Roghobur Das, I. L. R 24 Calc 272,* referred to. *Maharam Chaprasi* v. *Telam-ud-din Khan, 15 C. L. J. 220,* distinguished. JAGABANDHU SHAHA *v.* MAGNAMOYI DASSEE (1916)

I. L. R. 44 Calc. 555

——— *Held,* that a tenant's possession under a Zurpeshgi lease which merely provided that part of the rent be paid in advance was that of cultivators and not creditors as well and tenants could acquire occupancy rights. DAMODAR NARAYAN CHOWDHRI *v.* DALGLEISH

15 C. W. N. 345

——— Where the lower Appellate Court held that the presumption under s 5, cl. (*5*) of the Bengal Tenancy Act, that a holding comprising an area of more than 100 bighas of land was a tenure and not a raiyati holding, had not been displaced by the contrary being shown: *Held,* that it was not open to the High Court in second appeal to interfere with the finding of the lower Appellate Court that the holding was a tenure. *Sulatu Dass* v. *Jadunath Dass, 8 C. W. N. 774,* referred to. RAMANUJ DAS MOHANTA *v.* THE MIDNAPUR ZEMINDARY CO., LD. (1912)

16 C. W. N. 725

——— **ss. 5 (*5*), 103 (b), 104 (h)**—"*Tenure-holder" or "raiyat"—Question of fact—Definition in the Act, if reproduced the meaning the words had previously borne.* Where the question in a suit under s. 104 (*h*) of the Bengal Tenancy Act was whether they were "raiyats" or "tenure-holders": *Held,* that the question ultimately depended on questions of fact; and that one must "look to the attendant circumstances to judge of the purpose" for which the land was acquired. That it lay on the plaintiffs who had been entered [illegible]

that the holders of it were tenure-holders [s 5

BENGAL TENANCY ACT (VIII OF 1885)— *contd.*

——— s. 19—*contd.*

5, had acquired a right of occupancy prior to the passing of the Act. SECRETARY OF STATE *v.* GOVIND PRASHAD BARIK (1916) . **21 C. W. N. 505**

——— **ss. 19, 21**—*Person claiming to be raiyat at fixed rates under invalid lease, if may have acquired occupancy right by possession—Permanent lease by Hindu widow, twelve years' occupation under—Right of occupancy acquired before Act, saving of. Bhut Nath Naskar* v. *Surendra Nath Dutta, 13 C. W. N. 1025,* is no authority for holding that a person who claims the higher status of *raiyat* at fixed rates cannot, if the claim is disallowed, fall back upon and establish, if he can, the lower status of an occupancy *raiyat*. A permanent *raiyati* lease of land in which the grantor has the qualified interest of a Hindu female heir is invalid. But the lessees would nevertheless acquire occupancy right in the holding after 12 years' possession as *raiyat*. Where such lease commenced in March 1873: *Held*, that irrespective of whether the provisions of the Bengal Tenancy Act operate to prevent the acquisition of occupancy right by a person claiming to be a *raiyat* at fixed rates or not, in this case occupancy right was acquired before the Bengal Tenancy Act came into force and was saved by s. 19 of that Act. ICHHYAMOYI *v.* KAILASH CHANDRA MUKHOPADHYA (1913) **18 C. W. N. 358**

——— s. 20—

See NON-OCCUPANCY RIGHTS. **3 Pat. L. J. 1**

——— The presumption under s. 20 does not arise in a suit for rent which is not a proceeding under the Bengal Tenancy Act. *Pramada Nath Roy* v. *Ramani Kanta Roy, I. L. R. 35 Calc. 331; s. c. 12 C. W. N. 249,* referred to. MULLUK CHAND DAS *v.* SATIS CHANDRA DAS (1909). **14 C. W. N. 335**

——— In the Province of Bihar and Orissa the word "kaimi" denotes a settled raiyat and not a raiyat at a fixed rent. PUNIA MAHTO *v.* SHAIK BUNDEY ALI **5 Pat. L. J. 387**

——— The presumption under s. 20, cl. 7 of the Bengal Tenancy Act that a raiyat has continuously held the land as such for 12 years, arises only in proceedings under the Bengal Tenancy Act, but a suit for rent is not a proceeding under that Act. *Pramada Nath* v. *Ramani Kanta, I. L. R. 35 Calc. 331; s. c. 12 C. W. N. 249: 7 C. L. J. 139; Mulluk Chand* v. *Satis Chandra, 11 C. L. J. 56,* relied on. JAHANDAR BAKSH MULLIK *v.* RAM LAL HAZRA (1910). **14 C. W. N. 470**
I. L. R. 37 Calc. 449

——— ss. 20 and 21—

See ORISSA TENANCY ACT. ss. 154, 332 . **3 Pat. L. J. 475**

——— s. 21—

See s. 19 . . **18 C. W. N. 358**

BENGAL TENANCY ACT (VIII OF 1885)— *contd.*

——— s. 22—

——— "*Third person*" *whether co-sharer proprietor may be.* A co-sharer proprietor may be a third person within the meaning of s. 22 if he was inducted on the land as a tenant and not as a proprietor. EMANUDDIN *v.* SAIYAD MOHAMMAD RASHIDUL HUQ **4 Pat. L. J. 540**

——— *Thika taken by a cultivating raiyat—Conversion into tenure-holder—Merger—Liability to eviction after expiry of the period of thika—Construction of lease.* A *thikadar* is liable to eviction after the expiry of the period of his lease, even though it is found that he was a cultivating raiyat with respect to the lands of which he took the *thika* prior to it. His interests as a raiyat became merged into the rights he acquired under the lease. MANNERS *v.* SATROGHAN DAS (1916) . . . **20 C. W. N. 800**

——— s. 22 (*2*)—*Acquisition of occupancy right by landlord—Holding, if ceases to exist—Occupancy holding and occupancy right, distinction between.* The plaintiff who was an occupancy raiyat subsequently purchased the superior tenure. Thereafter A, who was an under-raiyat on the holding, transferred his interest in the land to B. The plaintiff's suit was for ejecting B. *Held*, that the effect of the purchase by the plaintiff which must be determined with reference to s. 22 (2) of the Bengal Tenancy Act was to vest the holding in the purchaser subject to the limitation that the occupancy right ceased to exist and not that the holding itself ceased to exist and A continued to be an under-raiyat under the purchaser. That a comparison of the phraseology of sub-s. (*2*) with that of sub-s. (*1*) of s. 22 shows that in sub-s. (*1*) a distinction is made between "occupancy holding" and "occupancy right," and when the occupancy right ceases to exist, it does not follow that the holding also vanishes. AKHIL CHANDRA BISWAS *v.* HASAN ALI SADAGAR (1913) . . **19 C. W. N. 246**

——— **ss. 22 (*2*), 49, 85, 167**—

See LANDLORD AND TENANT. **I. L. R. 43 Calc. 164**

——— **ss. 22, cl. (*2*), 159, 160 cl. (*g*)**—

See LANDLORD AND TENANT. **I. L. R. 37 Calc. 709**

——— s. 23—

See LANDLORD AND TENANT. **I. L. R. 37 Calc. 815**

——— **ss. 23, 86 and 87**—*Held*, that transfer of part of a holding does not amount to abandonment so as to entitle the landlord to re-enter. When there are several tenants in a holding and each holds a separate portion each does not constitute a separate holding. KARIM CHAKLADAR *v.* SRIMATI SAPORANNESSA BIBI **25 C. W. N. 717**

——— s. 25—

See LANDLORD AND TENANT. **I. L. R. 40 Calc. 870**

——— s. 26—*Occupancy holding, if may be bequeathed by will.* Except under local usage an occupancy holding is not capable of being bequeathed by will. *Amulya Ratan Sircar* v. *Tarini Nath Dey, 18 C. W. N. 1290,* followed.

BENGAL TENANCY ACT (VIII OF 1885)— *contd.*

———— **s. 26**—*contd*

Dayamoyi v. *Ananda Mohan Roy, 18 C. W. N. 971,* referred to. KUNJA LAL ROY *v.* UMESH CHANDRA ROY (1914) . . **18 C. W. N. 1294**

———— **ss. 26, 178, sub-s. (3), cl. (d)—**

See OCCUPANCY HOLDING.
I. L. R. 42 Calc. 254

———— **s. 29—**

See LANDLORD AND TENANT—ENHANCEMENT OF RENT **I. L. R. 37 Calc. 610**

———— of the Bengal Tenancy Act controls merely cl. (*a*) and not cl (*b*), *Bepin Behari Mondal* v. *Krishna Dhone Ghose. I. L. R. 32 Calc. 395 . s. c. 9 C. W. N 265,* referred to If therefore rent has been enhanced by more than two annas in the rupee. the mere fact of payment at the enhanced rate for three years does not entitle the landlord to realise at that rate. MULLUK CHAND DASS *v.* SATISH CHANDRA DASS (1909) . . . . **14 C. W. N. 335**

———— *Occupancy raiyat—Enhancement of rent by contract-stipulation in original kabuliyat—Colourable evasion of statute.* Where a kabuliyat executed by an occupancy raiyat contained a statement that the rent for the holding was Rs. 57-4 in all, but that out of this the sum of Rs. 17-2 was remitted and the rent was fixed at Rs. 40-2 for the period of the kabuliyat, and it was further stipulated that at the end of the term the tenant "shall take a settlement at the rate of Rs. 57-4 and if he does not the landlord shall be entitled to realise that rent by suit;" and the lower Appellate Court found that the rent really settled was Rs. 40-2, and that the reference to Rs. 57-4 was merely a device to evade the provisions of s. 29 of the Bengal Tenancy Act: *Held,* that s. 29 was a bar to the recovery of the rent by the landlord at Rs. 57-4. MOHAMAYA KAR *v.* KISHORE CHUNG (1913) . **18 C. W. N. 738**

———— *Class of agreements in kabuliyats not affected by the section.* An agreement embodied in a *kabuliyat* to pay a certain amount of rent agreed upon by the parties in settlement of a *bonâ fide* dispute regarding the [illegible]

[illegible] C. W. N. [illegible]

———— *Kabuliyat, construction of—Hajat, allowance of, for a term, at the end of which full rent payable—Suit for full rent at the end of the term, if suit for enhancement.* In a kabuliyat, dated 1st of Baisakh 1295, executed in respect of a *miadi sarasari jote* which was to have effect for three years, the amount of rent was stated to be Rs. 19 odd, but it was provided that a *hajat* (deduction) of Rs. 10-8-4½ gandas was to be allowed till the end of the term, but that on the expiry of the term, the full *jama* of Rs. 19 odd was to be paid. The landlord sued upon the *kabuliyat* to recover arrears of rent for the year 1299 onward at Rs. 19 odd. The tenant did not set up any case that the document was never intended to be acted upon, and nothing in regard to conduct amongst themselves was placed by the parties for determination before the Court. *Held,* upon a construction of the *kabuliyat,* that the suit was not for enhancement and that s. 29 of the Bengal Tenancy Act was no bar to recovery by the landlord at the rate claimed. ROMES CHANDRA BISWAS *v.* GOLAM NABI FAKIR (1898)
19 C. W. N. 867

———— In a suit for arrears of rent, the plaintiff claimed an enhanced rent on the basis of a kabuliyat The tenant proved the previous rent and that the enhancement claimed was in excess of two annas in the rupee. The plaintiff claimed the benefit of a decision under s. 105 of the Bengal Tenancy Act pronounced subsequent to the institution of the rent suit and before the trial thereof. *Held,* that as the previous rent of the tenant had been proved, it was for the plaintiff to justify the enhancement of the rent claimed which was obviously in excess of the enhancement allowed by s 24. RAJENDRA NARAIN MAZUMDAR *v.* SHEIKH HALIM
26 C. W. N. 758

———— **ss. 29, 30—**

See LANDLORD AND TENANT.
I. L. R. 47 Calc. 280

———— **ss. 29, 30, 32, 39—**

See LANDLORD AND TENANT.
I. L. R. 37 Calc. 742

———— **ss. 29, 31—**

See ENHANCEMENT OF RENT
2 Pat. L. J. 574

———— **ss. 29, 33 and 179**—*Kabuliyat enhancing existing rent and creating permanent Mukarari interest, effect of.* A landlord entered into an agreement with his tenant for the payment of rent at a certain rate. The agreement was contained in a *patta* and *kabuliyat* The latter recited that the tenants were to have a perpetual status at a fixed rate of Rs. 5 *per bigha,* and that the landlord was not to have any power of enhancement. It contained no provision as to the heritability or transferability of the holding. The landlord sued for rent at the rate stipulated in the *kabuliyat.* The tenant pleaded that the real rent was at a lesser rate, that the *kabuliyat* was executed under undue influence, and that its provisions infringed the Bengal Tenancy Act, 1885, s. 29. *Held,* that even if the *kabuliyat* had been executed under undue influence, a notice sent by the tenant to the landlord, calling upon the latter to sink a *pakka* well on the land in accordance with the terms of the *kabuliyat* amounted to ratification of the *kabuliyat. Held,* further, that the *kabuliyat* created a permanent *mukarrari* interest within the meaning of the Bengal Tenancy Act, 1885, s. 179, and that, therefore, s. 29 of that Act, did not apply In order to make out a claim for enhancement under s. 29 of the Bengal Tenancy Act it is necessary to comply strictly with the provisions of s. 33 of that Act. GUR SAHAI MAHTO *v.* KESHWAR SAHU
1 Pat. L. J. 76

———— **s. 30—**

See BENGAL TENANCY ACT, s. 188.
I. L. R. 38 Calc. 270

See ENHANCEMENT OF RENT.
2 Pat. L. J. 574
I. L. R. 40 Calc. 29

BENGAL TENANCY ACT (VIII OF 1885)—*contd.*

——— s. 30—*contd.*

See LAND TENURE IN BENGAL.
L. R. 46 I. A. 279

See LANDLORD AND TENANT.
I. L. R. 47 Calc. 280
I. L. R. 37 Calc. 742

——— ss. 30 (b), 35—*Grounds on which enhancement under s. 35 may be refused as inequitable.* S. 35 of the Bengal Tenancy Act is a section of a general nature and means that the Court has to take into consideration all the facts of the particular case and has to take into consideration the rules which are set out in the Bengal Tenancy Act relating to the particular application and then before he allows an enhancement, he must be satisfied that under the circumstances of the case the enhancement is fair and equitable, the provision being inserted for the protection of the tenant. *Guru Charan Nandi* v. *Sarab Ali, 23 C. W. N. 1041 : s.c. 30 C. L. J. 9 (1919)*, referred to. ISHAN CHANDRA DIASI *v.* RAMA PROSAD AICH . . . . . . **25 C. W. N. 897**

——— ss. 30 (b), 37, 105, 107, 109—

See SUIT . . **I. L. R. 40 Calc. 428**

——— ss. 30, 39, 50 (2), 52, 105 (4) and 109A—"*Decision settling a rent,*" *whether decision determining amount of enhancement is—Appeal—Enhancement of rent, basis of, discussed.* A decision of a Special Judge determining the amount of an enhancement under s. 30 (*b*) of the Bengal Tenancy Act, 1885, is a decision settling a rent and, therefore, no appeal lies from it. In determining the amount of enhancement under s. 30 (*b*) regard must be had to the nature of the land on which rent is to be assessed. If it is upland the prices of the upland staple crop must be considered, while if it is lowland the prices of the lowland staple crop must be ascertained. It is not permissible to assess the enhancement on one kind of land by comparing the average prices of upland and lowland staple crops together. SAJIWAN MAHTO *v.* GULAB CHAND LAL . **1 Pat. L. J. 409**

——— ss. 30, 50—*Enhancement of rent at the instance of the landlord—Tenant, if bound to produce rent receipts when pleading uniform payment for 20 years, when zemindar's papers show that.* In a suit for enhancement of rent under s. 30 of the Bengal Tenancy Act, all that has to be proved to entitle the tenant to the presumption under s. 50 is that he held at a rent or rate of rent which had not been changed during 20 years immediately preceding the institution of the suit, and ordinarily the tenant files his rent receipts which are the best evidence of non-variation; but when the zemindar's own papers, for example, *chittas* produced by him, show that, the tenant need not file the rent receipts. MADHUSUDAN MALLIK *v.* JAMIRUDDIN SHEIKH (1917) . . . . . **22 C. W. N. 999**

——— ss. 30, 52—

See ENHANCEMENT OF RENT.
2 Pat. L. J. 276

——— ss. 30, 188—*Shebaits, joint—Suit for enhancement of rent if may be brought by one shebait alone—Joint trustees—Consent of co-trustee if authorises suit by some only—Authority to sue, necessity to prove—Joint landlords, if shebaits.*

BENGAL TENANCY ACT (VIII OF 1885)—*contd.*

——— ss. 30, 188—*contd.*

Joint *shebaits* are, in some respects, joint trustees. Where one of two *shebaits* of an idol sued a tenant holding *debutter* land for enhancement of rent under s. 30, Bengal Tenancy Act, making the other *shebait* a co-trustee, and alleging that the latter had ceased to reside in the village and was no longer interested in the management of the endowed property, and the defendant *shebait* filed a written statement in which she stated that she had no longer any connection with the endowment and did not object to enhancement of rent at the plaintiff's instance: *Held,* that the plaintiff and the *shebait* defendant were joint landlords within the meaning of s. 188, Bengal Tenancy Act, and the right to institute the suit vested jointly in them as *shebaits. Jagadindra Nath Roy* v. *Hemanta Kumari Debi, 8 C. W. N. 809 : I. L. R. 32 Calc. 129,* followed. That to succeed in the suit both *shebaits* should have joined as plaintiffs, or plaintiff should have made out a case that he was authorised by his *co-shebait* to maintain the suit on her behalf. That no foundation for a case of agency had been laid in this case. That renunciation by the defendant *shebait* of her rights as *co-shebait* in a manner known to law should have been proved to justify the plaintiff suing alone. ABDUL GOFUR MANDAL *v.* UMAKANTA PANDIT (1914) . **19 C. W. N. 260**

——— s. 31—

See ENHANCEMENT OF RENT.
2 Pat. L. J. 574

——— ss. 31A, 50 (2), 113, 115—

See LANDLORD AND TENANT.
I. L. R. 45 Calc. 930

——— s. 32—

See LANDLORD AND TENANT.
I. L. R. 37 Calc. 742

——— s. 33—

See s. 29 . . **1 Pat. L. J. 76**

——— s. 35—S. 35 of the Bengal Tenancy Act relates to the amount of assessment and does not refer to the grounds upon which a Court has to determine whether enhancement should be allowed or not. GURU CHARAN NANDI *v.* SARAB ALI (1919) . **23 C. W. N. 1041**

——— s. 37—

See ENHANCEMENT OF RENT.
4 Pat. L. J. 106

See SUIT . . **I. L. R. 40 Calc. 428**

——— s. 38, cl. (*1*), (a)—*Permanent deterioration, what is.* The word "permanent" in s. 38 of the Bengal Tenancy Act must in every case be construed with reference to existing conditions and when a piece of land gets covered with sand the deterioration is permanent with reference to existing conditions. *Gouri Patra* v. *H. R. Reily, I. L. R. 20 Calc. 579, 586,* followed. KRISHNA SAHAY *v.* PALAKDHARI ROUT (1915)
20 C. W. N. 1157

——— ss. 38 and 52—It is not necessary that the tenant should himself institute a suit under s. 38 for abatement of rent for permanent deterioration of the land. He may plead non-liability on that ground in a suit by the landlord for rent. SUKHRAJ RAI *v.* GANGA DAYAL SINGH.
6 Pat. L. J. 665

BENGAL TENANCY ACT (VIII OF 1885)—*contd.*

—— s. 39—

See s. 30 . . 1 Pat. L. J. 409

See LANDLORD AND TENANT.

I. L. R. 37 Calc. 742

—— s. 40—*Competence of Revenue Court where tenant not occupancy raiyat and rent not produce rent—Civil Court if may question its competence on such ground.* The exercise of jurisdiction by a Revenue Court under s. 40 of the Bengal Tenancy Act presupposes that the raiyat is an occupancy raiyat and the rent is payable in kind as indicated in that section, and Civil Courts can consider the competence of the Revenue Court in commutation proceedings, where a suit is brought for recovery of arrears of rent as determined by those proceedings. *Kali Krishna Biswas* v. *Ram Chandra Baidya, 19 C. W. N. 823,* followed. DURGA MOHAN GANGOPADHYA *v.* SUKUMAR DAS (1915).

19 C. W. N. 825

—— *Settlement—Order of Revenue Court.* Where it is proved that a tenant is not an occupancy raiyat, a Revenue Court's order for commutation is without jurisdiction and not binding on Civil Courts. SHEIKH POKAN *v.* RAJANI KUMAR CHAKRAVARTY

23 C. W. N. 614

—— *Held,* that under s. 40 rent payable in kind can be commuted and the tenant has the status of an occupancy raiyat. MOHESH DUTTA SAKLA *v.* SHEIKH BASIR (*alias* DHURMA) . . . . . **25 C. W. N. 714**

—— ss. 40, 109—

See RENT. . **I. L. R. 45 Calc. 769**

—— ss. 43, 108—

See LANDLORD AND TENANT.

I. L. R. 37 Calc. 449

—— s. 44—

See NON-OCCUPANCY RIGHTS.

3 Pat. L. J. 1

—— s. 45—

SCH. III, CL. 1 (*a*)—

See NON-OCCUPANCY RAIYAT.

I. L. R. 44 Calc. 267

—— s. 46——*Non-occupancy raiyat, ejectment of, on ground of refusal to agree to enhancement—Tender of an agreement—Agreement, meaning of, if means proposed agreement—Draft of the proposed agreement without stamp, service of, if sufficient—Notice, service of, with copy of the agreement, if required—Procedure.* The word "agreement" mentioned in the first sub-section of s. 46 of the Bengal Tenancy Act cannot be strictly construed because an agreement cannot come into existence unless it has been assented to by both parties and where it requires to be reduced to writing until it has been executed. The statute means an agreement proposed by the landlord and the only requisite is that the document containing the terms of the proposed agreement be tendered. Where a landlord sent a draft of the proposed agreement duly stamped to the Court and the Court served on the tenant a copy identical with the draft but without a stamp on it, and it was said that it was not the original of the agreement that was tendered to

BENGAL TENANCY ACT (VIII OF 1885)—*contd.*

—— s. 46—*contd.*

the tenant but only a copy and hence there was no valid tender: *Held,* that there was a valid of the agreement as required under s. 46 of the Bengal Tenancy Act. If the defendant had executed the draft tendered to him, it would have been a sufficient compliance with the terms of the section: *Held,* further, that there is nothing in s. 46 of the Bengal Tenancy Act that requires a notice to be served along with the copy of the agreement though it may be convenient to do so. The statute does not make it obligatory. PORT CANNING AND LAND IMPROVEMENT CO., LD., *v.* NOYAN PARAMANIK (1918) . **22 C. W. N. 558**

—— In a suit for ejectment of a non-occupancy raiyat the statutory agreement was served on his son, and the lower Courts thought that it was sufficient compliance with the requirements of O. 5, r. 15, Civil Procedure Code, as the son was presumed to have duly brought it to the notice of the defendant. *Held,* that this clearly is a consideration which cannot be permitted to weigh with the Court when the question is whether or not the requirements of the statute have been carried out. It has to be definitely found that the defendant could not be found after reasonable and diligent enquiries, and that the person on whom the notice was served was an adult male member residing with him. It is essential that the requirements of the statute in these matters should be strictly carried out. BHARAM CHAND GUIN *v.* KANAH SARKAR . . . . . **26 C. W. N. 359**

—— ss. 46 and 158—

See OCCUPANCY RAIYAT.

5 Pat. L. J. 406

—— s. 48—

See UNDER-RAIYAT.

I. L. R. 39 Calc. 839

—— *Raiyat letting out a portion of holding to under-raiyat—Rent if must be limited to 25 per cent. in excess of rent assessable on that plot.* S. 48 of the Bengal Tenancy Act which provides that the landlord of an under-raiyati holding at a money-rent shall not recover rent exceeding that which he himself pays by more than 25 per cent. applies only to cases on which the land held by the raiyat is co-extensive with the land held by the under-raiyat. The mere fact that the raiyat's lease showed what rent was assessed in respect of the particular plot let out to the under-raiyat did not entitle the latter to pay rent up to 25 per cent. in excess of the assessed rate. NIM CHAND SAHA *v.* JOY CHANDRA NATH (1912) . **I. L. R. 39 Calc. 839**

—— The words "Holding at a money rent" in s. 48 refer to the under-raiyat. KAILASPATI CHOUDHURY *v.* MUNESHWAR CHOWDHURY . . . **3 Pat. L. J. 576**

—— s. 49—

See LANDLORD AND TENANT.

I. L. R. 43 Calc. 164

See OCCUPANCY HOLDING.

I. L. R. 44 Calc. 272

See UNDER-RAIYAT.

I. L. R. 39 Calc. 278

BENGAL TENANCY ACT (VIII OF 1885)—*contd.*

——— s. 49—*contd.*

——— *Under-raiyat, ejectment of—Notice to quit—Length of notice—English law, if applicable.* S. 49 of the Bengal Tenancy Act prescribes no form of notice to quit nor has it given any indications as to the length of the notice, the reason being that the Act itself protects the under-raiyat from ejectment until the end of the agricultural year next following the year in which the notice to quit is served upon him by the landlord. The rules of English law or even of the law prevailing in the Presidency towns concerning the length of the notice, should not be applied in such matters. Where a notice to quit which was served on the under-raiyat on the 10th April 1908 (about the end of Choitra 1314) asked the tenant to leave within the first of Baisak 1315, and the suit was instituted on the 3rd August 1909: *Held,* that the notice was not insufficient in law. HARIFULLAH GANI *v.* BENODE BEHARY MANDAL (1913) . **17 C. W. N. 932**

——— *Suit to eject under-raiyat—Notice to quit signed by one co-sharer landlord—Validity.* When a notice to quit under s. 49 (*b*), Bengal Tenancy Act, is signed by one co-sharer landlord, the question whether he signed it on behalf of himself and the other landlords cannot be in issue in a suit for ejectment under that section. JAKHER MAHMUD MANDAL *v.* KHATER MAHMUD SHEIKH (1918)

23 C. W. N. 76

——— *Ejectment of under-raiyat holding under harsana* patta *not for specified time—Notice necessary to terminate tenancy—S. 85, lease in contravention of—Grantor, if may challenge validity—Estoppel.* In a suit for ejectment of the defendant, an under-raiyat holding under *harsana patta* not for any specified time, it appeared that the plaintiff (who was the raiyat) before the expiry of a year served a six months' notice to quit on the defendant and on non-compliance therewith brought the suit more than one year after the service of notice: *Held,* that the tenancy was lawfully terminated and the plaintiff was entitled to recover possession of the land. *Per* MOOKERJEE, *J.*—That for agricultural tenancies of this description the provision for notice is to be found in s. 49 of the Bengal Tenancy Act which prescribes no form of notice and gives no indication as to its length, but only protects the under-raiyat from ejectment until the end of the agricultural year in which a notice to quit is served upon him by his landlord. *Per* BEACHCROFT, *J.*—That if it be found as a fact that a raiyat giving a permanent sublease in contravention of the provision of s. 85 (2) has induced his lessee to accept it on the faith of a representation that his own status was such as to validate such a sublease, he will not afterwards be allowed to prove in a suit against his lessee that his status was other than it was in the first instance represented to be. That it is absolutely necessary to plead estoppel if it is intended to rely on it. This is not a technical rule of pleading but a matter of substance, for if estoppel is pleaded it may be possible for the other side to shew that there could be no estoppel, the real facts being known. That the validity of a lease granted in contravention of s. 85 of the Bengal Tenancy Act can be questioned by the grantor. Cases on the point reviewed. CHANDI CHARAN NATH *v.* SAMLA BIBI (1917) . . . **22 C. W. N. 179**

——— *Under-raiyat holding under an occupancy raiyat, if can be ejected without notice—Landlord, meaning of.* An under-raiyat who is under an occupancy raiyat cannot be ejected by the landlord without notice prescribed by s. 49 (*b*) of the Bengal Tenancy Act. The intervention of a tenure holder between the landlord and the under-tenant makes no difference. *Amirulla* v. *Nazir, I. L. R. 31 Calc. 932,* followed. The term "landlord" includes a person who on the extinction of other rights comes into direct relationship with the tenant or under-tenant as the case may be. RASIK LAL SEN *v.* KRISHNA MOHAN MONDAL (1912) . **17 C. W. N. 781**

——— ss. 49, 85—*Under-raiyati lease for a term under nine years, if heritable on death of tenant within term.* A sub-lease granted by a raiyat for a term not exceeding nine years carries with it the ordinary incidents of a lease for a term of years—one of such incidents being that if the lessee dies before the end of the term, his heirs are entitled to succeed him in the tenancy. *Midnapore Zamindary Company* v. *Hrishikesh Ghose, I. L. R. 41 Calc. 1108 s. c. 18 C. W. N. 828, Arip Mondal* v. *Ram Ratan Mondal, I. L. R. 31 Calc. 757 : s. c. 8 C. W. N. 479,* and *Jamini Sundari Dasi* v. *Rajendra Nath Chakerbutty, 11 C. W. N. 519,* referred to. ABJAN BIBI *v.* RAHAM ALI (1915) . . . . . **20 C. W. N. 756**

——— ss. 49, 133—*Under-raiyat, if can acquire occupancy right by custom or usage—Status of under-raiyat with right of occupancy, if he remains an under-raiyat—Ejectment of such an under-raiyat, if s. 49, Bengal Tenancy Act, applicable.* An under-raiyat can acquire a right of occupancy by custom or usage, and on acquisition of such occupancy right continues to be an under-raiyat and is not liable to be ejected under s. 49 of the Bengal Tenancy Act. GOPAL MANDAL *v.* JAPAI SANKHARI (1918) . **22 C. W. N. 618**

——— ss. 49, 167—

See NOTICE TO QUIT.

I. L. R. 46 Calc. 766

——— s. 50—

See s. 30 . . **22 C. W. N. 999**

See LANDLORD AND TENANT.

I. L. R. 45 Calc. 930

——— (*1*), (*2*), (*3*)—*Presumption in favour of raiyat if rebutted by acquisition of non-transferable holding as representing creation of a new tenancy—Subdivision and amalgamation of raiyati holdings—New kabuliyat not varying the rent but stating it to be variable, if rebuts presumption.* Where in a proceeding instituted by the landlord for the settlement of fair rent under s. 105, Bengal Tenancy Act, the landlord contended that the presumption arising under s. 50, sub-s (2) to the benefit of which the tenant was *primâ facie* entitled was rebutted by the acquisition of non-transferable holdings which represented the creation of a new tenancy: *Held,* that the purchaser of a non-transferable occupancy holding cannot claim recognition by the landlord as a matter of right but if he obtains recognition from the landlord whether by payment or otherwise,

BENGAL TENANCY ACT (VIII OF 1885)— *contd.*

———— s. 50 (*1*), (*2*), (*3*)—*contd.*

then in the absence of special circumstances he is admitted into the original tenancy with all its incidents and becomes the successor in interest of the vendor. ABHOYA SANKAR MAJUMDAR *v.* RAJANI MONDAL (1918) . **22 C. W. N. 904**

———— s. 50 (*2*)—

See s. 30 . . **1 Pat. L. J. 409**

———— *Amalgamation of several tenures and stipulation by tenant to pay enhanced rents—New tenancy.* Where four originally separate tenures were in 1853 amalgamated and by a *kabuliyat* of that year the tenant expressly stipulated to pay enhanced rent: *Held,* that the presumption under s. 50 (2) of the Bengal Tenancy Act arising from proof of payment of rent at the same rate for 20 years before the suit was rebutted. UPENDRA NATH GHOSH *v.* GOPI CHARAN SAHA (1916) . . . . . **22 C. W. N. 321**

———— *Tenants producing rent receipts showing payment by themselves of same rent for 20 years—Presumption that tenancy commenced from permanent settlement—Onus to show former tenant predecessor or not of present tenants, on whom* In a proceeding under s. 105 of the Bengal Tenancy Act brought by a landlord against a raiyat for settlement of fair rent. *Held,* that when once the defendants have produced rent receipts covering a period of over 20 years showing that they paid rent at a uniform rate for that period, they are entitled to the presumption under s. 50 (2) of the Bengal Tenancy Act and it is for the landlord to show that the persons who were formerly on the land were not the predecessors of the defendants. GOPAL CHANDRA BANERJEE *v.* MAHOMED SOLEMAN MULLICK (1916).
22 C. W. N. 126

———— *Kabuliyat of 1840 agreeing to pay enhanced rent at parganah rate —Presumption, rebuttal of.* A *Kabuliyat* of 1840 by which the tenant expressly stipulated to pay enhanced rate according to the parganah rate rebutted the presumption arising from payment of the same rate of rent during 20 years before the suit. UPENDRA NATH GHOSH *v.* DWARKA NATH BISWAS (1916) . . . **22 C. W. N. 322**

———— *Slight variations in the rent paid with corresponding variations in area —Presumption of permanency, if arises.* Where a raiyat proved that for over 20 years, that is to say, from 1882 he had been paying the same rent for the holding: *Held,* that the presumption arising under s. 50 (2) of the Bengal Tenancy Act that he had held the land at a uniform rate of rent from the time of the Permanent Settlement was not rebutted by the landlord proving slight variation in the rents paid between 1861 and 1878, which was sufficiently explained by a very nearly corresponding variation in the area *Huronath* v. *Amir, 1 W. R. 230,* and *Anundloll* v. *Hills. 4 W. R., Act X, 33,* relied on. *Bissessur* v. *Woomachurn, 7 W. R. 14* and *Gopal Mundul* v. *Nobbo Kishen, 5 W. R., Act X, 83,* referred to. GRANT *v.* HAR SAHAY SINGH (1913).
19 C. W. N. 117

———— After the Record of Right becomes final in respect of a tenancy under Ch. X of the act the tenant is precluded by s. 115 for claiming the presumption under s. 50. BAMANDAS VIDIASAGAR BHATTACHARJA *v.* SADHU MAJHI.
26 C. W. N. 945

———— The expression "thereafter" in s. 115 means after particulars have been fully recorded and finally settled after under Ch. X. PRASANNA KUMAR SEN *v.* DURGA CHARAN CHAKRABARTY. . **26 C. W. N. 947**

———— ss. 50, 105—*Question of enhancibility of rent if a question under s. 105—Presumption under s. 50—Kabuliyat executed*

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enhancible by reason of the application of s 50 of the Bengal Tenancy Act, and the Special Judge on appeal held that the tenure having originated in a kabuliyat of 1238, the rent was enhancible: *Held,* that the question decided being a question relating to an incident of the tenancy did not come under s. 105 of the Act and a second appeal was not barred by s. 109A of the Act; that as the kabuliyat was a document by which a previously existing lease was recognised, the presumption under s. 50 of the Act applied. BISHESHUR RAY CHOWDHURY *v.* RAJENDRA KUMAR SINGH (1914) . . . . . **18 C. W. N. 949**

———— ss. 50, 105 and 115—

See LANDLORD AND TENANT.
I. L. R. 37 Calc. 30

———— s. 52—

See MEASUREMENT OF LAND.
I. L. R. 47 Calc. 266

See s. 30 . . **1 Pat. L. J. 409**

See ENHANCEMENT OF RENT.

———— *Civil Procedure Code (Act V of 1908), O. XLI, r 12—Appeal if may be limited to specified grounds—Jurisdiction of Appellate Court—Bengal Tenancy Act (VIII of 1885), ss. 52, 105 and 106—Enhancement of rent for increase of area within specified boundaries—Increase of area, proof of.* In a suit for enhancement of rent on the ground of any increase in area, the landlord must prove the area for which rent has been previously paid as well as the area now held by the tenant and that such area is in excess of the original area Where, therefore, a landlord proved that lands were once measured according to a known standard, that the rent was assessed on that measurement, that the area as well as the rent payable was entered in the *kabuliyats* and that the area of the lands measured by the same standard is in excess of the original area: *Held,* that unless it is established that the rent payable was a consolidated rent for lands within specified boundaries irrespective of the precise quantity, the landlord was entitled to claim additional rent. *Gouri Pattra* v. *H. R. Reily, I. L. R. 20 Calc. 579; Rajendra Lal Goswami* v. *Chunder Bhusan, 6 C. W. N. 318,* explained and distinguished *Rajendra Lal Goswami* v. *Chunder Bhusan, 6 C. W. N. 318, Surjikant* v. *Baneswar, I. L. R. 24 Calc. 251, Rajkumar* v. *Ram Lal, 5 C. L. J. 538,* referred to. Where it is specifically shown that the area of a land was ascertained by measurement and rent assessed on such measurement

BENGAL TENANCY ACT (VIII OF 1885)—*contd.*

———— s. 65—*concld.*

to recover the sum due to him which from being a first charge on the tenure itself, had, on the sale of the tenure, passed as a first charge on the surplus sale-proceeds. When two persons have charges on a property of equal priority, the first who takes out execution is entitled to satisfy his decrees by sale of the property and the other person losses his right to proceed against that property. NILAMBAR SAHA *v.* SATYAPRIYA GHOSAL (1912) . . . . . 16 C. W. N. 701

———— *Mortgage—Priority between mortgage and decree for road-cess—Rent, whether includes road-cess.* The purchaser at an auction sale held in execution of a decree for road-cess has a title paramount to that of a mortgagee of the same property, even though the decree was obtained subsequently to the execution of the mortgage. The definition of rent in the Bengal Tenancy Act, 1885, includes road-cess and, therefore, under s. 65 of that Act, a decree for road-cess is a first charge upon the tenure. A. B. CHEODITTI *v.* QUADRESS . 1 Pat. L. J. 161

———— *Sale in execution of decree for arrears of rent against outgoing tenant, if rent sale—Provisions of Chap. XIV of Bengal Tenancy Act, if applicable to such sale—Landlord and tenant, relationship of—Recognition of transferer of non-transferable occupancy holding by landlord, effect of, upon the old tenancy—Rent sale.* Where a landlord, after obtaining a decree for arrears of rent against a tenant in respect of a non-transferable occupancy holding, recognised the purchaser of the holding who had bought it long before the institution of the suit for rent as his tenant without any liability being taken by the purchaser for the decretal debt: *Held*, that the sale in execution of the decree for arrears of rent did not affect the interest of the previous purchaser from the tenant; that the sale could not be regarded as a rent sale, and the old tenancy having come to an end the landlord could not put up to sale the holding which had passed to the purchaser as the holding of the old tenant. GIRISH CHANDRA MONDAL *v.* NARENDRA NATH HALDAR (1919) . . 23 C. W. N. 654

———— ss. 65, 66, 148 (h)—

See LANDLORD AND TENANT.
I. L. R. 41 Calc. 926

———— ss. 65, 167—*Rent sale of holding after mortgage decree but before mortgage sale —Purchaser at rent sale, if must annul mortgage incumbrance—Priority.* Where between the date of a decree obtained by a mortgagee of an occupancy holding and purchase in execution thereof by the mortgagee the holding was sold in execution of the landlord's decree for rent. *Held*, that the mortgage incumbrance subsisted at the date of the rent sale, and not having been annulled under s. 167 of the Bengal Tenancy Act within the time allowed by the section, the purchaser at the rent sale could not avoid it, but was entitled to redeem the mortgagee purchaser. The purchaser at a rent sale who does not annul a subsisting mortgage incumbrance upon the holding does not acquire priority over the purchaser at a subsequent sale in execution of the decree obtained on the mortgage by reason of the rent being a first charge upon the holding under s. 65 of the Bengal

BENGAL TENANCY ACT (VIII OF 1885)—*contd.*

———— ss. 65, 167—*contd.*

Tenancy Act. *Gopi Nath* v. *Kashi Nath, 13 C. W. N. 412 (1909)*, not followed. BIDHUMUKHI DASI *v.* BHABA SUNDARI DASI (1920)
24 C. W. N. 961

———— s. 66—

See s. 55 . . 16 C. W. N. 104

See EXECUTION OF DECREE.
I. L. R. 46 Calc. 1032

See LANDLORD AND TENANT.
I. L. R. 41 Calc. 926

———— *Ejectment suit for—Arrears of rent in respect of which decree may be sought—Waiver.* The landlord may institute a suit for ejectment under s. 66 of the Bengal Tenancy Act at the time of the year mentioned in that section, but if he does not exercise his option at once but claims rent for any portion of the year subsequent thereto he treats the tenancy as existing after the specified date and cannot ask for ejectment in respect of arrears due for the year preceding that date. *Sitanath* v. *Basudeb, 2 C. L. J. 540; Sheikh Peer Bux* v. *Mowzah Ally, Marsh, 25; Jogeshuri* v. *Ebrahim, I. L. R. 14 Calc. 33*, followed. KALANAND SINGH *v.* GUNPUT SINGH (1911) . 16 C. W. N. 104

———— s. 67—

See INTEREST . I. L. R. 48 Calc. 93

———— ss. 67 and 68—No interest can be claimed on a decree for *bhowli* rent under s. 67 if the rent is not payable quarterly. BISHESHAR NATH SAHU *v.* HASANI SAO 4 Pat. L. J. 282

———— ss. 67 and 178—*Mortgage bond as security for payment of rent—Rate of interest.* Ss. 67 and 178 *(3) (h)* of the Bengal Tenancy Act, 1885, apply only to contracts between landlords and tenants as to the terms upon which the latter shall hold their tenancy. A mortgage bond executed by tenants as security for the payment of rent which has fallen into arrears, and which provides for a higher rate of interest than the rate laid down in s. 67 is not in contravention of s. 178 *(3) (h)*, and is not, therefore, void. A suit on such a bond is not a suit for rent within the meaning of s. 67. RAI HARI PRASAD LAL *v.* DAMRI SINGH
2 Pat. L. J. 367

———— ss. 67, 179—*Permanent mokurari lease—Stipulation to pay interest on arrears of rent "at 75 per cent. with full damages" if by way of penalty—Contract Act (IX of 1872), s. 74—Mere high rate, if sufficient to demand interference—Facts and circumstances to be proved—Position of tenant under permanent lease and a debtor compared—Onus of proof. Per* N. R. CHATTERJEA, *J.*—S. 179 of the Bengal Tenancy Act does not exclude the consideration of the question whether a stipulation in a permanent *mokurari* lease to pay interest at a higher rate than that provided by s. 67 is affected by provisions of law other than the Bengal Tenancy Act, and although Courts should not lightly interfere with contracts between landlords and tenants in cases of permanent *mokurari* leases, a stipulation for payment of interest on arrears of rent at rate which is unconscionable should not be allowed to be enforced even in such cases. No hard and fast rule can be laid down as to

BENGAL TENANCY ACT (VIII OF 1885)—*contd.*

——— ss. 67, 179—*contd.*

what is unconscionable and exorbitant, which must be determined with regard to the facts of each case. Interest represents compensation for the detention of the rent and a stipulation in a *mokurari* lease to pay "75 per cent. interest *plus* full damages" appears rather to have been intended as an effective means of securing punctual performance of the contract than represent the damages which the landlord was to suffer by reason of non-payment of the rent. *Per* RICHARDSON, *J.*—The lessee of a permanent lease at an invariable rent is not *primâ facie* entitled to the indulgent consideration which might be extended to a needy and improvident debtor in the clutches of a grasping money-lender, and though it may be that the provisions of s. 179 of the Bengal Tenancy Act must be read subject to the power of the Court to intervene under the Contract Act, they cannot be overlooked or left out of account. Stipulation to pay interest at a high rate may be proved to be one by way of penalty, but to justify an inference that it is so, it is not enough to show that it was a hard bargain. In general, evidence of facts and circumstances outside the contract is necessary to justify the Court's interference. The onus to prove such circumstances is on the lessee. NABO KUMAR CHUCKERBUTTY *v.* SYED ABDUL JUBBER MIYAN (1916) **21 C. W. N. 112**

——— s. 68—

See s. 67 . . **4 Pat. L. J. 282**

——— s. 69—*Crop, appointment of—Non-attendance of landlord—Liability of tenant if he appropriate whole crop.* Under s. 69 of the Bengal Tenancy Act if the landlord does not attend to take the share of the crops the remedy of the tenants is by way of an application to the Collector, but if it is found that the tenants have actually appropriated all the crops they are plainly liable to indemnify the landlord. KAMALESHWARI PERSHAD SINGH *v.* KANHARI SINGH (1913) **17 C. W. N. 1159**

——— ss. 69, 70—

See APPRAISEMENT. **I. L. R. 48 Calc. 1086**

See SANCTION FOR PROSECUTION. **I. L. R. 45 Calc. 336**

——— *'Batai' System*—Omis-

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sell them without an order. Where lands were held on the *batai* system and the Collector ordered the money to be deposited in the Treasury without any direction to pay it to any one: *Held*, that (1) an order having finality and enforcible as a decree is as necessary in case of *ba'ai* as of appraisement; (2) an order merely directing the deposit of sale-proceeds of crops in the Treasury without direction to pay them to anyone, is not an order having finality or enforcible as a decree within the meaning of s. 70 (5). SURAJ PRASAD MAHAJAN *v.* KARU SINGH . . **3 Pat. L. J. 325**

——— *Order under s. 70 (5), finality of—Execution of order—Limitation—Exclusion of time during which landlord was prevented*

BENGAL TENANCY ACT (VIII OF 1885)—*contd.*

——— ss. 69, 70—*contd.*

by injunction from executing the order—Whether plea of limitation amounts to denial of alleged acknowledgment or payment—Execution of Decree, transfer of. Where it has been established to the satisfaction of the executing Court that an order under s. 70 (5) of the Bengal Tenancy Act, 1885, was made by an officer who had jurisdiction to make such order, then no appeal lies from such order. The order is final even though the officer may have erred in his findings of fact. A person against whom an order under s. 70 (5) is sought to be executed cannot assail the Collector's order so far as the merits are concerned. Where the tenants instituted civil suits to set aside an order

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tenant-defendants had made certain payments on foot of a rent decree, and the defendants did not specifically deny this allegation but pleaded that the application was barred by limitation, *held*, that this did not amount to an admission by the defendants that the allegation was correct. Nor did the plea of limitation amount to a denial of the allegation of acknowledgment of liability. The Court granting a decree should itself transmit the decree to the executing Court for execution. S. 70 (5) expressly permits either the landlord or tenant to apply to the executing Court for exec-

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the law allows. BALUK CHAND LAL *v.* NATHUNI SINGH . . . . **2 Pat. L. J. 24**

——— *Order under s. 70, finality of—Ground for impugning the order.* A dispute as to whether the crops grown on a holding are to be appraised or divided is a dispute which the Sub-Divisional Officer is competent to determine under s. 70 (5) of the Bengal Tenancy Act, 1885. *Per* ROE, *J.*—It is open to the Civil Courts to inquire whether, in the circumstances of the holding as admitted or proved in proceedings under ss. 69 and 70 of the Bengal Tenancy Act, 1885, the Collector had jurisdiction to take action under those sections. Where the question whether a

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admitted that the holding was a *batai* holding, an order for appraisement would be without jurisdiction? THAKUR SINGH *v.* PARDIP SINGH **2 Pat. L. J. 183**

——— ss. 69, 75 and 40—Where there is a dispute as to the shares, of a landlord and tenant, the Revenue Court is empowered to decide the dispute or refer it to a Civil Court. BHAJAN AHIR *v.* MUSSAMMAT GANGESHWAR KUAR **5 Pat. L. J. 76**

——— s. 71—*Wrongful removal of crops by tenants—Theft—Penal Code (Act XLV of 1860), s. 379—Value of crops taken above Rs. 50—Summary trial.* After a summary trial a landlord was convicted under s. 379 of the Indian Penal Code of

BENGAL TENANCY ACT (VIII OF 1885)—*contd.*

——— s. 71—*contd.*

having cut and taken away a part of the paddy crops belonging to his tenant. The landlord and tenant were each entitled to half of the crops and the value of the paddy, stolen was Rs. 88. *Held*, that under s. 71 of the Bengal Tenancy Act, 1885, *the tenant* was entitled to possession of the whole of the crop until it was divided and that, therefore, the landlord could not be tried summarily since the value of the crop was more than Rs. 50. SHEIKH HABOO *v.* SHEIKH KARIMAN

1 Pat. L. J. 230

———sub-s. (4)—*Scope of—Wrongful removal of crops by tenant—Penal Code (Act XLV of 1860), s. 424.* S. 71 (4) of the Bengal Tenancy Act, 1885, merely provides the Courts with a definite rule as to the value of crops wrongly removed by the tenant. If the tenant, in removing the crops of a field which he holds under the *batai* system, acts dishonestly, he is liable to be convicted under *s. 424* of the Penal Code. KULDIP PANDEY *v.* KING-EMPEROR . 1 Pat. L. J. 353

——— s. 74—

See ABWAB . I. L. R. 40 Calc. 806

See PESHKOSH. I. L. R. 45 Calc. 866

——— ss. 74, 179—*Written lease—A definite amount over and above amount stated as rent, but forming part of consideration, if abwab—High rate of interest and damages in mokurari lease, if penalty—Contract Act (IX of 1872), s. 74.* The question whether any particular item is or is not an *abwab* must depend upon the construction of the contract of lease in each case, and the question in each case is whether the sum claimed is really part of the rent agreed upon to be paid as consideration for the lease. The question whether in a case where there is a written engagement, specified sum which is neither indefinite nor arbitrary and which is agreed upon to be paid as part of the rent in the lease creating the tenancy, can be recovered, was not referred to the Full Bench in *Radha Prosad Singh v. Bal Kower Koeri, I. L. R. 17 Calc. 726.* A stipulation in a *kabuliyat* creating a *mokurari* lease to pay interest at 75 per cent. on arrears of rent and damages at 300 per cent. is intended to secure punctual payment of rent rather than represent the loss to which the landlord is put for the non-payment of the rent. Being by way of penalty such a stipulation comes under s. 74 of the Contract Act, and is also unconscionable. UPENDRA LAL GUPTA *v.* MEHERAJ BIBI (1916)

21 C. W. N. 108

——— s. 75—

See s. 69 . . 5 Pat. L. J. 76

——— ss. 76 and 155—*Improvement—execution of a dwelling-house by tenants.* The clauses which specify what constitutes improvements within the meaning of s. 76 of the Bengal Tenancy Act, 1885, are not exhaustive. A tenant is entitled to effect on his holding any improvement which would add to the value of the holding. The mere fact that the tenant has a house in an adjacent *mouza* does not deprive him of his right to erect upon his occupancy holding another house for the purpose of making a residence for himself and his family MAHADEO RAI *v.* SHEOGULAM MAHTO

2 Pat. L. J. 634

BENGAL TENANCY ACT (VIII OF 1885)—*contd.*

——— s. 88—*Sub-division of tenancy—"Express consent in writing," how established—"Rent-roll," what is, jama-wasil-baki papers, if—Road-cess return how far evidence of consent.* An "express consent" in writing, within the meaning of s. 88 of the Bengal Tenancy Act as amended by Act I, B.C., of 1907 means a consent opposed to one which is to be implied from the document produced to prove it. *Jama-wasil-baki* papers which are annual statements of the rents payable and received from a particular estate are not landlord's "rent-roll" within the meaning of the proviso to the section. Road-cess returns filed by a co-sharer of the landlord having been produced to prove a sub-division of the tenancy within the meaning of s. 88 of the Bengal Tenancy Act: *Held*, that before such a document could be referred to establish express consent in writing, it must be proved, first, that there had been consent in writing, and, secondly, that the consent in writing though sought for could not be produced and therefore must be presumed at any rate against the person who made it. The road-cess return could not be taken in evidence as principal evidence to prove consent in writing which apparently did not exist. RAJANI SUNDARI DASSI *v.* HARA SUNDARI DASSI (1917)

22 C. W. N. 693

——— ss. 83 and 85—

See s. 11 . . 25 C. W. N. 9

——— s. 85—

See s. 49 . . 20 C. W. N. 256

See LANDLORD AND TENANT.

I. L. R. 43 Calc. 164

See TITLE. I. L. R. 44 Calc. 771

1. ——— *Lease exceeding nine years—Under-raiyat right of, to sue for recovery of possession on declaration of title—Possession.* Although an under-raiyat's lease was in excess of what a raiyat is entitled to grant to an under-raiyat under the provisions of s. 85 of the Bengal Tenancy Act, yet if the under-raiyat was in possession of the property on the basis of the *kabuliyat* he has sufficient interest in the property to recover the land. GOUR MONDAL *v.* BALARAM MANJI (1917) . . 22 C. W. N. 61

2. ——— An agreement by a raiyat to grant a sub-lease to an under-raiyat after the expiry of a lease is valid. ALI MAHAMMAD BEPARI *v.* NAYAN RAJAH BHUIYA (1903)

16 C. W. N. 620

3. ——— A permanent sub-lease by a riyat is binding as between the parties to the contract. *Basaratullah v. Kasirunnessa, 11 C. W. N. 190,* doubted. Where an under-raiyati lease provided that the tenant was at no time to be ejected from the land but that after the expiry of nine years a fresh settlement would be made and until it was made the conditions of the *kabuliyat* were to remain in force: *Held,* that the lease was intended to be a permanent lease. ABDUL KARIM PATWARI *v.* ABDUL RAHAMAN (1911). 16 C. W. N 618

4. ——— *Registered mokurari under raiyati lease—Under-raiyats dispossessed by strangers—Suit to recover possession—Proof of title, if necessary.* Where certain persons in whose favour an occupancy raiyat had executed

BENGAL TENANCY ACT (VIII OF 1885)—*contd.*

———— s. 85—*contd.*

a registered *mokurari pattah* were in possession of the holding as tenants of the occupancy-raiyat when they were dispossessed by the defendants who had no title to the land: *Held*, that, assuming that the permanent *mokurari* under *raiyati* lease was void under s. 85 of the Bengal Tenancy Act, it was open to them to prove their tenancy *aliunde*. *Lala Surabh Narain* v. *Catherine Sophia, 1 C.*

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dants who were trespassers should succeed upon proof of their bare possession when dispossessed. *Premraj* v. *Narayan, I. L. R. 6 Bom. 215*, followed. BANKA BEHARY CHRISTIAN *v.* RAJ CHANDRA PAL (1909) . . . . . . **14 C. W. N. 141**

5. ———————— *Permanent underraiyati lease—Raiyat's holding, purchase of, by landlord in rent decree—Suit for khas possession—ss. 167, 49, 22—Notice.* Where a permanent lease was given to an under-raiyat by a registered instrument and the landlord purchased the holding of the raiyat in execution of a decree for arrears of rent an

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to take *khas* possession by ejecting such underraiyat without annulling the same under s. 167 and without giving a notice in the terms of s. 49 of the Bengal Tenancy Act. *Held*, also, that the rights of the under-raiyat were not protected by sub-s. (*1*) of s. 22 of the Bengal Tenancy Act. *Peary Mohun Mookerjee* v. *Badul Chandra, I. L. R. 28 Calc. 205*, followed. GANGADHAR MONDAL *v.* RAJENDRANATH GHOSE (1913) **17 C. W. N. 860**

6. ———————— *Under-raiyati lease for term exceeding 9 years erroneously registered, if passes title—Previous possession as tenant not claimed—Oral evidence if admissible to prove tenancy—Evidence Act (I of 1872), s. 91.* A sublease created by a raiyat for a term exceeding nine years and erroneously registered in contravention of the provisions of s. 85, cl. (*2*) of the Bengal Tenancy Act, is not admissible in evidence to prove the tenancy. Oral evidence to prove the tenancy in such a case is inadmissible under s. 91 of the Evidence Act. Where the sub-lease registered in contravention of s. 85, cl. (*2*) of the Bengal Tenancy Act, was the only title on which the grantee relied so that he could not fall back on any prior possession as *tenant or otherwise*, his suit to recover *khas* possession was dismissed. *Lala Sorabh Narain Lal* v. *Catherine Sophia, 1 C. W. N. 248, Manick Borai* v. *Bani Charan Mandal, 13 C. L. J. 649*, referred to. Recognition of the plaintiff by the superior landlord as tenant was in the circumstances of no avail to him. JARIP KHAN *v.* DORFA BEWA (1912) **17 C. W. N. 59**

7. ———————— *Permanent underraiyati lease, registered, effect of—Registration Act (XVI of 1908), s. 49—Registration in contravention of law, effect of. Held*, upon the view of authorities, that a permanent sub-lease by a raiyat does not confer any title on the underraiyat and is inadmissible to prove the tenancy even when registered, as registration in contravention of the statutory prohibition contained in sub-s. (*2*) of s. 85 of the Bengal Tenancy Act is of no effect. *Jarip Khan* v. *Dorfa Bewa, 17 C. W. N. 59*, followed. TELAM PRAMANIK *v.* ADU SHEIKH (1913) . . **17 C. W. N. 468**

8. ———————— *Under-raiyat, sub lease by—Permanent lease by under-raiyat if invalid—Application by analogy of statutory provision to cases outside it—Permanent lease described as on for nine years to meet objection of Registering Officer.* S. 85 of the Bengal Tenancy Act has no application to a permanent lease created by an under raiyat in favour of a sub-lessee: nor can the provisions of that section be applied to such a case by analogy. *Ram Chunder Dutt* v. *Jughes Chunder Dutt, 19 W. R. 353*, referred to. The leases in this case were held to be permanent leases. GURUDAS DAS *v.* KALI DAS CHANGA (1914) . . . . . **18 C. W. N. 828**

9. ———————— *Under-raiyati lease for 9 years with covenant of renewal, if valid—Ejectment, suit for, at termination of term* Notwithstanding the provisions of s. 85 of the Bengal Tenancy Act, a stipulation in a lease granted by a raiyat to an under-raiyat that after the expiry of the nine years for which the lease was granted, the raiyat would grant the underraiyat a fresh lease of the land is valid. *Ali Mohamed* v. *Nayan Rajah, 15 C. L. J. 122*, followed. *Abdul Karim* v. *Abdul Rahaman, 15 C. L. J. 672, s. c. 16 C. W. N. 618*, referred to. When there is a covenant for renewal if the option does not state the terms of the renewal the new lease would be for the same period and on the same terms as the original lease in respect of all the essential conditions thereof except as to the *covenant for renewal itself. If it is possible* to interpret an agreement between the parties so as to make it operative, effect should be given to it and the contract should not be pronounced unenforceable: *Held*, that the only reasonable interpretation of the convenant in this case was that the parties agreed that the lease would be renewed on the same terms and for the same period as the original lease. LANI MIA *v.* MUHAMMAD EASIN MEA (1915) . **20 C. W. N. 948**

10. ———————— *If excludes operation of rules of equity in the relation of landlord and tenant.* The Bengal Tenancy Act is not a complete Code, even in respect of the law of landlord and tenant; much less does it profess *to incorporate the general principles of the law* of contract and the doctrines of equity jurisprudence in so far as they may have to be applied in the determination of disputes between landlords and tenants. BAMANDAS BHATTACHARYYA *v.* NILMADHAB SAHA (1916) . **20 C. W. N. 1340**

11. ———————— *Under-raiyati lease for a term exceeding nine years, if void—Objection by trespasser—Oral evidence and admission by*

the defendants for ejectment on the ground that they were trespassers and he also sought to prove his tenancy, irrespective of the lease, by an admission of the raiyat that he granted the lease to the

BENGAL TENANCY ACT (VIII OF 1885)—*contd.*

——— s. 85—*concld.*

plaintiff and took *selami* from him and that plaintiff obtained possession of the remainder of the land covered by the lease: *Held*, that plaintiff's lease was for a term exceeding nine years and as such it was not admissible in evidence and did not create any title in the plaintiff. *Jarip Khan* v. *Dorfa Bewa, 17 C. W. N. 59*, followed: *Held*, that the admission of the raiyat, being evidence relating to the transaction of the lease in respect of which there was a document, was not admissible in evidence and possession by plaintiff of other land covered by the lease, even if proved, was not sufficient to prove plaintiff's tenancy in the land in suit: *Held*, further, that having regard to the expression "*putra-poutra-dikramay*" the *patta* granted to the plaintiff was perpetual lease. KARTICK MANDAL *v.* BAMA CHARAN MANDAL (1915) . **20 C. W. N. 182**

——— *Lease granted by raiyat who represents himself to be a tenure-holder or raiyat at fixed rate, effect of—Lessor and lessee, collusion between, to evade Statute, effect of—Estoppel.* Where a lease, purporting to be of a permanent character, is granted, on the face of the document, by a raiyat (not being a raiyat holding at a fixed rate) to an under-raiyat, the lease is not operative as a permanent lease between the raiyat and the under-raiyat—Registration of such a lease being in violation of the statutory prohibition contained in s. 85 (2) of the Bengal Tenancy Act is null and void in law. But as the tenancy of an under-raiyat may be created without a written lease the grantee in such a case is an under raiyat who holds otherwise than under a written lease and his tenancy is liable to be terminated in the manner provided by s. 49 (*b*) of the Bengal Tenancy Act. Till the tenancy has been terminated, the grantor cannot treat him as a trespasser. Where the lease, purporting to be of a permanent character, is granted by a person who on the face of the document professes to be a higher status than that of a raiyat (for example, that of a tenure-holder or a raiyat holding at a fixed rate), the grantee, when his title as permanent lessee is challenged by his grantor, may invoke the aid of the doctrine of estoppel and plead that the grantor cannot be permitted to prove the falsity of the recitals in the document (on the faith of which he took the lease) so as to enable him to derogate from his grant. Where the lease, purporting to be of a permanent character, is granted by a person who on the face of the document, professes to have a higher status than that of a raiyat (for example, that of a tenure-holder or a raiyat holding at a fixed rate) and the grantee invokes the aid of the doctrine by Estoppel in answer to a challenge of his title as permanent lessee by his grantor: *Quære:* Whether such plea may be defeated by the grantor on proof that they had conspired by false recitals to evade the provisions of the statute. CHANDRAKANTA NATH *v.* AMJAD ALI HAZI (F. B.). **25 C. W. N. 4**

——— **ss. 85, 159, 161—**

See APPEAL] . **I. L. R. 43 Calc. 178**

——— s. 86—

See s. 23 . **25 C. W. N. 717**

BENGAL TENANCY ACT (VIII OF 1885)—*contd.*

——— s. 86—*contd.*

See RAYATI HOLDING.

I. L. R. 47 Calc. 129

See RENT . **I. L. R. 47 Calc. 133**

1. ——— *Sale of part of a holding, if an incumbrance.* An incumbrance must imply a limitation of the rights of the tenant and not a total extinction of them. A sale of a portion of a non-transferable occupancy holding is not an incumbrance within the meaning of s. 86, sub-ss. (6) and (7) of the Bengal Tenancy Act. *Jogeshwar Mazumdar* v. *Abed Mahomed, 3 C. W. N. 13*, distinguished. TAMIZUDDIN KHAN *v.* KHODA NAWAZ KHAN (1909) . . **14 C. W. N. 229**

2. ——— *Non-transferable holding, transfer of portion of—Collusive surrender by transferer to landlord—Landlord if may eject transferee.* Where after transferring a portion, a raiyat surrenders the whole of his holding to the landlord: *Held*, that, if the surrender be collusive, the tenancy subsists; and, so long as the tenancy subsists, the landlord is not entitled to eject the transferee of a portion of the holding. *Quære:* Whether a purchaser of a portion of a holding is not protected under sub-s. (*6*) of s. 86, Bengal Tenancy Act. *Tamizuddin Khan* v. *Khoda Nawaz Khan, 14 C. W. N. 229*, commented on. *Gagan Chandra Chowdhury* v. *Alek Chand Saha, 17 C. W. N. 698*, distinguished. ASKAR ALI *v.* GOUPEE MOHAN CHOWDHURY (1913)

18 C. W. N. 601

3. ——— *Non-transferable raiyati holding—Sale of a portion by raiyat—Subsequent surrender of same by him—Landlord, if may eject transferee—Fraud—Knowledge.* Per TEUNON, J.—Irrespective of fraud, collusion or knowledge, a landlord who accepts from a raiyat the surrender of a portion of the holding after the same had been sold by him, is not entitled to eject the transferee. The raiyat's rights in the portion having been extinguished, by the surrender or grant to the landlord, the latter took nothing. Sale of a part of a holding may be reasonably argued to be an incumbrance or limitation of the raiyat's rights in the whole and should therefore operate to prevent a surrender whether of the whole or the part. *Per* RICHARDSON, *J.* (*contra*). On the authorities sale of a part of a raiyati holding is not an incumbrance within the meaning of cl. (6) of s. 86 of the Bengal Tenancy Act. On the authorities the landlord (apart from fraud) has the right to re-enter if the whole or a part of a non-transferable raiyati holding be relinquished or surrendered by the raiyat after the same has been sold by him. DASTUR ALI *v.* RAM KUMAR GOPE (1918) . . . **22 C. W. N. 972**

4. ——— *Vendee of portion of non-transferable raiyati holding, if may be evicted by landlord in whose favour vendor surrenders the portion after sale.* A raiyat who has sold a portion of his non-transferable occupancy holding has parted with all his rights in the portion in favour of the purchaser, and has no interest in it to surrender. Moreover surrender may be looked upon as a transfer or grant and whatever binds the raiyat binds the landlord in whose favour he surrenders. The landlord cannot on accepting a surrender of the part of the holding sold by the raiyat sue to evict the transferee.

BENGAL TENANCY ACT (VIII OF 1885)— *contd.*

——— s. 86—*contd.*

ANANDA MOHAN ROY CHOWDHURY *v.* GURUDAYAL SAHA (1917) . . . 22 C. W. N. 965

5. ——— *Sale of portion of non-transferable raiyati holding—Surrender by vendor of same and re-settlement taken by him of rest—Implied surrender—Landlord, if may evict purchaser.* Where a raiyat expressly surrendered a part of his non-transferable holding which, prior to such surrender he had sold, and took a new settlement of the remainder: *Held,* that this operated as a surrender of the whole holding (express as to a portion and implied as to the rest) and as no fraud on the part of the landlord was established, he was entitled to evict the purchaser from the portion sold. TAMIJ MUNSHI *v.* BROJENDRA KISHORE ROY CHOWDHURY (1918). 22 C. W. N. 967

6. ——— *Surrender by occupancy raiyat of portion of holding sold by him—Landlord if may eject vendee.* An occupancy raiyat having sold a portion of his holding surrendered his tenancy in respect of the portion sold to his landlord who thereupon sued his vendee for *khas* possession *Held,* that the vendor having transferred a portion of the holding had nothing left in him in that portion to surrender, *Ananda Mohan Roy Choudhury* v. *Gurudayal Saha, 22 C. W. N. 965 (1917)* followed. [illegible]

7. ——— *Surrender of portion of occupancy holding sold by tenant, if binds transferee.* A surrender by a raiyat of a part of his holding which he has already sold to another is not binding on the transferee. *Ramoni Mohan Ray* v. *Sheikh Kalimuddi, 17 C. W. N. 1101 (1912). Sheikh Tamij Munshi* v. *Brojendra Kissore Roy Choudhury, 22 C. W. N. 967 (1918), Ananda Mohan Roy Choudhury* v. *Gurudayal Saha, 22 C. W. N. 965 (1917)* and *Dastur Ali* v. *Ram Kumar, 24 C. W. N. 571 (1919),* considered. Apart from authority, a person who has parted with his interest in property cannot deal with that interest by surrendering it in favour of the landlord, and he cannot confer upon the landlord a higher right than he could have passed to any other person by assignment. It would be different in the case of the surrender of the entire holding because then the tenancy would cease to exist, and the landlord would be in a position to re-enter on the land. SAILESH CHANDRA BOSE *v.* UMESH CHANDRA RUDRA (1919) . . . 24 C. W. N. 573

8. ——— *Non-transferable occupancy holding, transfer of—Recognition, what amounts to—Rent receipts granted by* patwari, *whether* [illegible]

BENGAL TENANCY ACT (VIII OF 1885)— *contd.*

——— s. 86—*contd.*

amounted to a recognition of the transfer. *Held,* that these documents did not amount to a recognition of the transfer. *Per* CHAMIER, *C. J.*—It is [illegible]

is an important act to be performed only by a person having at least some of the powers of a manager. The onus does not lie on the landlord to show that his *patuari* had no authority to consent to a [illegible] The transfer of 5 [illegible] to a division of [illegible] the rent which, u[illegible] Act, 1885, w[illegible] because not made with his express consent in writing. A. W. N. WYATT *v.* SEOGOBIND SAHU 1 Pat. L. J. 414

9. ——— *Occupancy raiyat transferring a portion of the holding, if may destroy the transferee's title by subsequent surrender of the whole or that portion of the holding—Equitable bar to such action—Bengal Tenancy Act, if excludes application of equitable doctrines—Donee of power, if may derogate from grant by its exercise.* An occupancy raiyat who has transferred part of his non-transferable holding is not competent to surrender to his landlord the portion so transferred either by surrender of that portion alone or by surrender of the whole inclusive of such portion. This follows from the principle, which is of [illegible]

of s. 86 of the Bengal Tenancy Act, since that Act does not purport to be a complete code even in respect of the law of landlord and tenant and does not profess to incorporate the general principles of the law of contract and the doctrine of equity jurisprudence, in so far as they may have to be applied in the determination of disputes between landlord and tenant. KRIPA SINDHU *v.* *Annada Sundari, I L. R. 35 Calc. 34: s.c. 11 C. W. N. 983 (F. B.) (1907)* referred to. SYED MOHSENUDDIN *v.* BAIKUNTHA CHANDRA SUTRADHAR (F. B.) . . . 25 C. W. N. 22

10. ——— *Surrender of raiyati interest by Hindu widow, whether effects merger—Re-letting to new tenant, effect of.* A Hindu widow has not an unqualified right or power to surrender the entire *raiyati* interest in a *raiyati* holding to which she succeeds as heir of her husband in the absence of proof of legal necessity or [illegible]

which she has in the *raiyati* holding and no more. A Hindu widow may, without necessity and irrespective of the provision of the Bengal Tenancy Act as to the power of surrender, transfer or assign her limited interest in a part of the property to [illegible]

widow at the instance of such stranger or trans-

BENGAL TENANCY ACT (VIII OF 1885)—*contd.*

——— s. 86—*concld.*

force. The *surrender* to her landlord, by a Hindu widow of *her entire interest* in a *raiyati* holding of which she is for the time being in occupation, if it forms merely a part of the estate to which she succeeds is a transfer of her limited interest in such holding which the law recognises. Apart from the act the question of merger depends on intention. JAMNA PRASAD SINGH *v.* BASDEO SINGH . . . . 4 Pat. L. J. 548

——— ss. 86 (6), 88—*Surrender of holding without the consent of mortgagee of portion of holding—Suit to eject mortgagee after settlement of remaining land with another—Sub-division of holding.* The provision of s. 86 (6) of the Bengal Tenancy Act embodies within certain bounds the principle that the lessee has no power to effect by surrender anything he could not do by assignment to a third person. *Walter* v. *Yalden*, *[1902] 2 K. B. 304*, referred to. A surrender of a *raiyati* holding by the *raiyat*, without the consent of a usufructuary mortgagee of a portion of the holding, does not entitle the landlord to eject the mortgagee, and where the landlord after such surrender himself settled the rest of the land with another, the sub-division of the holding was effected by the landlord and so did not offend against s. 88. RAGHUNATH SINGH *v.* WILLIAM COX (1914) 19 C. W. N. 268

——— s. 87—

See OCCUPANCY HOLDING.

I. L. R. 42 Calc. 172

——— *If exhaustive—Abandonment by tenant.* S. 87 of the Bengal Tenancy Act is not exhaustive and the landlord may proceed by suit if he can prove that the facts and circumstances of the case lead to an inference of abandonment. MATOOKDHARI SHUKUL *v.* JUGDIP NARAIN SINGH (1914) . . 19 C. W. N. 1319

——— Mere execution of a usufructuary mortgage is not an abandonment, but coupled with other facts might be. MONOHARPAL *v.* ANANTHA MOYEE DASYA 17 C. W. N. 802

——— s. 88—

See s. 86 . . 16 C. W. N. 268

——— The rent roll mentioned therein means a permanent document kept in the estate office of the husband with particulars of tenants and rents and kept up to date. RAJANI SUNDARI DASI *v.* HARI SUNDARI DASI 22 C. W. N. 693

———*Proviso—Sub-division of holding with consent of thikadar, whether binding on landlord.* The consent by a *thikadar* given in good faith for the benefit of the estate to an alteration of the area of the holdings under him and the apportionment of rent upon the new holding is binding upon the landlord. MAHMAD NAZIRUL HUSSAIN *v.* CHUNI KAMTI . 2 Pat. L. J. 151

——— s. 91—*Application for requiring attendance of tenants at measurement of holdings by landlord—One application against several tenants if competent.* S. 91 of the Bengal Tenancy Act does not comtemplate that there should be separate applications under that section by the landlord against each tenant. An application by the landlord with reference to the several tenants having holdings in the land which the zemindar desires to measure, is competent under the section. HAJI SHAH MOMTAZ HOSSAIN *v.* RAGHU NANDAN SAHU (1909) . . . 14 C. W. N. 231

——— s. 93—

See COMMON MANAGER.

I. L. R. 43 Calc. 986

——— *Common manager, appointment of—Dispute amongst some co-sharers as to their shares—"Estate," meaning of—Opening of separate accounts, if bars appointment of manager to whole estate.* A dispute between some of the co-owners of an estate as to the management of their share is sufficient for the appointment of a common manager of the estate under s. 93 of the Bengal Tenancy Act. A dispute as to the terms on which, or the person with whom, a particular holding or a number of holdings should be settled, is a dispute as to the management of the estate though only a part of the estate is involved. A dispute as to the boundaries between the common estate of the co-owners and another contiguous estate of which one of the co-owners of the common estate is the sole proprietor, is not a bar to the appointment of a common manager when there are other disputes between the co-owners. An estate remains a single estate for revenue purposes though separate accounts may have been opened in respect of it. SARADINDU RAY *v.* GRISH MOHINI DEBI (1916). 21 C. W. N. 240

——— s. 95—

See COMMON MANAGER.

I. L. R. 44 Calc. 800

——— A common manager appointed under s. 95 is a public officer within s. 2 (17) of the Civil Procedure Code and a notice under s. 80 must precede a suit for accounts. BENI MADHAB SUKUL *v.* DEB NARAYAN SUKUL 24 C. W. N. 138

——— ss. 95-98—

See COMMON MANAGER.

I. L. R. 40 Calc. 150

——— s. 98, cl. (3)—*Common manager of representative of proprietors—Suit against common manager if properly framed—Owners not all made defendants within time—Limitation—Limitation Act (XV of 1877), s. 22.* A common manager under s. 98, cl. 3, of the Bengal Tenancy Act, is a representative of the proprietors for the purpose of defending a suit as well as for instituting suits. Where, therefore, a suit was brought making the common manager as well as some of the proprietors parties, but some of the co-proprietors were made parties after the period of limitation allowed by law: *Held*, that the suit against the common manager was rightly brought and that as the suit as against him was in time, it was immaterial whether some of the proprietors were brought on the record out of time. CHOUDHRY KIRTIBASH DAS *v.* UMESH CHANDRA DUTT (1911) 16 C. W. N. 96

——— s. 98 (4)—*Common Manager, power of—District Judge, jurisdiction of.* Where, subsequent to the appointment of a common manager, the title of an alleged co-owner being disputed had to be decided by a competent Court: *Held*,

BENGAL TENANCY ACT (VIII OF 1885)—*contd.*

——— s. 98 (4)—*contd.*

was adjudicated upon. BHABANGANA DEBYA *v.* HORENDRA NARAIN ROY (1912) **17 C. W. N. 445**

——— s. 99—*Common manager—Application to District Judge for restoration of the management of the estate to the co-owners—Common manager if can be made a party to such proceeding.* In an application by the co-owners under s. 99 of the Bengal Tenancy Act for restoration of the management of their estate the common manager is not and cannot be made a party to the proceeding. BHAGABATI DEBYA CHAUDHURANI *v.* NILKANTO CHATTERJEE (1919) . **24 C. W. N. 927**

quired to institute any suit upon that challenge, but may institute a suit at any time within six years of any new challenge which has the effect of prejudicing his rights. RAMJI RAM *v.* LALA SADHU SARAN LAL . . **2 Pat. L. J. 493**

——— s. 101, 2(*a*), 3—

See RECORD OF RIGHTS. **5 Pat. L. J. 681**

See ULTRA VIRES. **I. L. R. 40 Calc. 123**

——— s. 102—*Bengal Tenancy Act (VIII of 1885), s. 102, as amended by Act III of 1898, s. 102, cls. (a), (c), (i), s. 106—Trespasser in possession of holding—Name erroneously recorded—Suit to declare him trespasser under s. 106—Amending of entry.* The terms "occupier" and "occupant" in cls. (*a*) and (*c*), s. 102, were presumably added to cover the case indicated in clause (*i*) added at the same time. A purchaser of a non-transferable occupancy holding, being a trespasser, is not entitled to have his name entered in the record-of-rights under cls. (*a*) or (*c*) of s. 102 of the Bengal Tenancy Act. Where such a person's name was recorded: *Held,* that the Revenue Officer proceeding under s. 106 acted properly in adding a note to the effect that he was a trespasser. UMEDULLA SARDAR *v.* RAM CHANDRA BHADURI (1910) **14 C. W. N. 812**

———*Its amendment in 1898—Effect of s. 102—Settlement Officer, power of.* S. 102 of the Bengal Tenancy Act has now been amended by the insertion of a new clause which expressly authorises the Settlement Officer to decide when the land is claimed to be held rent-free—whether or not rent

has inserted this clause in s. 102 points to the conclusion that the matter provided for thereunder is not covered by the other clause of s. 102. The

BENGAL TENANCY ACT (VIII OF 1885)—*contd.*

——— s. 102—*contd.*

Legislature could not possibly have intended to accord finality to a decision of a dispute by a Settlement Officer which it was beyond the jurisdiction of the Revenue Officer to decide under s. 106 of the Bengal Tenancy Act. *Radha Kishore* v. *Durganath, I. L. R. 32 Calc. 162, Donay Dass* v. *Keshub Prukti, 8 C. W. N. 741, Nabin Chandra* v. *Radha Kishore, 11 C. W. N. 859, Nikunja Behary* v. *Radha Kishore, 22 C. L. J. 148, Secretary of State for India* v. *Nitye Singh, I. L. R. 21 Calc. 38, Dharani Kanta Lahiri* v. *Gaber Ali Khan, I. L. R. 30 Calc. 339, Karmi Khan* v. *Brojo Nath Das, I. L. R. 22 Calc. 244,* and *Birendra* v. *Bhoirab, 20 C. L. J. 295,* referred to. BIRENDRA KISHORE MANIKYA *v.* KALITARA DEBI (1915). **I. L. R. 43 Calc. 547**

——— ss. 102 (b), (e), 104H (3) (g), 158—*Suit under s. 104 H—Court, if has general jurisdiction to revise rent-roll.* A suit under s. 104H of the Bengal Tenancy Act does not lie on the ground that an enhancement of rent made by reason of a rise in the price of staple food crops should not have been made. The special conditions and incidents of the tenancy mentioned in s. 104H (*3*) (*g*) of the Bengal Tenancy Act refer to the special conditions and incidents mentioned in s. 102 (*h*), whilst the rent payable comes under s. 102 (*e*) of the Act. KALI PRASONNO MAITY *v.* SECRETARY OF STATE FOR INDIA (1918) **23 C. W. N. 383**

——— s. 103A—*Draft record-of-rights, entries in, if admissible in evidence in rent suits.* Entries in a draft record-of-rights published under s. 103A of the Bengal Tenancy Act are not admissible in evidence in a suit for rent. It is not until the record-of-rights is finally published that the presumption of correctness arises. GULAB KOER *v.* RAMRATAN PANDE (1913) . **18 C. W. N. 896**

——— ss. 103A, 105, 108A—*Record-of-rights, final publication of—Settlement of fair and equitable rent, upheld by Special Judge on appeal—Subsequent amendment of record-of-rights—Correction of clerical or arithmetical error—Inherent jurisdiction of Court—Application and scope of s. 108A.* Where after the final publication of the record-of-rights fair and equitable rent was settled by the Settlement Officer by his order, dated the 21st December 1908, in a proceeding under s. 105 of the Bengal Tenancy Act, an appeal by the tenants against which order was dismissed by the Special Judge on the 9th April 1906, the substantial matter in controversy before the Special Judge being whether the rate of rent settled was or was not equitable, no question being raised as to the area, and subsequently it being discovered that the area had been erroneously put down, the Settlement Officer on the 2nd September 1907 amended the record so as to alter the entry about area and the rent

every Court to correct obvious errors or incidental slips in its own record. *Mellor* v. *Swire, 30 Ch. D.*

BENGAL TENANCY ACT (VIII OF 1885)—*contd.*

——— ss. 103A. 105, 108A—*contd.*

correction of obvious errors and incidental slips in a record-of-rights. It entitles the Settlement Officer to correct the record when there has been a *bonâ fide* mistake made either by the Settlement Officer or one of the parties concerned. The section in substance authorises a Settlement Officer to reconsider the matter on the merits. RAJ MOHAN GUHA *v.* ALAM GAZI (1912) . **17 C. W. N. 625**

——— s. 103B—

See s. 5 . . **23 C. W. N. 649**
I. L. R. 45 Calc. 805

——— *Res judicata—Civil Procedure Code (Act V of 1908), s. 12.* A record-of-rights was prepared and finally published on the 31st December 1898. In a suit for rent which subsequently fell due, rent was claimed at the rate stated in the *khatian*; the Court did not allow the plaintiff rent at the rate claimed but at the rate admitted by the defendant. In a second suit for rent for a period subsequent to that for which the first suit was brought, plaintiff claimed rent again at the rate mentioned in the *khatian*: *Held*, that inasmuch as the *khatian* was not considered in the earlier suit, the presumption under s. 103B of the Bengal Tenancy Act in its favour continued, and the Court should consider the same as evidence in the case. SARIFUNNESSA CHOWDHURANI *v.* SASADHAR MOULIK (1909) . **14 C. W. N. 364**

——— *Presumption as to correctness of entry—If arises, when the entry in the record-of-rights relates to land not within the scope of the Act—S. 102 (b), proper entries—Weight to be attached to entries not properly made—"Chandina" land, meaning of.* Certain lands were described in the record-of-rights as *Chandina*, by which the settlement authorities meant bazar lands not subject to the provisions of the Bengal Tenancy Act. In a suit for *khas* possession of the lands, it was pleaded by the defendant that the entry being with respect to lands which did not come within the scope of the Bengal Tenancy Act, the Revenue Officer had no jurisdiction to make the entry, and as such no presumption as to its correctness arose under s. 103B (3). The landlord did not produce his papers which would have shown the origin and nature of the tenancy and the defendant stated the lands to be *jote* or homestead lands: *Held*, that though it cannot be said that no presumption arose under s. 103B (3), the presumption cannot be of such great weight as would be the case if the entry were with regard to matters which are rightly and properly included in the record-of-rights. The non-production of papers by the plaintiff coupled with the statement of the defendant was sufficient to rebut the statement in the record-of-rights. RAJA SASI KANTA ACHARJYA BAHADUR *v.* SANDHYA MONI DASYA
26 C. W. N. 483

——— ss. 103B, 104H— *Definitions of "raiyat" and "tenure-holder"—Purpose for which land was acquired—Presumption of correctness of record-of-rights, and that holder is a "tenure-holder"—Cultivation by others than holders—Suit for alteration of record-of-rights and for declaration that holder is a raiyat—Rent Acts prior to Bengal Tenancy Act (X of 1859 and Beng. Act VIII of 1869)—Rent Settlement Act (Beng. VIII of 1879).* Whether tenants are really "raiyats" or "tenure-

BENGAL TENANCY ACT (VIII OF 1885)—*contd.*

——— s. 103B, 104H—*contd.*

holders" depends ultimately on questions of fact; one must "look to the attendant circumstances to judge of the purpose" for which the land was acquired. *Debendra Nath Das* v. *Bibudhendra Mansingh Bhramarbar Roy, I. L. R. 45 Calc. 805; L. R. 45 I. A. 72,* referred to. Where the predecessor of the appellants, long prior to the Bengal Tenancy Act, 1885, acquired land and reclaimed it merely in order that it might be cultivated by others who would pay rent to him, whilst he resided and followed his avocations elsewhere, and had no intention of cultivating it himself: *Held*, that it was not a raiyati holding within the definition in the Bengal Tenancy Act, though it would be within it for the purpose of the relief given by s. 104 H of that Act. In a suit by the appellants for such relief in regard to a record-of-rights in which they were entered as tenure-holders for a declaration that they were "raiyats" and for a reduction of the rent (which had been enhanced) to a fair and equitable amount, they contended that the suit was governed, not by the Bengal Tenancy Act, 1885, but by the Rents Act, prior thereto in which there were no definitions of the words "raiyat" and "tenure-holder," and that a change had been made by the Bengal Tenancy Act in the meaning of those terms as interpreted under the prior Acts: *Held*, that the onus was on the appellants to rebut the statutory presumption that the record-of-rights was correct (s. 103B) and the holding being in excess of 100 bighas, to rebut the further presumption that the holders of it were "tenure-holders" [s. 5 (5)]; and that there was very little and doubtful support given by the documentary and other evidence to the appellants' contention, and it was not sufficient to rebut the above presumptions. There was no decision giving a universal definition of a raiyati interest as being different, prior to the Bengal Tenancy Act, from the definition given in that Act. *Durga Prosonno Ghose* v. *Kalidas Dutt, 9 C. L. R. 449,* distinguished. No instance was cited of such a use of the term "raiyat" as contended for; and the use of the words "cultivated and held" in s. 6 of Act X of 1859 had not any such effect. RAJANI KANTA GHOSE *v.* SECRETARY OF STATE FOR INDIA (1918)
I. L. R. 46 Calc. 90

——— *Fard rawaj bhaoli, presumption, whether attaches to—Evidence Act (I of 1872), s. 35—Admissibility of fard.* The presumption referred to in s. 103B of the Bengal Tenancy Act, 1885, only attaches to the record-of-rights which has been *published* under Chapter X of the Act. *Quære*: Whether the *fard rawaj bhaoli* is part of the record-of-rights. The *fard rawaj bhaoli* is admissible in evidence under s. 35 of the Evidence Act, 1872. TULSI MAHTO *v.* JHANDOO PANDEY . . . . **2 Pat. L. J. 187**

——— ss. 103B, 106—

See LAKHERAJ LANDS.
I. L. R. 45 Calc. 574

——— s. 104—

See RENT . . **I. L. R. 38 Calc. 278**

——— ss. 104A, 104F, 104H, 104J—*Record-of-rights, entry settling rent in, when conclusive—Rent, enhancement of, suit for, if maintainable.* An entry in the record-of-rights settling a rent in

BENGAL TENANCY ACT (VIII OF 1885)—*contd.*—

——— s. 104A, 104F, 104H, 104J—*contd.*

accordance with the provisions of ss. 104A to 104F, unless altered by means of a suit brought as contemplated by s. 104H, is conclusive, and no suit is afterwards maintainable for enhancement of rent on the ground of an excess in area in spite of their having been a stipulation to that effect in the *kabuliyat* executed by the settlement proceedings. S. 113 of the tenant prior to the Bengal Tenancy Act is no bar to the maintainability of a suit of this character and has no application in such circumstances. PROSONNA KUMAR ADHIKARI *v.* RACHIMUDDIN HOWLADAR (1912).
17 C. W. N. 153

——— s. 104H—

See LIMITATION **I. L. R. 46 Calc. 199**

See s. 5 . . **23 C. W. N. 649**

See s. 102 . **23 C. W. N. 383**

See s. 103B . **I. L. R. 46 Calc. 90**

1. ——— *Suit under, scope of—Necessary parties—Defendants, who should be joined as.* The only relief which the plaintiffs in a suit under s. 104H can claim, is the alteration of an entry in the record-of-rights of the rent settled or the insertion of an entry as to the amount of rent to be settled and prayers in a plaint in a suit under s. 104H to the effect that the plaintiffs may be declared occupancy raiyats and that the entry in the record-of-rights to the effect that they are tenureholders may be declared erroneous and that the names of the defendants recorded as occupancy raiyats may be expunged from the record and the lands in their occupation recorded in the *khatian* as the *nij jote* of the plaintiffs, are entirely foreign to a suit under s 104H. A suit under s. 104H should have as defendant only the person benefited by the rent entry or by the omission to make a rent entry as the case may be, and in a suit brought for the determination of the question whether the rent entry showing the amount of rent payable by the plaintiffs to the Secretary of State for India is or is not correct, the Secretary of State for India is the proper party to be made defendant, and the under-tenants subordinate to the plaintiffs are not necessary parties defendants Two conditions must be satisfied in order that a party may be considered a necessary party defendant, namely, *first*, there must be a right to some relief against him in respect of the matter involved in the suit; and *secondly*, his presence is necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit; and a person who is only indirectly or remotely interested is not a necessary party. JOGENDRANATH SINGH *v.* SECRETARY OF STATE FOR INDIA (1912) . **17 C. W. N. 835**

2. ——— *Limitation Act (IX of 1908), s. 29 (1) (b)—Civil Procedure Code (Act V of 1908), s. 80—Period of notice to Secretary of State, if to be deducted in computing the six months within which suit to be brought.* In a suit against the Secretary of State under s. 104H of the Bengal Tenancy Act, in computing the period of six months prescribed by cl. (2) of the section, the plaintiff is not entitled to deduct two months in respect of the notice which he is bound to give to the Secretary of State under s 80 of the Civil Procedure Code. SECRETARY OF STATE FOR INDIA *v.* SHIB NARAIN HAZRA (1918) . **22 C. W. N. 802**

3. ——— *Period of limitation for a suit under—Limitation Act (IX of 1908), s. 15, cl. (2) and s. 29,—Time of the currency of a notice under s. 80, Civil Procedure Code (Act V of 1908), if can be excluded in calculating the period of limitation for such a suit.* The provisions of s. 15, sub-s. (2) of the Indian Limitation Act do not apply to a suit instituted under the terms of s. 104H of the Bengal Tenancy Act. A suit under s. 104H must be brought, in any event, within six months as specified in that section and the plaintiff is not entitled to exclude the time during the currency of a notice to the Secretary of State whom he has joined as a defendant. GANGADHAR NANDA *v.* JANOKIMONI DASI (1918)
22 C. W. N. 817

4. ——— *Suit under.* In a suit under s 104H of the Act by tenants who had been recorded as tenure-holders to have themselves recorded as raiyats, the Court cannot disturb the rent settled unless the plaintiffs succeed in showing under s. *104H (3), (e),* that *in the* record-of-rights their status has been wrongly recorded. SECRETARY OF STATE *v.* GOVIND PRASHAD BARIK (1916) . . **21 C. W. N. 505**

——— *Held* that s. 104H allows a suit amongst others on the grounds that land has been wrongly accorded as part of or

[illegible]

——— ss. 104H, 111A—

See LIMITATION **I. L. R. 45 Calc. 645**

——— ss. 104H, (2), 184, 185—

See SUIT . **I. L. R. 45 Calc. 934**

——— s. 104J—

1. ——— *Evidence to contradict statement against record-of-rights, if admissible—*Ex parte *decree for rent obtained after publication of record-of-rights, if supersedes record.* S. 104J of the Bengal Tenancy Act precludes any evidence from being given to contradict the statement as to the rent mentioned in the record-of-rights where a settlement rent-roll has been prepared under the provisions of ss. 104A to 104F

[illegible]

DAR *v.* PALKU MAHAMAD (1919)
23 C. W. N. 860

2. ——— *Scope of section—Conclusive nature of rent settled.* The words "deemed to have been correctly settled" in s. 104J, Bengal Tenancy Act, mean an irrebuttable presumption and it is not open to the defendant in a suit for rent brought in accordance with the finally published record-of-rights to show that the rent was not correctly settled. BAIKUNTHA NATH GHORA *v.* PRASANNA KUMAR MAHAPATRA (1918) . . . . . **23 C. W. N. 651**

BOMBAY DISTRICT MUNICIPALITIES ACT (BOM. III OF 1901)—*contd.*

———— **s. 96**—*contd.*

———— *Permission to build a privy granted under sub-s. (2)—Subsequent order by the Municipality revoking the permission—Legality of the order.* The plaintiff applied to the Municipality on December 1, 1913, for permission to build a privy on his own land. The permission was granted by the Municipality on 22nd December under sub-s. (2) of s. 96 of District Municipalities Act, 1901. On January 8, 1914, the Municipality acting on the resolution of the Managing Committee gave notice and passed an order to the plaintiff not to build the privy until further orders. The plaintiff having sued for the cancellation of the order of January 8, 1914, as *ultra vires. Held*, that the order was not legal in the absence of any power to cancel the permission once granted under sub-s. (2) of s. 96 of the District Municipalities Act, 1901. *Emperor* v. *Kareen Ranjan, 19 Bom. L. R. 65*, followed VITHAL DHONDDEV *v.* THE ALIBAG MUNICIPALITY (1918) . . . **I. L. R. 42 Bom. 629**

———— *Permission to build—Permission once granted c[illegible] cancelled—Sale of land by [illegible] of written contract of sale—Effect on the validity of the sale.* It is not competent to a District Municipality to revoke a permission to build which has already been granted under the provisions of s. 96 of the Bombay District Municipal Act, 1901. *Emperor* v. *Kareem Ranjan Khoji (1916) 19 Bom. L. R. 65*, and *Vithal* v. *Alibag Municipality (1916) 42 Bom. 629*, followed. *Quære*—Where a District Municipality sells land without a contract in writing as required by s. 40 (*6*) of the Act, is the sale valid? *Abaji Sitaram* v. *Trimbak Municipality (1903) 28 Bom. 66*, and *Young and Co.* v. *The Mayor, etc., of Royal Leamington Spa (1883) 8 App. Cas. 517*, considered. MUNICIPALITY OF SHOLAPUR *v.* ABDUL WAHAB

I. L. R. 45 Bom. 797

———— *Building an Otla in front of a house—Permission of the Municipality not obtained—Otla an additional structure—Permission necessary.* The plaintiff raised an Otla in front of his house without previously obtaining permission of the Municipality as required by clause (1), s. 96 of the District Municipalities Act (Bom. Act III of 1901). The defendant Municipality served the plaintiff with a notice to remove the Otla. The plaintiff having sued for a permanent injunction restraining the Municipality from removing the Otla alleging that the Municipality's notice for its removal was illegal and *ultra vires. Held*, dismissing the suit, that in raising the Otla, the plaintiff was seeking to add to an existing building which he could not do without asking for permission of the Municipality under clause (1), s. 96 of the District Municipalities Act, 1901. VIRAMGAM MUNICIPALITY *v.* BHAICHAND DAMODAR (1919)

I. L. R. 44 Bom. 198

———— *Permission to build privy subsequently revoked.* The plaintiff applied to the Municipality for permission to build a privy on his own land and was given same under s. 96 (*2*) of the Act. Later permission was withdrawn. *Held*, that the revocation was illegal. *Emperor* v. *Kareen Ranjan, 19 B. L. R. 65*, followed. VITHAL DHONDDEV *v.* THE ALIBAG MUNICIPALITY

I. L. R. 42 Bom. 629

BOMBAY DISTRICT MUNICIPALITIES ACT (BOM. III OF 1901)—*contd.*

———— **ss. 113, 122**—*Suit against Municipality for re-instating a stone removed by it—Plaintiff's adverse possession—Municipality creature of the statute—Duties of Municipality—Municipal District—Encroachment—Obstruction to safe and convenient passage—Notice of removal—Justification by reference to statutory powers.* In a suit brought against a Municipality to restrain them from obstructing the plaintiff in re-instating a stone which was imbedded in his *otla* in its original position, the lower Appellate Court found that the stone had been *in situ* for twelve years, therefore the Municipality had no right to interfere with it as there had been adverse possession for the statutory period of the portion of the street occupied by the stone. On second appeal by the Municipality, *held*, that the Municipality was the creature of the statute with duties, *inter alia*, to preserve the passage along public streets. It mattered not for the Municipality whether the encroachment had been in existence for 12 years or more. Under s. 113 of the District Municipal Act (Bom. Act III of 1901) the Municipality might, on proof that the encroachment objected to was an obstruction to the safe and convenient passage along a street, by written notice require the owner to remove it. Section 122 of the Act empowered the Municipality to remove the encroachment which might have been put up after the place had become a Municipal District. In the present case the Municipality having failed to justify their action by reference to the said statutory powers, the decree was confirmed. DAKORE TOWN MUNICIPALITY *v* TRAVEDI ANUPRAM (1913). . **I. L. R. 38 Bom. 15**

———— **s. 142**—*Held* that a Municipality had power to order destruction of bad meat exposed for sale. EMPEROR *v.* HAJI ABOO

I. L. R. 45 Bom. 193

———— **s. 151 (1)**—*Use of property for a lime-kiln—Nuisance—Municipality to determine whether the use is or is likely to be a nuisance—Power of the Court to interfere with the discretion of the Municipality.* The use of property for the purpose of a lime-kiln would be a nuisance within the meaning of s. 151 (*1*) of the District Municipal Act (Bom. Act III of 1901) and under that section it is the Municipality who is to judge whether the use is or is likely to become a nuisance to the neighbourhood. The Courts will not interfere with the exercise of that power unless it can be shown that it is exercised in an improper manner. NURMAHOMED GULAM *v.* THE SURAT CITY MUNICIPALITY (1919) . . . **I. L. R. 44 Bom. 738**

———— **s. 160**—

See CIVIL PROCEDURE CODE (ACT V OF 1908), s. 115 **I. L. R. 40 Bom. 509**

———— *Municipality—Compulsory—Acquisition of land—Compensation—Arbitration—Decision of District Court—Appeal—High Court—Construction of Statutes.* No appeal lies from the decision of a District Court under cl. (3) of s. 160 of the Bombay District Municipal Act (Bom. Act III of 1901). Where a Statute creates a right not existing at common law and prescribes a particular remedy for its enforcement, then that remedy alone must be followed. *Wolverhampton New Waterworks Co.* v. *Hawkesford, 6 C. B. N. S. 336*, followed. CHUNILAL VIRCHAND *v.* AHMEDABAD MUNICIPALITY (1911) . **I. L. R. 36 Bom. 47**

BOMBAY DISTRICT MUNICIPALITIES ACT (BOM. III OF 1901)—*concld.*

———— ss. 161 (2)—

See CRIMINAL PROCEDURE CODE s. 435
I. L. R. 43 Bom. 864

BOMBAY DISTRICT POLICE ACT (BOM. IV OF 1890).

———— s. 42—*District Magistrate—Order for prevention of disorder—Promulgation of the order—Presence of the Magistrate at the place when the order is promulgated—Ultra vires order.* A District Magistrate issued a notification, under the provisions of s. 42 of the Bombay District Police Act, 1890, prohibiting circulation of certain pictures throughout the whole District. The notification was promulgated in all the Taluka head-quarters. The Taluka head-quarters of the village, where the accused lived, was nearly twelve miles distant. At the time when he issued the notification, the District Magistrate was at a con-

under s. 42, because (i) it was not promulgated at the village where the accused lived; and (ii) the District Magistrate was not present at or near the village at the time of the promulgation. *Per* Chandavarkar, *J.*—The preliminary condi-
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Magistrate of the First Class; (ii) these must have jurisdiction in the town or village where the jurisdiction is intended to operate; (iii) they must be present *in such town or village* or *in the neighbourhood* thereof at the time the jurisdiction under the section is set in motion. EMPEROR *v.* DATTATRAYA LAXMAN (1912). . I. L. R. 36 Bom. 504

———— s. 61, cl. (b)—*Disregarding rule of the road—Driving a bicycle on a wrong side of the road—Vehicle—Bicycle.* A bicycle is a vehicle within the meaning of the word as used in cl. (*b*) of s. 61 of the District Police Act (Bombay Act IV of 1890). EMPEROR *v.* KIKABHAI (1917)
I. L. R. 41 Bom. 464

———— s. 62—Where the provisions of the Prevention of Cruelty to Animals Act 1890 are extended by the Bombay Government to a certain district under s. 1 (2) of the Act the extension does not by itself operate to repeal s. 62 of the Bombay District Police Act within that district. EMPEROR *v.* BHAGWAN KRISHNA THORAT.
I. L. R. 45 Bom. 203

———— ss. 63 (b), 80 (3)—*Complaint against police officer for vexatiously seizing property—Limitation for the application.* On the 2nd March, 1916, certain property was seized from the applicant by a police officer. The applicant was tried by a Magistrate and acquitted; and the property was returned to him on the 30th October, 1916. The applicant applied, under s. 63 (*b*) of the Bombay District Police Act (Bombay Act IV of 1890), charging the police officer with vexatiously seizing the property. It was objected that the application not having been made within six months from the date of the seizure was time-

BOMBAY DISTRICT POLICE ACT, (BOM. IV OF 1890)—*contd.*

———— ss. 63(b), 80(3)—*contd.*

barred under s. 80 (*3*) of the Act. *Held*, that the application was not barred by s. 80 (*3*), for the act complained of was the whole act of seizure by the police, which must be taken to have been a continuous act so long as the seizure by the police was maintained. MADHAV GANPATPRASAD *v.* MAJIDKHAN (1917). . I. L. R. 41 Bom. 737

BOMBAY GENERAL CLAUSES ACT (Bom. I OF 1904).

———— s. 3—

See MAMLATDARS COURT ACT, s. 23
I. L. R. 39 Bom. 552

BOMBAY HEREDITARY OFFICES ACT (BOM. III OF 1874).

See HEREDITARY OFFICES ACT.

———— s. 11—

See LIMITATION ACT (IX OF 1908) s. 14. . I. L. R. 43 Bom. 201

———— s. 15—*Mutalik Desai Vatan—Presumption in grants—In Vatans, grant is usually of the soil—In Inams and Saranjams, grant is, usually of the royal share of the revenue —Construction of grants.* The village of Rajgoli Khurd was granted to the plaintiff's ancestor in 1734 A. D., by a Maratha Ruler, for maintenance in return of service. The grant was expressed to be "Koolbab and Koolkanoo (*i.e.*, all taxes and assessments) but exclusive of the (Haks of) Hakdars and Inamdars." In 1858, the Inam Commissioner continued th
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service. A question having arisen whether the grant was of the royal share of the revenue or of

case of Inams and Saranjams cannot be conveniently made without detriment to the statutory restriction on the Vatandar's power of alienation and should not be made unless it is clearly justified by the terms of the settlement. In the Presidency of Bombay in the case of Inams and Saranjams the ordinary presumption in the absence of any indication to the contrary is in favour of the grant being limited to the royal share of the revenue; and clear words are necessary to indicate grant of the soil. The words ordinarily used to indicate a grant of the soil are "water, grass,

village is mentioned in a Sanad evidencing a settlement under s. 15 of the Bombay Hereditary Offices Act (Bombay Act III of 1874) it is for the party alleging that a particular survey number of that village is outside the scope of that settlement to prove it. AMRIT VAMAN *v.* HARI GOVIND (1919) . . . I. L. R. 44 Bom. 237

BOMBAY HEREDITARY OFFICES ACT (BOM. III OF 1874)—*contd.*

———— **s. 18**—

See BOMBAY REVENUE JURISDICTION ACT (X OF 1876), s. 4 (*a*).
I. L. R. 43 Bom. 277

———— **ss. 25, 36**—*Death of registered Vatandar—Representation—Eldest son or other nearest heir of the deceased—Suit for declaration—Jurisdiction.* S. 25 of the Hereditary Offices Act (Bom. Act III of 1874) imposes the duty upon the Collector of determining the custom of a Vatan and what person shall be recognized as representative Vatandar. A suit for a declaration that the plaintiff is the nearest heir of a deceased representative Vatandar is maintainable under s. 36 of the Act notwithstanding that it is manifest that the declaration is sought for the purpose of establishing fact which would enable the plaintiff to have his name entered in the Vatan Register. RAHIMKHAN *v.* DADAMIYA (1909) . **I. L. R. 34 Bom. 101**

———— *Suit for a declaration—Declaration that plaintiff is the nearest heir of a deceased representative Vatandar—Watan—Civil Court—Jurisdiction.* A suit for a declaration that the plaintiff is the nearest heir of a deceased representative Vatandar is within the jurisdiction of a Civil Court although a declaration that the plaintiff is entitled to have his name entered in Vatan Register is a matter beyond the jurisdiction of the Court. *Rahimkhan* v. *Dadamiya, I. L. R. 34 Bom. 101,* followed. SHANKAR BABAJI *v.* DATTATRAYA BHIWAJI (1915) . . **I. L. R. 40 Bom. 55**

BOMBAY HIGH COURT.

See HIGH COURT RULES AND ORDERS.

———— **Appellate Side Rule 65**—

See BOMBAY REGULATION II OF 1827, s. 52. . **I. L. R. 37 Bom. 303**

———— **Civil circulars**—

See HIGH COURT RULES AND ORDERS.

———— **cl. (17)**—In every proclamation for sale carried out under the Rules, it should be notified that any person wishing to set aside the sale under O. XXI of the Civil Procedure Code should make his application to the Court and not to the Collector, to whom the decree has been sent for execution, within thirty days from the date of the sale. SHANTMURTI DERAPPA *v.* NARAYAN RAMCHANDRA **I. L. R. 45 Bom. 1132**

BOMBAY HIGH COURT (CIVIL CIRCULARS)

———— **ch. II, cl. 91**—

See CIVIL PROCEDURE CODE, 1908, s. 70, O. XXI, R. 72.
I. L. R. 42 Bom. 621

———— **cl. 159**—

See CIVIL PROCEDURE CODE, 1908, s. 97
I. L. R. 38 Bom. 33

———— **ch. VI, p. 2**—

See CIVIL PROCEDURE CODE, 1908, ss. 115 AND 151 . **I. L. R. 38 Bom. 638**

BOMBAY IRRIGATION ACT (VII of 1879).

See IRRIGATION ACT.
I. L. R. 38 Bom. 116

BOMBAY LAND REVENUE CODE (V OF 1879).

See GUJERATH TALUKDARS' ACT (BOM. ACT VI OF 1888), s. 31.
I. L. R. 35 Bom. 97

See LAND REVENUE CODE, BOMBAY.

See BOMBAY REVENUE JURISDICTION ACT, (X OF 1876), ss. 4 (*c*), 5 AND 6.
I. L. R. 37 Bom. 542

———— **s. 3, cl. (19)**—*Village of Ghatkooper—Kowl (lease) for 99 years—"Alienated" village—Agricultural lease—Buildings erected by occupiers on their respective lands—Extra assessment levied by Government—Right to levy extra assessment not parted with under the kowl.* The *kowl* (lease) of the village of Ghatkooper in the Thana District granted by Government on the 31st December 1845 for 99 years provided *inter alia* that the grantee should pay to Government annually a fixed sum with respect to the land which had already been under cultivation and "that as to waste lands, the grantee should bring them all into cultivation within 40 years, and on the expiration of that period the full assessment, according to the prevailing usage of the country should be collected annually from the grantee on such quantity as might remain waste out of the present waste entered in the public accounts." The *kowl* further provided that "In respect of the abovenamed village you (grantee) are to consider yourself as a farmer thereof. You are therefore to exercise the authority vested in farmers by Chap. VI of Reg. XVII of 1827 or such as may hereafter be vested in them by any new enactment, shall also be exercised by you, and in the event of your acting contrary to the abovesaid enactments, you will be subject to such penalties as are now or may hereafter be provided for by Regulations." Subsequently some of the occupants of the village having built upon their respective lands, Government levied extra assessment from them under the provisions of the Bombay Land Revenue Code (Bom. Act V of 1879). The grantee under the *kowl* himself claimed the right to levy extra assessment on the ground that the village was an "alienated" village within the meaning of cl. (19) of s. 3 of that Code, and was, therefore, not liable to the provisions of the Code. He, therefore, applied to Government for a refund either wholly or in part of the extra assessment collected by them, and the Government having refused to grant his request, he brought a suit against the Secretary of State for India in Council praying (i) for a declaration that (*a*) the extra assessment imposed by the defendant upon lands appropriated for building sites in the village was illegal, (*b*) the Bombay Land Revenue Code (Bom. Act V of 1879) was not applicable to the village, and (*c*) the resolution of Government to the effect that the *kowl* was agricultural was erroneous, (ii) that the defendant be restrained by a permanent injunction from levying the extra assessment, (iii) that in the event of its being found that the Government were entitled to levy the assessment, it be declared that the plaintiff was entitled to receive the same, and (iv) that the amount, if any, received by the defendant on account of such assessment be awarded to him. The Court dismissed the suit. *Held,* on appeal, that having regard to the terms of the *kowl* it was a lease of the revenues of the village on certain

BOMBAY LAND REVENUE CODE (V OF 1879)—*contd.*

——— ss. 3, cl(19)—*contd.*

conditions. The object of the lease was agricultural and Government never parted with their rights so far as the right to build was concerned. The *kowl* was no more than a lease. The Government parted with their rights as lessors in favour of the grantee as lessee and imposed upon him certain conditions, none of which brought the

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vested in them by any new enactment shall be exercised by you and you will be subject to such penalties as are now or may hereafter be provided for by Regulations," brought the village within the operation of the provisions of the Bombay Land Revenue Code (Bom. Act V of 1879). HAJI ABDULLA *v.* SECRETARY OF STATE FOR INDIA (1911) . . . . I. L. R. 35 Bom. 462

——— ss. 3, 74, 76 and 88—*Rajinama—Unsurveyed alienated village—Inamdar—Rajinama executed in favour of the Inamdar—Rajinama inadmissible in evidence unless registered —Rajinama would not have the effect of extinguishing title—Inamdars power to receive notices of relinquishment—Indian Registration Act (XVI of 1908, section 90—" Holder of alienated land " interpretation of.* The land in suit was situated in an unsurveyed alienated village. The defendanr was an Inamdar of the village. The land was entered in the Inamdar's Khata book in the name of the plaintiff's father who had mortgaged it with possession to one Joti. In 1900, plaintiff's eldest brother passed a Rajinama to the defendant Inamdar relinquishing the land in suit. In 1908 the Inamdar entered into possession after redeeming the mortgage. The plaintiff having sued to recover possession of the land, the defendant contended that the Rajinama extinguished the interest of the plaintiff in the land and therefore the action in ejectment could not be sustained. A question having arisen whether the Rajinama was admissible in evidence for want of registration and whether it extinguished the rights of the plaintiff's family in suit land. *Held,* that the Rajinama did not come within the exemption of s. 90 of the Registration Act and was inadmissible for want of registration and therefore the rights of the plaintiff's family had not been extinguished, was only when a survey settlement had been introduced or when powers contemplated in section 88 of the Land Revenue Code had been introduced or when powers contemplated in s. 88 of the Land Revenue Code had been given to the Inamdar that he was entitled to receive notices of relinquishment under s. 74 of the Land Revenue Code and only such notices were exempt from registration under s. 90 of the Registration Act. SHIDHARAJ BHOJRAJ *v.* DASI (1920).
I. L. R. 45 Bom. 898

——— ss. 3(11), 109, 197 and 217—*'Holder'—A person in whom a right to hold land is vested—Occupants—Entry in the revenue register—Misunderstanding of an order—'Oversight'—Rectification of the register—Natural justice.* The term 'holder' as defined by s. 3 (*11*) of the Land Revenue Code (Bom. Act V of 1879) signifies the person in whom a right to hold land is vested. Where persons are not 'holders' their claim as occupants cannot be supported by s. 217 of the Land Revenue Code (Bom. Act V of 1879). Where an entry in the revenue register was due to a misunderstanding of a certain order: *Held,* that the cause of the error being of the same nature as 'oversight' falling within the description of

both parties, was not contrary to natural justice. It was a case in which the revenue officer concerned was authorized under s. 197 of the said Code to dispense with any judicial or *quasi*-judicial inquiry. WASUDEV LAKSHMAN *v.* GOVIND MAHADEV (1911)
I. L. R. 36 Bom. 315

——— s. 3, cl. (20) and s. 217—*"Alienated" interpretation of the term—Inamdar—Grant of soil—Survey Settlement—Effect of introduction of Survey Settlement in Inam lands.* The plaintiff was an Inamdar of a village. In 1880, the Survey Settlement was introduced into the village and in the settlement register the defendants-appellants were entered as Khatedars. Since 1880, they had been cultivating the lands in their occupation, paying only a sum equivalent to annual assessment to the Inamdar. In 1910, the plaintiff sued to eject the defendants, alleging that they were annual tenants. The defendants contended that by virtue of the provisions of s. 217 of the Land Revenue Code, 1879, the effect of the introduction of the Survey Settlement in 1880 was that thereafter the defendants had the same rights in respect

the meaning of that term as it was defined in cl. (20) of s. 3 of the Land Revenue Code, 1879, by reason of the entire property in the soil and not merely the rights to receive the land-revenue ... *Held,* that the ... lage within the ... Code, 1879, not- ... erty in the soil was granted by Government to the Inamdar. S. 217 of the Land Revenue Code, 1879, was, therefore, applicable to the case. *Pandu* v. *Ramchandra Ganesh, I. L. R. 42 Bom. 112,* approved. The words "transferred in so far as the rights of Government to payment of the rent or land-revenue are conce ... nue Cod ... requirem ... ment is ... notwithstanding that the transfer may cover certain other interests over and above those contained in the minimum requirement. DADOO BIN BHATOO *v.* DINKAR VISHNU (1918)
I. L. R. 43 Bom. 77

——— ss. 3 (11), 217—*Survey settlement introduced into Inam village—Inamdar's name entered as Khatedar—Permanent tenant of the Inamdar before the settlement—Inamdar's right to enhance rent.* S. 217 of the Bombay Land

BOMBAY LAND REVENUE CODE (V OF 1879)—*contd.*

——— ss. 3(ii), 217—*concld.*

Revenue Code (Bom. Act V of 1879) is not restricted in its application to registered occupants only: it invests "the holders of all lands" in alienated villages with the same rights and imposes upon them the same responsibilities in respect of the lands in their occupation that occupants in unalienated villages have. The term "holder" as defined in clause 11, s. 3 of the Land Revenue Code, is wide enough to include even a tenant who has entered into possession under an occupant. NANABHAI BAJIBHAI *v.* THE COLLECTOR OF KAIRA (1910) . . **I. L. R. 34 Bom. 686**

——— s. 10—

See FOREST ACT, 1878, s. 75.
I. L. R. 45 Bom. 110

See MAMLATDARS' COURTS ACT, BOMBAY (BOM. II OF 1906), s. 23.
I. L. R. 39 Bom. 552
I. L. R. 36 Bom. 123

——— s. 37—

See EVIDENCE ACT, 1872, s. 110.
I. L. R. 45 Bom. 789

———*Order—Suit to set aside order—Collector—Order ultra vires—Limitation Act (XV of 1877), Sch. II, Art. 14.* Art. 14 of the Second Schedule of the Indian Limitation Act only applies to orders passed by a Government officer "in his official capacity." The article does not apply to orders which are *ultra vires* of the officer passing them. When a Collector passes an order under the provisions of s. 37 of the Land Revenue Code (Bom. Act V of 1879), with reference to land which is *primâ facie* the property of an individual who has been in peaceful possession thereof and not of the Government, he is not dealing with that land in his official capacity, but in acting *ultra vires*. MALKAJEPPA *v.* SECRETARY OF STATE FOR INDIA (1911) . . **I. L. R. 36 Bom. 325**

——— ss. 40 and 214—

See FOREST ACT, 1878, s. 75.
I. L. R. 45 Bom. 110

———s. 48—*Government—Assessment on land—Land appropriated for agricultural purposes—Special user of land by stacking thereon timber in fair season—Construction of statute.* The plaintiff, who was the occupant of land used for agricultural purposes, paid to Government the assessment chargeable on "land appropriated" for those purposes under cl. (*a*) of s. 48 of the Bombay Land Revenue Code, 1879. During the seasons when the land was not used for agricultural purposes, the plaintiff had let it out for stacking timber and derived profit from this special user of the land. Government levied an additional assessment on the land on account of that special user, purporting to do so under s. 48, cl. (*b*) of the Code. *Held*, that the lands could not be charged with any additional assessment in respect of the special user under s. 48, cl. (*b*), of the Code; for the expression "appropriated for any purpose" in the clause means set apart for that purpose to the exclusion of all other uses. The Bombay Land Revenue Code (Bombay Act V of 1879) is a taxing enactment and must be construed strictly in favour of the subject. SECRETARY OF STATE *v.* LALDAS (1909)
I. L. R. 34 Bom. 239

BOMBAY LAND REVENUE CODE (V OF 1879)—*contd.*

——— s. 38—*contd.*

——— *Bombay Act I of 1865, s. 35—Agricultural land—Land used for brick kilns—Fine levied under s. 35 of Bombay Act I of 1865—Revision Survey—Land classed as agricultural—Subsequent erection of buildings on the land—Collector's power to levy enhanced assessment as building fine under s. 48 of the Land Revenue Code.* The plaintiff, who held certain agricultural land, began to use it for purposes of brick kilns in 1872. For this conversion of use, a fine of 30 times the assessment was levied from him by the Collector, under the provisions of s. 35 of Bombay Act I of 1865. Some huts were erected on the land about the time. The revision survey of the land took place in 1889, when the land was assessed as agricultural land. In 1901, the plaintiff erected substantial buildings on the land, for which he was called upon by the Collector in 1912 to pay extra assessment at the rate of Rs. 85 per year. The plaintiff sued to recover back the amount of the extra assessment levied from him and for a perpetual injunction restraining the Collector from levying it in future. *Held*, that substantial buildings having been erected on the land after the revision survey of 1889, the plaintiff was liable to pay the enhanced assessment under the provisions of s. 48 of the Bombay Land Revenue Code, 1879. MAHAMADBHAI DOSUBHAI *v.* THE SECRETARY OF STATE FOR INDIA (1917) **I. L. R. 42 Bom. 126**

——— s. 56—*Mortgagor in possession—Failure to pay assessment—Forfeiture of land—Re-grant of land to mortgagor by Collector under new tenure—Previous encumbrances not to subsist on the land re-granted.* In 1895, the defendants Nos. 1 and 2 mortgaged their lands to the plaintiff, one of the conditions of the mortgage being that the mortgagors were to remain in possession of the land, and to pay the Government assessment. Default having occurred in payment of assessment. the Collector demanded payment first from mortgagors and then from the mortgage. The latter expressed his willingness to pay, if he was placed into possession of the land. The Collector eventually forfeited the land in 1902; but shortly afterwards re-granted it to defendants Nos. 1 and 2 under s. 56 of the Bombay Land Revenue Code (Bom. Act V of 1879 as amended by Bom. Act VI of 1901) on a new tenure. The mortgagee (plaintiff) next obtained a decree on his mortgage; and in execution of it attached the land. The attachment was, however, raised by the Revenue authorities under s. 70 of the Code. The plaintiff sued for a declaration that the land was liable to be attached and sold in execution of his decree. The Court of first instance dismissed the suit on the ground that the plaint disclosed no cause of action. On appeal:—*Held*, that the land was, under the operation of s. 56 of the Bombay Land Revenue Code, vested in defendants Nos. 1 and 2 free from the incumbrance which had been created and from the equities theretofore existing between them and the plaintiff. VEDU SHIVLAL *v.* KALU UKHARDU (1913) . . . . **I. L. R. 37 Bom. 692**

———ss. 56, 214, rr. 32, 62, 68—*Occupancy—Non-payment of assessment—Forfeiture of occupancy—Re-grant to fresh occupants—Restoration of holding to original occupants—Collector, powers of* Owing to non-payment of assessment to

BOMBAY LAND REVENUE CODE (V OF 1879)—*contd.*

———— ss. 56, 214—*concld.*

Government, an occupancy was forfeited under s. 56 of the Bombay Land Revenue Code (Bom. Act V of 1879), and was thereafter disposed of by the Collector, under rr. 32 and 62 framed under s. 214 of the Code, to the defendants who signed *kabuliyats.* Some years after this, the Collector ordered the same occupancy to be taken from the defendants and given to the plaintiffs who had been occupants before the forfeiture. The defendants having declined to deliver up possession were sued by the plaintiffs. *Held,* that the Collector was not empowered by the rules framed under s. 214 of the Code to pass the order he did; and that the plaintiffs were, therefore, not entitled to succeed. R. 68 of the rules framed under s. 214 of the Bombay Land Revenue Code, 1879, empowers a Collector to restore a forfeited occupancy to the original occupant. But when a forfeited occupancy has been disposed of by grant to a new occupant, it ceases to be forfeited occupancy and the rule has no longer any application. DHARMA BAL PATIL *v.* BALAMIYA (1911)

I. L. R. 36 Bom. 91

———— ss. 56, 153—

See DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879)

I. L. R. 40 Bom. 483

———— ss. 65, 66—*Possession of land as owner for fifty years—User of land as graveyard and also as timber depôt—Order by Government for discontinuing the user as timber depôt—Order ultra vires—Land Revenue Code (Bom. Act V of 1879), ss. 65, 66.* The plaintiffs were in possession of the land in dispute as owners ever since 1860 and used a portion of it as a graveyard, and on another portion of it they built a shed which was used as a timber shop. In 1871, Government assessed the land and entered it in the Revenue Registers as "Government waste land." The plaintiffs paid no assessment on the land. In 1908, the District Deputy Collector passed an order directing the Mamlatdar to "cause the building and the wood to be removed forthwith from the said land." This order was finally confirmed by the Commissioner on the 24th April 1909. The plaintiffs filed the present suits on the 2nd February 1910, to obtain a declaration that they were absolute [illegible] dismissed the suits holding that the plaintiffs were not absolute owners but occupants only, and that the suits were barred under Art. 14 of the First Schedule to the Limitation Act, 1908. The plaintiffs having appealed: *Held*, that as the land in dispute was not used for the purpose of agriculture, neither s. 65 nor s. 66 of the Land Revenue Code (Bom. Act V of 1879) applied to the case, and the orders passed by the Revenue Authorities to evict the plaintiffs were *ultra vires.* RASULKHAN HAMADKHAN *v.* SECRETARY OF STATE FOR INDIA (1915) . . I. L. R. 39 Bom. 494

———— ss. 68, 73—

See KASBATIS. I. L. R. 39 Bom. 625

———— ss. 69 and 79—Land granted by Government on condition that it was not alienated.

BOMBAY LAND REVENUE CODE (V OF 1879)—*contd.*

———— ss. 69, 79—*concld.*

What amounts to alienation discussed. DHANJI *v.* THE SECRETARY OF STATE FOR INDIA.

I. L. R. 45 Bom. 920

———— s. 74—*Rajinama and Kabuliyat—Legal effect of Rajinama—Occupancy not subject to an* [illegible] *—Sale—Tran* [illegible] *s. 2 and 54—* [illegible] *and 90.* One [illegible] tain unalien [illegible] August 11th, 1904, relinquishing the Khata of the lands in favour of *D.* *D* on the same day executed a Kabuliyat to the Mamlatdar undertaking to pay land-revenue in respect of that Khata. *C* had not created any valid equitable interest in any third party by way of mortgage or otherwise. In 1911, he sold the lands to the plaintiffs by a registered sale-deed and the plaintiffs filed a suit for the purpose of obtaining possession from *D.* The Subordinate Judge held that in the absence of a registered sale deed as required by s. 54 of the Transfer of Property Act, 1882, the Rajinama could not by itself operate to transfer ownership in the property to *D.* The lower appellate Court found that by passing the Rajinama *C* intended to abandon all his interest in favour of *D* and dismissed the plaintiff's suit. On appeal to the High Court: *Held,* confirming the decree, that the legal effect of the Rajinama was the extinguishment of the interest of *C* in the property and therefore the plaintiffs got nothing by their sale deed MOTIBHAI JIJIBHAI *v.* DESAIBHAI GOKALBHAI (1916) . I. L. R. 41 Bom. 170

———— ss. 74, 76—

See RAJINAMA AND KABULIYAT.

I. L. R. 42 Bom. 359

———— s. 79—

See GUJARAT TALUKDARS' ACT s. 31..

I. L. R. 44 Bom. 832

———— s. 79A—*Gujarat Talukdari Act (Bom. Act VI of 1888)—Collector, powers of—Summary eviction—Persons in wrongful possession—Possession under a decree of Civil Court—Discretion of Collector—Jurisdiction of Civil Court to examine the order* The Talukdari Settlement Officer of Gujarat in exercise of his powers as Collector under s. 79A of the Land Revenue Code (Bom. Act V of 1879) authorised the summary eviction of a person who was in possession of land under the decree of a Civil Court. In a suit brought to set aside the order: *Held,* that the powers given by s. 79A of the Land Revenue Code, 1879, could only be exercised in cases of wrongful possession. *Held,* also, that no finality was given to the Collector's decision by the Land Revenue Code or Gujarat Talukdari Act; and the jurisdiction of the Civil Court to decide whether the person evicted was in rightful possession was not excluded. TALUKDARI SETTLEMENT OFFICER, GUJARAT *v.* UMASHANKAR NARSIRAM PANDYA (1910).

I. L. R. 35 Bom. 72

———— ss. 83, 216, and (B) 217—*Unalienated village—Inam grant of a portion of the village—Permanent tenancy—Rent—Enhancement—Inamdar entitled to enhance according to usage—Grant of "a definite share of a village," meaning of.* The plaintiff who was the holder of an Inam grant of

BOMBAY LAND REVENUE CODE (V OF 1879)—*contd.*

——— ss. 83, 216 and (B) 217—*contd.*

a portion in a surveyed unalienated village, claimed to recover increased rent from the defendants who were his tenants. The defendants contended that they were Mirasi tenants at a fixed rent. The lower appellate Court found that the defendants were permanent tenants and held that under the provisions of s. 216 (*b*) read with section 106 of the Land Revenue Code, 1879, the plaintiff had no right to claim enhancement in excess of the rates fixed by the Revision Survey, though he was of opinion that the maximum enhancement should be three times the assessment. The plaintiff having appealed to the High Court. *Held*, that the defendants being permanent tenants, and not occupancy tenants, they were subject to the saving clause in s. 83 of the Land Revenue Code, 1879, and therefore the plaintiff had a right to enhance the rent to a reasonable extent according to the usage of the locality. PER MACLEOD, C. J. :—"The phrase 'a definite share of the revenue of a village' or 'the definite share of a village' is perfectly well known in these Courts, and it cannot be said that a grant of 20 bighas or 10 bighas out of the cultivated area of a village can be construed as a grant of a definite share of a village." VYASACHARYA MADHAVACHARYA *v.* VISHNU VITHAL (1910). **I. L. R. 44 Bom. 566**

——— s. 83—*Presumption of permanent tenancy—Burden of proof—Ejectment suit.* In a suit by a landlord for ejectment the presumption ordinarily is that the tenancy is annual. If the tenant alleges permanent tenancy, the burden of proving it lies on him. If he has not got a document of permanent tenancy, he has to prove the antiquity of his tenure. If he shows it, it is for the landlord to show under s. 83 of the Land Revenue Code that there is evidence of the intended duration of the tenancy either by agreement or by usage. In absence of the proof, the presumption arises that the tenancy is co-extensive with the duration of the tenure of the landlord. MANEKLAL VAMANRAO *v.* BAI AMBA (1920)

I. L. R. 45 Bom. 350

——— *Landlord and tenant—Ejectment—Plea of permanent tenancy—No disclaimer of landlord's title—Notice necessary—Antiquity of tenancy—Fixity of rent—Rent note by tenant—Presumption of permanent tenancy—Burden of proof.* Where a tenant sets up permanent tenancy, it is not such a disclaimer of the landlord's title as to disentitle him from demanding notice to quit. *Vithu* v. *Dhondi (1890), 15 Bom. 407,* relied on. The defendant and his ancestors began to cultivate the land in suit on the same rent from a time which was lost in antiquity. In 1882 defendant passed a rent note for one year in favour of the landlord. In a suit for ejectment it was contended that by reason of the execution of the rent note, the presumption of permanent tenancy under s. 83, Land Revenue Code, would not arise. *Held*, that the presumption or permanent tenancy arising by reason of the antiquity of tenancy and the fixity of rent under s. 83 of the Land Revenue Code was not rebutted by the rent note passed by the defendant. *Raghunath* v. *Lakshuman (1899), 2 B. L. R. 93,* followed RAMA RANCHHOD *v.* SAYAD ABDUL RAHIM (1920).

I. L. R. 45 Bom. 303

BOMBAY LAND REVENUE CODE (V OF 1879)—*contd.*

——— s. 83—*contd.*

——— *Transfer of Property Act (IV of 1882), s. 108, cl. (h)—Permanent tenant—Right to cut trees—English law of fixtures—No application in this country.* A permanent tenant, the origin of whose tenancy is lost in antiquity and who has planted trees upon the lands demised, has a right to cut them down and to use them. The English law of fixtures and the principles upon which it is based have no applicability in this country. SITABAI *v.* SAMBHU SONU (1914)

I. L. R. 38 Bom. 716

——— s. 84—

See KHOTE SETTLEMENT ACT, SS. 8 AND 10.

See LAND REVENUE CODE.

——— s. 85—*Jurisdiction—Civil Court—Suit by superior holders against inferior holders to recover arrears of assessment.* The jurisdiction of civil Courts to try suits by superior holders to recover their dues from inferior holders is not barred by s. 85 of the Bombay Land Revenue Code (Bom. Act V of 1879). VISHWANATH GANESH *v.* KONDAJI (1917) . . . . **I. L. R. 42 Bom. 49**

——— ss. 102, 106—*Survey and Settlement Act (Bom. Act I of 1865), ss. 25, 28, 37, 38 (1)—Khoti village in Kolaba District—Survey and settlement—Introduction of "sanctioned" settlement—"Fixed or guaranteed"—Expiration of the period of "sanctioned" settlement—Continuance of the terms of the "sanctioned settlement" after the expiration of the period as still being sanctioned.* A question having arisen as to whether under the settlement of the *khoti* village in suit, which was sanctioned in 1863 and introduced in 1865 subject to all the provisions of the Survey and Settlement Act (Bom. Act I of 1865), and thereafter for a fixed period of twenty-seven years, the Government was entitled on the expiration of the said period of twenty-seven years to insist upon the terms imposed upon the Khot as between him and his tenants under the settlement as still being sanctioned. *Held*, that in 1892 when the fixed period of the settlements sanctioned in 1863 and introduced in 1865 came to an end, the terms which had been imposed upon the Khot under s. 38 of the Survey and Settlement Act (Bom. Act I of 1865), when that settlement was introduced, remained in force, since the settlement itself must be deemed to have been then and still to have been sanctioned and that Government was within its rights in insisting upon the Khot accepting certain clauses in the *kabuliyat* of that year. SECRETARY OF STATE FOR INDIA *v.* SADASHIV ABAJI (1911)

I. L. R. 36 Bom. 290

——— s. 121—*Boundaries—Collector's order—Adverse possession—Civil Court—Jurisdiction.* The plaintiff and the defendant were owners of adjoining survey numbers. The land in suit was situated between these numbers. The defendant having complained to Revenue Authorities of an encroachment made by the plaintiff over the plaint land, the Collector found that the plaintiff was wrongfully in possession of the land and ordered his eviction therefrom under s. 121 of the Land Revenue Code. The plaintiff, therefore, sued to recover possession on the ground that he had acquired a perfect title to the land in dispute by adverse possession. The lower Courts held that

BOMBAY LAND REVENUE CODE (V OF 1879)—*contd.*

——— s. 121—*contd.*

they had no jurisdiction to hear the suit. On appeal to High Court. *Held*, that the order of the Collector adjudging that the plot in dispute formed part of the defendant's survey number did not stand in the way of a Civil Court going into the question of adverse possession. S. 121 of the Bombay Land Revenue Code merely enables the Collector to evict summarily a landholder who is wrongfully in possession of land which has been adjudged by the settlement of a boundary. But whether the Collector's order would be legally correct or not would still remain to be determined by a Civil Court if a suit were brought. *Bai Ujam* v. *Valiji Rasulbhai (1886), 10 Bom. 456*, considered. BHAGA MOTIGI *v.* DORABJI (1920).

I. L. R. 45 Bom. 67

——— s. 135-H—*Held*, that an Appellate Court has discretion to allow a plaintiff an opportunity of making good the omission to annex a certified copy of the entry in the Record of Rights required by s. 135. GIRJABAI *v.* HEMRAJ.

I. L. R. 45 Bom. 1339

———s. 135 J—*Record of Rights, entries in —Presumption of correctness—Retrospective effect.* The provisions of s. 135 J of the Bombay Land Revenue Code, 1879, are not retrospective with regard to entries which for the purpose of determining the rights of the parties were until after the year 1913 innocuous. HATHISING JEEBHAI KUBER JETHA . . I. L. R. 44 Bom. 214

——— ss. 144, 160—(*As amended by the Gujarat Talukdars Act, Bom. Act VI of 1888, s. 33. Talukdar—Payment of Jama to Government in lump sum for the whole village—Grant of lands rent-free by the Talukdar—Attachment of village by Government consequent upon non-payment of Jama by Talukdar—Right of Government to recover proportionate assessment from the grantee of rent-free lands.* The Talukdar of a village, who paid the Government assessment for the whole village in a fixed sum, granted certain lands to the plaintiff free of rent. The assessment not having been paid by the Talukdar, the Government attached the village under the provisions of s. 144 of the Bombay Land Revenue Code, 1879, and proceeded to levy proportional assessment from the plaintiff in respect of the lands held by him. The plaintiff sued to restrain the Government from levying the assessment from him: *Held*, dismissing the suit that the fact that the plaintiff held rent-free lands from the Talukdar, did not affect the right of Government to levy proportionate assessment from the plaintiff under the provisions of s. 160 of the Bombay Land Revenue Code, 1879. TULJA SOBHARAM *v.* THE COLLECTOR OF KAIRA (1918)

I. L. R. 43 Bom. 6

——— s. 154—

See PENAL CODE, s. 379.

I. L. R. 43 Bom. 550

——— Chap. XII—

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), s. 195.

I. L. R. 39 Bom. 310

——— s. 202—*Resumption—Pasaita Inam land—Patelki service—Exemption from payment of land revenue in return for service as Patel—Service ceasing claim for exemption from paying land revenue ceases—Government not entitled to resume Possession of land.* The land in suit was held as a *Pasaita Inam* land by one Vallabh Pema. It was entered as *Chakariat* at the time of the settlement in 1868 and in consideration of rendering services as a Patel, Vallavh Pema was excused from paying revenue to Government. In 1916 Vallabh Pema was removed from the Patelship and a stranger to the family was selected to officiate in his place. The Collector then purporting to act under s. 202 of the Land Revenue Code made an order that Vallabh Pema should vacate the land and hand over possession to the new Patel. The plaintiff, grandson of Vallabh Pema, thereupon sued for a declaration that the plaintiff had a right to hold and occupy the suit land so long as he paid the full assessment to the Government and that the Government had no right to evict the plaintiff. *Held*, that the plaintiff was entitled to succeed as his right to possession of land was not lost though his family ceased to hold the Patelkiship and their claim for exemption from paying the land revenue came to an end. BHAVAN MORAR *v.* THE SECRETARY OF STATE.

I. L. R. 45 Bom. 894

——— s. 214—

See FOREST ACT (VII OF 1878), s. 75.

I. L. R. 45 Bom. 110

——— s. 216—*Unalienated village—Grant of certain lands within unalienated village—Survey settlement—Permanent occupant—Right of grantee to enhance rent—Rent can be enhanced according to usage of district.* In an unalienated village where there has been a grant of certain fields by Government to be held on certain terms either absolutely free from payment of revenue or merely on payment of a portion of the revenue, such lands were not intended to be brought within the purview of s. 216 of the Land Revenue Code, 1879. Even though survey might be introduced into the unalienated village, the grantee of lands from Government will be entitled to enhance the rent of the occupants holding the land permanently under him within the limits of the usage or custom of the particular district in which the lands were situate. SITARAM SADASHIV *v.* TUKARAM DAJI (1920) . . . . I. L. R. 45 Bom. 994

——— ss. 216 and 217—*Sharakati Inam Village—Extension of survey settlement to the village without consent of the Inamdar—Right of the Inamdar to levy dues according to Mamul rates—Decree in favour of Inamdar to levy Mamul dues from Khots—Second suit to recover Mamul dues for subsequent years—Res judicata—Point of law—Civil Procedure Code (Act V of 1908), s. 11—The principle of stare decisis, applicability of.* The Sharakati Inam village of Kasar-Kolwan was divided half and half between Government and the plaintiff Inamdar but not by metes and bounds. In 1885-86 survey settlement was introduced into the village without the consent of the Inamdar. The defendant-khots who were in the position of occupants in the village used to collect the assessment, half of which they paid to Government. The Inamdar did not rest content with the other half, but levied payment at Mamul rate, which was a higher rate. At first the defendants made the payment. In 1892 the plaintiff sued the defendants to recover Mamul dues for the years 1888-1890. The Court decreed the plaintiff's

BOMBAY LAND REVENUE CODE (V OF 1879)—*contd.*

——— **ss. 216 and 217**—*contd.*

claim following the decision in *Gangadhar Hari Karkare* v. *Morbhat Purohit (1893) 18 Bom.* 525. In 1917, the plaintiff again sued one of the defendants to recover the Mamul dues for the years 1915 and 1916. The defendant contended that all that the plaintiff was entitled to recover was one-half of the survey assessment under ss. 216 and 217 of the Bombay Land Revenue Code; but the plaintiff contended that the defendant was barred by *res judicata* from re-agitating the question: *Held*, that the principle of *stare decisis* should be applied. SITARAM SAKHARAM *v.* LAXMAN VINAYAK . . **I. L. R. 45 Bom. 1260**

——— **s. 217**—

See KADIM INAMDAR. **I. L. R. 42 Bom. 112**

——— *Inamdar grantee of the soil as well as of the royal share of the revenue—Mirasdar—Right to enhance rent—Introduction of survey settlement into a village with the consent of Inamdar—Inamdar cannot enhance rent beyond the amount of assessment.* The plaintiff was a Kadim Inamdar of certain lands in a village. He was a grantee of the soil and not merely of the royal share of the revenue. Survey Settlement was introduced into the village with his consent or acquiescence. The defendant was a Mirasdar (permanent tenant) of the lands and he used to pay as rent the amount of assessment which was fixed for the land. The plaintiff having claimed to recover enhanced rent from the defendant: *Held*, that the defendant was, by virtue of s. 217 of the Bombay Land Revenue Code, 1879, entitled to hold the lands on payment only of the amount of assessment as rent; and that the plaintiff could not enhance the rent. *Dadoo bin Bhatoo* v. *Dinkar Vishnu. (1918) 43 Bom.* 77, followed. Pershad J. Assuming that the consent of the plaintiff would be necessary for a valid introduction of the survey settlement into the village, it seems to me that having regard to his statements in this suit, he must be taken to have accepted the introduction of the survey settlement. The Judgment under appeal proceeds on the assumption that the survey settlement has been validly introduced into this village and the suggestion to the contrary made in the argument must be disallowed. PANDU *v.* RAMCHANDRA (1920). **I. L. R. 45 Bom. 61**

——— *Alienated village—Sanad granted to Inamdar under Bombay Act II of 1863—Introduction of Survey Settlement under Bom. Act I of 1865—Right of Inamdar to enhance assessment at the end of the period of settlement.* In 1870, survey settlement was introduced into an Inam village under Bombay Act I of 1865, on the application of the Inamdar, who held the village under a Sanad granted under the Survey Settlement Act (Bom. Act II of 1863). The period of the settlement expired in 1888. From 1895 to 1910, the plaintiff recovered, with the concurrence of the Collector, higher assessment than that allowed under the survey settlement. The Commissioner having objected to the Inamdar doing so in 1910, the Inamdar sued to establish his right to charge higher assessment:—*Held*, that the Inamdar had not the right to enhance the assessment, because

BOMBAY LAND REVENUE CODE (V OF 1879)—*concld.*

——— **s. 217**—*contd.*

s. 217 of the Bombay Land Revenue Code, 1879 applied when a survey settlement had been introduced into an alienated village with the consent of the alienee under Bombay Act I of 1865 and when the period of the settlement had expired after the Land Revenue Code of 1879 came into force. DHONDO VASUDEV *v.* THE SECRETARY OF STATE FOR INDIA. . . **I. L. R. 44 Bom. 110**

BOMBAY MAMLATDAR COURT ACT (BOM. II OF 1916).

See MAMLATDAR COURT ACT.

BOMBAY PREVENTION OF GAMBLING ACT (BOM. IV OF 1887).

——— **s. 3**—*Instruments of gaming—Book used for recording bets already made is an instrument of gaming.* A book which is used for recording entries of the bets made by persons frequenting a place, is an instrument of gaming, within the definition of that term in s. 3 of the Bombay Prevention of Gambling Act (Bombay Act IV of 1887). *Emperor* v. *Lakhamsi, I. L. R. 29 Bom. 264*, followed. EMPEROR *v.* MANILAL MANGALJI (1915) . . **I. L. R. 40 Bom. 263**

——— **s. 4, cls.** (*a*), (*c*)—*Place—Interpretation—A chok having houses on all sides and approached by a narrow lane.* The accused were convicted under s. 4, cls. (*a*) and (*c*), of the Bombay Prevention of Gambling Act (Bom. Act IV of 1887), for having the use of a place and keeping or using the same for the purpose of a common gaming house. The spot in question was a small open space surrounded by houses on all sides and accessible only by a narrow lane on which was a sign-board pointing to the spot. The accused No. 1 was the lessee in occupation of the spot. The question for determination was whether the spot in question was a "place" within the meaning of s. 4, of the Act: *Held*, that the spot in question was a place within the meaning of s. 4, inasmuch as it was a small area, limited by metes and bounds, surrounded on all sides by buildings, and appropriated for the business of betting by the accused No. 1 becoming the lessee in occupation of it. EMPEROR *v.* FATTOO MAHOMED. . . . **I. L. R. 37 Bom. 651**

——— **ss. 5, 6 and 7**—*Gaming in a common gaming-house—Search of the house without warrant issued under s. 6—Presumption under s. 7 cannot arise in search conducted without warrant under s. 6.* The Deputy Commissioner of Police in Bombay, who was invested by the Commissioner of Police with power to issue warrants under s. 6 of the Bombay Prevention of Gambling Act (Bom. Act IV of 1887), on receipt of certain information on oath, personally raided a house and searched it, without issuing a warrant under the provisions of s. 6. The accused seventeen in number were not seen gaming, but there were found three packs of playing-cards and small coin lying near them. The accused were tried for the offence of gaming in a common gaming-house; and the trying Magistrate applying to them the presumption raised by s. 7 of the Act, convicted them of an

BOMBAY PREVENTION OF GAMBLING ACT (BOM. IV OF 1887)—*contd.*

———— ss. 5, 6 and 7—*contd.*

offence under s. 6. The accused applied to the High Court: *Held*, that the presumption under s. 7 that the mere finding of cards and dice was to be taken as evidence that the house in which they were found was used as a common gaming-house, could only arise when the house is entered under warrant issued under s. 6 of the Act. *Held*, accordingly, that the accused should be acquitted and discharged. *Emperor* v. *Fernad, I. L. R. 31 Bom. 438*, considered. EMPEROR *v.* JAFFUR MAHOMED (1912) . . **I. L. R. 37 Bom. 402**

———— s. 8—*Order of forfeiture—Cash and ornaments found on the person of the gamblers.* Cash, ornaments and currency notes found on the person of the accused convicted of gambling, cannot be ordered to be forfeited under s. 8 of the Bombay Prevention of Gambling Act, 1887. *Emperor* v. *Walli Mussaji* (1902) 26 Bom. 641, referred to. EMPEROR *v.* SADASHIV BAB HABBU. **I. L. R. 44 Bom. 686**

———— s. 12—*Gambling in the courtyard of a mosque—Sentence.* The accused who were peons and mill-hands betook themselves on a hot afternoon to the cool shades of a musjid where they amused themselves by playing cards for very insignificant stakes. They were convicted for an offence under s. 12 of the Bombay Prevention of Gambling Act, 1887, and sentenced to undergo simple imprisonment for fifteen days: *Held*, that the sentence passed was, under the circumstances, out of proportion to the criminality of the acts charged; and that a sentence of small fine would have been adequate. EMPEROR *v.* MAHOMED NATHU (1916) **I. L. R. 41 Bom. 149**

BOMBAY PUBLIC CONVEYANCES ACT (BOM. ACT VI OF 1863).

———— s. 1—*Public conveyance—Hand-drawn lorry is a public conveyance.* A hand-drawn lorry plied for the conveyance of goods is a public conveyance within the meaning of the expression as defined in the Public Conveyances Act (Bom. Act VI of 1863). EMPEROR *v.* BANUBHAI HADUBHAI (1912) . . . **I. L. R. 37 Bom. 374**

———— s. 28—**Proceeding to recover legal fare, not complaint for an offence—**

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), s. 250.

I. L. R. 44 Bom. 463

BOMBAY REGULATION (II OF 1827).

See HINDU LAW—CASTE QUESTION. *I. L. R. 36 Bom 94.*

———— s. 5—

See CIVIL PROCEDURE CODE (ACT V OF 1908), s. 115 . **I. L. R. 40 Bom. 86**

———— s. 52—*Pleaders' Act (I of 1846), ss. 6 and 7—Bombay High Court Appellate Side Rules. Rule 65—Pleaders' fees—Taxation—Appeal from a preliminary decree deciding status of agriculturist—Practice.* The pleaders' fees in the High Court, in an appeal from a preliminary decree determining the status of an agriculturist, must be assessed at Rs. 30 under Rule 65 of the Bombay High Court Appellate Side Rules, and not on the subject-matter in dispute, under s. 52 of the Bombay Regulation II of 1827 or under s. 6 of Act I of 1846. MANOHAR RAMCHANDRA *v.* THE COLLECTOR OF THE NASIK DISTRICT (1912) **I. L. R. 37 Bom. 303**

BOMBAY REGULATION (II OF 1827)—*contd.*

———— s. 52—*contd.*

———— s. 56—*Pleader—Pleader in the mofussil—Duty towards client—Winding up proceedings—Pleader must not represent parties whose interests are conflicting.* By the custom of the mofussil a pleader employed by a party to a proceeding before a Court is bound faithfully and exclusively to serve that party throughout the whole proceeding. The pleader in the mofussil is not merely an advocate—he is the confidential legal adviser of his client and does for him those things which in the Presidency towns are often done by solicitors. For legal advice, for the prosecution of legal proceedings in all their stages, the client depends on the pleader. This dependence makes the position of the pleader peculiarly onerous and binds him to give exclusive attention to the interests of the client throughout any proceedings in which he is engaged. In winding up proceedings, a single pleader must not represent two different creditors whose interests are known to conflict. A pleader must not accept a vakalatnama when he knows that he cannot act for his client throughout the proceedings. A pleader in defending himself against charges of professional misconduct made certain statements. He was dealt with under the disciplinary jurisdiction for making them. It was contended in his behalf that the statements made by him in defence must be regarded as having been made by an accused and were therefore protected. *Held*, overruling the contention, that the pleader was writing to the Court as a pleader and was responsible as such for the statements made by him. GOVERNMENT PLEADER *v.* BHAGUBHAI DAYABHAI (1912) **I. L. R. 36 Bom. 606**

————————*Pleader—Misbehaviour — Not limited to professional misconduct—High Court—Disciplinary jurisdiction.* The term "misbehaviour" in s. 56 of the Bombay Regulation II of 1827 is not restricted to misbehaviour in the strict course of a pleader's professional duties, but includes general misbehaviour. There is no reason to suppose that the Legislature intended in this matter to enact a laxer rule of practice in India than the rule which prevails in England. GOVERNMENT PLEADER, BOMBAY *v.* ANNAJI NARAYAN DESHPANDE (1912) **I. L. R. 37 Bom. 354**

———— **1827—IV.**

———— **s. 26—**

See CUSTOM . **I. L. R. 45 Calc. 450**

See PRE-EMPTION **I. L. R. 40 Bom. 358**

————**1827—V**

———— **s. 1—**

See LIMITATION **I. L. R. 37 Bom. 231**

BOMBAY REVENUE JURISDICTION ACT (BOM. X OF 1876)—*contd.*

—— s. 4—*contd.*

taken away by the defendants who claimed the right to retain the skins as Mahar-Watandars of the village. The lower Courts dismissed the suit as barred by s. 18 of the Bombay Hereditary Offices Act, 1874, and s. 4 (*a*) of the Bombay Revenue Jurisdiction Act, 1876. The plaintiffs having appealed: *Held*, that the question, whether there was a Mahar-Watan was within the jurisdiction of the Civil Courts. *Held*, also, that the plaintiffs would be entitled to their injunction unless the defendants succeeded in showing that there was an hereditary office of Mahars. SAVLA-BIN TUKARAM *v.* SANTYA VALAD PARSHA (1918) **I. L. R. 43 Bom. 277**

——*Kulkarni Vatan—Commutation—Suit for a declaration of right as Vatandar—Civil Court—Jurisdiction—Indian Limitation Act (IX of 1908), Schedule I, Articles 14 and 91.* The plaintiffs were the hereditary Kulkarni Vatandars of certain villages. By an agreement dated the 7th July 1914, arrived at between the plaintiffs and the Government, the plaintiffs consented to the commutation of their Vatans. On the 30th September 1917, the plaintiffs filed suits for a declaration that they were the Vatandars and were entitled to the vahivat of the Kulkarni Vatan hereditarily as before. *Held*, that the suits were barred under s. 4 (*a*) of the Bombay Revenue Jurisdiction Act, 1876. *Held*, also, that even if the suits be treated as having been brought to set aside the agreement they were barred under Article 14 or under Article 91 of the Limitation Act, 1908. DAMODAR KRISHNA *v.* THE SECRETARY OF STATE FOR INDIA . **I. L. R. 44 Bom. 261**

—— *Collector's order—Civil Courts—Jurisdiction—If right of action against East India Company jurisdiction of Civil Court cannot be ousted by Legislature.* The plaintiffs claimed to be the occupants of land in suit. In 1914 the Collector at the instance of the second defendant made an order that the lands should be resumed and restored to him as the holder of a sanad granted to his predecessors in 1841. The plaintiffs thereupon sued for a declaration that the order made by the Collector was not binding on them and that they had an absolute right over the lands in suit. The lower Court dismissed the suit as barred under s. 4 (*a*) of the Bombay Revenue Jurisdiction Act, 1876. On appeal to the High Court: *Held*, remanding the case, that if the plaintiffs could show that their predecessors-in-title cultivating the suit lands in 1841 had such rights of occupancy that if dispossessed by the East India Company, they would have had a right to sue the Company on account of such dispossession, the jurisdiction of the Civil Court would not be ousted. *Secretary of State for India* v. *Moment (1912) 40 Calc. 391*, considered. DAMODAR TUKARAM *v.* SECRETARY OF STATE FOR INDIA **I. L. R. 45 Bom. 1161**

—— **s. 4 (a), Prov. (k) and ss. 5 (a) and (b)**—*Khatib Inam land—Alienation of land by Inamdar's widow—Adjudication passed by Inam Commissioner exempting the land from payment of assessment—Collector's order directing alienee to pay economic rent to the officiator appointed—Suit by alienee to set aside the order—Jurisdiction—Civil Court.* The lands in suit were originally granted in Inam to one Fakarudin for Khatibgiri services. In 1856 by an adjudication passed by the Inam Commissioner under Bombay Act XI of 1852, it was declared that the lands were to be held by the Inamdar free from payment of land revenue. In 1864 Fakarudin's widow Pachhabi alienated the lands and transferred the Khatibgiri right to plaintiff's father. Thereafter the plaintiff enjoyed the lands free from assessment and performed the services as Khatib until 1911 when an order was passed by the Commissioner directing that the full economic rent be recovered from the plaintiff and be paid to defendant No 3 as long as he officiated as Khatib on behalf of the Inamdar. The plaintiff sued for a declaration that the Commissioner's order was invalid and not binding upon him and also claimed the right to officiate as Khatib. The defendants contended that the jurisdiction of the Civil Court was ousted under s. 4 (*a*) of the Bombay Revenue Jurisdiction Act, 1876; and the suit was not saved by clause (*k*) of the proviso to that section, nor by s. 5 (*a*) and (*b*) of the Act. *Held*, that the plaintiff's claim being a claim to hold land wholly or partially free from payment of land revenue under an adjudication duly passed by a competent officer under Bombay Act XI of 1852, was cognizable by the Civil Court under clause (*k*) of the proviso to s. 4 of the Bombay Revenue Jurisdiction Act. The fact that the plaintiff claimed as alienee did not take the case out of the proviso. *Held*, further, that the claim to perform the services as Khatib apart from the claim to hold the lands exempt from the payment of land revenue, was, although in form a claim covered by the first part of the second paragraph of s. 4 (*a*) of the Revenue Jurisdiction Act, 1876, in substance a matter between private parties and might be treated as falling under s. 5 (*b*) of the Act, notwithstanding the suit was against Government and was thus cognizable by Civil Courts. FAKARUDINSAB *v.* THE SECRETARY OF STATE FOR INDIA **I. L. R. 44 Bom. 130**

—— Where a Vatandar applies to the Collector to declare that a particular alienation of Vatan property is void but the Collector refuses to make the order the party aggrieved can file a suit in a Civil Court against the alience in respect of the alienation. DATTATRAYA KESHAV *v.* TUKARAM RAGHU. **I. L. R. 45 Bom. 1141**

—— **s. 4 (a), Prov. (k)**—*Kazi Inam lands—Alienation of lands by Inamdar—Adjudication passed by Inam Commissioner declaring the land to be held wholly free of assessment—Order passed by the Collector directing alienee to pay rent to Kazi or else directing resumption—Suit by alienee to set aside the order—Civil Court—Jurisdiction.* The lands in suit were granted in Inam for Kazi services. In 1852 by the decision of the Inam Commissioner it was declared that the lands will be continued to be held wholly free of assessment. In 1914 the Collector passed an order directing that the plaintiff who was an alienee from the Inamdar should pay a certain rent on the lands in suit for Kazi services or else the lands would be resumed from his possession. The plaintiff sued for a declaration that the order of the Collector was illegal and *ultra vires*. The defendant Kazi contended that the plaintiff's

BOMBAY REVENUE JURISDICTION ACT (BOM. X OF 1876)—*contd.*

———— s. 4—*contd.*

claim being against Government relating to the property appertaining to his office as village officer, the jurisdiction of the Civil Court was ousted under s. 4 (*a*), paragraph 1 of the Bombay Revenue Jurisdiction Act, 1876. *Held*, that the plaintiff's claim being a claim to hold land wholly exempt from assessment under the decision of the Inam Commissioner was clearly within the scope of Proviso (*k*) of s. 4 of the Bombay Revenue Jurisdiction Act, 1876, and therefore cognizable by Civil Court. *Held*, also, that the proviso to s. 4 of the Bombay Revenue Jurisdiction Act, 1876, in terms applied to any person claiming exemption from land revenue under an adjudication duly passed by a competent officer under Bombay Act XI of 1852 and an alienee from the Inamdar could not be treated as being outside the scope of the proviso. MAHAMADSAHEB *v.* THE SECRETARY OF STATE FOR INDIA **I. L. R. 44 Bom. 120**

———— ss. 4, 5, 6—*Held*, that s. 4 is not a bar

in question the Court has to enquire under s. 6 whether the act complained of was done *bonâ fide* The Mamlatdar can only exercise delegated powers in the Taluka which the delegation occurred. GANGARAM HATIRAM *v.* DINKAR GANESH **I. L. R. 37 Bom. 542**

———— s. 11. *See* PROVINCIAL SMALL CAUSE COURT ACT, 1877, SCH. II. **I. L. R. 39 Bom. 131**

———— s. 11—*Collector's order. Forfeiture of land—Appeal—Suit to set aside order of forfeiture—Limitation.*

See LIMITATION ACT (IX OF 1908), SCH. I, ART. 14. **I. L. R. 44 Bom. 451**

———— s. 12—

See BOMBAY REVENUE JURISDICTION ACT (X OF 1876). **I. L. R. 45 Bom. 1177**

———— s. 12 gives the High Court jurisdiction not only to say which party should bear the costs but also on what scale they should be taxed. JAGANNATH WASUDEV PANDTI *In re* . . . **I. L. R. 45 Bom. 1177**

———— *Reference by Government to High Court—Bombay Summary Settlement Act (Bom. Act II of 1863), s. 1—Summary Settlement—Inam Dharmadaya—Sanads—Jaghir—Treaty between the Government and the Native State—Lands, whether held under a treaty or on political tenure.* Under s 12 of the Revenue Jurisdiction Act, 1876, Government can refer a question for the decision of the High Court, when investigating any claim or objection which before 1876 may have been excluded from the cognizance of a Civil Court In 1818, the British Government granted by a Sanad some villages in Chikodi and Manowlee as Inam Dharmadaya to be enjoyed from "son to grandson, etc , from generation to generation." Shortly afterwards, the talukas of Chikodi and Manowlee were ceded by the British Government to the Maharaja of Kolhapur. In 1821, the Raja of Kolhapur granted some more villages in the said talukas to the same grantee. In 1826, a

BOMBAY REVENUE JURISDICTION ACT (BOM. X OF 1876)—*concld.*

———— s. 12—*concld.*

treaty was concluded between the British Government and the Maharaja of Kolhapur One of the articles of the treaty provided that the Raja of Kolhapur promised to continue to the grantee his lands and rights; and the British Government guaranteed enjoyment of those villages to the grantee for life, provision being made that the rights of the grantee's descendants as founded on Sanad or custom should not be prejudiced by the cessation of the said guarantee As the Raja did not keep his promise not to molest the grantee, the British Government made in 1827 a further treaty with the Raja of Kolhapur, by which it was provided that the latter should give back to the former the said talukas "in the same state in which he received them," and that, as the Raja

and the Raja accordingly engaged never to molest them. Thereafter, in 1828, a question having arisen with regard to the villages granted by the Raja in the said talukas, it was declared by the Government that the same should be allowed to remain in possession of the grantee as if the grant was made with the concurrence of the British Government. In 1863, on the introduction of the Summary Settlement, the Government was of opinion that no *primâ facie* case had been made out for excluding the grantee's lands from the benefit of the Summary Settlement on the ground of their being held on political tenure, and the Summary Settlement was accordingly applied to the grantee's lands with his consent. It was contended, nearly sixty years afterwards, that the lands in question being either lands held under a treaty or under political tenure, were excepted from the provisions of the Bombay Summary Settlement Act, 1863. *Held*, (1) that at the time of Summary Settlement the lands in question were not held under a treaty, for neither was it shown that the original title was under a term of treaty which remained in force nor that the treaty of cession guaranteed title; (2) that the title of the grantee to the lands in question originated in the Sanads of 1818 and 1821, and that when the two talukas were given back by the Raja to the British Government in 1827, the existing rights of the grantee under the Sanads remained undisturbed *pleno vigore* and were so recognised by the British Government; (3) that the grant was specifically described in the Sanad as Dharmadaya Inam, and there was nothing to show that it was a Jaghir or held under political tenure; (4) that, therefore,

guished. *In re* VASUDEV HARIHAR PANDIT (1920) **I. L. R. 45 Bom. 463**

BOMBAY SURVEY AND SETTLEMENT ACT (BOM. I OF 1865).

———— ss. 25, 28, 37, 38—*Land Revenue Code (Bom. Act V of 1879), ss. 102, 106—Khoti village in Kolaba District—Survey and Settlement—Introduction of "sanctioned" settlement—"Fixed or guaranteed"—Expiration of the period of "sanc-*

BOMBAY SURVEY AND SETTLEMENT ACT (BOM. I OF 1865)—*contd.*

——— **s. 25**—*contd.*

tioned" settlement—Continuance of the terms of the "sanctioned" settlement after the expiration of the period as still being sanctioned. A question having arisen as to whether under the settlement of the khoti village in suit which was sanctioned in 1863 and introduced in 1865 subject to all the provisions of the Survey and Settlement Act (Bom. Act I of 1865), and thereafter for a fixed period of twenty-seven years, the Government was entitled, on the expiration of the said period of twenty-seven years, to insist upon the terms imposed upon the Khot as between him and his tenants under the settlement as still being sanctioned: *Held*, that in 1892 when the fixed period of the settlement sanctioned in 1863 and introduced in 1865 came to an end, the terms which had been imposed upon the Khot under s. 38 of the Survey and Settlement Act (Bom. Act I of 1865), when that settlement was introduced, remained in force, since the settlement itself must be deemed to have been then and still to have been sanctioned and that Government was within its rights in insisting upon the Khot accepting certain clauses in the *kabuliyat* of that year. SECRETARY OF STATE FOR INDIA *v.* SADASHIV ABAJI (1911)

I. L. R. 36 Bom. 290

BOMBAY TITLES TO RENT-FREE ESTATES ACT (BOM. XI OF 1852).

——— **Shetsanadi lands**— *Rules framed under Act XI of 1852 (Bombay)—Government continuing the shetsanadi lands to the family of the shetsanadi who is discharged by Government without any fault on his part—Continuance on condition of paying full survey assessment on the lands—Subsequent resumption of the lands by Government.* On the death in 1865 of the then *shetsanadi*, one *B*, Government appointed one *Y* as the new *shetsanadi*; but under the rules framed under Bombay Act XI of 1852, Government continued the *shetsanadi* lands to the family of *B* on condition of their paying full survey assessment on the lands. The remuneration of *Y* was made payable out of the extra assessment recovered in 1905. Government resumed the lands and handed them over to *Y* for his services: *Held*, that both the order passed in 1865 and the action taken under the rule framed under Bombay Act XI of 1852 had in law the effect of converting the land from a *shetsanadi vatan* into a *rayatwari* holding and investing the holder of the land with the rights of an ordinary occupant, entitled to it, so long as he paid the survey assessment. *Held*, also, that the proceedings of 1905 were on the supposition that what was done in 1865 on *B's* death had the effect of continuing the lands in dispute as one reserved for *shetsanadi* service; but that was not its effect, and the proceedings in question were *ultra vires*. YELLAPPA *v.* MAHLINGAPPA (1910) . **I. L. R. 34 Bom. 569**

BOMBAY VILLAGE POLICE ACT (BOM. VIII OF 1867).

——— **s. 9**—*Held*, that a District Magistrate had power to appoint [illegible] (inferior village police) in a Talukdari village. [illegible] *v.* [illegible].

I. L. R. [illegible] Bom. 677

——— **s. 14**—

See [illegible] ACT, 18[illegible], ss. [illegible] to 11.

I. L. R. 45 Bom. 96

BONÂ FIDE ACT.

——— **by Collector**—

See BOMBAY ABKARI ACT (BOM. ACT V OF 1878), ss. 32, 67.

I. L. R. 37 Bom. 101

BONÂ FIDE CLAIM.

See CRIMINAL TRESPASS.

I. L. R. 43 Calc. 1143

See THEFT . **I. L. R. 44 Calc. 66**

BONÂ FIDE PURCHASER.

See HINDU LAW—ENDOWMENT.

I. L. R. 38 Calc. 526

See MAHOMEDAN LAW—MINOR.

I. L. R. 35 Bom. 217

See RATES AND TAXES (ARREARS OF).

I. L. R. 42 Calc. 625

BONÂ FIDES.

See PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), s. 57.

I. L. R. 39 Mad. 250

——— **want of**—

See DEPOSIT IN COURT.

I. L. R. 43 Calc. 269

BOND.

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), s. 269.

I. L. R. 37 Mad. 17

See CONSTRUCTION OF DOCUMENT.

16 C. W. N. 957

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), s. 125.

I. L. R. 37 Mad. 125

See JOINT BOND **I. L. R. 39 Mad. 409**

See HINDU LAW—BOND.

I. L. R. 40 All. 17

See LIMITATION ACT (IX OF 1908), SCH. I, ART. 75 . **I. L. R. 35 All. 455**

I. L. R. 41 All. 104

ART. 116, 166. **I. L. R. 38 Bom. 177**

See MORTGAGE . **I. L. R. 37 All. 426**

See PROBATE AND ADMINISTRATIVE ACT, s. 50.

I. L. R. 47 Calc. 115

See SUCCESSION CERTIFICATE.

I. L. R. 38 Calc. 182

——— **for appearance**—

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), ss. 90, 501 AND 537.

I. L. R. 38 Mad. 1088

s. 514 . . **I. L. R. 42 Mad. 409**

——— **Interest in advance and progressive**

See INTEREST . **I. L. R. 44 Bom. 775**

——— **liability upon**—

See PROCEDURE . **L. R. 46 I. A. 228**

——— **whether surety liable where principal is not**—

See CRIMINAL PROCEDURE CODE, 1898, s. 514 . . **I. L. R. 2 Lah. 204**

——— *Slavery bond—Public policy—Overreaching interest.* Where in a bond the executant bound himself down to daily

BOND—*contd.*

attendance and manual labour until a certain sum was repaid in a certain month, and it penalised default with overwhelming interest: *Held,* that such a bond was not enforceable at law being opposed to public policy. RAM SARUP BHAGAT v. BANSI MANDAR (1915). **I. L. R. 42 Calc. 742**

———— *Alteration in good faith, consonant to original intention of the parties —Instrument, whether vitiated thereby.* Where a mortgage was in terms one rupee per mensem on a loan of Rs. 200, and the mortgagee inserted the words "per cent" in the bond while in his possession, thus altering the interest from eight annas per cent. per mensem to one rupee per cent per mensem; and it was found that there had been no fraud; and that it was the common intention of the parties that interest was to be paid at the rate of one rupee per cent.: *Held,* that an alteration made in good faith to carry out the original intention of the parties does not vitiate the instrument. ANANDA MOHAN SHAHA v. ANANDA CHANDRA NAHA (1916)
I. L. R. 44 Calc. 154

———— *Held,* on a construction of the bond in question in the case, that it imposed personal liability upon the executants. The Courts in India having allowed interest at the rate of 8½ per cent. per annum during the period of the pendency of the suit: *Held,* that the Civil Procedure Code gives the Court discretion in the matter and the Judicial Committee was not prepared to dissent from the view taken by the Courts in India. PANNA LAL v. NIHAL CHAND (P. C.) . . . **26 C. W. N. 737**

———— *Bond payable by instalments, with condition that interest may be charged if instalments are not paid on due date—Irregular payments made and accepted, not as instalments but in reduction of the debt generally.* Where a bond is payable by instalments without interest, but with a condition that if the instalments are not paid on due date then the obligor will be entitled to charge interest, acceptance of an instalment, though paid after due date, may be evidence of a waiver of the rights to charge interest, but the payment must be in discharge of a specific instalment in arrear and not merely a payment in reduction of the debt generally. WIZARAT HUSAIN v. MOHAN LAL . . **I. L. R. 43 All. 38**

BONUS.

———— stipulation for—

See PUTNI LEASE.
I. L. R. 42 Calc. 1029

BOOKS.

———— of a Firm—

See SUMMONS TO PRODUCE DOCUMENTS.
I. L. R. 47 Calc. 647

———— preventing production of—

See INSOLVENCY . **I. L. R. 47 Calc. 254**

———— translations of—

———— *Books, tendency of, if can be judged from translations of isolated passages.* A Court cannot be invited to form an opinion as to the true tendency of books from translations of isolated passages; books must be judged as a whole. PULIN BEHARY DAS v. KING-EMPEROR (1911) . . **16 C. W. N. 1105**

BOOKS OF REFERENCE.

———— *Reliance by Court on Books of Reference—Parties should know of it at the trial—Practice.* Whenever a Court relies on a book of reference, such as a work on medical jurisprudence, it should be made known at the trial to the parties, so that they may have an opportunity of adducing evidence or argument on the point. *Durga Prasad Singh* v. *Ram Dayal Chaudhuri, I. L. R. 38 Calc. 153,* referred to. WESTON AND OTHERS v. PEARY MOHAN DASS (1912) . . . . **I. L. R. 40 Calc. 898**

BOUGHT AND SOLD NOTES.

See ARBITRATION **I. L. R. 40 Calc. 219**

See SALE OF GOODS.
I. L. R. 42 Calc. 1050

See STAMP DUTY.
I. L. R. 39 Calc. 669

BOUNDARY.

See BOMBAY LAND REVENUE CODE, 1879, s. 121 . **I. L. R. 45 Bom. 67**

———— *Dispute between two lessees—Agent of lessor settling a boundary line before dispute, without reference to the boundaries given in the registered leases—Boundary so fixed if binds lessees—Agreement necessary to alter boundary so fixed if binds lessees—Agreement necessary to alter boundary.* Plaintiffs and defendants claimed respectively two plots of land in mouzah P, 175 bighas and 212 bighas in area on either side of a common boundary, under two registered leases granted in 1895 by the Pandeys to their predecessors. The correct boundary line between [illegible]

partition. DEBENDRANATH GHOSH v. NEW TETTURYA COAL COMPANY (1920)
24 C. W. N. 746

BOUNDARIES ACT (XXVIII OF 1860).

———— ss. 24, 25—

See CIVIL PROCEDURE CODE (ACT V OF 1908), s. 11. **I. L. R. 39 Mad. 1202**

BOUNDARY SETTLEMENT OFFICER.

———— decision of a—

See CIVIL PROCEDURE CODE (ACT V OF 1908), s. 11 . **I. L. R. 39 Mad. 1202**

BREACH OF CONTRACT.

See CONTRACT . **I. L. R. 38 Mad. 791**
I. L. R. 45 Bom. 129

See DAMAGES . **I. L. R. 43 Calc. 493**

See PROCEDURE
I. L. R. 48 Calc. 862

See SALE OF GOODS.
I. L. R. 45 Calc. 28

———— by vendor—

See VENDOR AND PURCHASER.
I. L. R. 38 Calc. 458

BREACH OF CONTRACT—*contd.*

——— by workman—

See WORKMAN'S BREACH OF CONTRACT ACT (XIII OF 1859), s. 2. I. L. R. 40 All. 282

——— procuring of—

See MARRIAGE, CONTRACT OF. I. L. R. 39 Bom. 682

——— to deliver goods at a particular time—

See CONTRACT ACT (IX OF 1872), ss. 39 55, 63, 73 . I. L. R. 37 Mad. 412

BREACH OF CONTRACT ACT (XIII OF 1859).

See WORKMAN'S BREACH OF CONTRACT ACT

BREACH OF CONTRACT OF MARRIAGE.

See DAMAGES . I. L. R. 41 Bom. 137

See HINDU LAW—WILL. I. L. R. 37 Bom. 18

BREACH OF THE PEACE.

See PROHIBITORY ORDER. I. L. R. 38 Calc. 876

See SECURITY FOR GOOD BEHAVIOUR. I. L. R. 38 Calc. 156

——— likelihood of—

See DISPUTE CONCERNING LAND. I. L. R. 39 Calc. 150

BREACH OF TRUST.

See TRUSTEE . I. L. R. 38 Mad. 71
I. L. R. 39 Mad. 115

BRIBE.

See PRINCIPAL AND AGENT. I. L. R. 37 Calc. 81

BRIBERY.

——— imputation of—

See SEDITION . I. L. R. 38 Calc. 214

BRITISH BALUCHISTAN REGULATION (IX OF 1896).

——— s. 10—

See ESTOPPEL . L. R. 44 I. A. 213

See RES JUDICATA. I. L. R. 45 Calc. 442

BRITISH COURT.

See FOREIGN DECREE. I. L. R. 40 Bom. 551

BRITISH INDIA.

See WADHWAN CIVIL STATION. I. L. R. 37 Bom. 152

BROACH AND KAIRA INCUMBERED ESTATES ACT (BOM. XXI OF 1881).

——— s. 28—*Indian Contract Act (IX of 1872), s. 65—Talukdar, mortgage by—Validity of mortgage during Talukdar's lifetime—Mortgage void on Talukdar's death—Mortgagee not entitled to compensation for discharge of mortgage.* A mortgage effected by a talukdar being void beyond the natural life of the mortgagor-talukdar under s. 28 of the Broach and Kaira Incumbered Estates Act (XXI of 1881), the mortgagee is not, in that event, entitled to recover back the money advanced by him on the mortgage under s. 65 of the Indian Contract Act (IX of 1872). *Javerbhai Jorabhai v. Gordhan Narsi, I. L. R. 39 Bom. 358*, distinguished. PARSHOTTAM VERIBHAI *v.* CHHATRASANGJI (1917) . I. L. R. 41 Bom. 546

BROKER.

See CONTRACT . I. L. R. 46 Calc. 331

See LIMITATION ACT (IX OF 1908), SCH. I, ART. 115 . I. L. R. 39 All. 81

See PAKKA ADATIA. I. L. R. 45 Bom. 386

——— appointment of—

See DAMAGES . I. L. R. 46 I. A. 314

——— offer of—

See ABETMENT I. L. R. 46 Calc. 607

——— personal liability of—

See SALE OF GOODS. I. L. R. 42 Calc. 1050

BROTHEL.

——— order for discontinuance of—

See HIGH COURT, JURISDICTION OF. I. L. R. 37 Calc. 287

——— *Order of Magistrate directing discontinuance of use of house as such—Jurisdiction of District Magistrate to stay order—Eastern Bengal and Assam Disorderly Houses Act (II of 1907), ss. 2, 3.* The District Magistrate has no jurisdiction under the law to interfere with the order of a Criminal Court under s. 3 of the Eastern Bengal and Assam Disorderly Houses Act (II of 1907) and stay its operation. *Rajani Khemtawali v King-Emperor, 14 C. W. N. 404*, referred to. LALIT MOHAN CHAKRAVARTI *v.* HEMENDRA KUMAR DE (1917) . . . I. L. R. 45 Calc. 301

BROKERAGE CONTRACT.

——— *terminable by parties by three months' notice before the end of the term—Under-broker who had notice of brokerage contract, if may claim damages for whole term when brokerage contract legally terminated before expiry of term—Under-broker wrongfully dismissed before brokerage contract terminated—Damages, measure of—Brokerage contract, if terminable by fresh agreement—Under-broker, if may insist on termination by notice—Hindu joint family, carrying on business in partnership—Contract by family, if terminates with death of coparcener—Contract Act (IX of 1872), s. 253, cl. 10—Rule of Hindu law, if to be considered.* By an agreement between *A* and *B* dated 31st May 1911, the former appointed the latter to act as broker for him for 5 years or for such further period as might be mutually agreed upon between the parties. It was provided in the agreement that it might be determined by either party by giving three months' notice to the other party. In pursuance of another term of the said agreement *B* (the broker) appointed *C* to act as under-broker for him during the subsistence of the said agreement and *C* (the under-broker) had notice of the said agreement. On

BROKERAGE CONTRACT—*contd.*

12th August 1912, the broker *B*, wrongfully dismissed the under-broker *C*, and subsequently on 2nd December 1912 in good faith entered into a second agreement with *A* inconsistent with the first. *Held*, in a suit by *C* against *B* for wrongful *termination of the under-brokerage contract, that* as the under-brokerage contract depended upon the subsistence of the brokerage contract and the latter contract was validly terminated on the 2nd December 1912, the under-brokerage contract also came to an end on the same day, and the plaintiff was entitled to recover damages as for the period from his dismissal on the 12th August to the termination of the contract on 2nd December 1912. *Per* MOOKERJEE *J.* That the three months' notice required by the contract between *A* and *B* was for the benefit and protection of the contracting parties themselves and *C* was not entitled to make a grievance that either party has allowed the other to determine that agreement without insisting on the prescribed notice. Where *X* and *Y* members of a joint family (of which *Y* was the *karta*) carrying on a joint family business entered into a contract of under-brokerage and *X* subsequently died; but *Y* and the other party to the contract went on dealing with each other as if the contract subsisted: *Held, per* CURIAM, that *X's* death did not terminate the contract. *Per* MOOKERJEE, *J.* Where there are two joint agents and one of them dies, upon his death the contract of agency terminates only so far he is concerned, but not as regards the surviving agent. The rights and liabilities of coparceners in a joint Hindu family cannot be determined by exclusive reference to the Indian Contract Act, but must be considered also with regard to the general rules of Hindu Law; according to these rules, the death of one of the coparceners does not dissolve a family partnership RAGHUMULL *v.* LUCHMONDAS (1916) . . **20 C. W. N. 708**

BUILDING.

See BOMBAY DISTRICT MUNICIPALITIES ACT (BOM. ACT III OF 1901), s. 3.

See CANTONMENT LAND.
15 C. W. N. 809

——— **addition of bath-rooms in**—
See BOMBAY CITY MUNICIPAL ACT (BOM. III OF 1888), s. 349B
I. L. R. 41 Bom. 741

——— **by co-owner**—
See TEMPORARY INJUNCTION.
I. L. R. 41 Calc. 436

——— **compensation for a ejectment**—
See LANDLORD AND TENANT.
I. L. R. 44 Bom. 950

——— **concession of**—
See LANDLORD AND TENANT.
I. L. R. 44 Bom. 609

——— **constructed by lessees**—
See BOMBAY CITY MUNICIPAL ACT (BOM. ACT III OF 1888), s. 305.
I. L. R. 34 Bom. 593

——— **erection of, without sanction**—
See UNITED PROVINCES MUNICIPALITIES ACT (II OF 1916), ss. 185, 186.
I. L. R. 39 All. 482

BUILDING—*contd.*

——— "*Re-erection*" —*Renewing or repairing a roof replaced on its former site—Reconstruction not exceeding one-half its cubical extent—"Building," whether a shed with posts and tin roof is a—Building line of a road encroachment on—Calcutta Municipal Act (Ben. III of 1899), ss. 3 (3), (39), (a), 351, 419* The removal of an old roof of a shed consisting of posts and the replacing on the same site either of a new roof or the former one after repairs, without an alteration exceeding one-half its cubical extent, is not a "re-erection" within s. 3 (*39*) (*a*) of the Calcutta Municipal Act. The offence of infringing on a building line within the meaning of s 351 is, having regard to the definition in s 3 (*3*), the erection or re-erection of the wall of a building within that line, and not the removal of an old roof and replacing it on the same site TRIPENDESWAR MITTER *v.* CORPORATION OF CALCUTTA (1911)
I. L. R. 39 Calc. 84

BUILDING FINE.

——— **Collector's power to levy**—
See BOMBAY LAND REVENUE CODE (BOM. ACT V OF 1879), s 48
I. L. R. 42 Bom. 129

BUILDING LEASE.

——— [illegible] *and Residents* [illegible] *Property Act* [illegible] there is a lea[illegible]rposes, in the absence of any intention to the contrary, indicated either in the terms of the grant or in the nature of the tenancy, the leasehold interest is heritable, and the tenancy does not determine by the death of the lessee, but vests in his legal personal representatives who are entitled to give or receive the usual notice to quit. Such a tenancy, in the absence of any custom or contract to the contrary, is governed by the provisions of the Transfer of Property Act, and is consequently *primâ facie* transferable under s. 108 (*j*) of that Act. KISHORILAL ROY CHOWDHURY *v* KRISHNA-KAMINI CHOWDHRANI (1910)
I. L. R. 37 Calc. 37

BUILDING PLANS.

——— **sanction of**—
See MUNICIPAL CORPORATION.
I. L. R. 40 Calc. 836

BUNDELKHAND ALIENATION ACT (U. P. II OF 1903).

——— **s. 3**—

——— *Agricultural tribe—Suit for pre-emption—Sanction.* The sanction contemplated in s. 3 of the Bundelkhand Alienation of Land Act, 1903, applies to a voluntary transfer, and there is no provision in the Act which entitles an intending pre-emptor to get the sanction of the Collector to bring a suit for pre-emption. Therefore a Court is not entitled to grant a decree for pre-emption to a person who is not entitled to purchase the property in question not being a member of the agricultural tribe within the meaning of s. 3 of the Bundelkhand Alienation of Land Act. SURAJ BHAN *v.* SOMWARPURI (1915) . . **I. L. R. 37 All. 662**

——— *Equity of redemption sold and pre-em*[illegible] *of mortgagor's*

BREACH OF CONTRACT—*contd.*

——— by workman—

See WORKMAN'S BREACH OF CONTRACT ACT (XIII OF 1859), s. 2.
I. L. R. 40 All. 282

——— procuring of—

See MARRIAGE, CONTRACT OF.
I. L. R. 39 Bom. 682

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BREACH OF CONTRACT ACT (XIII OF 1859).

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See DAMAGES . **I. L. R. 41 Bom. 137**

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BREACH OF THE PEACE.

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I. L. R. 39 Calc. 150

BREACH OF TRUST.

See TRUSTEE . **I. L. R. 38 Mad. 71**
I. L. R. 39 Mad. 115

BRIBE.

See PRINCIPAL AND AGENT.
I. L. R. 37 Calc. 81

BRIBERY.

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See SEDITION . **I. L. R. 38 Calc. 214**

BRITISH BALUCHISTAN REGULATION (IX OF 1896).

——— s. 10—

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See RES JUDICATA.
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BRITISH COURT.

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BRITISH INDIA.

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BROACH AND KAIRA INCUMBERED ESTATES ACT (BOM. XXI OF 1881).

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BROKER.

See CONTRACT . **I. L. R. 46 Calc. 831**

See LIMITATION ACT (IX OF 1908), SCH. I, ART. 115 . **I. L. R. 39 All. 81**

See PAKKA ADATIA.
I. L. R. 45 Bom. 386

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——— offer of—

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I. L. R. 37 Calc. 287

——— *Order of Magistrate directing discontinuance of use of house as such—Jurisdiction of District Magistrate to stay order—Eastern Bengal and Assam Disorderly Houses Act (II of 1907), ss. 2, 3.* The District Magistrate has no jurisdiction under the law to interfere with the order of a Criminal Court under s. 3 of the Eastern Bengal and Assam Disorderly Houses Act (II of 1907) and stay its operation. *Rajani Khemtawali v. King-Emperor, 14 C. W. N. 404,* referred to. LALIT MOHAN CHAKRAVARTI *v.* HEMENDRA KUMAR DE (1917) . . . **I. L. R. 45 Calc. 301**

BROKERAGE CONTRACT.

——— *terminable by parties by three months' notice before the end of the term—Under-broker who had notice of brokerage contract, if may claim damages for whole term when brokerage contract legally terminated before expiry of term—Under-broker wrongfully dismissed before brokerage contract terminated—Damages, measure of—Brokerage contract, if terminable by fresh agreement—Under-broker, if may insist on termination by notice—Hindu joint family, carrying on business in partnership—Contract by family, if terminates with death of coparcener—Contract Act (IX of 1872), s. 253, cl. 10—Rule of Hindu law, if to be considered.* By an agreement between *A* and *B* dated 31st May 1911, the former appointed the latter to act as broker for him for 5 years or for such further period as might be mutually agreed upon between the parties. It was provided in the agreement that it might be determined by either party by giving three months' notice to the other party. In pursuance of another term of the said agreement *B* (the broker) appointed *C* to act as under-broker for him during the subsistence of the said agreement and *C* (the under-broker) had notice of the said agreement. On

BROKERAGE CONTRACT—*contd.*

12th August 1912, the broker *B*, wrongfully dismissed the under-broker *C*, and subsequently on 2nd December 1912 in good faith entered into a second agreement with *A* inconsistent with the first. *Held*, in a suit by *C* against *B* for wrongful *termination of the under-brokerage contract, that* as the under-brokerage contract depended upon the subsistence of the brokerage contract and the latter contract was validly terminated on the 2nd December 1912, the under-brokerage contract also came to an end on the same day, and the plaintiff was entitled to recover damages as for the period from his dismissal on the 12th August to the termination of the contract on 2rd December 1912. *Per* MOOKERJEE *J.* That the three months' notice required by the contract between *A* and *B* was for the benefit and protection of the contracting parties themselves and *C* was not entitled to make a grievance that either party has allowed the other to determine that agreement without insisting on the prescribed notice. Where *X* and *Y* members of a joint family (of which *Y* was the *karta*) carrying on a joint family business entered into a contract of under-brokerage and *X* subsequently died; but *Y* and the other party to the contract went on dealing with each other as if the contract subsisted: *Held, per* CURIAM, that *X's* death did not terminate the contract. *Per* MOOKERJEE, *J.* Where there are two joint agents and one of them dies, upon his death the contract of agency terminates only so far he is concerned, but not as regards the surviving agent. The rights and liabilities of coparceners in a joint Hindu family cannot be determined by exclusive reference to the Indian Contract Act, but must be considered also with regard to the general rules of Hindu Law; according to these rules, the death of one of the coparceners does not dissolve a family partnership RAGHUMULL *v.* LUCHMONDAS (1916) . . **20 C. W. N. 708**

BUILDING.

See BOMBAY DISTRICT MUNICIPALITIES ACT (BOM. ACT III OF 1901), s. 3.

See CANTONMENT LAND.
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———— **addition of bath-rooms in—**
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———— **erection of, without sanction—**
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BUILDING—*contd.*

———— "*Re-erection*" —*Renewing or repairing a roof replaced on its former site—Reconstruction not exceeding one-half its cubical extent—"Building," whether a shed with posts and tin roof is a—Building line of a road encroachment on—Calcutta Municipal Act (Ben. III of 1899), ss. 3 (3), (39), (a), 351, 419.* The removal of an old roof of a shed consisting of posts and the replacing on the same site either of a new roof or the former one after repairs, without an alteration exceeding one-half its cubical extent, is not a "re-erection" within s. 3 (*39*) (*a*) of the Calcutta Municipal Act. The offence of infringing on a building line within the meaning of s. 351 is, having regard to the definition in s 3 (*3*), the erection or re-erection of the wall of a building within that line, and not the removal of an old roof and replacing it on the same site TRIPENDESWAR MITTER *v.* CORPORATION OF CALCUTTA (1911)
I. L. R. 39 Calc. 84

BUILDING FINE.

———— **Collector's power to levy—**
See BOMBAY LAND REVENUE CODE (BOM. ACT V OF 1879), s 48
I. L. R. 42 Bom. 129

BUILDING LEASE.

———— **Transferability**—*Building and Residential* [illegible] *Property Act (II* [illegible] there is a lease [illegible] rposes, in the absence of any intention to the contrary, indicated either in the terms of the grant or in the nature of the tenancy, the leasehold interest is heritable, and the tenancy does not determine by the death of the lessee, but vests in his legal personal representatives who are entitled to give or receive the usual notice to quit. Such a tenancy, in the absence of any custom or contract to the contrary, is governed by the provisions of the Transfer of Property Act, and is consequently *primâ facie* transferable under s. 108 (*j*) of that Act. KISHORILAL ROY CHOWDHURY *v.* KRISHNA-KAMINI CHOWDHRANI (1910)
I. L. R. 37 Calc. 37

BUILDING PLANS.

———— **sanction of—**
See MUNICIPAL CORPORATION.
I. L. R. 40 Calc. 836

BUNDELKHAND ALIENATION ACT (U. P. II OF 1903).

———— **s. 3—**

———— *Agricultural tribe—Suit for pre-emption—Sanction.* The sanction contemplated in s. 3 of the Bundelkhand Alienation of Land Act, 1903, applies to a voluntary transfer, and there is no provision in the Act which entitles an intending pre-emptor to get the sanction of the Collector to bring a suit for pre-emption. Therefore a Court is not entitled to grant a decree for pre emption to a person who is not entitled to purchase the property in question not being a member of the agricultural tribe within the meaning of s. 3 of the Bundelkhand Alienation of Land Act. SURAJ BHAN *v.* SOMWARPURI (1915) . . **I. L. R. 37 All. 662**

———— *Equity of redemption sold and pre-empted—Sale of mortgagor's*

BURDEN OF PROOF—*contd.*

See Bombay District Municipal Act (Bom. III of 1901), ss. 50, 54. **I. L. R. 35 Bom. 492**

See Bombay Land Revenue Code, s. 83 . **I. L. R. 45 Bom 350, 393**

See Carriers . **I. L. R. 47 Calc. 1027**

See Civil Procedure Code (1908), s. 60 (c) . **I. L. R. 35 All. 307**

O. XXI, r. 23 . **I. L. R. 34 All. 612**

See Contract . **I. L. R. 39 All. 418**

See Evidence . **I. L. R. 33 All. 483**

See Evidence Act (I of 1872),

s. 106 . . **1 Pat L. J. 166**

Ss. 108, 114. **I. L. R. 34 All. 36, 511**

See Forfeiture **I. L. R. 47 Calc. 190**

See Grant of Land. **I. L. R. 43 Bom. 37**

See Hindu Law—Alienation. **I. L. R. 40 Calc. 288**
I. L. R. 36 All. 187

See Hindu Law—Joint Family.
I. L. R. 32 All. 415
I. L. R. 33 All. 677
I. L. R. 34 All. 126, 135
I. L. R. 39 All. 437
I. L. R. 41 All. 235, 523 609
5 Pat L. J. 622

See Hindu Law—Legal Necessity. **I. L. R. 38 Calc. 721**

See Hindu Law—Mortgage. **I. L. R. 41 All. 571**

See Hindu Law—Widow. **I. L. R. 33 All. 342**

See Jurisdiction. **I. L. R. 35 Bom. 264**

See Limitation Act (IX of 1908), Sch. I, Arts. 140, 141. **I. L. R. 40 Bom. 239**

See Mahomedan Law—Divorce. **I. L. R. 36 All. 458**

See Mahomedan Law—Pre-emption. **I. L. R. 38 Bom. 183**

See Mortgage . **I. L. R. 36 All. 478**
I. L. R. 38 All. 540
I. L. R. 41 All. 250
I. L. R. 42 All. 575

See Negotiable Instruments Act (XXVI of 1881), ss. 64, 76.
I. L. R. 39 All. 364
I. L. R. 41 All. 40

s. 98 . . **I. L. R. 33 All. 4**

See Onus of Proof.

See Oudh Estates Act (I of 1869), ss. 8, 10 . **I. L. R. 33 All. 552**

See Parda-nashin Lady. **I L. R. 34 All. 455**

See Penal Code Act (XLV of 1860), s 436 . . **I. L. R. 37 All. 395**

See Pre-emption. **I. L. R. 36 All. 461**

See Succession Act (X of 1865), ss. 7, 9, 10 . . **I. L. R. 41 Bom. 687**

BURDEN OF PROOF—*concld.*

See Suit to recover Possession of Land from an alleged Licensee. **I. L. R. 41 All. 669**

See Transfer of Holding. **15 C. W. N. 953**

See Will . . **15 C. W. N. 177**

———— **Title against Government**—*Evidence of possession necessary to prove title against Government—Nattam poramboke, classification as effect of.* Where in a suit for declaration of title against Government, the plaintiff proves possession for a period of more than 12 years, the Government must prove that it has a subsisting title. When the Government fails to prove such title or possession within 60 years, the plaintiff is entitled to a declaration of title and not merely to a declaration that he is lawfully in possession of such land. The classification of land as *nattam poramboke* is no legal evidence of title in the Government. At the most, it is evidence only of an assertion of title *Kattai Mahomed Meera Mahideen* v. *Secretary of State for India, 13 Mad. L. J 269,* explained *Ganga Ram China Patel* v. *Secretary of State for India, I. L R 20 Bom. 798,* distinguished. *Hanmantarav* v. *Secretary of State for India, I. L. R. 25 Bom. 287,* distinguished. Krishna Aiyar *v.* Secretary of State for India (1909) **I. L. R. 33 Mad. 173**

———— *Reversioner, declaratory suit by, to set aside alleged adoption—Onus on adopted son, whether reversioner entitled to immediate possession or only to declaration.* Where a reversioner, during the lifetime of the widow on whose death he will be entitled to possession, sues for a declaration that an adoption alleged to be made by her is invalid and his right as reversioner is not impeached, the burden will be on the party relying on the adoption to prove its validity as it would be in the case where the reversioner sues for immediate possession *Asharfi Kunwar* v. *Rup Chand, I. L. R. 30 All. 197,* dissented from Rajagopala Reddy *v.* Nattu Govinda Reddi (1910) . . . . **I. L. R. 34 Mad. 329**

———— *Agreement to sell land—Recital of receipt of consideration—Denial of receipt by vendor—Title deeds in vendee's possession—Presumption.* Mere denial by the vendor of the receipt of the consideration acknowledged in the recitals of a deed of sale is not in all cases sufficient to cast upon the vendee the burden of proving payment of the consideration. Where the plaintiff wishes to set aside a contract of which there has been performance, and under which the defendant has been in possession and enjoyment of the subject-matter, he must establish at least a good *primâ facie* title to the relief which he seeks. Rampal Ram *v.* Suba Singh **4 Pat. L. J. 517**

BURGADAR.

See Landlord and Tenant. (Misc.) **14 C. W. N. 620**

See Specific Relief Act, s. 9. **15 C. W. N. 936**

BURMA TOWN AND VILLAGE LANDS ACT (BURMA IV OF 1898).

———— s. 41 (b)—

See Jurisdiction of Civil Court. **I. L. R. 40 Calc. 331**

BURMESE LAW.

————— **Adoption**—*Kittima adoption—Publicity and notoriety essential—Forfeiture of adoption by kittima son separating from adoptive parents—Distinction where there are other children—Intention to break tie with adoptive parents—Contest between two claimants each claiming the whole estate.* A child adopted under the Burmese Buddhist Law according to the fullest form of adoption, and retaining his status as an adopted child till the death of his adoptive parents, is entitled to inherit their estate as if he were a natural and lawful child, either in the absence of other children or in competition with them. Such a child is called a *kittima* child. There is no ceremony of adoption, and it is not necessary for one who claims adoption to point to any particular statement made or act done by his adoptive parents on a particular date. But on the other hand the adoption must be a matter of publicity and notoriety. *Ma Me Gale* v. *Ma Sa Yi, I. L. R. 32 Calc. 219 ; L. R. 32 I. A. 72*, and *Ma Ywet* v. *Ma Me, I. L. R. 36 Calc. 978 ; L. R. 36 I. A. 192*, followed. A *kittima* child may forfeit his right of inheritance by separating from his adoptive parents, this being considered an act of ingratitude : see the texts set forth in s. 195 of Gaung's 'Digest of Burmese Buddhist Law." These authorities, however, draw a distinction between the cases where there are other children with whom the *kittima* child seeks to compete and share, and cases where he has no such competitor, and in the latter instance allow him to inherit in whole or in part notwithstanding his separation. The true principle on which the rule of forfeiture rests is that it is a matter of intention. The fact that the child goes to live apart is some evidence of an intention to break the bond ; and it is easier to presume this where the adoptive parents have other children who can perform the duties and receive the estate. The extent of the separation is to be also taken into account. The distance may be so great as to render it impracticable for the child to continue to discharge duties to the adoptive parents, and in that case it probably works a forfeiture. But if the distance be not great, if the separation of residence be with the consent of the adoptive parents, and if the child is ready and willing to discharge filial duties after this separation, the bond is not broken. This is the result of the modern decisions. Chan Toon's "Principles of Buddhist law," 88 to 95 where the authorities are given, and *Maung Shwe Thwe* v. *Ma Saing*, 2 U. B. Rul. (1897—1901) 135, referred to. In this case where each of the parties claimed to be the sole adopted son of the same adoptive parents, and in that capacity to be entitled to succeed to their whole to the exclusion of the other : *Held* (reversing the decision of the Chief Court), that on the evidence both the claimants were adopted heirs, and that, it not being contended for the appellant that there would be any legal objection to the widow adopting a second heir, or that the position of a son so adopted would be in any way inferior to that of the first adopted son, they were both entitled to inherit the estate. As in that case both of them had asked for too much, each should bear his own costs of the litigation. MAUNG THWE *v.* MAUNG TUN PE (1917) . **I. L. R. 45 Calc. 1**

————— **Inheritance**—*Sisters in trade living apart from, and independent of, their father—Succession of elder sister to property of younger sisters in priority to father.* The appellant was the eldest, and the survivor, of three sisters, daughters of the respondent. They traded in cocoanuts in the Municipal market in Rangoon, and lived together apart from, and quite independently of, their father : *Held* (reversing the decision of the Chief Court of Lower Burma), that, by the Burmese Buddhist Law, and irrespective of any question of partnership between them, the appellant succeeded to the property of her sisters in preference to the respondent. The balance of the authority of the Dhammathats, pre-eminent among which is the Manu Kyay, is upon the side of the brothers and sisters of a deceased person being preferred to the parent. MA NHIN BWIN *v.* U SHWE GONE (1914) . **I. L. R. 41 Calc. 887**

————— *Right of eldest son in a family to a share of the estate on the death of the father—Right of election to take share or not—Limitation Act (IX of 1908), Sch. I, Art. 123—Manu Kyay, Book X, rr. 5* and *14.* By the Burmese Buddhist law of succession laid down in the Manu Kyay, r. 5 of Book X, the eldest son in a family takes on the death of the father a definite one-fourth share of the estate, a right which he is at liberty to assert within any period not outside that fixed by Art. 123, Sch. I of the Limitation Act of 1908, as the period within which a claim must be made for a share of property on the death of an intestate. There is no authority to the effect that the eldest son has merely a right to elect within a certain limited period whether he will take the share of the property or not. MAUNG TUN THA *v.* MA THIT (1916) . . . . **I. L. R. 44 Calc. 379**

————— **Marriage**—*Mutual consent—Repute as evidence of marriag[illegible] with sister of living [illegible] separate houses—Social status of after-married wife, evidence as to—Effect of recognition of wife—Evidence of reputation.* No ceremony of any kind is essential to a marriage among Burmese. Mutual consent is all that is required ; and in the absence of direct proof consent may be inferred from the conduct of the parties or established by reputation. In Burma polygamy is lawful, as also is marriage with the sister of a living wife, as well as with a deceased wife's sister. The title of the respondent (plaintiff) to share in the property of a deceased Burman, a twinzayo or hereditary oil-well owner, depended on proof that she was his lawful wife, as to which the Courts in Burma differed, the Appellate Court finding on the evidence that she was. At the time of the alleged marriage, the plaintiff was a widow with children, and the deceased was the husband of the defendant, her elder sister, with whom after the marriage she remained on good terms, though for convenience, both having families, they lived in separate houses, at which the husband took his meals, to a far greater extent, however, at the house of the defendant than at that of the plaintiff : *Held*, that there was abundant evidence that the plaintiff was recognised as the wife of the deceased. None of the witnesses said she occupied a dishonourable or inferior position, and it was difficult to see how there could be any question of social inferiority. The Courts regarded the evidence from different standpoints ; but whether the particular testimony on which they differed was accepted or not, there was very little con-

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tradiction in the evidence. On the whole the appellants had not made out a sufficient case for disturbing the judgment of the Judicial Commissioner. Mi Me *v.* Mi Shwe Ma (1912)

I. L. R. 39 Calc. 492

BUSINESS AND LEARNING.

See Hindu Law—Joint Family.

I. L. R. 45 Calc. 666

BUSTEE LAND.

See Land Acquisition

I. L. R. 41 Calc. 967

——— *Owner of bustee—Receiver—Liability of actual owner to carry out bustee improvements when his estate is under a Receiver appointed by the High Court—Calcutta Municipal Act (Beng. Act III of 1899), s. 408.* When a notice under s. 408 of the Calcutta Municipal Act has been served on the actual owner of an estate in the hands of a Receiver appointed by the High Court, he is liable under the section as such, and not the Receiver, to carry out the requisitions made therein It is incumbent on the owner in such a case to request the Receiver to comply with the notice, after taking the directions of the Court, and on the latter's failure to do so he should himself apply to the High Court making the Receiver a party. If the Court refuses the application, the owner would be enabled to satisfy the Magistrate that he had used all diligence to carry out the requisitions, and in the event of a conviction the penalty would be merely nominal If the owner is helpless in the matter the General Committee may proceed under the section against the occupiers. *Parker* v. *Inge, 17 Q. B. D. 584*, referred to. A Receiver appointed by the High Court is not the "owner" of the premises he holds as such, nor is he an "agent or-trustee" within the definition of the term in s. 3 (32) of the Calcutta Municipal Act. *Fink* v. *Corporation of Calcutta, I. L. R. 30 Calc. 721*, followed. Corporation of Calcutta *v.* Hazi Kassim Ariff Bham (1911)

I. L. R. 38 Calc. 714

——— *Notice on owners to carry out improvements thereon—"Owners," meaning of—Co-sebait during turn of management of debuttur property and collection of rents and profits by another sebait—Liability of sebait not in receipt of rents and profits—Previous convictions—Calcutta Municipal Act (Ben III of 1899), ss. 3 (32), 408, 575.* Where *debuttur* property is managed according to a settled scheme by the co-sebaits in rotation and the rents and profits collected, for the time being, by the persons enjoining their turn, a sebait out of turn is not an "owner" within the meaning of s. 3 (32) of the Calcutta Municipal Act nor in any other sense, and is not liable to carry out a requisition under s. 408 of the Act. A sebait is not an owner but only a manager for the deity. Ratnendra Lal Mitter *v.* Corporation of Calcutta (1913)

I. L. R. 41 Calc. 104

——— *Lease of same by owner to others—Sub-lease by latter—Requisition on owners to carry out improvements—Application by him to Chief Judge, only against his lessee—"Occupier," meaning of—Obstruction by sub-tenants in actual occupation—Discharge of owner from liability—Previous conviction of owner—Calcutta Municipal Act (Beng. III of 1899), ss. 3 (30), 408, 575, 622.* The owner of a bustee, who has leased it out to others and is thereafter served with a notice under s. 408 of the Calcutta Municipal Act, to carry out certain bustee improvements, is discharged from obligation where he has proceeded and obtained an order under s 622 against his lessee only and is prevented by the sub-tenants of the latter, actually in occupation, from executing the required improvements. *Semble* The lessee may take action under s. 622 against his tenants in the event of their proving refractory, and he can, on failure to do so, be himself proceeded against under ss 574 and 575 of the Act Benode Lal Ghose *v.* Corporation of Calcutta (1913) **I. L. R. 41 Calc. 164**

BY-LAWS.

See Bombay District Municipalities Act (Bom. Act III of 1901), ss. 70, 113, 122 **I. L. R. 42 Bom. 454**

——— **a "law for the time being"—**

See Specific Relief Act (I of 1877), s. 45 **I. L. R. 40 Mad. 125**

——— **for weights and measures—**

See Bombay City Municipal Act (Bom. III of 1888), ss. 418, 461, cl. (o).

I. L. R. 41 Bom. 580

——— **infringement of—**

See Encroachment.

I. L. R. 37 Calc. 671

——— **validity of—**

See Prosecution **I. L. R. 37 Calc. 545**

See Theatrical Performance

I. L. R. 44 Calc. 1025

——— *Local Government—Power to authorise Municipal Committees to frame by-laws and punish for breaches thereof—Validity of by-laws—Hours of closing theatres—Reasonableness of by-law—Abetment of offences under Municipal Acts—Power of Municipal Magistrate to try charges of abetment—India Councils Act, 1861 (24 and 25 Vic., c. 67), ss 42 and 44—Calcutta Municipal Act (Beng III of 1899), ss. 559 (52), 561, 628—By-laws, 83 and 85.* S 42 of the Indian Councils Act, 1861 (24 and 25 Vic, c 67), as extended by s. 44, gives authority to the Government of Bengal to pass such an Act as the Calcutta Municipal Act and to empower the General Committee to frame by-laws; and the latter has clear authority to make breaches of the by-laws punishable. *Empress* v. *Burah, I. L. R. 4 Calc 172, Hodge* v. *Queen, L. R. 9 App. Cas. 117, Powell* v. *Appollo Candle Co., L. R. 10 App. Cas. 282*, followed. By-law 83, framed under the Calcutta Municipal Act (Beng. III of 1899), in prescribing a time-limit for the continuance of a theatrical performance, is not invalid on the ground of unreasonableness. *Theatre De Luxe* v. *Gledhill, [1915] 2 K. B 49, London County Council* v. *Bermondsey Bioscope Co. [1911] 1 K. B. 445*, referred to. The Calcutta Municipal Act is a "special" and "local" law, and the provisions of s. 40 of the Penal Code apply to abetment of offences punishable under the former Act or the by-laws made thereunder. *Amrita Lall Bose* v. *Corporation of Calcutta, 26 C. L. J. 29*, explained. The Calcutta Municipal Magistrate is also a Presidency Magistrate, and has power to try a charge of abetment of an offence created by the Calcutta Municipal Act or the by-laws made thereunder. Prabodh Chandra Bose *v.* Corporation of Calcutta . **I. L. R. 47 Calc. 547**

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CALCUTTA BALED JUTE ASSOCIATION.

See CONTRACT . I. L. R. 43 Calc. 77

CALCUTTA GAZETTE.

——— Publication in—

See SALE OF ARREARS OF REVENUE. I. L. R. 42 Calc. 897

CALCUTTA HIGH COURT.

——— decisions of—

See PATNA HIGH COURT. 20 C. W. N. 983

——— General Rules and Orders—

See BELCHAMBER'S RULES AND ORDERS.

See HIGH COURT RULES AND ORDERS.

——— Ch. VI, rr. 136 and 42, Ch. X, r. 26.

See PLEADERS' FEE. I. L. R. 41 Calc. 637

——— Ch. XI, r. 45 (c).

See VAKALATNAMA I. L. R. 43 Calc. 384

——— Ch. XIII, r. 9.

See LEASE . . 24 C. W. N. 1007

——— Ch. XXXVIII, r. 67.

See ATTORNEY AND CLIENT. I. L. R. 46 Calc. 249

——— r. 370.

See REVIVOR . I. L. R. 43 Calc. 903

——— r. 426.

See REVIEW . I. L. R. 40 Calc. 140

CALCUTTA IMPROVEMENT ACT (BENG. V OF 1911).

See LAND ACQUISITION. I. L. R. 48 Calc. 916

See RECOUPMENT I. L. R. 45 Calc. 343

——— ss. 39, 41, 78—

See LAND ACQUISITION. I. L. R. 47 Calc. 604

——— ss. 39-42, 49, 68-81—

See LAND ACQUISITION. I. L. R. 44 Calc. 219

——— ss. 41, 42, 78, 16—

See RECOUPMENT. I. L. R. 45 Calc. 343

——— ss. 42 and 122—

See LAND ACQUISITION. I. L. R. 47 Calc. 500

——— s. 49—

See LAND ACQUISITION. I. L. R. 44 Calc. 219

——— ss. 70, 71(a), (c), 77—

See SANCTION FOR PROSECUTION. I. L. R. 45 Calc. 585

——— s. 71, cl. (c)—

See RECORDS, POWER TO CALL FOR. I. L. R. 43 Calc. 239

CALCUTTA IMPROVEMENT ACT (BENG. V OF 1911)—*contd.*

——— ss. 78, 81, 122, 123, 155 and 160—

See LAND ACQUISITION. I. L. R. 44 Calc. 219

——— s. 122—

See LAND ACQUISITION. I. L. R. 44 Calc. 219
I. L. R. 47 Calc. 500

CALCUTTA IMPROVEMENT TRIBUNAL.

——— *Held*, that the President is a Civil Court with power to make an order for costs and as such has an inherent power to execute an order for costs made by him. BITA KRISHNA PRAMANICK *v.* A. K. ROY . 26 C. W. N. 30

CALCUTTA MUNICIPAL ACT (BENG. III OF 1899).

——— s. 3, cl. 29—*Nuisance, what is.* Where the owner of a *bustee* in which there were certain private streets put up certain posts on his property which had the effect of preventing the wheel traffic passing through the *bustee* in certain directions, with the result that thereby the cleansing of the *bustee* became more expensive to the Municipality and more inconvenient to its officers: *Held*, that the owner did not thereby cause a nuisance under the Calcutta Municipal Act, so long as he did not interfere with the effective cleansing of the *bustee*. NARENDRA NATH MITTER *v.* CHAIRMAN, CORPORATION OF CALCUTTA (1910) . 15 C. W. N. 100

——— ss. 3 (30), 37, 47, and Sch. IV rr. 3, 8 (1)—

See MUNICIPAL ELECTION. I. L. R. 45 Calc. 950

——— ss. 3 (16), 286, 337—

See PUBLIC DRAIN I. L. R. 44 Calc. 689

——— ss. 3 (3), (39) (a), 351, 449—

See BUILDING . I. L. R. 39 Calc. 84

——— ss. 3 (35), 361, 416 (1), (5), 419—*Roadway in bustee land—Public exercising right of way—Applicability of s. 361—Definition of "street" if includes "passage"—Conditions necessary to create public right of way—Criminal Procedure Code (Act V of 1898), s. 439—Order of acquittal, revision of.* A roadway less than 20 ft. wide was originally made as part of a *bustee* and in accordance with the standard plan approved by the General Committee. The owner of the *bustee* sold the land covered by the *bustee* to various persons who built residences on the land. At the instance of the Chairman of the Corporation, the opposite party whose house abutted on the roadway was prosecuted for failure to comply with a direction under s. 351 of the Act to improve the roadway. The Magistrate found that the public exercised a right of way over the road and acquitted the accused. There was no agreement between the General Committee and the owner as to the road being made public. *Held*, that the roadway in question was a private street to which s. 361 of the Calcutta Municipal Act applied. That the definition of the word "street" in the Act includes a passage and the fact that the roadway was not 20 feet wide did not make s. 361 inapplicable. That the meaning of s. 416 read with s. 419 is that

CALCUTTA MUNICIPAL ACT (BENG. III OF 1899)—*contd.*

———— ss. 3—*contd.*

... remains a private ...

a public right of way ... a dedication by the owner and in the present case under s. 416 (*1*) the owner could not dedicate without the consent of the General Committee. That the Chairman of the Corporation was competent to initiate the prosecution. CORPORATION OF CALCUTTA *v.* MAHAMAYA DEBI (1913)

17 C. W. N. 1250

———— ss. 3 (32), 408, 574, 575—*Bustee land—Debutter property—Shebait not in possession if an "owner."* When the petitioner, being one of several *shebaits* who had his last turn of worship ... non-compliance with a notice under s. 408 calling upon him to carry out certain improvements in a bustee which was one of the *debutter properties*. *Held*, that the petitioner was not an owner within the meaning of s. 3, sub-s. (*32*) of the Act inasmuch as though he might be regarded as a manager for the deity, yet he was not receiving the rent. RATNENDRA LAL MITTER *v* CORPORATION OF CALCUTTA (1913) . . . 17 C. W. N. 1084

———— ss. 3 (32), 408, 575—

See BUSTLE LAND.

I. L. R. 41 Calc. 104

———— ss. 3 (30), 408, 575, 622—

See BUSTEE LAND. I. L. R. 41 Calc. 164

———— ss. 18, 102, 391, 449—

See DEMOLITION OF BUILDINGS.

I. L. R. 37 Calc. 585

———— s. 20—

See LAND ACQUISITION.

I. L. R. 48 Calc. 916

———— ss. 36, 47, 54; Schs. IV, V—

See MUNICIPAL ELECTION.

I. L. R. 46 Calc. 132

———— ss. 37, 38; Sch. IV, rr. 9, 10—

See MUNICIPAL ELECTION.

I. L. R. 39 Calc. 754

———— s. 56—*Corrupt Practices—Impersonation—Coercion—Intimidation—Free election—Interference by the candidate or his agent.* The ... Municipal Comm... four of them being dead and one absent from Calcutta. (2) That a voter was coerced to vote ... through fear. (4) That the said Inspector of Police interfered with the election, intimidated voters and freely canvassed for the elected candidate. *Held*, that the election must stand inasmuch as the charges were not substantiated. The Calcutta Municipal Act, 1899, contains no provision regarding corrupt practices in elections. *Mens rea* is essential ingredient to constitute

CALCUTTA MUNICIPAL ACT (BENG. III OF 1899)—*contd.*

———— s. 56—*contd.*

impersonation. In this case there was nothing to show that the elected candidate or his agent fraudulently and wrongfully caused improper personification and so the charge of impersonation could not stand. In order to avoid an election on the ground of intimidation and undue influence it must be shown either that (1) the rioting or violence was instigated by the candidate or his agents, for whom he is responsible, or that (2) it prevailed to such an extent as to prevent the election from being an entirely free election. Staleybridge's case (2) referred to. MONORANJAN MUKHERJEE *v.* BROJO GOPAL GOSWAMI

22 C. W. N. 678

———— s. 151, cl. (b)—*Boundary wall, if building and assessable with rates—Statutes, interpretation of—Interpretation first placed on it by those whose duty is to execute it, value of.* *Held*, on a consideration of various provisions of the Calcutta Municipal Act, that a boundary or compound wall is not a "building" within the meaning of s. 151, cl. (*b*) of the Calcutta Municipal Act and is not liable to assessment of rates as such. *Corporation of Calcutta* v. *Jogeswar Laha, 8 C. W. N. 487*, referred to. Courts in construing a statute will give much weight to the interpretation put upon it at the time of its enactment and since by those whose duty it has been to construe, execute and apply it, though such interpretation has not by any means a controlling effect upon the Courts and may, if occasion arises, have to be disregarded for cogent and persuasive reasons. *Baleswar* v. *Bhagirath, I. L. R. 35 Calc. 701. s.c. 12 C W. N 657, Evanturel* v. *Evanturel, L. R. 2 P. C. 462*, referred to. CORPORATION OF CALCUTTA *v.* BENOY KRISHNA BOSE (1910)

15 C. W. N. 84

———— ss. 223, 228—

See RATES AND TAXES.

I. L. R. 42 Calc. 625

———— s. 286—

See PUBLIC DRAIN I. L. R. 44 Calc. 689

———— ss. 298, 299—"*Place lawfully set apart by Municipality for discharge of drainage*"—*Private common drain of the landlord in a bustee, right of Municipality over.* The private common drain of the landlord of a bustee set apart for the discharge of drainage, cannot be presumed to be a "place lawfully set apart for the discharge of drainage" as contemplated by s 299 of the Calcutta Municipal Act. In a case under s 299 there should be no presumption as to the statutory powers of the Corporation. A place lawfully set apart for the use of the public by the Corporation must be a place over which the Corporation have acquired, by some procedure under the statute, a right to make use of private property as a public drain. GOBINDA CHANDRA ADDY *v.* CORPORATION OF CALCUTTA (1910) . . I. L. R. 38 Calc. 263

15 C. W. N. 412

———— ss. 299, 571—

See DRAINAGE . I. L. R. 38 Calc. 238

———— s. 341—Coping—*Fixture, a project-* ...

CALCUTTA MUNICIPAL ACT (BENG. III OF 1899)—*contd.*

——— s. 341—*contd.*

Calcutta Municipal Act. BARADA PRASANNO ROY CHOWDHURY *v.* CORPORATION OF CALCUTTA (1911) 15 C. W. N. 730

——— "*Fixture attached to a building,*" *meaning of.* The Magistrate directed the removal of a masonry platform extending in front of the petitioner's building and over a drain in the public street. There was no evidence when the platform was erected: *Held*, that the words "when a fixture has been attached" mean that the building must be first in existence and the attachment of the fixture subsequent to the erection of the building and in the absence of proof that the platform in question was constructed after the erection of the building, the Magistrate's order must be set aside. RAZIUDDIN *v.* CORPORATION OF CALCUTTA (1919) . 23 C. W. N. 752

——— ss. 341, 617—

See COMPENSATION I. L. R. 44 Calc. 87

See MUNICIPAL LAW L. R. 43 I. A. 243

——— ss. 341 (1), 450 (3), 574 (c), 631—*Notice to remove fixture—Disobedience of requisition—Application by General Committee to Magistrate for removal of fixture—Criminal prosecution for offence not instituted—Limitation of time for criminal prosecution.* S. 631 of the Calcutta Municipal Act applies only to a criminal prosecution instituted against a person under s. 574 (*c*) for non-compliance with a requisition under s. 341 (1) in the regular way, that is, on complaint as defined in s. 4 of the Criminal Procedure Code, and not to a proceeding taken under s. 450 (3) by the Magistrate on the application of the General Committee in respect of such non-compliance. SARAT CHANDRA MUKERJEE *v.* THE CORPORATION OF CALCUTTA (1910) I. L. R. 37 Calc. 384

——— ss. 343, 442—*Notice for removal of dilapidated hut belonging to tenant if can be served on the landlord.* The definition of owner of land as given in s. 3, sub-s. (*32*), includes both the landlord and the tenant and a notice under s. 343 for the removal of a hut belonging to the tenant can be served upon the person who is the owner of the land and such person having had a notice served upon him is liable to comply with the terms thereof. S. 442 of the Act which contemplates a different set of circumstances does not in any manner abridge the power conferred by s. 343. CORPORATION OF CALCUTTA *v.* MONMOTHA NATH SETT (1914) . . . . 19 C. W. N. 391

——— ss. 356 and 357—

See LAND ACQUISITION. I. L. R. 48 Calc. 916

——— s. 357 (2)—

See RECOUPMENT . I. L. R. 45 Calc. 343

——— ss. 374, 376—*Application for execution of work neither granted nor refused—Remedy—Imprisonment in default of payment of fine, whether legal under the Act—Offence under the Municipal Act whether falls within s. 64 of the Penal Code (Act XLV of 1860).* S. 374 of the Calcutta Municipal Act is governed by s. 376. When the Chairman does not refuse or grant permission to execute any work, the only remedy of the applicant for such permission is to apply to the General Committee by

CALCUTTA MUNICIPAL ACT (BENG. III OF 1899)—*contd.*

——— ss. 374—*contd.*

a written request for permission to execute the work The applicant could not under the law prefer an appeal to the General Committee unless the Chairman has refused permission. There is no authority under the Calcutta Municipal Act to impose imprisonment in default of payment of fine, at any rate for such offences to which a daily penalty is assigned in addition to the substantive fine: *Semble*: All offences under the Calcutta Municipal Act may not be "offences" within the meaning of s. 64 of the Penal Code. BASANTA KUMARI DEBI *v.* THE CORPORATION OF CALCUTTA (1911) . . . . 15 C. W. N. 906

——— ss. 375, 377—

See MUNICIPAL CORPORATION. I. L. R. 40 Calc. 836

——— s. 408—

See BUSTEE LAND. I. L. R. 38 Calc. 714

——— ss. 408, 575, 622—

See BUSTEE LAND. I. L. R. 41 Calc. 164

——— ss. 444, 574—

See JOINT PENALTY. I. L. R. 37 Calc. 895

——— ss. 449, 580—

See ACQUIESCENCE I. L. R. 37 Calc. 833

——— s. 466—A carrier who takes out a trade license and one for animals kept by him must also take out one for the premises in which he keeps these animals HOWRAH MUNICIPALITY *v.* LEWIS & Co. . . . 24 C. W. N. 744

——— ss. 494, 574—

See ADULTERATION I. L. R. 39 Calc. 682

——— s. 495—*Article of human food or drink, tea if.* Tea dust is an "article of human food or drink" within the meaning of s. 495 of the Calcutta Municipal Act. CORPORATION OF CALCUTTA *v.* PAGLI (1919). I. L. R. 47 Calc. 53
23 C. W. N. 911

——— s. 495A—

See GHEE (ADULTERATION OF). I. L. R. 47 Calc. 633
22 C. W. N. 745

——— s. 557—

See LAND ACQUISITION. I. L. R. 41 Calc. 967

——— *Municipality, if may acquire different portion of a holding by separate proceeding and thus evade the presumption of the section.* A holding within the Calcutta Municipality which was the subject of a single assessment, having been partitioned amongst its owners, the owner of one of the partitioned shares applied for separate assessment of his share, but that application was refused and the Municipality then proceeded to acquire the portions under the Land Acquisition Act by two separate proceedings. *Held*, that there was no legal bar to the Municipality proceeding in this manner and thereby depriving the owners of the several shares of the benefit of s. 557 (*d*) of the Calcutta Municipal Act. SHAM LAL DAS *v.* SECRETARY OF STATE FOR INDIA (1918) . . . . 22 C. W. N. 538

CALCUTTA MUNICIPAL ACT (BENG. III OF 1899)—*contd.*

———— s. 569—

See MOTOR VEHICLES.

25 C. W. N. 21

———— ss. 590 (18), 561 (b), 631—

See PROSECUTION

I. L. R. 37 Calc. 545

———— ss. 559 (52), 561 and Bye-Laws 83 and 85—

See THEATRICAL PERFORMANCE.

I. L. R. 44 Calc. 1025

———— By-law 85 framed by the General Committee of the Corporation of Calcutta to regulate the hours of theatrical performance is not *ultra vires*. Statute 24 and 25 Vict., Chap. 67, gives ample authority to the Bengal Legislature to pass such an Act as the Calcutta Municipal Act and to empower the General Committee of the Municipality to frame by-laws and the General Committee has clear authority to make breaches of the by-laws punishable. The abetment sections of the Penal Code apply to an offence created by a by-law framed under the Calcutta Municipal Act. PROBODH CHANDRA RAI *v.* CORPORATION OF CALCUTTA . 24 C. W. N. 196

———— ss. 559 (52), 591—By-Law framed under these sections discussed. THE MANAGER, INDIAN MOTOR TAXI CAB CO., LTD. *v.* CORPORATION OF CALCUTTA . . 25 C. W. N. 32

———— s. 575—*Proceedings under, for failing to comply with the Municipality's requisition under s. 299—Revival of criminal proceedings after a great lapse of time, if warranted.* Criminal proceedings under s. 575 of the Calcutta Municipal Act were taken against the petitioner for failing to comply with certain municipal requisitions made upon him under s. 299 of the Act. Thereupon the accused's son appeared and took time Then again the proceedings were stayed for one month at the instance of the prosecution. Negotiations were entered upon between the petitioner and the municipal authority, which eventually fell through More than two years after the proceedings had been stayed, an application was made for reviving the old proceedings, and the proceedings were accordingly revived and the petitioner was convicted: *Held*, that having regard to the special circumstances, the great delay that occurred, during which nothing was done with regard to *the proceedings, it must be taken that those* proceedings were abandoned, and consequently the conviction of the petitioner was invalid NANDO LAL GUHA *v.* CORPORATION OF CALCUTTA

21 C. W. N. 467

———— ss. 578 and 631—*Pleader, prosecution of, for practice without license—Limitation of time for prosecution—Acquittal, order of, set aside by High Court in revision.* Where a pleader who was prosecuted for practising as a pleader without taking a license under s. 578 of the Calcutta Municipal Act admitted that he had exercised his profession in 1917-18 without a license, and the Magistrate acquitted the accused on the ground that under s. 631, cl. *(1)* of the said Act the complaint had not been made within three months of the date of the commission of the offence: *Held*, that upon the admission of the accused he was guilty of an offence under s. 578 on the last date of the year 1917-18, and the complaint

CALCUTTA MUNICIPAL ACT (BENG. III OF 1899)—*concld.*

———— s. 578—*contd.*

lodged within three months of that date was not barred under cl. *(1)* of s. 631 of the said Act. *Per* RICHARDSON, *J.*—For the purpose of carrying on a pleader's profession, it is not necessary that he should every day conduct a case or attend or address the Court. The offence is committed afresh or continues to be committed on every day on which a pleader practises without a license and the prosecution may be commenced within three months of the last of such days THE CHAIRMAN OF THE HOWRAH MUNICIPALITY *v.* BARODA PRASANNA PAIN . 24 C. W. N. 415

———— Sch. IV, rr. 8, 9—

See MUNICIPAL ELECTION.

I. L. R. 39 Calc. 598

———— Sch. V, r. 2 (a) (d)—

See MUNICIPAL ELECTION.

I. L. R. 46 Calc. 119

CALCUTTA POLICE ACT (BENG. IV OF 1866).

———— s. 13—

See POLICE OFFICER.

I. L. R. 46 Calc. 581

———— *Police officer being in possession of money when on duty—Contravention of order of Commissioner of Police—Order contravened, necessity of proof of—Plea of guilty, qualified.* The petitioner was placed on his trial under s. 13B, cl. (*c*), of Beng. Act IV of 1866 for being, while on duty, in possession of annas four, contrary to an order of the Commissioner of Police. After the examination of one witness the petitioner pleaded guilty to having the money in his possession He, however, stated before the Magistrate that at the time in question he was not on duty, but engaged in the private business of a police officer and also that he had been on duty the previous night. The Magistrate convicted the accused on this plea of guilty The order, the contravention of which was the subject-matter of the prosecution, was not proved: *Held*, that a copy of the Government order or an extract therefrom or a reference thereto should have been placed on the record. That the petitioner's plea of guilty was to be looked upon merely as an admission of the fact that he had at the *time in question the sum found upon his person.* The High Court set aside the conviction and sentence and directed a retrial by a new Magistrate. GAYA RAY *v.* EMPEROR (1914)

13 C. W. N. 1273

———— s. 16—

———— A stall where soda water is sold not for consumption on the premises is not a place of "public resort" within this section. HEMANTA KUMAR SEN *v.* THE KING EMPEROR . . . . 20 C. W. N. 58

———— s. 44—

See WAGERING

I. L. R. 39 Calc. 668

———— ss. 45, 46—*Materials sufficient for Magistrate to take cognizance of offence under s. 45 and issue warrant under s. 46—"Chalan" submitted by the Police when may be complaint.* A

CALCUTTA POLICE ACT (BENG. IV OF 1866)—*contd.*

——— ss. 45—*contd.*

petition was filed before the Chief Presidency Magistrate of Calcutta by one *S* alleging that at the premises mentioned therein cotton figure gambling had been carried on, the *modus operandi* of which was described and that the accused had taken part in it. The Magistrate examined *S*, issued a warrant for books and papers and directed the Assistant Commissioner of Police, Southern Division, to take cognizance of the case. He next made an order directing the Assistant Commissioner, Northern Division, to take cognizance "if evidence sufficient" and to "send up case." The police thereafter submitted a *chalan* charging the accused with gambling for gain on the date specified therein at the premises mentioned. The accused moved the High Court for quashing the proceedings pending before the Magistrate: *Held*, that the Magistrate took cognizance on the petition filed before him and not upon the *chalan* submitted by the police. He issued the warrant under s. 46 of the Police Act and the proceedings were not irregular. That the petition disclosed an offence under s. 45 of the Police Act of which the Magistrate could take cognizance thereon. *Semble*:—It is irregular for a Magistrate to take cognizance of an offence on a *chalan* submitted by the police which does not give a sufficient description of the offence in question. BAJRANGA LAL KEDIA *v.* THE KING-EMPEROR

25 C. W. N. 428

——— s. 54A—

See AUTREFOIS ACQUIT.

I. L. R. 45 Calc. 727

——— *Possession of property suspected to be stolen.* The preliminary condition which must be fulfilled before effect can be given to s. 54 (*a*) is that there must be reason to believe that the property found in the accused's possession was stolen property. In the present case the High Court acquitted the accused on the ground that the reasons given by the Magistrate were not sufficient. SUKHU KALWAR *v.* KING-EMPEROR (1918) . . **22 C. W. N. 936**

——— *Possession of article suspected to be stolen—Requisites for conviction.* To justify a conviction under s. 54A of the Calcutta Police Act there must be reason to believe that the article has been stolen or fraudulently obtained and no conviction can be had in the absence of a reasonable ground for suspicion. BAI DAS *v.* ALIM BUX KHAN (1919) . **23 C. W. N. 1053**

——— ss. 62A (4), 102A—

See PROCESSION . **I. L. R. 40 Calc. 470**

——— s. 66, sub-s. (4) (a)—*Calcutta Municipal By-law (2) framed under sub-s. 18, s. 559 of the Calcutta Municipal Act (Beng. III of 1899)—Obstruction of footpath.* The petitioner was granted a license under By-law (2) framed under sub-s. 18, s. 559 of the Calcutta Municipal Act, authorising him to make an enclosure in a portion of a particular street for depositing mortar, bricks, etc., during the building of certain premises on that street. The license was granted on condition that the portion of the street to be occupied must be fenced off with a temporary fence but the petitioner without putting up any such fence deposited some bricks on the footpath and was convicted

CALCUTTA POLICE ACT (BENG. IV OF 1866)—*concld.*

——— s. 66—*contd.*

under s. 66 of the Calcutta Police Act. *Held*, that the petitioner committed a breach of the by-law under which his license was granted but his offence also fell under sub-s. 4(*a*), s. 66 of the Police Act, and his conviction under that section was proper. *Quære*: Whether sub-s. 4 (*a*) introduced into s. 66 of the Police Act by the amending Act of 1910 (Bengal Act III) repealed the provisions regarding the regulation of obstructions in the Calcutta Municipal Act. BROOKE *v.* KING-EMPEROR (1917)

22 C. W. N. 455

CALCUTTA POLICE CIRCULAR.

——— No. 1159.

See POLICE OFFICER.

I. L. R. 46 Calc. 581

CALCUTTA PORT ACT (BENG. IX OF 1890).

——— s. 91—

See CARRIERS . **I. L. R. 41 Calc. 703**

——— ss. 112, 113, 114—

See LOSS OF GOODS.

I. L. R. 46 Calc. 56

——— s. 139—*Criminal Procedure Code (Act V of 1898), s. 20—Presidency Magistrate, if has jurisdiction in respect of offence committed outside Calcutta but within the limits of the Port.* By the operation of s. 20 of the Code of Criminal Procedure a Presidency Magistrate is an officer authorised to exercise the powers of a Magistrate within the limits of the Port of Calcutta within the meaning of s. 139 of the Calcutta Port Act and so has jurisdiction in respect of an offence under the said Act committed outside Calcutta, but within the limits of the Port thereof. GUNPAT RAI KHEMKA *v* W. J. WOOD . . . **24 C. W. N. 79**

CALCUTTA RENT ACT (III OF 1920).

——— s. 2—*"Tenant," meaning of—Suit filed before the Rent Act came into force, applicability of the Act—Effect of non-payment of rent—Relief against forfeiture for non-payment, if available.* The term "tenant" is used in a special sense in the Calcutta Rent Act, 1920, and includes a person whose tenancy has expired even before the Act came into operation. Such a "tenant" is entitled to the benefit of the Act even if a suit for ejectment was instituted before the Act came into operation. A tenant is not entitled to the benefit of s. 11 of the Act, if he does not pay rent as provided in s. 11, sub-s. 5, of the Act. BITHALDAS CHANDAK *v.* LALBEHARI DUTT

25 C. W. N. 967

——— *Held*, that a workshop did not come within "premises" under this section. INDIAN ENGINEERING MOTOR CO., LTD. *v.* GLADSTONE WYLLIE & CO. . **26 C. W. N. 102**

——— s. 4—*Held*, that the fact that there was option for renewal for a further period of three years after the expiration of the first three years did not make the lease one for five years and upwards within the meaning of s. 4, sub-s. 3. That the Rent Controller refused to exercise jurisdiction vested in him by law and the High Court could properly interfere in revision. BASANTA CHARAN SINHA *v.* RAJANI MOHUN CHATTERJEE

26 C. W. N. 711

CALCUTTA RENT ACT (III OF 1920)—*contd.*

——— s. 11—

See s. 2. 25 C. W. N. 967

——— *Held,* that to allow a landlord who has sufficient premises for his requirement to eject a tenant for his own better convenience or profit would be to defeat the object of the Act. REKHAB CHAND DOOGER *v.* J. R. D'CRUZ . 26 C. W. N. 499

——— Where there is an agreement to extend the time for payment before the rent actually becomes due under the lease then it might well be that the time within which under s. 11 (5) rent has to be paid to the landlord is such extended date, but where the default has already taken place the subsequent acceptance of rent by the landlord does not take the matter out of the provisions of s. 11, sub-s. (5). JETHA BHALCHAND *v.* F. C. GRACE 26 C. W. N. 679

——— Grounds on which a landlord can claim to enter into possession, discussed. KUMAR NATH MITTER *v.* WALTER LOCKE & Co. 25 C. W. N. 1012

——— s. 15—

——— *Held,* that under this section the Controller must grant a certificate certifying the standard rent. ALLEN BROS. & Co. *v.* BANDO & Co. 26 C. W. N. 845

[illegible]

26 C. W. N. 52

——— s. 20—

——— *Held,* that this section is not but that r. 4 framed under s. 23 is *ultra vires.* GOBARDHAN DAS DEORA *v.* DOOLIE CHAND SHETHIA . 25 C. W. N. 661

——— ss. 20 and 23—

See ULTRA VIRES.
I. L. R. 48 Calc. 955

CALCUTTA SUBURBAN POLICE ACT (BENG. II OF 1866).

——— ss. 39A (4), 49A—

See PROCESSION . I. L. R. 40 Calc. 470

CALLS.

See COMPANY.
I. L. R. 42 Bom. 159 & 264

CAMBAY.

See PENAL CODE, ss 34, 109, 467.
I. L. R. 36 Bom. 524

CANAL.

See NORTHERN INDIA CANAL AND DRAINAGE ACT (VIII OF 1873).

——— damage to—

See PENAL CODE (ACT XLV OF 1860) s. 430 . . I. L. R. 41 All. 599

CANCELLATION.

See GIFT . . I. L. R. 39 Calc. 933

See LIMITATION ACT (XV OF 1877), SCH. II, ARTS. 91 AND 141.
I. L. R. 32 All. 392

See PARDANASHIN LADY.
I. L. R. 36 All. 81

——— of order—

See PROBATE AND ADMINISTRATION ACT (V OF 1881), s. 50.
I. L. R. 37 All. 380

——— of Registration under Patents and Designs Act—

See DESIGN . I. L. R. 45 Calc. 606

——— of sale-deed—

See LIMITATION ACT (IX OF 1908), SCH. I, ART. 91 . I. L. R. 42 Bom. 638

CANDIDATE.

——— for pleadership—

See PLEADERSHIP EXAMINATION.
I. L R. 40 Calc. 588

——— for Municipal Election—

See MUNICIPAL ELECTION.
I. L. R. 46 Calc. 119 & 132

CANTONMENT PROPERTY.

See ADVERSE POSSESSION.
I. L. R. 33 All. 229

——— Resumption by Government of land in—*Cantonment Code of 1836 and 1850—Ownership of land in Poona Cantonment—Suit by Government for ejectment of tenant from premises within Cantonment limits—Private ownership in Cantonment, claim to—Presumption of ownership—Possession, effect of—Right of Government to resume land.* In a suit for ejectment of the appellants from premises within the limits of the Poona Cantonment, the Government as plaintiffs claimed that the land belonged to them, and was merely held by the defendants on military or cantonment tenure which entitled them to resume it at their pleasure subject to compensation for buildings which the tenants might have erected thereon. The defendants claimed the land as their private property on the ground that their predecessors in

[illegible]

houses and premises generally, marked 23 Staff Lines, Poona Cantonment." This document was endorsed as "sanctioned" by the Brigadier-General Commanding. *Held,* on a consideration of the mode of delimitation of the Poona Cantonment,

CANTONMENT PROPERTY—*contd.*

the regulations affecting it, the arrangements made with the owners of the lands taken to indemnify them for the loss they sustained by being deprived of their rights of occupancy, and the other circumstances of the case, (i) that even if the defendants established that their house was built at or before the time the cantonment was made, there was still a strong probability that they were duly compensated for the change in their position as owners to that of licensees; (ii) that from the regulations as summarised in Aitchison's Cantonment Code of 1836 and Jameson's Cantonment Code of 1850, it was clear that, though permission to occupy ground was frequently given, especially for the building of officers' houses or bungalows, such permission carried with it no sort of proprietary right, and the buildings were liable to expropriation at a price to be fixed by the authorities, and the permission of the Commanding Officer was necessary even for the letting or sale of the house so built. It was therefore impossible to say that mere possession or occupation of the bungalow on this site, afforded any presumption whatever that the defendants or their predecessors in title were owners in fee. The presumption was all the other way, and was strengthened by an examination of the history of the site itself which showed that the defendants' predecessors in title did not regard the property as differing in its tenure and terms from other property in the cantonment. The defendants were, therefore, mere licensees and the land had been lawfully resumed by Government. KAIKHUSRU ADERJI GHASWALA *v.* SECRETARY OF STATE FOR INDIA (1911) I. L. R. 36 Bom. 1
15 C. W. N. 909

CANTONMENT CODE OF 1836 AND 1850.

See CANTONMENT.

I. L. R. 36 Bom. 1

CANTONMENT CODE, 1912.

———— r. 97—*Notice of removal—Cantonment authority—Building in a ruinous condition.* A notice issued under r. 97 of the Cantonment Code of 1912 can require the owner to do one of the two things, *viz.*, to remove the building or to cause repairs to be made. It is not necessary that the notice should always be in the alternative either to remove or to repair, the choice to lie with the owner. EMPEROR *v.* BYRAMJI PUDUMJI (No. 2) (1919) . I. L. R. 43 Bom. 838

———— rr. 107A, 97—*Order to repair a building in a bad condition—Disobedience of the Order—Power to inflict daily fine for disobedience —Fine can be levied for disobedience in the past only.* The owner of a bungalow within Cantonment limits, having failed to carry out repairs to the bungalow, was, on the 27th October 1918, ordered by a Magistrate, under r. 107A of the Cantonment Code of 1912, to pay a daily fine of Rs. 5 from the 1st November 1918, until such time as the repairs were carried out: *Held*, that r. 107A did not authorise the Magistrate to convict the owner of a failure in regard to the future, though he was competent to impose a fine for the past failure. EMPEROR *v.* BYRAMJI PUDUMJI (No. 1) (1919) . . . I. L. R. 43 Bom. 836

CANTONMENTS ACT (III OF 1880).

———— s. 22—*Limitation Act (IX of 1908), Art. 62—Taxes levied by cantonment authorities—*

CANTONMENTS ACT (III OF 1880)—*contd.*

———— s. 22—*contd.*

Payment under protest—Jurisdiction of Civil Courts to entertain suit for recovery of payment—Assessment on the annual letting value—Payment by cheque—Limitation runs from the date of the receipt of the money by the payee. Civil Courts have jurisdiction to entertain a suit to recover the amount of taxes levied by the cantonment authorities and paid under protest on the ground that the assessment was illegal. This may be the case both when a serious demand requiring very attentive consideration had been made on the plaintiffs and reasonable time has not been given to the latter to take advice on the subject and when the cantonment authorities have wholly disregarded the basis on which the rate should have been assessed, by assessing the rate upon the gross income of the plaintiffs. *Kasandas* v. *Ankleshvar, I. L. R. 26 Bom. 294,* followed. In assessing a tax based on the annual letting value of premises, it is illegal to take the annual income derived from the premises as the basis of calculation. In case of payment by a cheque, limitation runs not from the date of the delivery of the cheque, but from the date of the receipt of the money by the payee. SECRETARY OF STATE FOR INDIA *v.* MAJOR HUGHES (1913) . I. L. R. 38 Bom. 293

CANTONMENTS ACT (XIII OF 1889).

———— s. 80—*Civil Procedure Code (Act V of 1908), ss. 2 (17), 80—Public officer—Suit against public officer—Notice of claim necessary —Cantonment Committee is public officer—Cantonments Act (XIII of 1889), s. 80 applies to actions* ex delicto *and not to actions* ex contractu. A Cantonment Committee constituted under the Indian Cantonments Act (XII of 1889) is a "public officer" within the meaning of s. 2, cl. (17) of the Code of Civil Procedure (Act V of 1908). Before the Committee can be sued, the notice prescribed by s. 80 of the Code must be given. The notice contemplated by s. 80 has to be given for actions sounding substantially in tort; and it makes no difference that those actions are, by operation of law, treated, for certain purposes, as actions *ex contractu*. *Rajmal* v. *Hanmant, I. L. R. 20 Bom. 697,* considered. CECIL GRAY *v.* THE CANTONMENT COMMITTEE OF POONA (1910)
I. L. R. 34 Bom. 583

CAPACITY OF PARTIES TO SUE.

———— *Res judicata—Capacity of parties—Matter substantially in issue—Civil Procedure Code (Act XIV of 1882), s. 13.* If a plaintiff is suing in a capacity in which he is a stranger to the capacity in which he sued in a former suit, his claim has no proper connection with that former suit, and the Civil Procedure Code (Act XIV of 1882), s. 13 does not apply. HARGOVAN RAMJI *v.* MULJI HARJIVAN (1909)
I. L. R. 34 Bom. 416

CAPITAL CASES.

See PUBLIC PROSECUTOR, DUTY OF.

I. L. R. 42 Calc. 422

CAPTURE OF VESSEL.

See SALE OF GOODS.

I. L. R. 45 Calc. 28

CARE AND PRUDENCE.

——— degree of—

See TRUSTEE . I. L. R. 38 Mad, 71

CARGO.

See CONFISCATION I. L. R. 42 Calc. 334

——— release of—

See SALE OF GOODS I. L. R. 45 Calc. 28

CARRIAGE OF GOODS.

See CONTRACT . I. L. R. 41 Calc. 670

CARRIERS.

See CARRIERS ACT

See CARRIERS BY SEA.

See COMMON CARRIER.

——— On Railway Risk Note—

See CONTRACT . I. L. R. 39 All. 418

——— misdelivery by Railway—

See RAILWAYS ACT, 1890, s. 80.

I. L. R. 2 Lah. 133

——— Partly by Rail and partly by River—

See RAILWAY COMPANY.

I. L. R. 47 Calc. 6

——— suit against—

See SPECIFIC MOVEABLE PROPERTY.

I. L. R. 39 Mad. 1

1. ——— "During Transit"—*Construction of contract—Consignor bound by ordinary train arrangements made by Company.* A consigned certain cotton by railway from *E* station to *K* station. Under the terms of the risk-note signed by the consignor, the company was exempted from liability for any loss *before, during or after transit over the Railway.* Under the train arrangements made by the Railway Company, goods consigned from *E* to *K* were carried beyond *K* to *C*, and then back from *C* to *K*. The goods were damaged while at *C*. In a suit to recover compensation for the loss so caused: *Held*, that the loss occurred during transit from *E* to *K* and that the company was protected by the terms of the risk-note. Every customer dealing with a company is bound not only by the ordinary route but also by the ordinary train arrangements according to which it professes to carry. *Tobin v. London & North-Western Railway Company, 2 Ir. Rep. 22, 35,* referred to. ARUNACHELLAM CHETTIAR *v.* THE MADRAS RAILWAY COMPANY (1909) . . . . I. L. R. 33 Mad. 120

2. ——— "Clear receipt"—*By consignee—Loss of goods—Liability of Company for the loss.* Certain bales of cloth tendered to the East Indian Railway Company for transit were in due course delivered to the consignee, who granted "clear receipt" for them. Subsequently, the consignee discovered that some pieces of cloth out of the bales were missing, the same having been lost while in the custody of the Railway Company. In a [illegible] for compensation: [illegible] carriers. *Per* MOOKERJEE, J. A receipt acknowledging a delivery of the goods in good condition is only *primâ facie* evidence of the fact, and raises a presumption in favour of the carriers, which may be rebutted by the consignee. EAST INDIAN RAILWAY COMPANY *v.* SISPAL LAL (1911)

I. L. R. 39 Calc. 311

2. (a) ——— In deciding a suit against a common carrier for the loss, damage and non-delivery of goods entrusted to him for carriage the Court has to decide whether the [illegible] negligence is thrown on the common carrier on the theory that the loss or damage to the goods is *primâ facie* proof of negligence. INDIA GENERAL NAVIGATION AND RAILWAY CO. *v.* THE EASTERN ASSAM CO., LTD.

I. L. R. 47 Calc. 1027

3. ——— Liability of Steamer Company—*Carriers Act (III of 1865), ss 6, 7, 8, 9—Onus of proof—Negligence or criminal act of company, its servant, or agent presumed.* Where a steamer company forwarded a consignment of four tins of oil on terms contained in what is known as an owner's risk-note, after receiving the tins in good condition, and the consignee refused to take delivery as one tin was cut open and partly empty and another was quite empty, and brought a suit for the value of the oil: *Held*, that the steamer company, being a common carrier, was in a different position from railway companies who are only bailees, coming under ss. 151, 152 and 161 of the Contract Act. Its liability is, therefore, that of an insurer subject to certain exceptions under s 6 of the Carriers Act *Held*, also, that the onus was, as a matter of course, on the steamer company as common carriers, even in a case covered by special contract to disprove negligence as the loss of the goods is *primâ facie* evidence of negligence or criminal act of the carrier, his servants or agents. *Choutmul Doogur* v. *The Rivers Steam Navigation Co, I. L. R. 21 Calc. 786,* followed *Irrawaddy Flotilla Co* v. *Bhugwandas, I. L. R 18 Calc. 620, Lalchand Sew Karan* v. *E. I. Ry Co, 17 C. W. N. 635n,* referred to. *Sheobarut Ram* v. *B. and N.-W. Ry. Co, 16 C. W. N. 766,* not followed. INDIA GENERAL STEAM NAVIGATION COMPANY *v.* BHAGWAN CHANDRA PAL (1913) . . . I. L. R. 40 Calc. 716

4. ——— Undeclared luggage—*Carriers Act (III of 1865), ss 3, 4, 8, 9—Negligence of carrier or his agent—Liability* Where loss of or damage to goods was caused by negligence or [illegible] *Sheobarut Ram* v. *Bengal and North-Western Railway Company, 16 C. W N. 760,* distinguished.

CARRIERS—*concld.*

INDIA GENERAL NAVIGATION AND RAILWAY CO., LD. *v.* GOPAL CHANDRA GUIN (1913).
I. L. R. 41 Calc. 80

5. ———— **Conversion**—*Misdelivery of goods—Notice of arrival—Delivery order—Unauthorised act—Reasonable conduct—Consignee, duty of, regarding delivery—Calcutta Port Act (Beng. IX of 1890), s. 91* The plaintiff, Noel William Freeman shipped goods from London to Calcutta under a bill of lading which provided that the goods were "to be delivered at the Port of Calcutta unto Mr. N. W. Freeman or his assigns," and in which the consignee's name and address were slated as "N. W. Freeman, Calcutta." The consignee took no steps regarding delivery of the goods on arrival, and the defendant company after landing the goods handed them over, in the usual course, to the Port Commissioners. The defendant company thereafter posted a notice of arrival addressed to "N. W. Freeman, Esq., Calcutta," which was delivered by the post office to one Nigel W. Freeman. The latter through his agent gave a letter of indemnity to the defendant company, and the agent, without production of the bill of lading, obtained from the defendant company a delivery order on the Port Commissioners for the goods, and wrongfully took delivery of the same. When communicated with, Nigel W. Freeman returned most of the goods in a damaged and deteriorated condition to the plaintiff. In a suit by the owner consignee against the shipping company for damages for misdelivery: *Held* that the defendant company had not done an unauthorised act in issuing the notice of arrival or the delivery order, and that they have acted in a reasonable and proper manner. *Hiort* v. *Bott, L. R. 9 Ex. 86*, and *The Stettin, 14 P. D, 142*, distinguished. *Heugh* v. *London and North-Western Ry. Co., L. R. 5 Ex. 51*, referred to. It is the duty of the consignee to ascertain which goods will arrive and to be ready to take delivery. FREEMAN *v.* P. & O. S. N. Co., LD. (1913).
I. L. R. 41 Calc. 703

6. ———— reweighing goods. A Railway Company is not bound to reweigh goods and give a certificate of shortage on demand of consignee. JAGANNATH MARWARI *v.* EAST INDIAN RAILWAY.
22 C. W. N. 902

CARRIERS ACT (III OF 1865).

See CONTRACT ACT (IX OF 1872), ss. 56, 65.
I. L. R. 40 Bom. 529

———— not applicable to carriers by sea—
See BILL OF LADING.
I. L. R. 38 Mad. 941

———— ss. 3, 4, 8, 9—
See CARRIERS . **I. L. R. 41 Calc. 80**

———— ss. 5, 8, 9—
See COMMON CARRIERS.
23 C. W. N. 998

———— ss. 6, 7, 8, 9—
See CARRIERS . **I. L. R. 40 Calc. 716**

———— ss. 6, 8, 9—
See COMMON CARRIER, LIABILITIES OF.
I. L. R. 38 Calc. 28
See CARRIERS . **I. L. R. 40 Calc. 716**

CARRIERS ACT (III OF 1865)—*contd.*

———— s. 9—
See CARRIERS.
I. L. R. 47 Calc. 1027
See RAILWAY COMPANY
I. L. R. 37 Bom. 1

———— s. 10—
See COMMON CARRIERS.
I. L. R. 38 Calc. 50

CARRIERS BY SEA.

See CONTRACT ACT (IX OF 1872), ss. 56, 65 . . . **I. L. R. 40 Bom. 529**

———— Carriers Act not applicable to—
See BILL OF LADING.
I. L. R. 38 Mad. 941

CASE STATED.

See PRESIDENCY BANK, ACT, 1876, s. 23.
I. L. R. 45 Bom. 138

CASH ALLOWANCE.

See LIMITATION, ACT 1908, SCH. II, ART. 131 . . . **I. L. R. 38 Mad. 916**

———— *Tastik—Arrears of cash allowance, suit to recover—Limitation Act (XV of 1877), Sch. II, Arts. 131, 62.* The plaintiff, the manager of the temple of Shri Laxmi Narayan Dev at Hulekal, sued to recover from the defendants the managers of the temple of Shree Madhukeshwar at Banawasi, a sum of Rs. 96 as arrears of a cash allowance (tastik) which the former was entitled to receive from the property of the latter. The defendants admitted the title of the plaintiff to the allowance but pleaded limitation as to the arrears for two out of the six years. The lower Courts applied Art. 131 of the Limitation Act, 1877, and allowed the whole of the claim. On appeal: *Held*, that the claim was properly allowed. A cash allowance of the nature as in the present case is, according to Hindu law, *nibandha* or immoveable property; where it is annually payable, the right to payment gives to the person entitled a periodically recurring right as against the person liable to pay. The right to any amount which has become payable stands as to such person on the same footing as the aggregate of rights to amounts which are to become payable and which have become actually due. But where there are more than one person entitled to the payment as co-sharer and the payment is made to one of them by the person liable to pay, the co-sharer receiving the amount holds it, *minus* his share, on behalf of the rest as money had and received for their use though as to him with reference to the aggregate of rights, it is *nibandha* or immoveable property, in the nature of a periodically recurring right. The important question is who is the person sued and what is it that is sued for? If what is sued for is the establishment of a title to the right itself, then Art. 131 applies, whether the defendant is the person originally liable to pay or is a co-sharer who has received payment from that person. If, on the other hand, what is sued for is the amount of arrears, which has become actually payable to the plaintiff, then there is a distinction between the person originally liable to pay and a co-share of the plaintiff, who has actually received payment from that person. Art. 131 applies in that case

CASH ALLOWANCE—*contd.*

to the person originally liable to pay and Art. 62 applies to the co-sharer who has received the payment. SAKHARAM HARI *v.* LAXMIPRIYA TIRTHA SWAMI (1909) . . . I. L. R. 34 Bom. 349

CASTE.

See CHURCH . I. L. R. 39 Mad. 1056

See CIVIL PROCEDURE CODE (1908), O. I, R. 8, s. 97 I. L. R. 39 Bom. 339
I. L. R. 40 Bom. 158

See HINDU LAW—CONVERSION.
I. L. R. 33 All. 356

See HINDU LAW—MARRIAGE.
I. L. R. 39 Bom. 538
I. L. R. 48 Calc. 926

See LIBEL . . I. L. R. 39 All. 561

——— property of—

See CONTRACT ACT (IX OF 1872), s. 70.
I. L. R. 42 Bom. 556

——— usage of—

See DEFAMATION . I. L. R. 33 Mad. 67

——— *Ownership of property by.* Ownership of property by a fluctuating body of persons is recognised in Hindu Law and though there is no case in which the right of a particular caste or community to hold property has been decided there are observations tending to show that such a body is capable of owning property. PROBHAT CHANDRA SEN *v.* HARI MOHAN DHUPI.
24 C. W. N. 206

——— *Regulation II of* [illegible] *-isdiction* [illegible] *and to* [illegible] *-lf.* The plaintiff sued to obtain a declaration that he was [illegible] defendant from using the name of "Ayya of Hiremath." The plaintiff's complaint was that the [illegible] fees which would otherwise have been paid to the [illegible] virtue of that office. It was a caste question not cognizable by a Civil Court. *Held,* also, that the [illegible] defendant showed that what the parties had been fighting for was merely a question of dignity under the cover of a religious office. If the Court were to interfere in such cases, it would be merely assisting one party at the expense of the other and compelling the caste or the sect to follow one spiritual leader in preference to another. GADIGEYA *v.* BASAYA (1910) . . . . I. L. R. 34 Bom. 455

——— *Caste—Trustee of caste funds—Jurisdiction of Civil Courts in caste questions—Application of Indian Trusts Act (II of 1862), ss. 5 and 6, to creation of trusts of caste funds—Civil Procedure Code (Act V of 1908), s. 151.* As a result of dissensions in a Hindu caste a suit was filed by the plaintiff, a trustee of certain caste funds and member of the Managing Committee, against the defendant, a co-trustee and the President of that Committee. The plaintiff prayed for a declaration that he had the right to inspect all books and documents of the Mahajan Managing Committee, Sub-Committee and Trustees, and for an injunction restraining the defendant from interfering with him in the exercise of such right. The only two documents about which there was any real controversy were the minutes of the Sub-Committee and the correspondence file of the Mahajan. *Held,* that as trustee of the Dorasai and Sadharan funds, the plaintiff had no right, either in law or by virtue of any caste rules, to the roving inspection claimed. *Bank of Bombay* v. *Suleman, I. L. R. 32 Bom. 466, 474,* referred to. *Held,* further, that the Mahajan fund of this caste being a purely secular fund the Indian Trust Act applied, and the plaintiff could not claim to have been made a trustee of that fund merely by virtue of a caste resolution and his own letter of acceptance. *Held,* further, on the evidence, that there had been no express demand addressed by the plaintiff to the proper quarter, and no refusal by the defendant such as would be necessary to enable a suit of this character to succeed. *Held,* further, that where rights to property are not involved all matters of external management must be left to the decision of the caste. The question in dispute was in reality a question between the caste and a section, apparently a small section, of the caste led by the plaintiff, and as such it was outside the Court's jurisdiction in accordance with the decision in *Nemchand* v. *Savaichand, I. L. R. 5 Bom. 85; Lalji Shamji* v. *Walji Wardhman, I. L. R. 19 Bom. 507,* referred to and distinguished. *Held,* lastly, that when according to well established principles certain questions have been removed from the jurisdiction of the Court, they cannot be brought within the jurisdiction under s. 151 of the Civil Procedure Code (Act V of 1908). JETHABHAI NARSEY *v.* CHAPSEY COOVERJI (1909)
I. L. R. 34 Bom. 467

CASTE DISABILITIES REMOVAL ACT (XXI OF 1850).

See HINDU LAW—CONVERSION.
15 C. W. N. 545

——— *Descendant of Hindu convert to Christianity, whether relieved by the Act.* The Caste Disabilities Removal Act does not apply to descendants of persons relieved by the Act. The descendants of a Hindu convert to Christianity have, therefore, no interests in the property of their unconverted relatives. *Bhagwant Singh* v. *Kallu, I. L. R. 11 All. 100,* dissented from. VAITHILINGA *v.* AYYATHORAI (1917)
I. L. R. 40 Mad. 1118

——— *Succession by a Christian to the sons of a convert to Islam—Muhammadan Law—Pre-emption—Punjab Pre-emption Act, I of 1913, s. 15.* In 1914 defendants 1 to 3, the 3 Muhammadan sons of Mr. Stuart Skinner, *alias* Nawab Mirza, who was a convert to Islam, sold 6 villages to Mr. R. H. Skinner, defendant 4, a first cousin of theirs once removed. The plaintiffs

CASTE DISABILITIES REMOVAL ACT (XXI OF 1850)—*contd.*

as occupancy tenants in one of the villages sold, brought the present suit for pre-emption in respect of that village, and the only question before the High Court was whether the vendee would, but for the sale, be entitled on the death of the vendors to inherit the land sold, he being a Christian, as in that case he would have a right of pre-emption superior to that of the plaintiffs under the Punjab Pre-emption Act, I of 1913, s. 15. *Held,* following *Bhagwant Singh* v. *Kalu* (*I. L. R. 11 All. 100*) that Act XXI of 1850 has the effect of abrogating the rule of Muhammadan Law by which a *non-Muslim* is excluded from succession to a *Muslim*, and that the vendee had consequently a right of succession to the vendors and therefore a right of pre-emption superior to that of the plaintiffs. *Gulab* v. *Ishar Kaur* (*63 P. R. 1895*) *per Stogdon J.*, *Mahna* v. *Chand* (*104 P. R. 1902*) and *Jiwan* v. *Harnam Das* (*77 P. W. R. 1907*), referred to, *Kanshi Ram* v. *Jiwan* (*82 P. R. 1890*), *Desu* v. *Jowala* (*13 P. R. 1885*), *Badar Bakhsh* v. *Mussammat Sahib Jan* (*75 P. R. 1912*), *Khunni Lal* v. *Govind Krishna* (*I. L. R. 33 All. 356 P. C.*) and *Mukerji* v. *Alfred* (*36 P. R. 1909*), distinguished. RUPA *v.* SARDAR MIRZA . **I. L. R. 1 Lah. 376**

CATTLE TRESPASS.

See RAILWAYS ACT (IX OF 1890), s. 125.
I. L. R. 34 All. 91

CATTLE TRESPASS ACT (III OF 1857).

See ACT OF STATE **I. L. R. 39 Calc. 615**

CATTLE TRESPASS ACT (I OF 1871).

———— ss. 1 and 18—

See ACT OF STATE **I. L. R. 39 Calc. 615**

———— s. 10—*Person authorised to seize cattle—S. 24, rescue of cattle lawfully seized.* No conviction can be had under s. 24 of the Cattle Trespass Act unless it is proved that the cattle rescued was lawfully seized within the meaning of the provisions of the Act. Where it appeared that the complainant had let out the land in question in *burga* : *Held,* that the question whether the complainant could be said to be the occupier of the land within the meaning of s. 10 depended entirely on the terms of the *burga* lease. If it was a lease properly so called, then the lessee would be the occupier and not the complainant. That the onus was on the complainant to satisfy the Court that he was a person entitled to seize the cattle or cause it to be seized. MANIK CHANDRA RAY *v.* ISMAIL (1918) . . **23 C. W. N. 387**

———— s. 20—

———— Magistrate's cognizance of offence—

See CRIMINAL PROCEDURE CODE, s. 190.
I. L. R. 44 Bom. 42

———— s. 24—*Offence not compoundable—Compromise—Intention of compromise effected by complainant refraining from producing evidence.* The offence provided for by s. 24 of the Cattle Trespass Act, 1871, is not compoundable. Inasmuch as, however, it is a summons case, the accused would be entitled to an acquittal if the complainant failed to produce his evidence. Where, therefore, a Magistrate purported to accept a compromise entered into between the complainant and persons accused of committing offences under s. 24 of the Cattle Trespass Act and s. 323 of the Indian Penal Code in pursuance of which the complainant had refrained from producing evidence against the accused, it was *held* that, though the *procedure of the Magistrate* was incorrect, the result of his order was substantially right. EMPEROR *v.* JULUA.
I. L. R. 42 All. 202

CAUSE OF ACTION.

See AGRA TENANCY ACT (II OF 1901), s. 34 . . **I. L. R. 35 All. 512**

See ARREST OF SHIP.
I. L. R. 42 Calc. 85

See CIVIL PROCEDURE CODE, 1882, s. 43
I. L. R. 34 All. 172

See CIVIL PROCEDURE CODE, 1908—

s. 9 . . **I. L. R. 32 All. 527**

s. 11, EXPL. IV, O. II, R. 2.
I. L. R. 39 Bom. 138

s. 20 . . **I. L. R. 36 All. 563**
I. L. R. 45 Bom. 1228
I. L. R. 37 All. 189
I. L. R. 39 All. 607
I. L. R. 42 All. 480

O. II, R. 2 . **I. L. R. 36 All. 560**
I. L. R. 38 All. 217
I. L. R. 41 All. 286 & 53
I. L. R. 45 Bom. 55

O. XXXIII, RR. 1, 2 AND 5.
I. L. R. 34 Bom. 638

See CONTRACT . **I. L. R. 34 All. 429**

See CONTRACT ACT, ss. 39, 73, 120.
I. L. R. 34 Bom. 192

See DECREE FOR POSSESSION.
I. L. R. 38 All. 509

See EVIDENCE ACT (I OF 1872), s. 91.
I. L. R. 34 All. 158

See FRAUD . . ***14 C. W. N. 695***

See HINDU LAW—SUCCESSION.
I. L. R. 32 All. 594

See HINDU LAW—WILL.
I. L. R. 42 Calc. 561
I. L. R. 37 All. 422

See HUNDI, SUIT ON.
I. L. R. 40 Bom. 473

See INDEMNITY BOND.
I. L. R. 41 All. 395

See LETTERS PATENT, CLS. 12 AND 14.
I. L. R. 34 Bom. 564

See LIMITATION ACT (IX OF 1908), SCH. I, ARTS. 97 AND 116 **I. L. R. 45 Bom. 955**

ARTS. 91 AND 120.
I. L. R. 37 All. 640

ART. 120 . **I. L. R. 36 All. 492**
I. L. R. 41 All. 509

See MADRAS ESTATES LAND ACT (I OF 1908), s. 192 . **I. L. R. 38 Mad. 655**

See MADRAS LAND ENCROACHMENT ACT, 1905—

ss. 3, 5, 14 . **I. L. R. 38 Mad. 674**

ss. 5, 6, 7, 14 . **I. L. R. 39 Mad. 727**

See MAHABRAHMANS. **I. L. R. 43 All. 159**

CAUSE OF ACTION—*contd.*

See MALICIOUS PROSECUTION.
I. L. R. 37 Calc. 358
I. L. R. 42 All. 305
I. L. R. 38 Calc. 880

See MISJOINDER OF PARTIES.
I. L. R. 45 Calc. 111

See ORISSA TENANCY ACT, 1913, s 3. . . 4 Pat. L. J. 387

See PRACTICE . L. R. 41 I. A. 142

See RES JUDICATA I. L. R. 34 Mad. 97

See SECRETARY OF STATE FOR INDIA.
I. L. R. 38 Calc. 378

See SPECIFIC RELIEF ACT (I OF 1877), s. 42 . . I. L. R. 32 All. 316
I. L. R. 33 All. 430

See TORT . . I. L. R. 43 All. 688

See TRADE MARK I. L. R. 37 All. 446

See TRANSFER OF PROPERTY ACT (IV OF 1882), s. 111, CL. (*g*).
I. L. R. 42 Bom. 195

———— abatement of—

See PARTIES—RELIGIOUS ENDOWMENT.
I. L. R. 40 Calc. 323

———— Dissolution of Partnership—

See CIVIL PROCEDURE CODE, 1908, s. 20. . I. L. R. 45 Bom. 1228

———— for mesne profits—

See CIVIL PROCEDURE CODE (ACT V OF 1908), O. II, RR. 2 AND 4.
I. L. R. 38 Mad. 829

———— for possession of land—

See CIVIL PROCEDURE CODE (ACT V OF 1908), O. II, RR. 2 AND 4.
I. L. R. 38 Mad. 829

———— for redemption—

See MORTGAGE . I. L. R. 36 All. 36

———— for return of purchase money on dispossession—

See LIMITATION ACT (IX OF 1908), SCH. I, ARTS. 62 AND 97 I. L. R. 38 Mad. 887

———— fresh suit on same cause—

See CIVIL PROCEDURE CODE, 1908, O. XVII, R. 2 O. IX, R 3 J. O. XXXII, R. 3 . . I. L. R. 44 Bom. 767

———— Hundi-money advanced on—

See EVIDENCE ACT, 1872, s. 91.
I. L. R. 2 Lah. 330

———— misjoinder of—

See CIVIL PROCEDURE CODE (1908), O. II, R. 5 . I. L. R. 38 Bom. 120

———— on promissory note unstamped—

See VARTHA MANAMU.
I. L. R. 38 Mad. 660

———— on mortgage—

See CIVIL PROCEDURE CODE, 1908, O. II, ACT. 2 . I. L. R. 45 Bom. 55

CAUSE OF ACTION—*contd.*

———— splitting up of—

See CIVIL PROCEDURE CODE (ACT V OF 1908), O. II, R. 2.
I. L. R. 40 Bom. 351

———— splitting up of suits to recover different parts of property—
I. L. R. 44 Bom. 352

———— survival against insolvent defendant—

See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXII, R. 10.
I. L. R. 39 Bom. 568

———— survival of—

See PARTIES. . I. L. R. 45 Calc. 862

———— suits by several mortgagees—

See CIVIL PROCEDURE CODE, 1908, O. II, R. 2 . . I. L. R. 45 Bom. 55

———— suspension of—

See LIMITATION . I. L. R. 43 Calc. 660

1. ———— Amendment of plaint—*Secretary of State for India in Council—Action in tort—Notice of suit—Civil Procedure Code (Act V of 1908), s. 80—Amendment of plaint, when not permissible—Leave to withdraw.* Where notice of an action against the Secretary of State for India in Council required under s. 80 of the Civil Procedure Code, pointed to a suit based on negligence and the original plaint proceeded on that basis and it was subsequently sought to amend the plaint by setting up a cause of action based on nuisance: *Held*, that such amendment of the plaint could not be permitted. Leave to withdraw suit granted. MCINERNY *v.* THE SECRETARY OF STATE FOR INDIA (1911) . I. L. R. 38 Calc. 797

2. ———— Vendor and purchaser—*Right of vendor to sue purchaser for default in paying creditors as agreed in the sale.* A vendor has a cause of action against the purchaser, when the latter commits default in paying the creditors of vendor, as directed in the sale deed. It is not necessary to maintain such a suit that the vendor should show, that he has sustained damage at the date of suit *Dorasinga Thevar* v. *Arunachallam Chetty, I. L. R. 23 Mad. 441,* followed. *Dorasamy Thevan* v. *Lashmana Chetty, 14 Mad. L. J. 285,* not approved. ANSUR SUBBA NAYUDU *v.* BATHULA BEE BEE SAHIBA (1910) . . I. L. R. 34 Mad. 479

3. ———— Separate causes—*Contract—Intention—Civil Procedure Code (Act V, 1908) O. II, r. 2, scope of—Presidency Small Cause Courts Act (XV of 1882), s. 69—Damage suit for.* A contract by indent provided for the supply of goods by two monthly shipment clauses 13 of the contract being as follows: "This indent is to be deemed and construed as a separate contract in respect of each item and instalment of goods and your rights and liabilities and ours respectively shall be the same as though a separate indent has been made out and signed in respect of each instalment." The purchaser having failed to take delivery or pay for the goods in respect the the two shipments, the vendor brought two separate suits in the Calcutta Small Cause Court for re-sale damages, one in respect of each shipment: *Held*, that in view of the intention expressed in clause 13, the plaintiff was entitled to

CAUSE OF ACTION—*concld.*

bring a separate suit for damages in respect of each shipment. *Volkart v. Sabju Sahib, I.L. R. 19 Mad. 304*, followed. *Sesha Ayyar v. Krishna Ayyangar, I. L. R. 24 Mad. 96, Jashvant v. Vithal I. L. R. 21 Bom. 267, Umed Dholchand v. Pir Saheb Jira Miya, I. L. R. 7 Bom. 134, Pramada Dasi v. Lakhinarain Mitter, I. L. R. 12 Calc. 60* referred to. *Anderson Wright & Co. v. Kalagarla Surjinarain, I. L. R. 12 Calc. 339*, and *Duncan Brothers & Co. v. Jeetmull Greedharee Lall, I. L. R. 19 Calc. 372*, distinguished. MANDAL & Co. *v.* FAZUL ELLAHIE (1914) . **I. L. R. 41 Calc. 825**

4. ———— **Omission to sue for, portion of claim**—*Civil Procedure Code (Act V of 1908). O. II, r. 2*—In 1908 the plaintiff sued the defendant Company for damages for Rs. 1,900 for having dismantled a building situate on certain land which was stated to belong to the plaintiff in certain undivided shares. In that suit the plaintiff alleged that the defendant Company had not only dispossessed the plaintiff from his share the property by denying the plaintiff's title thereto but had wrongfully appropriated the material of the same on such demolition as aforesaid to the prejudice of the plaintiff's right—the work of dismantling having been commenced and completed in October 1908. The plaintiff in his plaint in that suit assessed the damages as for the value of the plaintiff's share in the building but asked for no relief in respect of the recover of possession of the said property. The Munsi gave the plaintiff a decree for Rs. 712-8 and the decision was ultimately affirmed on appeal. In a suit brought by the plaintiff in 1914 against the same defendants for the recovery of separate possession of the said property after declaration of title thereto and after partition of the same by metes and bounds: *Held*, that the cause of action in the present suit is the same as that in the former suit and that the plaintiff is by O. II, r. 2, percluded from suing for the relief which he now claims. KHARDAH COMPANY, LTD. *v.* DURGA CHARAN CHANDRA (1919) . **I. L. R. 46 Calc. 640**

5. ———— **Suit for recovery of money lent**—*First suit based on promissory note—Subsequent suit for same relief based on plaintiff's account books.* Defendants borrowed money from plaintiff and executed a promissory note therefor in his favour. Plaintiff sued upon the promissory note: but the suit was dismissed, not on account of any defect in the promissory note, but owing to the plaintiff's personal default, and this order of dismissal became final: *Held*, that the plaintiff could not thereafter sue the defendant on the basis of entries in the plaintiff's books of account to recover the same money. *Baij Nath Das v. Salig Ram, 16 Indian Cases, 33*, referred to. MUNDAR BIBI *v.* BAIJ NATH PRASAD.

I. L. R. 42 All. 193

CAUSING DEATH BY RASH OR NEGLIGENT ACT.

See PENAL CODE, s. 304 (A).

———— *Administering of a love-potion without knowledge of, or inquiry into its actual contents—Penal Code (Act XLV of 1860), s. 304A—Statement by accused, when the only evidence in the case, and relied on by the prosecution—Evidentiary value of such statement.* If a person intentionally commits an offence, and consequences beyond his immediate purposes result, the result is not to be attributed to mere rashness: if knowledge cannot be imputed, still the wilful offence does not take the character of rashness because its consequences have been unfortunate, but acts probably or possibly involving danger to others, which in themselves are not offences, may be offences within s. 304A and kindred sections if done without due care to guard against dangerous consequences. *Reg. v. Nidamarti Nagabhushanam, 7 Mad. H. C. 119, Empress v. Ketabdi Mundul. I. L. R. 4 Calc. 764*, followed. Where the only evidence of an offence is a statement by the accused, and it is relied on by the prosecution as evidence thereof, it must be taken as a whole, and nothing can be read into it which is not contained therein. PIKA BEWA *v.* EMPEROR (1912)

I. L. R. 39 Calc. 855

CAVEAT EMPTOR.

See VENDOR . . **3 Pat. L. J. 358**

———— **doctrine of**—

See SALE IN EXECUTION OF DECREE.

I. L. R. 37 Calc. 67

———— **not applicable to a Court sale**—

See COURT SALE.

I. L. R. 36 Mad. 194

CAVEAT.

See PROBATE AND ADMINISTRATION ACT, s. 81 . . **I. L. R 34 Bom. 459**

CENTRAL BUREAU REGISTER OF THUMB IMPRESSION.

See SECURITY FOR GOOD BEHAVIOUR.

I. L. R. 43 Calc. 1128

CENTRAL PROVINCES CIVIL COURT ACTS 1885 AND 1904.

See CENTRAL PROVINCES LAND REVENUE ACT, 1881, s. 136 . **1 Pat. L. J.**

CENTRAL PROVINCES GOVERNMENT WARDS ACT (XVII OF 1885).

———— s. 18—*Application of Act—Hindu joint family estates—Application by managing members of joint family for superintendence of estate by Court of Wards—Mitakshara law, family governed by—Sanction by Chief Commissioner to mortgage of estate under charge of Court of Wards—Suit on mortgage after relinquishment by Court of Wards.* The Central Provinces Government Wards Act (XVII of 1885) applies to the superintendence by the Court of Wards of the estates of Hindu joint families, as well as to the separate estates of Hindus and others situate within the territories administered by the Chief Commissioner of the Central Provinces. The two managing members of a Hindu joint family governed by the Mitakshara law, and zamindars of the family estate of Baherakhedi in Hosangabad, which had become overburdened with debt, applied under the above Act to the Deputy Commissioner, as the Court of Wards

CENTRAL PROVINCES GOVERNMENT WARDS ACT (XVII OF 1885)—*contd.*

———— **s. 18**—*contd.*

for the district, to assume superintendence of the joint family estate with a view to liquidate the debts: *Held*, that in making the application they acted within their power and authority as managing members, and in the interest of all the members of the joint family; and that inasmuch as no member had in the property any definite undivided share [*Garibullah* v. *Khalak Singh, I. L. R. 25 All. 407; L. R. 30 I. A 165.* and *Appovier* v. *Rama Subba Aiyan, 11 Moo. I A. 75*] what was taken over by the Court of Wards on assuming superintendence of the estate was the property of all the members of the joint family. The Chief Commissioner had power to sanction the assumption by the Court of Wards of the whole of the joint family property, whether the application was made by the managing members only, or by all the members of the family: and the acts of the Court of Wards in dealing with the property after charge of it was assumed, bound the interest of all the members. The sanction of the Chief Commissioner to a mortgage of such property as required by s 18 of Act XVII of 1885 may be an implied sanction. By the terms of a mortgage made in 1891 by the Court of Wards in favour of the respondents (plaintiffs) on the security of the joint family estate, the mortgage money (Rs. 1,20,000 way repayable with interest by annual instalments of Rs. 10,000 extending over more than 20 years and in the event of Rs. 30,000 becoming overdue, the Court of Wards covenanted to recover such sum by sale or otherwise of sufficient of the mortgaged property. If it was found impossible to continue to manage the estate the Court of Wards was either to sell up the entire property and devote the proceeds to the liquidation of the debt, or make over the estate to the mortgagees in satisfaction of their claim. In the event of the management being relinquished before the debt was liquidated in the ordinary course, the Court of Wards was to liquidate the debt remaining due by the sale of such portion of the property as might be necessary. The sum borrowed was applied to pay off the debts on the property. Only Rs. 16,000 was repaid up to 1893, and since then no instalment had been paid, the Court of Wards, owing to unforeseen circumstances, finding its impossible to pay more, either of principal or interest: and in March, 1902, the Court of Wards after giving the mortgagees notice that the relinquishment by it of the management had been sanctioned, offered to make over to them the mortgaged property in satisfaction of their claim "excepting the cultivating rights of *sir* land which are to be reserved for the maintenance of the wards," which the mortgagees declined as not being a compliance with the terms of the mortgage deed. In June, 1902, the Court of Wards relinquished the management of the estate without selling it or transferring it to the mortgagees. [illegible]

[illegible] mortgage had become due on the relinquishment of the management by the Court of Wards, and the usual decree for sale was made GULAB SINGH v. GOKULDAS (1913) . . I. L. R. 40 Calc. 784

CENTRAL PROVINCES LAND REVENUE ACT XVIII OF 1881 (AMENDED BY ACT IV OF 1906).

See ACT OF STATE . I. L. R. 39 Calc. 615

———— s. 65A—*Gaontia* [illegible]

[illegible] the Central Provinces Land Revenue Act, 1881, which in any way suggests that a *gaontia* is not entitled to relinquish his rights *Held*, further, that the suit was not barred by limitation because possession could not be adverse to a person who was not himself entitled to claim present possession and so long as the *gaontia* tenure subsisted, the *zamindar* was not entitled to actual possession of any part of the village. Therefore the possession of the defendants did not become adverse to the plaintiff until the tenure was relinquished in 1907. A *gaontia* cannot confer on others, rights of a permanent character which would be binding upon the *zamindar* after the *gaontia's* tenure ceases to exist LAL NARAPRAJA SINGH v BHABANI TELI.

1 Pat. L. J. 293

———— **ss. 65A, 132 and 152**—

See GAONTIA TENURE 3 Pat. L. J. 229

———— **s. 78**—*Central Provinces Land Revenue Act (XVIII of 1881), ss. 78, 82, 83, 120 (b) 152, sub-s. (b), cl (12)—S. 69, sub-s. (4) contrasted—Record-of-rights, entry in—Suit to correct as provided in s. 83 not instituted—Entry if becomes final and conclusive—Title suits by party affected, if maintainable—"Presumption of correctness until the contrary is shown".* When an entry has been made in the record-of-rights as to any matter referred to in s. 78 of the Central Provinces Land Revenue Act (XVIII of 1881), such entry is presumed under s. 82 to be correct until the contrary is shown; and under s 83, a person aggrieved by the entry may institute a suit in the Civil Court to have such entry cancelled or amended, but it does not follow that the "contrary" referred to in s. 82 can be proved in such a suit only and not otherwise. Cl (12) of sub-s. (*b*) of s. 152 of the Act means only that the entry cannot be corrected except by the Revenue Authorities, but it does not preclude a suit by the person affected by the entry to establish his title in the Civil Court. The remedy provided by s. 83 of the Act is cumulative and not exclusive: *Held*, that the present suit by the plaintiff in which he sought relief, *inter alia*, on the basis of his alleged title as occupancy-tenant was maintainable, athough the defendant's name had been entered as the occupancy-tenant in the record-of-rights, and the plaintiff had not instituted a suit under s. 83 for the cancellation or amendment of the entry. DIBAKAR BISI v. CHATTO BAG (1908) . . . . 14 C. W. N. 686

———— **ss. 83, 72, 68**—*Suit to correct an entry in record-of-rights if a suit under s. 83—Limitation—Limitation Act (IX of 1908), Art. 120.* In a record-of-rights prepared under Chap. VI of the Central Provinces Land Revenue Act, the appellants were described as "*shikmi gaontias*" or permanent tenants under plaintiffs. The plaintiffs sued to have the entry amended so that the appellants might be described as mortgagees and not as permanent tenants: *Held*, that the suit was within s. 83 of the Act and a suit under that section is not governed by Art. 14, but by

CENTRAL PROVINCES LAND REVENUE ACT XVIII OF 1881 (AMENDED BY ACT IV OF 1906)—*contd.*

———— **s. 83**—*contd.*

Art. 120 of the Limitation Act. Where the defendants having been recorded as "*shikmi gaontias,*" the plaintiffs, *gaontias,* sued for a declaration that they were in possession as mortgagees only: *Held,* that the Settlement Officer acted either under s. 68 or under s. 72 of the Act, so that the Court had jurisdiction to entertain the suit under s. 83. NABAGHAN BADHAI *v.* RAGHUNATH BABU (1915) . . . . **19 C. W. N. 1303**

———— **ss. 112, 138**—

See LAMBARDAR . **I. L. R. 37 Calc. 694**

———— **s. 136 (g & h)**—*Appeal if lies to High Court against decision of Commissioner on appeal—Deputy Commissioner, if a District Court.* There is no appeal to the Commissioner against the decision of a Deputy Commissioner passed under s. 136G of the C. P. Land Revenue Act and no appeal lies to the High Court against an order of a Commissioner passed on appeal against such decision of a Deputy Commissioner. GAJRAJ DAS *v.* KRIPASINDHU DAS (1912)

17 C. W. N. 155

———— **ss. 136 (f & h), 22**—*Partition, application for—applicants' title admitted—duty of court to grant partition—Appeal—"right of the parties."* If the title of an applicant for partition is admitted, the court is bound to partition the land, unless an objection has been made by a co-sharer in possession, under s. 136F, and the objection has been upheld by the court. If no such objection has been made and the court declines to partition the land, the decision is appealable to the High Court. ANANDA CHANDRA PATI *v.* SADANAND PATI . . . **5 Pat. L. J. 140.**

———— **s. 136 (g)**—*Order passed by Deputy Commissioner, appeal from.* In the Sambalpur District the District Judge has taken the place of the Deputy Commissioner as the principal Civil Court of original jurisdiction under the Central Provinces Civil Courts Act, 1885, and, therefore, an order passed by a Deputy Commissioner under s. 136 G. of the Central Provinces Land Revenue Act, 1881 must be deemed to be a decision of a District Judge and is appealable to the High Court, not to the District Court. PADMAN LOCHAN MISSIR *v.* KRISHNA CHAURA MISRA.

1 Pat. L. J. 290

———— **ss. 136 H and 22, cl. (b), (as amended)**

See APPEAL . **I. L. R. 38 Calc. 391**

CENTRAL PROVINCES TENANCY ACT XI OF 1898 (AMENDED BY ACT I OF 1920).

———— *Trespass, suit for, whether Act applies to.* The provisions of the Central Provinces Tenancy Act, 1898, do not apply to a suit based on trespass which is cognizable by the Civil Courts. *Quære*—Whether the provisions of ss. 46 and 47 of the Act would apply in a case where a mortgagee forecloses and takes possession of a tenancy under a decree in a foreclosure mortgage suit. CHAMRU SATPASTI *v.* DIRBA BABU.

1 Pat. L. J. 525

———— **ss. 4 (a) and 69**—Bhogra *land—lease by landlord—suit for ejectment.* Where a suit is brought to eject a tenant of *bhogra* land there is

CENTRAL PROVINCES TENANCY ACT XI OF 1898 (AMENDED BY ACT I OF 1920)—*contd.*

———— **s. 4 (a)**—*contd.*

nothing in s. 69 of the Central Provinces Tenancy Act, 1898, to debar the defendant from setting up a lease granted by the proprietor himself. ADITYA PRASAD *v.* PARMANANDA PATEL.

4 Pat. L. J. 505

———— **ss. 35, 36, 46, 47 and 95**—"*Otherwise transfer*"—*Surrender of tenancy by occupancy raiyat to some of the co-sharer landlords—remaining co-sharer put in possession of holding by Revenue Officer—Suit for recovery of possession by the other co-sharers and their lessees—Ejectment suit for, whether maintainable by lambardar.* A surrender is not a transfer within the meaning of s. 46 of the Central Provinces Tenancy Act, 1898. The words "otherwise transfer" in s. 46 (3) are limited to transactions of a similar nature to those enunciated in the first part of the sub-section, namely, transfers by way of sale, gift mortgage or sub-lease. The Act does not make any provision for recovery of possession by a co-sharer landlord, of land which has been surrendered to the other co-sharers by a tenant. A suit for ejectment can be brought only by the entire body of landlords. If a *lambardar* co-sharer landlord seeks to maintain such a suit he can do so only as the agent of the whole body. The institution of a suit for ejectment against a purchaser is not one of the duties which a *lambardar* has to perform as the representative of the landlords. A *lambardar* has no power to eject trespassers or tenants. TRILOCHAN PANDA *v.* DINABANDHU PANDA.

3 Pat. L. J. 88

———— **s. 45, sub-ss. (1), (6)**—*Construction of Act—Mortgages made before Act came into force—Effect of Conciliation Award made after coming into force of Act—Foundation of origin of rights of parties was Award—Proceedings in suit not "in pursuance" of mortgages—Transfer of rights to occupy sir land by proprietor (mortgagor).* On the construction of s. 45 of the Central Provinces Tenancy Act (XI of 1898), sub-ss. (*1*) and (*6*):—*Held* in this case that a Concillation Award, dated 28th February 1905, was a fresh contract or origin of rights between the parties, which although it came into existence in consequence of registered mortgages of 1881 and 1884, and transactions under them, was both for the purposes of enforcement, and for the purpose of the application of s. 45, sub-s. (*6*), the transaction between the parties which was the foundation of their rights. The transfer made or decreed by the proceedings in suit could not therefore be said to be "in pursuance" of the mortgages. As documents expressly providing for the transfer of the right to occupy *sir* land as a proprietor within sub-s. (*6*) the mortgages would have been saved from the operation of sub-s. (*1*). But that sub-section was applicable in this case and therefore, notwithstanding the terms of the award which by virtue of the agreement of reference became the agreement of the parties, the mortgagor could not so transfer his rights to occupy *sir* land as to divest himself of his right as an "occupancy tenant" under the Act XI of 1898 as amended by Act XXI of 1899. NARAYAN GANESH GHATATE *v.* BALIRAM (1918) . . **I. L. R. 46 Calc. 76**

L. R. 45 I. A. 179

CENTRAL PROVINCES TENANCY ACT XI OF 1898 (AMENDED BY ACT I OF 1920) —*concld.*

———— s. 46—

See HINDU LAW (JOINT FAMILY).
4 Pat. L. J. 354

———— ss. 46, 47, 95—*Unauthorised transfer by an occupancy tenant—S. 47 is the only provision for avoiding such transfer—Jurisdiction of Civil Court—Effect of s. 95* Where an occupancy tenant governed by the Central Provinces Tenancy Act, sold half of the share of his holding to the defendant and subsequently mortgaged the other half to another person with possession and the plaintiff landlord applied to the Revenue Officer under s. 47 of the Act for possession of the land and was given a decree in respect of the mortgaged moiety but as to the moiety which had been sold it was held that the plaintiff's application was out of time having been made more than two years after the date, and the plaintiff subsequently brought a suit in the Civil Court for precisely the same relief as to the moiety which was sold: *Held*, that having lost his case under s. 47, the plaintiff could not again bring a suit in a Civil Court for the same relief. S. 47 enacts the only method by which a transfer made by an occupancy tenant in contravention of s. 46 of the Act may be avoided. *Icharam Sing* v. *Nilmony Bahida, 7 C. L. J. 499*, followed. Under s. 95 the jurisdiction of the Civil Court is excepted in the case of ss. 46 and 47. BAIKANTHA NATH MISRA *v.* LABOO NAG (1912) . . . . . 17 C. W. N. 621

CEREMONIES.

See BURMESE LAW—MARRIAGE.
I. L. R. 39 Calc. 492

See MAHOMEDAN LAW—PRE-EMPTION.
I. L. R. 39 Calc. 915

CERTIFICATE.

See GUJRAT TALUKDARS' ACT (BOM. ACT VI OF 1888), s. 29 E.
I. L. R. 43 Bom. 44

See LIMITATION ACT (IX OF 1908), SCH. ART. 182, CL. (5) I. L. R. 37 Bom. 559

CERTIFICATE OFFICER.

See CRIMINAL PROCEDURE CODE 1908, s. 476 . . 4 Pat. L. J. 475

CERTIFICATE OF COLLECTOR.

See PENSIONS (XXIII OF 1871)—

s. 4 . . I. L. R. 37 Bom. 91

ss. 6, 8, 11 . I. L. R. 34 Bom. 154

CERTIFICATE OF INCORPORATION.

See COMPANIES ACT (VI OF 1882), ss. 6, 40, 41 . . . I. L. R. 40 Calc. 1

CERTIFICATE OF MARRIAGE.

See PARSI MARRIAGE AND DIVORCE ACT, 1865 . . I. L. R. 45 Bom. 146

CERTIFICATE OF PAYMENT.

See EXECUTION OF DECREE.
I. L. R. 43 Calc. 207

CERTIFICATE OF PURCHASE.

See FORGERY . I. L. R. 43 Calc. 421

CERTIFICATE OF REGISTRY.

See COASTING-VESSELS ACT, ss. 4, 7, AND 13 . . I. L. R. 38 Bom. 111

CERTIFICATE OF SALE.

———— *Revenue Court, jurisdiction of—Public Demands Recovery Act (Beng. I of 1895), ss. 12, 15, 17, 24, 26—Sale by Collector, while deposit in treasury—Sale by Revenue Authorities without jurisdiction—Validity of sale* [illegible]

modified only on the ground that the amount stated was either never due, or, if due had been paid before the certificate was made; and ss. 12 and 15 of the Public Demands Recovery Act do not apply when the sale is held without jurisdiction, the amount due under the certificate having been paid before the sale. When the sale was held by the Revenue Authorities without jurisdiction, it cannot be treated as one made under the provisions of the Public Demands Recovery Act, and may consequently be challenged by a civil suit without recourse to procedure provided by the Act. *Balkishen Das* v. *Simpson, I. L. R. 25 Calc. 833, Baijnath Sahu* v. *Lala Sital Prasad, 2 B. L. R. F. B. 1, 10 W. R. F. B. 66* and *Harkhoo Singh* v. *Bunsidhur Singh, I. L. R 25 Calc. 876*, followed. Where a sale has taken place on the basis of a satisfied [illegible]

value without notice. A Certificate Officer has authority to sell only so long as the certificate remains unpaid, and a duty is cast upon him by law to enter satisfaction as soon as payment has been made. *Rewa Mahton* v. *Ram Kishen Singh, I. L. R. 14 Calc. 18; L. R. 13 I. A. 106, Mothura Mohun* v. *Akhoy Kumar, I. L R 15 Calc. 557*, and *Yellappa* v. *Ramchandra, I. L. R. 21 Bom. 463*, distinguished. No case of hardship arises where a person with eyes open makes a speculative purchase of a valuable estate for a nominal price. *Baijnath* v. *Ramgut, 5 C. L. J. 667*, affirmed by the Judicial Committee, *I. L. R. 23 Calc. 775*, followed. JANAKDHARI LAL *v.* GOSSAIN LAL BHAYA GAYWAL (1909)
I. L. R. 37 Calc. 107

CERTIFICATE OF SUCCESSION.

See CIVIL PROCEDURE CODE (1908), s. 109 . . I. L. R. 38 All. 188

See SUCCESSION CERTIFICATE.

See SUCCESSION CERTIFICATE ACT, 1889—

s. 4 . . I. L. R. 36. All. 21, 381
I. L. R. 43 All. 341

ss 7 AND 9 . I. L. R. 40 All. 81

ss. 16 AND 18 I. L. R. 36 All. 423

ss. 18, 19 . I. L. R. 42 All. 347

CERTIFICATE TO COLLECT DEBTS.

See SUCCESSION CERTIFICATE ACT (VII OF 1889), ss. 4 AND 7.
I. L. R. 32 All. 325

CERTIFIED COPY.

——— admissibility of—

See REGISTER OF DEATHS
I. L. R. 46 Calc. 152

——— filing of—

See APPEAL . I. L. R. 42 Calc. 433

See FORGERY . I. L. R. 43 Calc. 783

CERTIFIED PURCHASER.

——— Suit against—

See CIVIL PROCEDURE CODE, 1908, s. 66. . . 24 C. W. N. 1024

CERTIORARI (WRIT OF).

See PRESS ACT (I OF 1910), s 3 (1) . I. L. R. 39 Mad. 1164

See PRINTING PRESSES AND NEWSPAPERS ACT, 1867, s. 4 . I. L. R. 43 Mad. 146

——— *Power of High Court to issue—Income-tax Act (II of 1886)—Criminal Procedure Code (Act V of 1898), s. 476, when order may be passed under* (i) *Per* SUNDARA AYYAR, *J.*—The High Court has no jurisdiction to issue a writ of *certiorari* on an officer beyond the limits of its jurisdiction. *Per* SADASIVA AYYAR, *J.*—The High Court has such jurisdiction. *Per* CURIAM. (ii) A Divisional Officer hearing appeals under the Income-tax Act (II of 1886) is a Court. (iii) Presuming the High Court to have jurisdiction, a petition may be entertained by the High Court to set aside the order of such Court passed under s. 476 of the Criminal Procedure Code (Act V of 1898), it not being necessary for the petitioner to have appealed to the Revenue Board. (iv) The Divisional Officer's order under s. 476, Criminal Procedure Code, was not bad for want of jurisdiction as being passed long after the close of the income-tax proceedings. (v) Even assuming that the order is bad for want of jurisdiction and that the High Court has itself jurisdiction to proceed by way of *certiorari*, the High Court is not bound to interfere and quash the proceedings if on the merits petitioner has no case. Petition dismissed. *In re* NATARAJA IYER (1913) . . . . . I. L. R. 36 Mad. 72

CESS.

See ABWAB . I. L. R. 40 Calc. 807

See AGRA TENANCY ACT, 1901, SS. 56 AND 86 . . I. L. R. 43 All. 422

See JURISDICTION . I. L. R. 34 All. 358

See LANDLORD AND TENANT.
I. L. R. 35 All. 19

See U. P. LAND REVENUE ACT (III OF 1901), ss. 56, 86 . I. L. R. 32 All. 193
I. L. R. 43 All. 422
I. L. R. 38 All. 286

——— liability to—

See MINES AND MINERALS.
I. L. R. 38. Calc. 372

——— right of Government to levy, for irrigation purposes—

See IRRIGATION CESS ACT (MAD. VII OF 1865), s. 1, PROVISOS 1 AND 2.
I. L. R. 40 Mad. 886

CESS ACT (BEN. IX OF 1880).

See BENGAL CESS ACT.

——— ss. 4, 14, 15, 16, and 20—*Bhaoli batai holding whether Cl. (b) of s. 20, applies to.* S. 20 (*b*) of the Bengal Cess Act, 1880, does not apply to a suit for recovery of the value of the landlord's share of the produce of land held on the *bhaoli batai* system. The mere fact that on receipt of a notice under s. 16 of the Act a landlord has entered a certain sum as the annual value of the holding in column 5 of Part II of Schedule A, does not preclude him from recovering the actual value of his share of the produce of the holding in a suit against the tenant. UPENDRA LAL MISSER *v.* MOTI THAKUR. . 2 Pat. L. J. 617

——— ss. 6, 72—

See MINES AND MINERALS.
I. L. R. 38 Calc. 372

——— s. 20—*Holding wrongly entered in Part I of Sch. A —Suit for recovery of rent of holding maintainability of.* S. 20 of the Bengal Cess Act 1880, does not bar a suit for recovery of the rent of a holding which ought to have been entered in Part II of Schedule A, but which has in fact been entered in Part I. Where an appellate judgment and decree of the Calcutta High Court, passed *ex parte* on the 20th August, 1915, was set aside by that Court on the 19th February, 1917, with a direction that the appeal should be restored to its original number and re-heard, *held* that the appeal was not covered by the 1st proviso to cl. 39 of the Letters Patent of the High Court at Patna, and that consequently the High Court at Calcutta had no jurisdiction to hear it. RAMGOBIND CHOWDHURI *v.* THAKUR DAYAL JHA.
2 Pat. L. J. 653

——— *Held,* that s. 20 is no bar to the landlord recovering rent at the rate settled in proceedings under s. 105 of the Bengal Tenancy Act, 1885, when the road cess return shewing a lesser rate was filed prior to such proceeding. NAZIR RAI *v.* MAHARAJA KESHO PRASAD SINGH BAHADUR . . . 6 Pat. L. J. 622

——— s. 95—*Returns filed by certificated guardian of minor, if admissible in favour of minor —"Authorised agent."* A road cess return filed on behalf of a minor by his certificated guardian is not admissible in favour of the minor. The words in s. 95 of the Road and Public Works Cess Act requiring returns filed under the Act to bear the signature and address of the person or his authorised agent are directory only, and the fact that the certificated guardian was not the authorised agent of the minor does not make the returns admissible in his favour. RAJANI BALA DASI *v.* BHAJA HARI KOLEY (1914)
18 C. W. N. 1076

CESTUI QUE TRUST.

See TRUST . I. L. R. 41 Calc. 19

CEYLON CIVIL PROCEDURE CODE (ORDINANCE II OF 1889).

——— s. 34—

See PRACTICE—CAUSE OF ACTION.
L. R. 41 I. A. 142
18 C. W. N. 617

CHAIRMAN.

See Municipal Corporation.
I. L. R. 40 Calc. 886

——— **decision of—**

See Municipal Election.
I. L. R. 45 Calc. 950

CHAMPARAN AGRARIAN ACT, 1918.

——— **ss. 3 and 4**—kabulyats *enhancing rent —Suit to set aside—Finality of decision as to amount of rent by Revenue Officers.* Under s. 4 (4) (c) of the Champaran Agrarian Act, 1918, a decision of the authority prescribed under s. 4 (3) (a) as to the amount of rent to be noted in the Record-of-Rights is final. Hill *v.* Satan Singh . **4 Pat. L. J. 312**

CHAMPERTY AND MAINTENANCE.

——— *Agreement against public policy—Fair agreement to supply funds to carry on suit.* Although the English law of champerty does not apply in India, champerty or maintenance to be open to objection must have the [illegible]

tion, something that in a legal sense is immoral and to the constitution of which a bad motive is in the same sense necessary. To determine that, it is necessary to look at the substance and not merely the language of the instrument *Fischer* [illegible]

Chetty v. *Renga Krishna, L. R. 1 I. A. 211, 261,* followed. A fair agreement to supply funds to carry on a suit in consideration of having a share in the property if recovered, ought not to be regarded as *per se* opposed to public policy. But agreements of this kind ought to be carefully watched. *Ram Coomar Koondu* v *Chunder Kant Mookerjee, L. R. 4 I. A. 21,* followed. Gossain Ramdhun Puri *v.* Gossain Dalmir Puri (1909)
14 C. W. N. 191

——— *Agreements contrary to public policy—Assignment—Right of party to impeach. Held,* that there may be a valid transfer of property for the purpose of financing a suit upon the terms that the property or the proceeds realized from the litigation shall be divided between the transferor and transferee irrespective of the fact whether or not there was any agreement for the payment of consideration "win or lose." The duty of the Court in such a case is to determine whether or not the agreement is a fair agreement to supply funds and does not purport to have [illegible]

transferor being a party to the litigation had never admitted the assignment, but on the contrary had

CHAMPERTY AND MAINTENANCE—*contd.*

pleaded that it was fictitious and without consideration. *Mani Shankar Pranjivan* v. *Bai Muli, I. L. R. 12 Bom. 686,* followed. Baldeo Sahai *v.* Harbans (1911) . . **I. L. R. 33 All. 626**

——— *Agreement to hand over half of the land in dispute to the person who had agreed to supply funds for the litigation—Whether compulsorily registrable and whether void by reason of being champertous—Indian Registration Act, III of 1877, s. 17 (2) (h).* The collaterals of one *H. S.* intended to sue *H. S.* and two donees, to each of whom he had gifted half of his land, and entered into an unregistered agreement dated 9th October 1888, whereby they undertook to hand over half the land to one *I. S*, defendant appellant, on condition of his supplying funds for the litigation necessary to set aside the gifts. Suits were then [illegible]

tained possession of the share agreed to be given to him, *i.e*, at least seven years before the present suit was brought by *M*, the son of one of the executants of the agreements, on the ground that the land had been sold by his father without any consideration or necessity: *Held,* that as the agreement was in the nature of an agreement to transfer rights in property which could only come into existence after *H. S.*'s death its registration as such was not compulsory—*vide* Indian Registration Act, s. 17 (2) (h). *Imam Bakhsh Khan* v *Karim Shah* (16 *P R. 1895*) and *Shridhar Ballal* v. *Chintaman* (*I. L. R. 18 Bom. 396*) following *Chunilal-Panalal* v. *Bomanji* (*I. L. R. 7 Bom. 310*) and *Partab Singh* v. *Karm Chand* (*18 P R. 1889 F. B.*), referred to. *Jhandu Khan* v. *Barkhurdar* (*150 P. R. 1889*), not followed. *Held also,* that the English law of Champerty is not in force in India and that fair agreements to share property in litigation with others in consideration of their supplying the funds for carrying on suits are not opposed to public policy, and that such agreements should receive effect except when extortionate or inequitable. *Raghunath* v. *Nil Kanth* (*I. L. R. 20 Calc. 843 P. C*), and *Raja Mohkam Singh* v. *Raja Rup Singh* (*I. L. R. 15 All. 352 P. C.*), followed. Indar Singh *v.* Munshi.
I. L. R. 1 Lah. 124

CHANDERNAGORE.

See Extradition . **I. L. R. 48 Calc. 328**

CHANGE OF ATTORNEY.

See Attorney and Client.
I. L. R. 40 Calc. 380

CHANGE OF VILLAGE.

See Religious Endowments Act (XX 1863) . . **I. L. R. 39 Mad. 919**

CHAR LANDS.

See Land Tenure in Bengal.
L. R. 45 I. A. 190

CHARGE.

See Company . **I. L. R. 36 Bom. 564**

See Co-operative Societies Act, 1912
I. L. R. 42 Calc. 377

See Criminal Procedure Code—
Ss. 222 (2), 233 . **I. L. R. 38 All. 42**

CHARGE—*contd.*

S. 250 . . . I. L. R. 37 Bom. 376

See DACOITY . I. L. R. 41 Calc. 350

See DEBT . . . I. L. R. 42 Calc. 849

See INTEREST . I. L. R. 40 Calc. 514

See LIMITATION ACT (IX OF 1908), SCH. I, ART. 132 . I. L. R. 35 All. 185

See MORTGAGE .

See PENAL CODE—

Ss. 361 AND 366 .. 4 Pat. L. J. 74

S. 409 . I. L. R. 33 All. 56

See RAILWAY RECEIPT.
I. L. R. 38 Mad. 664

See RIOTING . I. L. R. 39 Calc. 781

See SUMMARY TRIAL 16 C. W. N. 693

See TRANSFER OF PROPERTY ACT (IV OF 1882)—

S. 59 . . I. L. R. 38 All. 461

Ss. 58 AND 100 . I. L. R. 36 All. 201

Ss. 59 AND 100 . I. L. R. 35 All. 164

S. 82 . I. L. R. 37 All. 101

Ss. 118 TO 120, 54 AND 55, CL. 6 (*b*).
I. L. R. 38 Mad. 519

———— absence of—

See CRIMINAL TRESPASS.
I. L. R. 41 Calc. 662

———— cancellation of—

See JURISDICTION OF MAGISTRATE.
I. L. R. 39 Calc. 885

———— extinguishment of—

See TRANSFER OF PROPERTY ACT (IV OF 1882), s. 101 . I. L. R. 38 Bom. 369

———— misjoinder of—

See CRIMINAL PROCEDURE CODE—

Ss. 233, 236, 239.
I. L. R. 32 All. 219

Ss. 234, 235, 537.
I. L. R. 32 All. 67

S. 235 . . 15 C. W. N. 732

———— of money on immovable property—

See LIMITATION ACT, 1908, SCH. I, ART. 132 . . . . 25 C. W. N. 57

———— *Mortgage subrogation*—

See LIMITATION ACT, 1908, SCH. I, ART. 120 . . I. L. R. 45 Bom. 597

———— necessity of—

See SUMMARY TRIAL
I. L. R. 41 Calc. 743

I. CRIMINAL . . . . .
II. ON PROPERTY . . . .

I. CRIMINAL.

1. ———— **Of conspiracy**—*Persons "Known and unknown"* Where the accused were charged with conspiracy with persons "known and unknown"—*Held,* that if the persons were "known" they should be named in the charge. EMPEROR *v.* LALIT MOHAN CHUCKERBUTTY AND OTHERS (1911) . . . I. L. R. 38 Calc. 559

CHARGE—*contd.*

I. CRIMINAL—*contd.*

2. ———— **Omission to frame**—*Rioting—Causing hurt—Conviction for an offence other than the one charged with—Error of law—"Error, omission or irregularity"—Criminal Procedure Code (V of 1898), ss. 535, 537 (a)—Practice.* Ss. 535 and 537 (*a*) of the Criminal Procedure do not apply to a case where the accused is charged with one offence and convicted of another—totally different to the one he was charged with. S. 233 is mandatory for every distinct offence of which any person is accused there shall be a separate charge, and every charge shall be tried separately, except in the case mentioned in ss. 234, 235, 236 and 239 of the Code. S. 236 refers to a series of acts which are of such a nature that it is doubtful which of the several offences the facts constitute. To convict an accused of murder on a charge of rioting or to commit him to the Sessions without framing a charge, would be not merely an irregularity but an error of law vitiating the trial. SITA AHIR *v.* EMPEROR (1912) . . I. L. R. 40 Calc. 168

3. ———— **Misjoinder of**—*Joint trial on charges of criminal breach of trust and falsification of accounts committed in separate transactions—Criminal Procedure Code (Act V of 1898), ss. 233, 234, and 235—Penal Code (Act XLV of 1860), ss. 408 and 477A.* A charge of criminal breach of trust of a sum of money can be tried under s. 235 (*1*) of the Criminal Procedure Code, at the same time with one of falsification of accounts made to conceal the act of misappropriation as part of the same transaction and two unconnected charges of falsification may be tried at one trial under s. 234, but a charge of criminal breach of trust cannot be legally tried together with one of falsification relating to a distinct act of misappropriation committed in a separate transaction. *Kasi Viswanathan* v. *Emperor, I. L. R. 30 Mad. 328;* and *Subrahmania Ayyar* v. *King-Emperor, I. L. R. 25 Mad. 61; L. R. 28 I. A. 257,* followed. EMPEROR *v.* JIBAN KRISTO BAGCHI (1912) . I. L. R. 40 Calc. 318

4. ———— *Misjoinder—Illegality of trial—Criminal Procedure Code (Act V of 1898), s. 233.* A single charge relating to several distinct offences is illegal. Under s. 233 of the Criminal Procedure Code there should be a separate head of charge for each such offence. A charge under s. 409 of the Penal Code, of criminal breach of trust in respect of a total sum of 10 annas 6 pies, to wit, a sum of 4 annas 6 pies collected from *A* between certain dates in one year and a sum of 6 annas collected from *B* between other dates in the same year, is bad for misjoinder; and a trial held on such a charge is illegal. *Subrahmania Ayyar* v. *King-Emperor, I. L. R. 25 Mad. 61,* followed. ASGAR ALI BISWAS *v.* EMPEROR (1913)
I. L. R. 40 Calc. 846

5. ———— *Prejudice—Criminal Procedure Code (Act V of 1898), ss. 233, 234 and 537.* A single head of charge, relating to three offences of the same kind, is defective for duplicity and not misjoinder: but a trial under such a charge is not bad unless the accused has been prejudiced thereby. *Subrahmania Ayyar* v. *King-Emperor, I. L. R. 25 Mad. 61,* referred to. MUSAI SINGH *v.* EMPEROR (1913) I. L. R. 41 Calc. 66

6. ———— *Misjoinder—Joinder of three charges under s. 409 with three under s. 477A of the Penal Code—Legality of trial—*

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Criminal Procedure Code (Act V of 1898), ss. 222 (2), 233, 234. S. 222 (2) of the Criminal Procedure Code refers to cases of criminal breach of trust or dishonest misappropriation of money, and cannot be applied to a case under s. 477A of the Penal Code. *Queen-Empress* v. *Mati Lal Lahiri, I. L. R. 26 Calc. 560,* referred to. S. 233 of the Code must be strictly followed save where the law itself provides an exception. A joinder of three charges under s. 409 with three under s. 477A of the Penal Code relating to different transactions is not warranted by any of the exceptions provided in the Code, and is illegal. Such a misjoinder is absolutely fatal to the trial. *Kasi Viswanathan* v. *Emperor, I. L. R. 30 Mad. 328,* and *Subrahmania Ayyar* v. *King-Emperor I. L. R. 25 Mad. 61,* followed. A series of falsifications of accounts made to cover a single act of defalcation may be laid in one charge under s. 477A of the Penal Code, and does not constitute distinct offences merely by reason of a plurality of false entries intended to cover the same defalcation. RAMAN BEHARI DAS *v.* EMPEROR (1913) . **I. L. R. 41 Calc. 722**

7. ———————— *Misjoinder—Inherent power of Criminal Courts.* Per *Mookerjee J.* Criminal Courts have, equally with Civil Courts, inherent power to mould their procedure, subject to statutory provisions, to enable them to discharge their functions as Courts of justice. A Criminal Court has power to permit the prosecution to withdraw charges the joinder of which is objected to as illegal. PULIN BIHARI DAS *v.* KING-EMPEROR (1911) . . **16 C. W. N. 1105**

8. ———————— *Misjoinder of persons and offences—Cheating several persons individually by similar false representations, at the same time and place and in pursuance of the same conspiracy —False representation by the accused to each person and obtaining payments of separate sums of money from each—One head of charge relating to several offences—Joint trial of the accused—Criminal Procedure Code (Act V of 1898), ss. 233, 235, 239.* Where the accused acting in concert made separate representations to each of two sets of persons present at the same time and place, and induced each to pay individually a larger sum of money than was actually due from him, and where they were tried together, under two charges of cheating, each relating to one of the sets, under s. 420 of the Penal Code: *Held,* that there should have been as many charges as there were persons cheated, but that the defect had occasioned no failure of justice. *Gul Mahomed Sircar* v. *Chcharu Mandal, 10 C. W. N. 53, Johan Subarna* v. *King-Emperor, 10 C. W. N. 520, Srish Chandra Mukerjee* v. *Emperor, 13 C. W. N. 1067, Tilakdhari Das* v. *Emperor, 6 C. L. J. 757, Asgar Ali Biswas* v. *Emperor, I. L. R. 40 Calc. 846, Ram Subhag Singh* v. *King-Emperor, 19 C. W. N. 972,* referred to. *Held,* also, that as the misrepresentation was in each case the same and the offences were all committed at the same time and place and in pursuance of the same conspiracy, the transaction was the same, and the joint trial legal under [illegible]

[illegible] **I. L. R. 4[illegible] Calc. [illegible]**

8. (*a*) ———————— *Held,* that s. 234 of the Criminal Procedure Code does not [illegible]

may be used to prove association. KADEM ALI *v.* EMPEROR . . **I. L. R. 47 Calc. 154**

9. ———— **Form and Proof of**—An accused is entitled to know with certainty and accuracy, the exact value of the charge brought against him. But where the accused fully understood the nature of the offence with which they were charged, they had clearly not been prejudiced by the omission of the words "unlawfully and maliciously" and "in British India" occurring in s. 4 (*b*) of Act VI of 1903. Such an omission can be cured by the verdict. *The Queen* v. *Munslow, [1895] 1 Q. B. 758,* referred to. Where the illegal act charged under s. 120 B is the unlawful and malicious possession of explosive substances within the meaning of s. 4 of the Explosive Substances Act, 1908, it is not essential to specify in the charge the explosive substance which the accused have conspired to have in their possession or under their control. A person may be guilty of criminal conspiracy even though the illegal act, which he has agreed to do, has not been done, for the "crime of conspiracy consists only in the agreement or confederacy to do an illegal act by legal means or a legal act by illegal means." *Reg.* v. *Hibbert, 13 Cox. 82, Quinn* v. *Leathem, [1901] A. C. 495, The Queen* v. *Most, 7 Q. B. D. 244, 14 Cox, 583,* and *O'Connell* v. *The Queen, 11 Cl. & F. 155; 1 Cox 413; 5 St. Tr. N. S. 1,* referred to. The indictment in all cases of conspiracy must in the first place charge the conspiracy, but in stating the object of the conspiracy the same degree of certainty is not required as in an indictment for the offence conspired to be committed. *The King* v. *Gill, 2 B. & Ald. 204, The Queen* v. *Kenrick, 5 Q. B. 49, The Queen* v. *Blake, 6 Q. B 126, Sydserff* v. *The Queen, 11 Q. B. 245, The Queen* v *Gompertz 9 Q. B. 824; 2 Cox, 145, Aspinall* v. *The Queen, 2 Q. B. D. 48, Taylor* v. *The Queen, [1895] 1 Q. B. 25 Reg.* v. *Parker, 3 Q. B. 292,* referred to. It is a wholesome rule that the Court should adhere to the language of the statute, as far as practicable, when a charge is drawn up; as nothing is gained by a paraphrase, while opportunity is afforded to the accused to take exception to the form of the charge. The accused cannot be convicted on a conspiracy charge under s. 120 B, Indian Penal Code, unless the prosecution establishes that the accused were members of the conspiracy after the 27th March 1913 when Act VIII of 1913 became law. A comprehensive formula of universal application cannot be framed regarding the question whether two or more acts constitute the "*same transaction*"; the circumstances which must bear on its determination in each individual case are proximity of time, unity or proximity of place, continuity of action and community of purpose or design. If *A B* and *C* conspire to make, or have in their possession or under their control, an explosive substance within the meaning of the Explosive Substances Act, and, if in pursuance of

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such conspiracy *A* makes or has in his possession or under his control an explosive substance, they may, if the Court thinks fit, be charged and tried together under s. 120 B, Indian Penal Code, and s. 4 (*b*) of Act VI of 1908. If all the *known* co-conspirators named in the charge are not placed on their trial, the trial of some (separately) without the others is not vitiated. *Emperor* v. *Lalit Mohan Chuckerbutty, I. L. R. 38 Calc. 559 ; 15 C. W. N. 593*, explained. If the accused have committed an offence under s. 4 (*b*) of the Explosive Substances Act, 1908, in pursuance of a criminal conspiracy, it is open to the Crown to prosecute them for such offences, irrespective of the question of the ultimate design of the alleged conspiracy coming under s. 121A, Indian Penal Code (which charge requires previous sanction under s. 196, Criminal Procedure Code). In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. *R.* v. *Hodge, 2 Lewin C. C. 277*, referred to. The presumption of innocence (in criminal cases) signifies no more than this that if the commission of a crime is directly in issue in any proceeding it must be proved beyond reasonable doubt. "The whole doctrine when drawn out is, *first*, that a person who is charged with a crime must be *proved* guilty, that according to the ordinary rule of procedure, and of legal reasoning *presumitur pro reo, i.e. neganti*, so that the accused stands innocent until he is proved guilty; and *secondly*, that this proof of guilt must, displace all reasonable doubt." In a charge of conspiracy general evidence of the existence of the conspiracy may first be given, before particular facts are proved to show that one or more of the accused took part in it. *R.* v. *Sidney, 9 St. Tr. 817, Queen Caroline's Case, 2 B. & B. 284 ; 1 St. Tr. N. S. 1348, R.* v. *Hunt, 3 B. & Ald. 566*, followed. Under the law in England facts similar, but not part of the same transaction as the main fact, are not in general admissible to prove either the occurrence of the main fact or the identity of its author except (after evidence *aliunde* on these points has been given) to show the state of mind of the parties with regard to such fact, *i.e.*, knowledge of its nature, or his intent. In general, whenever it is necessary to rebut even by anticipation, the defence of accident, mistake or other innocent condition of mind, evidence that the accused has been concerned in a systematic course of conduct of the same specific kind as, and proximate in point of time to that in question, may be given. *R.* v. *Holt, (1860) Bell. 280 ; 8 Cox, 411*, to the contrary is no longer authority. *R.* v. *Smith 20 Cox, 804 ; 92 L. T. 208*, and *Emperor* v. *Debendra Prosad, I. L. R. 36 Calc. 573 ; 9 C. L. J. 610*, referred to. S. 4 of Act VI of 1908 substantially reproduces the provisions of s. 3 of 46 and 47 Vict. Chap. 3 (Explosive Substances Act, 1883), consequently the expression "*unlawfully and maliciously*" may be interpreted in the sense in which it is familiarly used in the criminal law of England. "*Unlawfully*" thus signifies "not for a lawful object," and "*maliciously*" signifies "intentionally and without justification or excuse or claim of right." *The Queen* v. *Clemens, [1898] 1 Q. B. 556 ; 19 Cox. 18, Miles* v. *Hutchins, [1903] 2 K. B. 714 ; 20 Cox. 555*, referred to. *Reg.* v. *Ward, 12 Cox. 123 ; 1 C. C. R. 356, McPherson* v. *Daniels, 10 B. & C. 272, Bromage* v. *Prosser, 4 B. & C. 247, Clark* v. *Molyneux, 3 Q. B. D. 237, Allen* v. *Flood, [1898] A. C. 1, Johnson* v. *Emerson, L. R. 6 Ex. Ch. 373, R.* v. *Pembleton, 2 C. C. R. 119 ; 12 Cox. 607, Mogul Steamship Co.* v. *McGregor, [1892] A. C. 25 ; 23 Q. B. D. 598*, followed. The term "explosive substance" as used in s. 4 (*b*) of Act VI of 1908 includes *any part* of an apparatus, machine, or implement intended to be used or adapted for causing or aiding in causing any explosive substance, and "by means thereof" does not mean by means thereof *alone*. *R.* v. *Charles, 17 Cox. 499*, referred to. The interference of fact may legitimately be drawn that the "explosive substances" made and possessed by Sasanka were intended for *use in British India.* It is the duty of the prosecution, not so much to secure a conviction as to place all the available evidence in the case fairly and fully before the tribunal by which alone the guilt or innocence of the accused is to be determined. *Ram Ranjan Roy* v. *King-Emperor, I. L. R. 42 Calc 422 ; 19 C. W. N. 28*, following *Regina* v *Holden, 8 C. & P. 606*, referred to. "The proof of the case against the prisoner must depend for its support not upon the absence or want of any explanation on the part of the prisoner, but upon the positive affirmative evidence of his guilt that is given by the Crown" But "if there is a certain appearance made out against a party, if he is involved by the evidence in a state of considerable suspicion, he is called upon, for his own sake and his own safety, to state and to bring forward the circumstances, whatever they may be, which might reconcile such suspicious appearances with perfect innocence" *Regina* v. *Frost, 4 St. Tr. N. S. 85*, followed. While it is not necessary to prove manual possession of the explosive substance by the accused, it must be proved that it was in his power or control: *possession* to be punishable must also be possession with knowledge and assent. The mere fact that the other accused were in the room does not show they were in possession of all or any of the things contained therein. When the evidence at the disposal of the prosecution is insufficient to secure a conviction for the crime committed, it is inexpedient, even though it may be lawful, to prosecute the accused for a conspiracy the proof whereof really rests on the establishment of that very crime. *Reg.* v. *Boulton, 12 Cox. 87*, and *Emperor* v. *Lalit Mohan, I. L. R. 38 Calc. 559 ; 15 C. W. N. 593*, referred to. A man's guilt is to be established by proof of the facts alleged and not by proof of his character; such evidence might create a prejudice but not lead a step towards substantiation of guilt. In India, as in England, the accused are entitled in cross-examination to elicit facts in support of their defence from the prosecution witnesses wholly unconnected with the examination-in-chief. In the course of cross-examination of this character the defence are entitled, in view of the generality of s. 143 of the Indian Evidence Act, to ask leading questions. Under s. 154, the Court has the discretion to permit the prosecution to test, by way of cross-examination, the veracity of their own witnesses with regard to the (unconnected) matters elicited by the defence in cross-examination. The defence is not entitled to elicit from individual prosecution witnesses whether he was a spy or an

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informer, or to discover from police officials the names of persons from whom they had received information; but a detective cannot refuse, on grounds of public policy, to answer a question as to where he was secreted. *R. v. Watson, 32 St. Tr. 1 R. v. Richardson, 3 Fos. & Fin. 693, A.-G. v. Bryant, 15 M. & W. 169 ; 71 R. R. 610, Marks v. Beyfus, 25 Q. B. D. 494, Webb. v. Catchlove, 3 T. L. R. 159* referred to. In strictly carrying out

Kamatchinathan v. Emperor, I. L. R. 28 Mad. 308, referred to. Though written statements may be accepted from the accused in accordance with the universal practice in the Courts under the Calcutta High Court, they do not take the place of evidence nor of such examination of the accused as is contemplated by s. 342 of the Code of Criminal Procedure. *Emperor v. Ansuiya, (1905) All. W. N. 1,* dissented from AMRITA LAL HAZRA v. EMPEROR (1915). . . I. L. R. 42 Calc. 517

II.—ON PROPERTY.

——— **Court sale of property subject to a charge**—

See CIVIL PROCEDURE CODE, 1908, O. XXI, R. 90. I. L. R. 44 Bom. 560

——— **distinction between charged mortgage**—

See RATES AND TAXES.
I. L. R. 42 Calc. 625

——— **New charge on old security—whether a new mortgage**—

See REGISTRATION ACT, S. 77.
I. L. R. 2 Lah. 202

1. ——— **Fixed deposit**—*Competence of depositor to charge money on fixed deposit in a bank as security for a loan.* It is competent to a person who has money with a banking company on fixed deposit, with the assent of such company, if not without it, to assign to any person whom he pleases, either absolutely or by way of a charge, the debt due or about to become due to him from the banking company. *Brandt's Sons & Co. v. Dunlop Rubber Co., [1905] A. C. 154,* referred to. *Agha Mahomed Jaffar Bindanim v. Koolsom Beebee, I. L. R. 25 Calc. 9,* distinguished. GUR PRASAD v. THE GORAKHPUR BANK, LIMITED (1914).
I. L. R. 36 All. 507

2. ——— **Annuity**—*Charge on movable as well as immovable property—Sale of property charged in separate lots—Notice of charge to purchasers.* Movable property, at all events movable property which is not perishable or necessarily consumed by

annuitant, in execution of a decree which he had obtained for arrears of an annuity, attached and sold part of such movable property without notice

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of the charge and the nature of the property was such that it was of no particular value apart from other property which was sold separately. *Held,* that such part must be taken to have been sold free of the charge. GANESH v. BABU RAM (1914),
I. L. R. 37 All. 72

3. ——— **Government revenue, due on land**—*Common Burden—Payment by one sharer—Right to claim charge on other shares—No right to a personal decree.* When several shares in the same land or when several lands are liable under a common burden (such as, Government revenue, as *in the present case*), *the discharge of the whole* burden by the owner of a distinct share or a distinct land would give him a charge on the remaining shares or lands for the proportionate sums they *were equitably* liable. But the common burden being only on the land or lands and not recoverable from the sharers personally, there can only be a charge and no personal decree. *Raja of Vizianagram v. Raja Setrucherla Somasekhararaz, I. L. R. 26*

I. L. R. 33 Mad. 41, distinguished. ABBAN PAPIYANI v. PAKRAN HAJI (1913).
I. L. R. 36 Mad. 493

4. ——— **What creates**—*Agreement to* give a lien or charge on monies for work done operates as a charge. NAVAJEE v. THE ADMINISTRATOR GENERAL, MADRAS.
I. L. R. 38 Mad. 500

CHARGE ON HUSBAND'S PROPERTY.

See JEWISH LAW . I. L. R. 38 Calc. 708

CHARGE TO JURY.

See JURY, TRIAL BY.
I. L. R. 40 Calc. 867

See PRACTICE . I. L. R. 40 Bom. 520

See PRIVY COUNCIL, PRACTICE OF.
I. L. R. 41 Calc. 1023

——— *Duty of judge, "heads of charge" meaning of.* The object of the heads of charge is to inform the High Court, should occasion arise, of what direction the Judge gave in law to the jury and *the nature of his summing up of* the evidence not only for the prosecution, but also for the defence. The heads of charge are not intended to be an exhaustive detail of every particular *which the Judge may have addressed to the* jury. The Judge is not bound to address himself in every particular and in every detail to every

respectively. In doing so he is entitled to take into consideration the speeches made upon both sides. If in substance it can be seen from the frame of the heads of charge what were the directions which the Judge gave to the jury and that they were right and proper, then there can be no ground of complaint, even though the phraseology and form adopted might be open to question. Mere informality in expression or form is not sufficient to invalidate the conviction. PRANATH SAHAY v. KING-EMPEROR. . 1 Pat. L. J. 31

CHARGES OF MISCONDUCT.

——— by Counsel—

See INSTRUCTIONS TO COUNSEL.
I. L. R. 40 Calc. 898

CHARGING ORDER.

——— *Practice—Dissolution of partnership—Assets in hands of receiver—Judgment creditor—Solicitor's lien for costs.* The rule at common law that a solicitor is entitled to a lien for his costs on property recovered or preserved by his exertions has always been followed by this Court; and, where there are assets of a partnership in the hands of a receiver appointed in a partnership suit, the solicitors engaged in that suit are entitled to ask for a charge on those assets in priority to the creditors of the partnership. *Ridd* v. *Thorne,* [1902] 2 *Ch.* 344, followed. Where a plaintiff has obtained a decree against a partnership firm, the available assets of which are in the hands of a receiver appointed in a previous partnership suit, his proper course is not to issue execution against those assets, but to ask the Court for a charging order, and to undertake to deal with the charge according to the order of the Court. *Kewney* v. *Attrill, 34 Ch. D. 345,* followed. A. HAJI ISMAIL AND CO. *v.* RABIABAI (1909)
I. L. R. 34 Bom. 481

CHARITABLE BEQUEST.

See WILL . . **I. L. R. 40 Calc. 192**

CHARITABLE INAMS.

——— *Resumption of, by Government—Patta granted to one of the previous trustees—Suit by representative of another trustee for share—Effect of resumption—Distinction between resumption and enfranchisement of personal or service inams.* Where the Government resumed certain lands which were held previously as charitable inam and 'after imposing an assessment' granted a patta to one of the persons who were the trustees thereof prior to the resumption. *Held,* that the representative of another trustee had no right to claim a share in the land, as against the trustee to whom the patta was given. The principles regulating the ownership of enfranchised lands in cases of enfranchisement of personal or service inams afford no guidance in cases of resumption of charitable inams. In cases of enfranchisement there is a change not of ownership of the land, but of the tenure on which it is held; in cases of resumption the land previously the property of the trust is at the absolute disposal of the Government, who can grant it to anyone, who becomes the owner subject to the obligations ordinarily attached to ryotwari tenure. *Gunnaiyan* v. *Kamakchi Ayyar, I. L. R. 26 Mad. 339,* and *Pingala Lakshmipathi* v. *Bommireddipalli Chalamayya, I. L. R. 30 Mad. 434* distinguished. PUNNIAH *v.* KOTAMMA (1916)
I. L. R. 40. Mad. 939

CHARITABLE OR RELIGIOUS TRUST.

See CIVIL PROCEDURE CODE (ACT V OF 1908), s. 92 . **I. L. R. 40 Bom. 439**
See WILL . **I. L. R. 46 Calc. 485**

——— liability of a trustee of—

See NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881), ss. 26, 27, 28.
I. L. R. 41 Mad. 815

CHARITABLE OR RELIGIOUS TRUST—*contd.*

1. ——— Trustees, acts of—*When act of majority will be binding—Estoppel—Suit by some of several trustees, when sustainable—Misjoinder—Form of decree.* The rule that in the case of charitable trusts the act of the majority will be binding on the minority only applies when such act is done after full opportunity given for mutual discussion by all the members. When the act is done after mutual discussion when the minority had an opportunity to record their dissent it will be the act of the whole body; otherwise it will be the act of the majority alone and will not bind the minority. *Teramath* v. *Lakshmi, I. L. R. 6 Mad. 270,* referred to. *Wilkinson* v. *Mallin, 2 Tyrwhit 544,* referred to. A company or body of persons will be estopped from questioning the validity of an act done by some only of such body or company only when such persons are held out as clothed with authority to do the act. Where such persons have not unlimited power to act for the body but only the right to act within certain limits, the stranger entering into the transaction has to find within such limits the power to transact. Where the remedial right does not accrue until the majority have after consultation signified their will, an action by some or the majority of the trustees, without consulting the others, will not be maintainable. When the right to the relief claimed has accrued to the joint trustees, the institution of a suit by some only without having consulted the remaining trustees, even where they have not perversely refused to join cannot be a ground for dismissing the suit. Although the interests of the co-trustees is joint and indivisible, it is fully represented when they are all on the record on one side or the other. *Peria Karuppan* v. *Valayutham Chetti, I. L. R. 29 Mad. 302,* referred to. One trustee can sue for redemption without consulting the other trustees or making them co-plaintiffs. Such misjoinder is not fatal to the suit. *Karattole Edamana* v. *Unni Kannan, I. L. R. 26 Mad. 649,* referred to. The proper decree in such a case would be to order the trust property to be restored to all for the benefit of the *cestui qui trust.* KUNHAN *v.* MOORTHI (1910).
I. L. R. 34 Mad. 406

2. ——— Madras Endowments and Escheats Regulation VII of 1817—*Charitable Trust—The Madras Religious Endowments Act X of 1863—The Madras Local Boards Act V of 1884, s. 51—Religious Endowments Act—Powers of Board of Revenue and Taluq Board to appoint new trustee—Non-dismissal of old trustee.* Regulation VII of 1817 and Act XX of 1863 are applicable to endowments made after the Regulation as well as to prior endowments. The Board of Revenue has no power to ignore the rights of a person lawfully in office as trustee and to appoint another person in his place without dismissing him. In this respect there is no difference between a hereditary and a non-hereditary trustee who is equally entitled to a freehold office. The Board of Revenue is entitled under s. 51 of Act V of 1884 to make over to a local body not only its power of superintendence but also the management of any endowment. *The Chairman, Municipal Council, Rajahmundry* v. *Susurla Venkateswarlu, I. L. R. 31 Mad. 111,* followed. *Nilayathakshi Ammal* v. *Taluk Board of Mayavaram, 20 Mad. L. J. 8,* followed. VENKATACHALA PILLAI *v.* THE TALUQ BOARD, SAIDAPET (1911) . . . **I. L. R. 34 Mad. 375**

Cf. RELIGIOUS ENDOWMENTS ACT, s. 3.
I. L. R. 38 Mad. 1176

CHARITABLE OR RELIGIOUS TRUST—*contd.*

3. ———— Acts of minority of Trustees—*binding on minority—Indian Trusts Act (II of 1882), s 42 "Any trustees or trustee," meaning of—Payment to some only of the trustees, not a valid payment.* An act of the majority of a body of charitable trustees binds the whole body. A mortgagy [illegible]

the trustees. [illegible] *270,* followed. A payment to some only of several trustees is not a valid payment unless he has or is held out by his co-trustees as having authority to receive the same. The words "any trustees or trustee" in s. 42 of the Indian Trusts Act mean the trustee where there is only one, the trustees where there are more. *Rambalu* v. *Committee of Rameshwar, 1 Bom. L. R. 667,* not followed. *Semble.* If a document is drawn up in the names of several persons and it is the intention of the parties that all should execute it, it will be incomplete and inoperative till all have done so *Sivaswami Chetty* v. *Sevagan Chetty, I. L. R. 25 Mad. 389* and *Latch* v. *Wedlake, 11 A. & E., 959,* followed. It is a question of fact in each case as to what was the intention of the parties. NETHIRI MENON *v.* GOPALAN NAIR (1915). . I. L. R. 39 Mad. 597

[illegible] necessary *condition* *charitable* [illegible]

without approving any trust and the zemindari was sold before any charitable trust was selected by the trustees. *Held,* that the conditions precedent to the constitution of the trust were not satisfied and it failed. It failed, further, as there was no general charitable intent overlying the particular charitable bequest. *In re Emson, 74 L. J. Ch. 65; 21 T. L. R. 623, A.-G.* v. *Earl of Craven, 21 Beav 392, Cherry* v. *Mott, (1836) Myl. & Cr. 123, Chamberlayne Brockett L. R. 8 Ch. 206, A.-G.* v. *Earl of Powis (1853) Kay 186, N. E. Rly.* v. *Lord Hastings, [1900] A. C. 260,* referred to, and also to Lord Eldon's principles in *Mills* v. *Farmer, 1 Mer. 55,* that where a testator has expressed an intention to give to charitable purposes, that intention must be *declared absolutely* and nothing must be left uncertain but the mode in which it is to be carried into effect. The question whether a charitable trust, if otherwise valid, is vitiated by the rule against perpetuities is left open, but the preponderance of authority is for the proposition that the doctrine of *cypres* is applicable only in wills and not in deeds. *Brudenell* v. *Elwes, 1 East 442, Pitt* v. *Jackson, 2 Bro. C. C. 51, Adams* v. *Adams, 2 Cowp. 651,* referred to. Between the applicability of the *cypres* doctrine and the failure of a charitable trust for the non-satisfaction of a condition precedent, the distinction is that in the former there is the breakdown of the machinery required to carry out validly-created charitable trust and in the latter there is the initial failure of the conditions essential to bring the trust into existence. *Yates* v.

CHARITABLE OR RELIGIOUS TRUST—*concld.*

[illegible] *White's* [illegible] *Ch. D.* [illegible] 1 to be [illegible] ect and that is not done, then the bequest is inoperative. *Grimond* v. *Grimond, [1905] A. C. 124 Houston* v. *Burns, [1918] A. C. 337,* referred to. Where A.-G. is made a party in a public capacity as guardian of a charitable fund and the bequest is upheld in the lower Court, it is his duty to maintain its validity in the Court of Appeal and his costs, if he loses, should come out of the estate. SANTANA RAY *v.* THE ADVOCATE-GENERAL OF BENGAL (1920) I. L. R. 48 Calc. 124

CHARITIES.

See CIVIL PROCEDURE CODE, 1882, s. 539 I. L. R. 35 Bom. 470

See CIVIL PROCEDURE CODE (ACT V OF 1908), s. 92 . I. L. R. 37 Bom. 95

See CUTCHI MEMONS. I. L. R. 41 Bom. 181

See EXCESS PROFITS DUTY. I. L. R. 48 Calc. 844

See MAHOMEDAN LAW—WAKF. I. L. R. 33 All. 400
I. L. R. 40 Mad. 116

See TRUSTEES AND MORTGAGEES' POWERS ACT . . I. L. R. 35 Bom. 380

CHAR LANDS.

———— Occupancy rights in—

See BENGAL TENANCY ACT, 1885, s. 180. 2 Pat. L. J. 48

CHARTER ACT (24 & 25 VICT., C. 104).

See HIGH COURT ACTS, 1861.

———— cls. 13, 14—

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), ss. 421, 233 AND 537. I. L. R. 39 Mad. 527

———— cl. 15—

See CIVIL PROCEDURE CODE, 1882, s. 310A. 15 C. W. N. 863

See CIVIL PROCEDURE CODE, 1908—

S. 109 . . 15 C. W. N. 879

S. 115 . . 15 C. W. N. 682

See INTERLOCUTORY ORDER. 14 C. W. N. 147

See JURISDICTION I. L. R. 42 Calc. 926

See LAND ACQUISITION. I. L. R. 38 Calc. 230

See LETTERS PATENT, HIGH COURTS.

See MADRAS CITY MUNICIPAL ACT (III OF 1904) . . I. L. R. 38 Mad. 581

See PRACTICE. I. L. R. 41 Calc. 632

See PRESIDENCY MAGISTRATES' I. L. R. 35 Mad. 739

See SONTHAL PARGANAS. I. L. R. 41 Calc. 876

See TEMPORARY INJUNCTION. I. L. R. 41 Calc. 436

CHARTER ACT (24 & 25 VICT., C. 104) —*concld.*

——— To constitute appellate jurisdiction there must exist the relation of superior and inferior courts and the power on the part of the former to revise the latter. Meaning of 'Final order' discussed SECRETARY OF STATE FOR INDIA *v.* BRITISH STEAM NAVIGATION COMPANY.
15 C. W. N. 848

CHARTER OF THE SUPREME COURT, 1774

——— cl. 26—

See ARREST OF SHIP.
I. L. R. 42 Calc. 85

CHARTER-PARTY.

See BILL OF LADING.

See CONTRACT.

See CONTRACT ACT (IX OF 1872)—

S. 56 . **I. L. R. 40 Bom. 301**

Ss. 56, 65 . **I. L. R. 40 Bom. 529**

——— *Bills of lading—Where charter-party and bills of lading conflict the prevailing contract is the charter-party—Stevedores, though named by the charterers, are the agents of shipowners, and not of the charterers—Dunnage improper and insufficient—Shipowners' ordinary liability for bad stowage and insufficient dunnage—Shipowners' specific liability for shortage and sweepings under the charter-party.* The plaintiffs chartered the defendant company's steamer 'Abydos' for the carriage of cargo of rice in bags from Akyab, a seaport in Burma, to Bombay. The plaintiffs under the charter-party were empowered to sub-let the whole or part of the cargo, and they sub-let about one-fourth of the cargo space to other shippers. The charter-party expressly provided, *inter alia*, that "nothing herein contained shall exempt the shipowners from liability to pay for damage to cargo occasioned by bad stowage, by improper or insufficient dunnage," that "the charterers' stevedores at loading port to be employed at market rate but not exceeding owner's contract rate," that "all mats and requisite dunnage to be provided by the steamer," that "all sweepings to be delivered to the charterers at port of discharge," and that "the steamer to be responsible for any proved shortage." The bills of lading contained a special exception that the ship was "not responsible for loss or damage caused by insufficient packing, torn, mended, or chafed, weak or fragile bags, and bagging wrappers not for usual and reasonable wear and tear of packages." During the voyage the ship experienced heavy weather for at least two days and throughout encountered average monsoon weather with south-westerly squall. On the cargo being unloaded at Bombay it was found that 710 bags of the plaintiffs were damaged, that there was a shortage to the extent of 400 cwts., and that the sweepings collected amounted on the whole to about 576 cwts. On the evidence adduced in the case it was found that the damage was to a certain extent caused by improper laying of the dunnage at the port of loading. The plaintiffs sued in respect of (*i*) damage, (*ii*) shortage, and (*iii*) sweepings. The defendants contended that the loading and stowage of the cargo, as well as the laying of the dunnage was within the discretion and control of the stevedore as the plaintiffs' agent,

CHARTER-PARTY—*concld.*

and not as the defendants' agent, and that in respect of shortage their liability was excluded by the bills of lading. *Held*, (*i*) that the shipowners would be *primâ facie* liable for the damage caused by bad stowage or improper or insufficient dunnage and that their liability would not be modified by a clause in the charters-party empowering the charterers to name the stevedores, as the stevedores were the agents and paid servants of the shipowners for the purpose of discharging the duty of the shipowners in loading the cargo; *Harris* v. *Best Ryley & Co., 68 L. T. 76*, followed: (*ii*) that the defendants were liable in respect of the shortage as the prevailing contract between the shipowner and the charterer was the charter-party, and not the bill of lading; (*iii*) the plaintiffs were entitled to claim the value of the sweepings as specific provision was made in that behalf in the charter-party. BOMBAY AND AFRICA STEAM NAVIGATION CO. *v.* HAJI AZUM (1916)
I. L. R. 41 Bom. 119

CHATTELS.

See PALAS OR TURNS OF WORSHIP.
I. L. R. 42 Calc. 455

CHAUKIDARI ACT.

See VILLAGE CHAUKIDARI ACT.

CHAUKIDARI CHAKARAN LANDS.

See LANDLORD AND TENANT—CHAUKIDARI CHAKARAN LANDS.

See PUTNI . . **15 C. W. N. 5**

See SIMANADARS . **I. L. R. 43 Calc. 227**

——— onus of proving—

See REMAND . **I. L. R. 43 Calc. 1104**

1. ——— Resumption and transfer to zamindar—*Putnidar's right to claim settlement for zemindar—Suit, virtually for specific performance—Conditions which zemindar may impose—Equitable defence—Liability of putnidar to pay amount of assessment by Collector and part of the profits.* A suit by a putnidar against his zamindar for recovery of resumed *chaukidari-chakaran* lands brought on the ground that under the terms of the putni the putnidar became entitled to the chaukidari-chakran lands as soon as they were transferred by the Government to the zemindar, is virtually a suit for specific performance of contract. The zamindar would be equitably entitled to refuse settlement asked by the putnidar unless the putnidar agreed to the conditions as to payment of the assessment made by the Collector and a proportionate share in the profits such as the zemindar would in the circumstances be entitled to impose on him. *Semble.* It is not correct to hold that the putnidar is not bound to pay to the zemindar more than the assessment made by the Collector. *Kazi Newaz Khoda* v. *Surendra Nath De, 5 C. L. J. 33 : s.c. 11 C. W. N. 201, Hari Narain Mazumdar* v. *Mukund Lal Mundal, 4 C. W. N. 814*, referred to. RAJENDRA NATH MUKERJEE *v.* HIRA LAL MUKERJEE (1910) . . . . **14 C. W. N. 995**

2. ——— Rent claimable on resumed land—*Village Chaukidari Act (Bengal VI of 1870), s. 49—Assessment of rent by Collector—Right of landlord to claim fair and equitable rent.* The right of a landlord to claim rent, when making a settlement of resumed *chaukidari-chakaran* lands with a putni-

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dar, is not restricted to the amount of assessment made by the Collector under s. 49 of the Village Chaukidari Act (Beng. Act VI of 1870): he is ... able rent. *Hari Lal Mundal, 4* ... *Khoda* v. *Ram* ... *5 C. L. J. 33,* referred to. GOPENDRA CHANDRA MITTER *v.* TARAPRASSANNA MUKERJEE (1910)

I. L. R. 37 Calc. 598

3. ———— **Resumption**—*Bengal Act VI of 1870, s. 50—Resumption and transfer by Government—Rights of punidars and dar-putnidars—Suit for recovery of khas possession—Frame of suit—Specific performance of contract—Landlord and tenant.* Where *chaukidari-chakaran* lands had been resumed by the Government and settled under s. 50 of Bengal Act VI of 1870, with a zamindar who had created a patni under which there was a dar-putni and who made a raiyati settlement, and the dar-patnidars brought a suit against the zemindar for khas possession of the lands and for the execution of a deed of transfer, on the allegation that the zemindar had transferred his rights in the said lands to the putnidars and the putnidars had similarly transferred all their rights, subject of course, to the payment of the respective head rents. *Held,* that the joining of the two prayers for execution of a deed of transfer and for recovery of possession was in no way repugnant to any rule of law. *Nathu Pandu* v. *Budhu Bhika, I. L. R 18 Bom 537,* and *Narayana Kavirayan* v. *Kandasami Goundan, I. L. R. 22 Mad. 24,* referred to. RANJIT SINGH *v.* KALIDASI DEBI (1900)

I. L. R. 37 Calc. 57

4. ———————— *Village Chaukidari Act (Beng. VI of 1870), ss. 1, 48, 49, 50, 51, 52, 58—Power of resumption and assessment of chaukidari chakran lands—Zamindari estates in Orissa—Regulation XII of 1805, s. 33—Regulation XIII of 1805, s. 41—Regulation I of 1793, s. 8, cl. (4)—Onus of proof.* In these appeals, the Judicial Committee (affirming the decision of the High Court) *held,* on a consideration of the history of Orissa, and of the legislation applicable to its settlement, and the nature of its zamindari estates, that the Government were, under the circumstances, not entitled to resume and assess with revenue, as

pur) in Orissa, with whose ancestors, settlements had been made in 1803, and sanads granted by which statutory confirmation was given by s. 33 of Bengal Regulation XII of 1805, and in respect of

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10 Moo. I. A. 16, referred to. The respondents in discharge of the duties imposed on them by their sanads to maintain peace and order within their estates (the manner in which they were to carry

country, they remunerated by grants of land in lieu of wages. A register of these chaukidars was kept in the zamindari office, and in the appointment of the chaukidars, in more than one instance, the Government Police Officer had a voice. But the records showed that the zamindars often changed the lands held by these men, and resumed what they considered to be in excess of their requirements. Bengal Act VI of 1870 was extended to Orissa in 1879. In suits by the respondents against the Secretary of State for a declaration that the Act did not apply to the lands in question. *Held,* that the onus was on the appellants to show that when the zamindaries were confirmed to the respondents' ancestors, such confirmation was subject

in the old Regulations in respect of lands which had been set apart by the zamindar with their per-

ties of the grants under which the lands were held depended on the implied authorisation of the Government, which excluded them from consideration in the adjustment of the jama of the mahal In

the part of the respondents to make such grants. The only obligation on them was to maintain peace and order within their zamindaries. They entertained the services of chaukidars for whose maintenance they allotted from time to time certain lands of their own free will. The mere fact that some appointments were made with the approval of a Government official could not alter the nature of the grants. The word "assigned" in the definition section of Bengal Act VI of 1870 means land assigned by Government, or appropriated under their authority or with their permission. Not only did the form of the "transferring order" in Schedule C of the Act clearly show that the expression "assigned" is applied to lands assigned by Government for the maintenance of the chaukidars, and in respect of which they reserved the right to resume and transfer to the zamindar subject to an additional assessment, but the resolution by which the Act was extended to Orissa leaves no possibility of doubt what the Government understood the Act to mean. In the orders passed a distinction is made with regard to

its assets in the future. Nothing can be clearer that the Act was designed to deal with lands which, although lying within a mahal, did not form part of its assets, which was not the case with the respondents' zamindaries. SECRETARY OF STATE FOR INDIA *v.* KIRTIBAS BHUPATI HARICHANDAN MAHAPATRA (1914)

I. L. R. 42 Calc. 710

5. ———— *Suit for khas possession—Chaukidari chakaran lands—Resumption by Government and settlement with private individual—Holding over by tenant without settlement from such private individual.* The plaintiffs sued to obtain *khas* possession of three plots of land and for damages and in the

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alternative for a decree declaring that the defendants were bound to pay rent and for assessment of adequate rent. The lands in suit were formerly chakaran lands which were resumed by Government and settled with plaintiff's vendor on 7th September 1898. The plaintiff obtained his title to the lands by purchase of his vendor's interest at an auction sale in execution of a decree in 1907 or 1908. The defendants who held the lands as chaukidari chakran lands at the time of the resumption continued to hold them ever since without taking any settlement either from the plaintiff's vendor or the plaintiff. In 1902 the plaintiff's vendor sued the defendants in the Small Cause Court for compensation for use and occupation and obtained decrees against them. The plaintiff brought his suit on the 10th September 1909. *Held,* that once the chakran lands were resumed and settled with the plaintiff's predecessor the latter had the right to take *khas* possession of the lands and the mere omission of the plaintiff's predecessor and of the plaintiff after him to assert that right would not amount to acquiescence on the part of the plaintiff which would alter the status of the defendants, from that of trespassers to that of tenants and the plaintiff was entitled to bring his suit within 12 years from the date of resumption by Government and settlement with the plaintiff's vendor. RAJ KRISHNA RUDRA *v.* PHAKIR DOME (1913) . **19 C. W. N. 478**

6. ——— Mortgage of zamindari before resumption and transfer—*Accession to mortgaged property upon transfer—Chakaran lands if become new estate.* Whether, upon resumption by Government, *chaukidari-chakran* lands are for all purposes severed from the zamindari or not, they form part of the zamindari before resumption, and a mortgage of the zamindari executed before the resumption would cover such lands upon transfer of the resumed *chakaran* lands to the zamindar. There is an accession to the mortgaged property within the meaning of s. 70, Transfer of Property Act. *Semble. Chaukidari-chakaran* lands upon resumption form a separate estate for one purpose only, *viz.*, as being hypothecated for the *chaukidari* assessment. Otherwise it remains a part of the estate. *Kashim Sheikh* v. *Prasanna Kumar, I. L. R. 33 Calc. 596, s.c. 10 C. W. N. 598,* disapproved. *Kazi Newaz* v. *Ram Jadu, I. L. R. 34 Calc. 109, s.c. 11 C. W. N. 201,* referred to. Tenants found holding under a *chaukidar* for 50 years or so before resumption acquired occupancy rights and were not liable to be ejected by the zamindar on resumption and transfer to him of the *chakaran* lands. *Ram Kumar Bhattacharjee* v. *Ram Newaj, I. L. R. 31 Calc. 1021,* followed. *Shaikh Jonab Ali* v. *Rakibuddin, 9 C. W. N. 571, Krishna Kinkar Dutt* v. *Mahanto Bhagaban Das, 12 C. W. N. 161,* distinguished. *Radha Pershad* v. *Budhu Dashad, I. L. R. 22 Calc. 938,* referred to. RAKHAL DAS MUKHERJEE *v.* MADHAB CHANDRA SINGHA (1910) **15 C. W. N. 61**

7. ——— Resumption—*Possession taken by putnidar—Ryots settled by putnidar if may be ousted by person taking settlement from zamindar—Recital in sale deed when estops vendee—Estoppel—Collateral statements in deed—Tenancy, if may be created by verbal settlement.* Where a conveyance of a putni taluk expressly recited that certain resumed *chaukidari-chakaran* lands appertaining to the putni taluk were retained by the vendor: *Held,* that the vendee was not estopped from claiming the *chakaran* lands under a subsequent settlement thereof from the zamindar. By accepting a deed of conveyance in fee and going into possession a grantee is not estopped to deny the title or seizing of the grantor unless he claims under the deed. *Rup Chand Ghose* v. *Sarbessar Chandra, 10 C. W. N. 747 : s.c. I. L. R. 33 Calc. 915 ; 3 C. L. J. 629,* referred to. The doctrine of estoppel does not extend to mere descriptive matters or statements or recitals which are immaterial and not contractual or essential to the purposes of the instrument. To give a recital to that effect it must be shown that the object of the parties was to make the matter recited a fixed fact as the basis of their action. The statement in question in the present instrument did not create an estoppel as it was essentially a collateral statement not concerning the direct purpose of the deed. When in pursuance of an agreement for a lease the intended lessee has taken possession though the requisite documents had not been executed the position is the same as if the document has been executed, provided specific performance can be obtained between the same parties in the same Court and at the same time as the subsequent legal question falls to be determined. Where a putnidar took possession of resumed *chakaran* lands on the footing that they were included within the putni and he was entitled to hold them upon payment of such rent as might be assessed, and there were negotiations between him and the zemindar regarding the *chakaran* lands ; and the putnidar settled the lands with the defendants who *bonâ fide* accepted a raiyati lease from him. *Held,* that the plaintiff who purchased the putni and then took settlement of the *chakaran* lands from the zamindar with full knowledge that the defendants were in occupation as cultivating tenants was not entitled to rent and treat the defendants as trespassers. *Binad Lal Pakrashi* v. *Kalu Pramanik, I. L. R. 20 Calc. 708, Upendra Narain* v. *Protap Chandra, 8 C. W. N. 320, Jonab Ali* v. *Rakibuddin, 9 C. W. N. 571 ; s.c. 1 C. L. J. 303,* referred to. BEPIN BEHARI MITRA *v.* TINCOURI PATHAK (1911) . **15 C. W. N. 976**

8. ——— *Zamindar's title under s. 50.* The suits which gave rise to this appeal were brought to recover *khas* possession from the appellant, the registered proprietor of extensive zamindaris in the Birbhum District of Bengal, of *chaukidari-chakaran* lands resumed by Government, and transferred to him under the provisions of the Village Chaukidari Act (Beng. Act VI of 1870). The plaintiff in each suit (respondents) was the putnidar or dar-putnidar of the village within the boundaries of which the land in each suit was situated. It was objected that the appellant had no such interest in the *chaukidari-chakaran* lands as could be conveyed in a putni lease. *Held* (on a consideration of the nature of *chaukidari-chakaran* lands, the provisions of the Bengal Permanent Settlement of 1793, the Regulations of that time so far as they deal with *chakaran* lands, and the true meaning and effect of Bengal Act VI of 1870), that the zamindar obtained or retained in the *chaukidari-chakaran* lands situate within the territorial boundaries of a village comprised in his zamindari an interest capable of being made the subject of a putni lease. The settlement of 1793 recognizes and proceeds on the footing that the zamindars are the actual proprietors of the land for which they undertake to pay the Government

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revenue; and it is clear that since the settlement they have had a *primâ facie* title to all lands for which they pay revenue, such lands being commonly referred to as malguzari lands: see *Perklad Sein* v. *Doorga Persaud Tewaree, 12 Moo. I. A. 289.* On the Regulations of the Permanent Settlement the leading authority is *Joykissen Mookerjee* v. *Collector of East Burdwan, 10 Moo. I. A. 16,* in which Lord Kingsdown said that the effect of the settlement was to divide *chakaran* lands into two classes, *viz., thanadari-chakaran* lands, that is, land held on service tenure by police officials and all other *chakaran* lands. The former class were, by Bengal Regulation I of 1793, s. 8, cl. 4, made resumable by Government, the Government relieving the zamindars from the duty of maintaining a police establishment. These lands were in fact shortly afterwards resumed, and became Government lands, the title of the zamindars being extinguished by such resumption. As to all other *chakaran* lands, whether held by public officers or private servants in lieu of wages, they are dealt with by Regulation VIII of 1793, s. 41. From [illegible] services for which were purely personal to the zamindar, it was clear that *thanadari* and *chaukidari-chakaran* lands, the services for which involved the performance of duties in which the public was interested, had not, as a rule, been taken into account for the purpose of increasing the revenue. The effect of a resumption by the Government of *chaukidari-chakaran* lands under the provisions of Bengal Act VI of 1870 is that after the assessment is complete the Collector is, under s. 50, by order in the scheduled form, to transfer to the zamindar subject to such assessment; and by s. 51 such order operates to transfer the land to the zamindar "subject to all contracts thereby made in respect of, under, and by virtue of which any person, other than the zamindar, may have any right to any [illegible] lessee of the zamindars' interest in the lands resumed, and also the rights of a dar-putnidar under a dar-putni grant. Not only, therefore, does the Act recognize the existing title of the zamindar to the lands resumed, but the estate taken by the [illegible]

RANJIT SINGH BAHADUR v. KALI DASI DEBI (1917)
I. L. R. 44 Calc. 841

9. ——————— *Included in revenue-paying estate—Resumption of, and transfer to landlord—Village Chaukidari Act (Beng. VI of 1870)—Sale of parent estate for default of payment of Government revenue—Revenue Sale Law (Act XI of 1859)—Title of purchaser.* Where *chaukidari-chakaran* lands resumed by Government under the provisions of the Village Chaukidari Act, 1870, were transferred in 1900 to *A* in consequence of whose default in paying Government revenue, the parent estate was sold in 1907 and purchased by *B*, and where *B* sued to recover possession of the same. *Held,* that the purchaser at the revenue sale acquired no title to the *chaukidari-chakaran* lands which were never put up to sale for realization of the arrears due from the remainder of the estate. *Ranjit Singh* v. *Kali Dasi Debi, I. L. R. 44 Calc. 841; 21 C. W. N. 609,* followed. *Kazi Newaz Kheda* v. *Ram Jadu Dey, I. L. R. 34 Calc. 109; 11 C. W. N. 201, Harreck Chand Babu* v. *Charu Chandra Sinha, 13 C. L. J. 102; 15 C. W. N. 5, Rakhal Das Mukerji* v. *Madhab Chandra Sinha, 13 C. L. J. 109,* referred to. *Kasim Sheikh* v. *Prasanna Kumar Mukerjee, I. L. R. 33 Calc. 596; 10 C. W. N. 598,* dissented from. BROJENDRA LALL DAS v. DEB NARAIN TEWARI (1917)
I. L. R. 45 Calc. 765

10. ——————— *Resumption —Putni lease—Transfer to landlord—Suit for recovery of possession with mesne profits—Village Chaukidari Act (Beng. VI of 1870), s. 51.* Where *A* obtained a putni of two villages from *Z*, paid a bonus and the annual rent was fixed in perpetuity, and where within the lands comprised in the putni were some *chaukidari-chakaran* lands which were subsequently resumed by Government and transferred to *Z*, who settled the same with tenants, and where *A*, the putnidar, instituted a suit for declaration of title and recovery of possession with mesne profits. *Held,* that, on equitable grounds, the putnidar and the zamindar must be placed in the position they would have occupied if the *chaukidari-chakaran* lands had been resumed before the putni was created; the assets of those lands would then have been taken into account in settling the amount of putni rent which would have represented the assessment due to the State, as also a fair share of the profits. *Held,* also, that mesne profits were to be calculated on the basis of the rent payable by the tenants to the zamindar and not on that of the actual value of the land produce. *Ranjit Singh* v. *Kali Dasi Debi, 21 C. W. N. 609, Kazi Newaz Kheda* v. *Ram Jadu Dey, I. L. R. 34 Calc. 109, Rajendra Nath Mukherjee* v. *Hira Lal Mukherjee, 14 C. W. N. 995, Gojendra Chandra Mitter* v. *Tara Prosonno Mukherjee, 14 C. W. N. 1049, Haral Chand Babu* v. *Charu Chandra Singha, 15 C. W. N. 5,* referred to. MEHDI HOSSEIN v. UMESH CHANDRA MOOKERJEE (1917)
I. L. R. 45 Calc. 655

11. ——————— *Effect of transfer —Village Chaukidari Act (Beng. VI of 1870), s. 51.* Where certain *chaukidari-chakaran* lands forming part of a revenue-paying estate, being abandoned by the chaukidars, were appropriated by the zamindar who settled the same with the defendants as tenants, and thereafter the lands were resumed under the provisions of the Village Chaukidari Act, [illegible] v. *Kali Dasi Debi, 21 C. W. N. 609,* referred to. SHIB CHANDRA BANERJEE v. SURENDRA CHANDRA MANDAL (1917) . . **I. L. R. 45 Calc. 515**

12. ——————— **Putni lease**—*Clause reserving power of zamindar to appoint and dismiss chaukidars, effect of.* A clause in a putni lease which reserves to or confers on the zamindar the right to appoint and dismiss chaukidars has not the effect of reserving to the zamindar and excluding

CHAUKIDARI CHAKARAN LANDS—*contd.*

from the *putni* the *chowkidari-chakaran* land. NAFAR CHANDRA CHANDRA *v.* BEJOY CHAND MAHTAP (1917) . . **22 C. W. N. 487**

13. ———— **Limitation**—*Act, 1877, Sch. II Arts. 113 and 144—Suit by putnidar to recover rights in, and to obtain a settlement of, chaukidari-chakaran lands on resumption by Government and transfer of them to zamindar—Suit for possession or for specific performance—Whether rights were contractual—Transactions creating real right—Village Chaukidari Act (Beng. VI of 1870), s. 51.* In suits brought by the respondent claiming to recover and obtain as settlement of certain *chaukidari-chakaran* lands in villages of which the appellant was the zamindar, it was contended that the suits were barred by limitation, and that question depended on whether they were suits for specific performance and governed by Art. 113 (three years) or for possession and governed by Art. 144 (twelve years) of the limitation Act. There was no doubt that under the ruling of the Board in *Ranjit Singh* v. *Kali Dasi Debi, I. L. R. 44 Calc. 841 ; L. R. 44 I. A. 117*, the putnidar had, on resumption of the lands by the Government and transfer of them to the appellant, such rights in the land as he claimed. *Held*, that it did not follow that because such rights originally arose by virtue of a grant declared to be a contract within the meaning of s. 51 of Bengal Act VI of 1870, they are therefore rights contractual in the sense that the contract by its terms creates or regulates the personal obligations and duties of the grantor in the circumstances that had arisen, which were not contemplated and necessarily not referred to at the time the grants were made. On the resumption of the lands by the Government the rights of the patnidar were those conferred on him by the estate and interest created by the putni leases, and it was these rights which were kept alive by s. 51 of Bengal Act VI of 1870. The suits were not suits for specific performance of a contract, nor was the application of Art. 113 of the Limitation Act in any way suitable to them, no date having been fixed for performance, nor any notice given of refusal to perform a contract for there was no unexecuted contract to be performed. A suit for specific performance is essentially a suit for enforcing a stipulation relating to property. The word "contract" itself primarily means a transaction which creates personal obligations, but it may, though less exactly, refer to transactions which create real rights. It is in this latter sense that the word was used in s. 51, and the rights thereby reserved to the putnidars, comprehensively in the word "contracts" are real rights, the enforcement of which is secured not by a suit for specific performance, but by a suit for possession, and this is the character of the present suits. The period of limitation applicable therefore is twelve years prescribed by Art. 144 of the Limitation Act, and the suits were not barred. RANJIT SINGH BAHADUR *v.* MAHARAJ BAHADUR SINGH (1918) . . . **I. L. R. 45 Calc. 173**

———————— *Chowkidari Chakaran lands within the ambit of a putni, resumed by Government—Respective rights of putnidar and Zamindar in such lands.* The interest of the *putnidar* in resumed *Chowkidari Chakaran* lands comprised in his putni is derived from the putni itself and nothing else and the Zamindar cannot claim a share in the profits derived from the settlement of such lands and thus in effect to vary the *putni*. The law to the contrary laid down in *Moharaja Bijoy Chand* v. *Krishna, 34 C. L. J. 375*, and the decisions followed therein is not correct in view of the decisions of the Privy Council in *Ranjit Singh Bahadur* v. *Kali Dasi Debi, 21 C. W. N. 609* and *Ranjit Singh Bahadur* v. *Maharaja Bahadur Singh, I. L. R. 46 Calc. 173.* NARPAT SINGH *v.* RAJA BHUPENDRA . . . **26 C. W. N. 943**

CHEATING.

See EVIDENCE ACT, 1872—

Ss. 11, 14, 15 . **I. L. R. 39 All. 273**

Ss. 14 AND 65 **I. L. R. 34 All. 95**

See EXTRADITION ACT (XV OF 1903), ss. 7, 8, AND 8A. **I. L. R. 43 Bom. 310**

See PENAL CODE (ACT XLV OF 1860), s. 415 . . **I. L. R. 43 Bom. 842**

———— **abatement of**—

See MISJOINDER **I. L. R. 38 Calc. 453**

———— **at examination**—

See UNIVERSITIES ACT, 1904, s. 25. **I. L. R. 2 Lah. 197**

CHELAS.

See CUSTOM . **I. L. R. 1 Lah. 511 & 540**

See HINDU LAW—SUCCESSION. **14 C. W. N. 191**

———— **mortgage by**—

See MORTGAGE . **15 C. W. N. 838**

CHEQUE.

See BANKER AND CUSTOMER. **I. L. R. 36 Bom. 455**

See LIMITATION ACT (IX OF 1908).

S. 20 . . **19 C. W. N. 724**

SCH. I, ART. 62 . **I. L. R. 38 Bom. 293**

———— **Effect of payment by**—*Part-payment—Limitation—Limitation Act (IX of 1908), s. 20—Continuous account.* If a cheque is delivered to a payee by way of payment and is received as such, it operates as a payment subject to a condition subsequent that if upon due presentation the cheque is not paid, the original debt revives. Where such a cheque is signed by the debtor and paid in part-payment of the principal of a debt, the cheque being subsequently honoured, the proviso to s. 20 of the Limitation Act has been complied with. *Mackenzie* v. *Tiruvengadathan, I. L. R. 9 Mad. 271*, distinguished. Where the dealings between two parties give rise to a continuous account, the whole forms one cause of action. *Bonsey* v. *Wordsworth, 18 C. B. 325*, followed. KEDAR NATH MITRA *v.* DINABANDHU SAHA (1915) **I. L. R. 42 Calc. 1043**

CHETTY MONEY-LENDING FIRM.

See PRINCIPAL AND AGENT. **I. L. R. 43 Calc. 527**

CHEIF JUDGE, SMALL CAUSE COURT.

———— **jurisdiction and discretion of**—

See SPECIFIC RELIEF ACT (I OF 1877), s. 45 . . **I. L. R. 34 Bom. 659**

CHIEF PRESIDENCY MAGISTRATE.

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), s. 514.
I. L. R. 42 Bom. 400

CHILD.

———— abandonment of—

See PENAL CODE (ACT XLV OF 1860), s. 317 . . I. L R. 41 Bom. 152

———— meaning and maintenance of—

See CRIMINAL PROCEDURE CODE, 1898, s. 488 . . I. L. R. 37 Mad. 565

CHILD WITNESS.

———— competency of—

See APPEAL . I. L. R. 41 Calc. 406

———— examination of, without affirmation—

See APPEAL . I. L. R. 41 Calc. 406

CHILDLESS WIDOW.

See REMARRIAGE, CUSTOM OF
I. L. R. 48 Calc. 300

———— property of—

See HINDU LAW—AYAUTUKA STRIDHAN.
I. L. R. 37 Calc. 863

CHITTAS.

———— *Chittas* prepared for the purpose of distributing the public revenue on a partition of an estate is a public document and is evidence of the state of affairs then existing and admissible in evidence. NORENDRA KISHORE ROY *v.* DURGA CHARAN CHOWDHURY (1910)
15 C. W. N. 515

CHOTA NAGPUR.

———— grant by Maharajah of, whether impartible—

See CUSTOM.
1 Pat. L. J. 109

———— under Raiyat in—

See BENGAL RENT ACT, s 82
20 C. W. N. 392

CHOTA NAGPUR ENCUMBERED ESTATES ACT (BENG. VI OF 1876).

———— application of——*Mortgage—Immovable property not within Chota Nagpur—Bengal Regulation VIII of 1819 (Patni Taluqs)—Proceedings under ss. 8 and 14 of the Regulation—Suit to recover from the zamindar money paid to him as being arrears of rent wrongly alleged to be due—Threatened sale of patni.* The Chota Nagpur Encumbered Estates Act (Beng. VI of 1876) is not applicable to immovable property outside the limits of Chota Nagpur. *Bhicka Ram Sahi v. Bishambhar Nath Sahi, 16 C. L. J. 527*, approved. The main purpose of the Act is the protection of zemindars within that district, and any provisions which affect rights to enforce in jurisdictions outside it, personal debts or liabilities, are merely ancillary to the main purpose of the Act, which is directed to improving the persons owning land within it. The procedure provided for by s. 14 of the patni Regulation (VIII of 1819) is not such as to put those submitting to pay money under it in the position of persons paying a claim

CHOTA NAGPUR ENCUMBERED ESTATES ACT (BENG. VI OF 1876)—*contd.*

brought against them in an ordinary suit in which they could have set up a full defence, but had failed to do so. In the latter case those who pay lose their right to assist, however good, because, having had the full opportunity of doing so which the law allows them once for all, they have not availed themselves of the opportunity so given. But s. 14 of the Regulation expressly recognises the right to bring a separate suit in an ordinary Court in which the question of title can be raised, notwithstanding the proceedings before the Collector taken by the zemindar under s. 8, which are of an administrative rather than a properly judicial character. The rule therefore which prevents a person from recovering back money which he has paid on a claim in legal pro- [illegible]

due without setting up any defence, as he might have done. RAJA OF PACHETE *v.* KUMUD NATH CHATTERJI (1918) . I. L. R. 46 Calc. 1

———— s. 2—*Act if applies to land outsid Chota Nagpur—Vesting order—Statute, interpretation of—Statute conferring special privilege in derogation of rights of others, strict construction* The Chota Nagpur Encumbered Estates Act has [illegible]

Nath Chowdhury v. *Keshub Chunder Mukherjee, 11 C. W. N. 1127*, followed and explained. BHICHA RAM SAHI *v.* BISHAMBHAR NATH SAHI (1912)
17 C. W. N. 754

———— ss. 2-A, 3, and 21-B—*Held*, that s. 21-B refers to suits other than proceedings in regard to debts and liabilities mentioned in s. 2-A and does not restrict the provisions of s. 3 BANSIDHAR DHAR *v.* TIKAIT HAR NARAYAN SINGH
6 Pat. L. J. 685

———— s. 3—

———— "*holder of property,*" *whether trespasser is included—*"*debt and liability,*" *whether contractual debt or liability is included.* The liability in respect of which protection is accorded by this Act is that to which a holder of the property or his heirs are liable and does not include a trespasser. *Querry.* Whether the words "debt and liability" in the same section include a contractual liability. LAL MIRTUNJAY NATH SAHI DEO *v.* THAKUR PANCH KAURI NATH SAHI DEO . . . . . 3 Pat. L. J. 156

———— *Deed of release executed by disqualified proprietor.* A deed of release [illegible]

not a case of a merely voidable agreement. An admission to that effect in a *chhar sanad* (which did not operate as an alienation) granted by the dis-

CHOTA NAGPUR ENCUMBERED ESTATES ACT (BENG. VI OF 1876)—*concld.*

——— s. 3—*concld.*

qualified proprietor did not bind the estate even as an admission. BISWANATH GORAIN *v.* SURENDRA MOHAN GHOSH (1913) . **19 C. W. N. 102**

——— ss. 3, 12—

See EXECUTION OF RENT DECREE. **I. L. R. 38 Calc. 288**

——— *Debts contracted during disqualification—subsequent ratification, validity of—" any person to whom the property is restored "—liability of debtor's heirs.* It is not competent to a proprietor whose estate has been released from the operation of the Chota Nagpur Encumbered Estates Act, 1876, to ratify debts contracted during his disability. HANUMAN BUKHS *v.* TIKAIT GANESH NARAYAN SAHA DEO **4 Pat. L. J. 1**

——— ss. 8, 11 and 22—*Debts, whether decretal debts, included—power of Manager to cut down interest decreed.* In dealing with an encumbered estate under s. 11 of the Chota Nagpur Encumbered Estates Act, 1876, the Manager must scrutinize all debts and finally pass orders even upon debts decreed by a competent Court. The Manager is, therefore, entitled to cut down interest already decreed by a competent Court. THAKUR PRASAD AURORA *v.* THE MANAGER OF BARABHUM ENCUMBERED ESTATE, PURULIA **4 Pat. L. J. 321**

——— s. 17—

See PUTNI LEASE. **I. L. R. 42 Calc. 1029**

——— ss. 17, 18, 18-B, 2, 3, 4, 9, 19, 21-A —*Managers, power of—power to lease under s. 17 before the enactment of s. 18-B did not include power to contract for a lease—Commissioner not entitled to grant lease—Suit for specific performance—Substitution of parties—Compromise—Code of Civil Procedure (Act V of 1908), O. 1, r. 8, and O. XXIII, r. 3.* The power to grant leases given to the Manager by s. 17 of the Chota Nagpur Encumbered Estates Act, 1876, does not, apart from s. 18-B enacted in 1909, include the power to enter into an executory contract to grant a lease. The powers granted by statute to the Manager of an encumbered estate should be as strictly construed as the powers of the guardian of a minor. The mere fact that the sanction of the Commissioner is required before the Manager of an encumbered estate has power to grant a lease for more than four years of any such property does not imply that the Commissioner has power to grant a lease without consulting the Manager, or to bind the Manager by an agreement to grant a lease. SETH HUKUM CHAND *v.* RAJA RAN BAHADUR SINGH **4 Pat. L. J. 580**

CHOTA NAGPUR ENCUMBERED ESTATES AMENDMENT ACT (BENG. III OF 1909).

——— s. 4—

See EXECUTION OF RENT DECREE. **I. L. R. 38 Calc. 288**

CHOTA NAGPUR LANDLORD AND TENANT PROCEDURE ACT (BENG. I OF 1879).

——— s. 6—*Chota Nagpur Landlord and Tenant Procedure Act (Ng. sit of 1879), s. 6—Non-occupancy raiyat position of, after notice to*

CHOTA NAGPUR LANDLORD AND TENANT PROCEDURE ACT (BENG. I OF 1879)—*concld.*

——— s. 6—*concld.*

quit—Trespasser—Occupancy right. After the service of a valid notice to quit, a non-occupancy raiyat holding land under the Chota Nagpur Landlord and Tenant Procedure Act of 1879 became a trespasser, and the fact that when the suit for ejectment consequent upon the notice was instituted, the raiyat had been already holding the land for 12 years did not entitle the raiyat to claim occupancy rights. *Sheikh Khossal* v. *Sheikh Shukhowdee, 1 W. R. 119, Aymel Islam* v. *Jardine Skinner and Co., 8 W. R. 501 ; Janardun Acharjee* v. *Haradhun Acharjee, 9 W. R. 513 ; Mackintosh* v. *Gopee Mohun Mojoomdar, 4 W. R. 24 ; Gale* v. *Maharanee Sreemutty, 15 W. R. 133,* considered. NATHUNI RAM *v.* RAJA PARESH NATH SINGH (1909) **14 C. W. N. 297**

——— s. 47—*Suit for rent—Plaint not specifying property in arrears—Tenure, if may be sold without amending plaint—Order of High Court to amend plaint if under Civil Procedure Code (Act V of 1908), O. VI, r. 18—Decree, if should be amended —Remand order directing trial by specific Court—Another Court having jurisdiction, if may try.* Where in a suit for rent governed by the Chota Nagpur Landlord and Tenant Procedure Act of 1879 the plaint did not specify correctly the property in respect of which the rent was due as required by s. 47 of the Act, and the sale proclamation issued in execution of the decree passed in the suit (which by force of s. 5 of the Bengal Rent Recovery Act of 1865 would specify the property in the words of the plaint) was in consequence found to be defective by the High Court on an appeal preferred to it in execution proceedings and the High Court by its order, dated 13th March 1913, acting on the agreement of the parties directed that the description in the plaint should be amended, the plaintiff being given liberty to submit a correct description, and further that the " Court that tried the original suit " should adjudicate upon the matter in case of controversy, but on remand, the Deputy Commissioner, and not the Deputy Collector who tried the original suit, caused the plaint to be amended on the 17th May 1913. *Held,* that r. 18 of O. VI of the Civil Procedure Code did not apply to the matter as the order of the High Court directing amendment was not made under O. VI, but under the power of the Court to order that certain steps should be taken by the parties to enable the differences between them to be properly settled, and the amendment made was not out of time. That although the Deputy Commissioner had general jurisdiction over the case under the High Court's order the Deputy Collector and not he had power to deal with the matter and his order should be set aside. That the objection on the part of the judgment-debtor that it was the decree and not the plaint that was to be amended, though it would have been a valid objection if the case was under the general law, under the special provisions of s. 5 of the Rent Recovery Act there was no necessity for amending the decree. MADAN MOHAN NATH SAHI *v.* PRATAP UDAI NATH SAHI DEO (1914) **19 C. W. N. 200**

——— s. 123—

See EXECUTION OF DECREE. **I. L. R. 40 Calc. 623**

CHOTA NAGPUR TENANCY ACT, VI of 1908.

——— ss. 3 (xi) and 81—

See PROFIT A PRENDRE.

2 Pat. L. J. 323

——— ss. 3 (xi), 81 (n), 91—*Forest-produce, if includes unworked coal—Suit to eject jaigirdar for breach of covenant—Minerals, right to—Status of tenant, question arising incidentally—Procedure, proper, when suit instituted to which s. 91 applies—Stay of suit—Receiver and injunction—Reliefs, if available under s. 91—Presumption against taking away Court's jurisdiction.* Whether any right referred to in cl. (n) of s. 81 of the Chota-Nagpur Tenancy Act is in issue or not in a suit or application instituted by the plaintiff so as to make the provisions of cl. (a) to s. 91, sub-s. (1) of the Act applicable, cannot be determined before written statement has been filed by the defendant. Cl. (n) of s. 81 does not include coal in a mine not yet opened. Forest-produce defined in sub-cl. (e) of cl. (xi) of s. 3 of the Act obviously refers to minerals lying on the surface of the soil which may be taken by any person, tenant or not. Cl. (b) of s. 91 sub-s. (1), does not apply to a suit where the question of the tenant's status arises only indirectly for consideration. A suit by the zemindar for recovery of possession of land from a jaigirdar, in which a point arises as to which of the parties is [illegible]

[illegible]

the plaintiff cannot demand a prohibition of waste or damage but merely the prohibition of the continuance of waste or damage already committed. [illegible]

[illegible]

shall not be taken away except by express words or by necessary implication. RAM NARAIN SINGH *v.* LACHMI NARAIN DEO (1912)

17 C. W. N. 408

——— ss. 4 (3), 41—

See EJECTMENT . I. L. R. 40 Calc. 858

——— s. 11—*Registration of transferee of tenure in landlord's office, condition precedent to suit for rent—Record-of-rights, transferee's name recorded in, if substitute for registration.* The granting by the Settlement Department of a copy of a *khewat* containing the name of a certain person as the holder of a tenure is not equivalent to registration in the office of the landlord of the transfer of the tenure to that person as contemplated by s. 11 of the Chota Nagpur Tenancy Act. ANGNU GHASI *v.* CHUTRU PATRAS (1914) . 19 C. W. N. 461

——— Where in a suit for recovery of rent it is pleaded that the provisions of s. 11 of the Act have not been complied with the onus of proving registration lies on the plaintiff. DUBEY SHIVASAHAY RAM *v.* THAKUR SHIVA BHANJAN LAL . . . 6 Pat. L. J. 677

——— ss. 14 (b), 208 and 212—*Raiyat at fixed rates, whether entitled to make a deposit to set aside sale.* A raiyat at fixed rates is entitled to have a sale held [illegible]

making [illegible]

Tenancy [illegible]

or intere[illegible]

CHOTA NAGPUR TENANCY ACT, VI OF 1908) —*contd.*

——— s. 14—*concld.*

tion sale is entitled to make a deposit under s. 212 irrespective of whether his right or interest was liable to annulment under ss. 14 and 208. PANCHANAN MAHTA *v.* KANAI MAHTO

4 Pat. L. J. 11

——— ss. 20 (3), 139 (6)—*Occupancy-right* [illegible]

[illegible]

period of 12 years, cultivated the same and paid rent therefor as rayats. DURGA PROSAD SINGH *v.* HARI RAM MAHATO (1914) . 19 C. W. N. 578

——— s. 26—*Agreement to pay enhanced rent made when Act X of 1859 in force—Occupancy raiyat if may object to agreement on extension of Beng. Act VI of 1908—Beng. Act I of 1879, s. 21, if affects question.* S. 17 of Act X of 1859 was no bar to the enhancement of the rent of an occupancy raiyat by agreement. Where Beng. Act VI of 1908 was extended to an area (Manbhum) where previously Act X of 1859 and not Beng. Act I of 1879 applied: *Held*, that s. 26 of Beng. Act VI of 1908 did not invalidate an agreement to pay enhanced rent validly made when Act X of 1859 was in force. SAJOR MAHTO *v.* S. P. COOKE (1912)

17 C. W. N. 430

——— s. 27—

See HIGH COURT, JURISDICTION OF.

I. L. R. 40 Calc. 516

——— ss. 27, 264, 528—

See JURISDICTION I. L. R. 43 Calc. 136

——— s. 41—

See MINOR . . 3 Pat. L. J. 518

——— s. 46—*Sale of raiyati holding—Statute invalidating such sale, subsequently applied to dis-* [illegible]

[illegible]

v. KULODA PROSAD DEOGHARIA (1910)

15 C. W. N. 43

——— s. 47—

See MORTGAGE . I. L. R. 40 Calc. 524

——— Prohibits the sale of the right of a *raiyat* in his holding in execution of a decree or order. It is the duty of the Court executing the decree to consider whether the sale of the property is forbidden by the section. An objection to the sale may be taken even after the passing of a decree for sale. JADHU MAHTO *v.* KALI PRASONNO BHATTACHARJEE

1 Pat. L. J. 33

——— ——— *Mortgage of raiyat's holding—suit for sale, whether maintainable—Construction of statutes.* Where a raiyat mortgaged his

CHOTA NAGPUR TENANCY ACT, VI OF 1908 —*contd.*

——— s. 47—*concld.*

holding before the Chota Nagpur Tenancy Act, 1908, was brought into force: *Held*, that a right to sell the mortgaged property having accrued at a time when the Act was not in force, a suit for sale on the mortgage was not barred by s. 47, although that section provides that the right of a raiyat in his holding cannot be sold in execution of a decree or order. BRAJA LALL DUTTA *v.* KENARAM PAL

4 Pat. L. J. 411

——— ss. 51 and 177—*Suit for recovery of rent—plea of* bonâ fide *payment to third person.* In a suit for recovery of rent under the Chota Nagpur Tenancy Act, 1908, if the tenants plead *bonâ fide* payment to a third person, such third person must be made a party to the suit under s. 177 of the Act, and the suit must be decided according to the decision whether the payment was *bonâ fide*. In rent suits it is desirable where the plaintiff has received delivery of possession from the Civil Court and has had his possession recognized in the survey proceedings, he should be permitted to realise his rent, leaving it to any third person who disputes the plaintiff's title, to bring a civil suit. SUNDAR ROY *v.* HEMA MAHTO

2 Pat. L. J. 386

——— ss. 59, 79—*Mokarari tenure, stipulation in, for ejectment on non-payment of rent, if enforcible.* A stipulation in a lease creating a permanent tenure to the effect that the lease shall be cancelled in case of non-payment of rent, is not a void stipulation under the provisions of the Chota Nagpur Tenancy Act. The liability to ejectment of the holder of a *mokarari istimrari ijara* is to be determined by the conditions of his lease, neither s. 59 nor s. 79 of the Act applying to permanent tenures. NAYAN SINGH *v.* AJIT LAL OHDAR (1913) . . . 17 C. W. N. 1068

——— ss. 71 and 217—*Application to eject trespasser—order of ejectment set aside by Deputy Commissioner—Jurisdiction of High Court to interfere—Code of Civil Procedure (Act V of 1908), s. 115—Government of India Act, 1915, s. 107.* Where the transferee of a non-transferable holding was, on the application of the landlord, ejected by the first Court but restored to possession by the Deputy Commissioner on appeal, and the matter was not further prosecuted before the Commissioner and the Board of Revenue, *held*, that the High Court would not enter into the merits of the case. UDHAB CH. SINGH *v.* LACHMI BIBI KUNRANI

3 Pat. L. J. 143

——— ss. 77 and 208—

See GHATWALI TENURE.

1 Pat. L. J. 601

——— ss. 78, 224 (2) and 264 (8)—*second appeal—Code of Civil Procedure (Act V of 1908), s. 100.* No second appeal lies to the High Court from a decision in a suit under s. 87 of the Chota Nagpur Tenancy Act, 1908. The word "decision" in s. 87 is not synonymous with "decree" and, therefore, s. 100 of the Code of Civil Procedure, 1908, does not apply to the decision of an appeal under s. 87. THAKUR JUGDESHAR DAYAL SINGH *v.* BHAGDI MAHTO . . . 5 Pat. L. J. 697

——— ss. 81, 83, 87, 256—*Dispute under s. 83, jurisdiction of Settlement Officer upon such dispute to record entry that tenure mundari khuntkati—Suit*

CHOTA NAGPUR TENANCY ACT, VI OF 1908 —*contd.*

——— s. 81—*concld.*

for rent instituted under Act X of 1859—Decree and purchase by landlord in execution after Chota Nagpur Tenancy Act brought into force and land recorded as above at Settlement—Title to tenure. Under s. 83 of the Chota Nagpur Tenancy Act, the Settlement Officer has jurisdiction to decide a dispute between landlord and tenant as to whether the latter was a *mundari khuntkatidar* and to record an entry to the effect in the record-of-rights. Where pending a suit for rent brought under Act X of 1859, the Chota Nagpur Tenancy Act (Beng. VI of 1908) came into operation, and the landlord in execution of the decree obtained in the suit put up the holding to sale and purchased it, but meanwhile in the course of settlement proceedings the land was recorded as the *mundari khuntkati* of the defendant. *Held*, that although the new Act did not apply to the suit, it governed proceedings in execution instituted after the suit had terminated in a decree; and the entry that the land was the *mundari khuntkani* of the tenants being conclusive evidence under s. 256 of the Act, the landlord acquired no title in the land. JOGENDRA NATH DEY *v.* GOUR SINGH MURA (1915)

20 C. W. N. 582

——— s. 85—*Settlement Officer, proceeding for settlement of fair rent in the course of preparation of record-of-rights—High Court's power of superintendence over—Appeal to Commissioner—Superintendence of Board of Revenue—High Courts Act (24 and 25 Vict., c. 104), s. 15.* Although for the purposes of the application of the power of superintendence of the High Court under s. 15 of the Indian High Courts Act, it is not necessary that an appeal should lie to the High Court in the very proceeding in which the power of superintendence is invoked, where, by statute, superintendence over a Revenue Officer in a particular matter is vested in the Board of Revenue, it would be anomalous to hold that the Revenue Officer should be deemed even for the purposes of that particular proceeding a Court subordinate to the Appellate Jurisdiction of the High Court and so subject to its powers of superintendence. A proceeding in the Court of a Settlement Officer of Chota Nagpur under s. 85 of the Chota Nagpur Tenancy Act for settlement of fair rent is not subject to the superintendence of the High Court under s. 15 of the High Courts Act, as appeals from the orders of the Settlement Officer lie under statutory rules to the Commissioner, an officer not shown to be subordinate to the Appellate Jurisdiction of the High Court. UMA CHARAN MONDOL *v.* MIDNAPUR ZEMINDARY CO. LD. (1914).

18 C. W. N. 782

——— s. 87—Whether a *jaigirdari* tenure is of a hereditary nature or one for life is a matter which a settlement officer is competent to decide under s. 87 of the Chota Nagpur Tenancy Act. RAGHUBUR SAHI *v.* PRATAP UDOY NATH SAHI DEO (1911) . . . I. L. R. 39 Calc. 241
16 C. W. N. 294

——— *ss. 87 and 224*—

No second appeal lies to the High Court from the decision of the Judicial Commissioner passed in an appeal from a decision under s. 87. FANJDAR SAHU *v.* NEMA BHOGTA

6 Pat. L. J. 634

CHOTA NAGPUR TENANCY ACT, VI OF 1908 —*contd.*

———— ss. 87, 244, 224—

See SECOND APPEAL.

I. L. R. 39 Calc. 241

———— ss. 87, 258, and 264—

See JURISDICTION.

I. L. R. 43 Calc. 136

———— ss. 87, 258, 265 (viii)—*Judicial Commissioner hearing appeals in cases under s. 87, if Revenue Officer—Order not modifiable by suit in Civil Court—Order to what extent res judicata—Civil Procedure Code (Act V of 1908), s. 11.* R having been entered in the record-of-rights (prepared under s. 83 of the Chota Nagpur Tenancy Act) holding Pargana Barway as a *jagir* descendible to children, the Maharaja of Chota Nagpur sued him under s. 87 to have the entry amended and altered to a life-*jagir*. The Revenue Officer dismissed the suit, but it was decreed by the Judicial Commissioner who had been appointed by the Local Government under s. 264 (viii) of the Act as Special Officer for hearing appeals from decisions of Revenue Officers under s. 87 of the Act. R thereafter brought this suit against the Maharaja in the Civil Court for a declaration that Pargana Barway was the hereditary impartible estate of the family of the plaintiff. *Held*, that the Judicial [illegible]

the nature of the tenure was within the competence of a Revenue Court acting under s. 87 of the Act and therefore the decision of the Judicial Commissioner was a bar to the trial of the present suit which was a suit only for such a declaration. That although R could not seek to vary or set aside the order of the Revenue Court under s. 87, he could, being in possession, defend his title in a suit for [illegible]

———— s. 139 (3), cl. (a)—

See JURISDICTION OF CIVIL COURT.

I. L. R. 40 Calc. 402

———— s. 139, cl. (5)—*If bars possessory suit* [illegible]

s. 9, Specific Relief Act, for recovery of possession. The word "application" in that clause does not include "suits." KHETTRA NATH GHATTAK *v.* PERU BAURI (1911) . . 15 C. W. N. 387

———— ss. 139, 231—

See CIVIL PROCEDURE CODE, 1908, O. XXI, R. 95 . . 4 Pat. L. J. 716

———— s. 177—

See s. 61 . 2 Pat. L. J. 286

———— A person who is under obligation to pay rent cannot claim to receive it. Therefore where in a rent suit the tenant pleads payment to a third party who does not intervene s. 177 of the Chota Nagpur Tenancy Act, 1908, does not apply. GHURA MANJHI *v.* PROBODH CHANDRA MOZUMDAR . 6 Pat. L. J. 603

CHOTA NAGPUR TENANCY ACT, VI OF 1908 —*contd.*

———— ss. 177, 318 and 224—An appeal lies to the Deputy Commissioner, and not to the Judicial Commissioner, from an order under s. 177 of the Chota Nagpur Tenancy Act, 1908. That section requires the Court to dispose of the dispute before it merely upon a decision of the question as to who had actually in good faith received and enjoyed the rent before the institution of the suit. No question of title or interest to land is to be decided under the section. LACHMINARAIN AGARWALA *v.* THAKUR HARI DUTTA 4 Pat. L. J. 163

———— s. 178, cls. (2), (3)—

See SINNAMAN SINGH *v.* SHAM CHARAN ORDAR . . 16 C. W. N. 1090

———— s. 184, 191 (2), 208 (2), 210—*Rent decree—Execution by arrest of judgment-debtor in the first instance, if legal—Effect.* A landlord who has obtained a decree for rent of a tenure under the Chota Nagpur Tenancy Act may proceed at once to execute it against the person of the tenant and he is not bound to put up the tenure to sale in the first instance. The warrant of arrest so taken out will only stay proceedings for sale of the tenure. S. 191 (2) of the Chota Nagpur Tenancy Act which refers to a person arrested in execution of a decree for money has no application to such a case. MADAN MOHAN NATH SAHI DEO *v.* PRATAP UDAI NATH SAHI DEO (1915) . 20 C. W. N. 111

———— s. 208—

See EXECUTION OF DECREE.

I. L. R. 40 Calc. 623

See GHATWALI TENURE

1 Pat. L. J. 601

———— ss. 208 and 209 (a)—*Bengal Rent Recovery Act (Bengal Act VII of 1865), s. 11—Sale certificate, whether appeal lies to High Court from order directing issue of—Confirmation of sale, whether necessary.* No appeal lies to the High Court from an order made by a Deputy Collector directing the [illegible]

(a). That expression must refer to the completion of the sale proceedings by deposit of the balance of purchase money under s. 11 of the Bengal Rent Recovery Act, 1865. The practice of confirming sales held under the Chota Nagpur Tenancy Act, 1908, is not warranted by the Act. LAL NIMANI NATH SAHI DEO *v.* RAI BAHADUR BALDEO DAS BIRLA . . . . 5 Pat. L. J. 101

———— ss. 208, 211 (1)—*Decree for rent against some only of registered tenants—Exemption from sale of share of persons not represented in suit—Decree if may be executed as rent decree against remaining share—Bengal Rent Recovery Act (Beng. VIII of 1860), sale under, nature of.* If a claim has been allowed in respect of some interest in a tenure under sub-s. (1) of s. 211 of the Chota Nagpur Tenancy Act, the decree cannot be exe-

CHOTA NAGPUR TENANCY ACT, VI OF 1908 —*contd.*

———— s. 208—*concld.*

cuted as a decree for rent under s. 208 of the Act. It is open to the decree-holder to treat the decree as a decree for money and to execute it in the ordinary Civil Court. *Madan Mohan Nath Sahi* v. *Protap Uday Nath Sahi, 16 C. W. N. 1024,* distinguished. Where a decree for rent was obtained against persons who did not represent the entire tenure, the registered holder of a fourth share in it having been left out of the suit, and on the application of the latter his share of the tenure was exempted from sale under s. 211, cl. (*1*) of the Chota Nagpur Tenancy Act: *Held,* that the decree could not be executed as a rent decree under s. 208 of the Act as against the remaining *three-fourths share of the tenure.* The Bengal Rent Recovery Act of 1865 contemplates the sale of an entire tenure. A decree obtained against some only of the registered tenants cannot be executed as a decree for rent. CHANDRA NATH TEWARI *v.* PROTAP UDAI NATH SAHI (1913)
18 C. W. N. 170

———— ss. 211 and 270—*Rent decree—application for—Execution of.* No appeal lies to the Deputy Commissioner from a decision of a Deputy Collector under s. 211 of the Chota Nagpur Tenancy Act, 1908. If a Deputy Collector, whilst exercising the power of the Deputy Commissioner delegated to him, fails to exercise a jurisdiction which he might have exercised or usurps a jurisdiction which it is not within his competence to exercise then the Deputy Commissioner has power to order him either to exercise that jurisdiction or to refrain from exercising it as the case may be. The same rule applies in the case of the Commissioner and the Board of Revenue dealing with facts performed by the Deputy Commissioner. Where, on an application to the Deputy Collector by the landlord for execution of a rent decree which he had obtained against the tenant, other persons objected to the execution under s. 211 on the ground that they were transferees from the tenant, and produced (*i*) evidence to show that they been sued for rent by the landlord and (*ii*) a money-order receipt for payment of registration fees, *held,* (*1*) that the Deputy Commissioner had power to revise the decision of the Deputy Collector upholding the objection, (*2*) that the decision of the Deputy Collector upholding the objection, amounted to a finding that the circumstances of the case shewed that as there had been recognition by the landlord of the tenancy of the objectors there was sufficient reason for not having it registered within the meaning of the proviso to s. 211, and (*3*) that as there was no failure on the part of the Deputy Collector to exercise jurisdiction nor any attempt to usurp jurisdiction the Deputy Commissioner was right in refusing to interfere in revision. TIKAIT GANESH NARAYAN SAHI DEO *v.* CHANDU MISTRI
5 Pat. L. J. 468

———— ss. 212 and 215—*Order rejecting application under s. 212, appeal from—"claims an interest," meaning of.* The appellants purchased a tenure in execution of a decree for rent. Thereupon the respondents, stating that they held a *dar mokurarri* interest in the tenure under a person for whom they alleged the judgment-debtors were *benamidars,* claimed to deposit the sums indicated in s. 212 of the Chota Nagpur Tenancy Act, 1908. The first court rejected their application. *Held,*

CHOTA NAGPUR TENANCY ACT, VI OF 1908 —*concld.*

———— s. 212—*contd.*

that, as the order passed by the first court was an order passed after a decree and relating to the execution thereof within the meaning of s. 215 of the Tenancy Act an appeal lay to the Judicial Commissioner. The court to which an application is made under s. 212 of the Tenancy Act is bound to inquire into the truth of the allegations made in the application. A person cannot have a sale set aside under s. 212 merely upon his putting before the court a series of statements which may be totally untrue. A person who, in an application under s. 212 to set aside a sale of property held in execution of a decree, claims "an interest therein under a title lawfully acquired before the sale," must prove his allegation. PANCHANAN MAHTA *v.* KANAI MAHTTA . . . **2 Pat. L. J. 153**

———— ss. 215 (3), 224, 229, 264, 265—*Appeal to High Court—Stay of execution, power to grant—Code of Civil Procedure (Act V of 1908), O. XLI, r. 5.* In an appeal to the High Court under s. 215 (3) and 224 of the Chota Nagpur Tenancy Act, 1908, the High Court has no power under that Act to order stay of execution in the absence of any rules made by the Local Government under s. 265 providing for stay of execution. But wherever an appeal lies to the High Court the Court has inherent jurisdiction to stay proceeding in the Lower Court. The right of staying execution in cases under appeal should be exercised sparingly, and only in cases where it is manifest that justice demands such an exercise. LAL NILMANI SAHI *v.* RAI BAHADUR BALDEO DAS BISTA
4 Pat. L. J. 371

———— s. 224—

See s. 74 . . **5 Pat. L. J. 697**

———— s. 231—

———————— *Mortgage decree—Execution sale—Purchase by decree-holder—Application by judgment-debtor to set aside sale—Limitation Act (IX of 1908), Sch. I, Art. 166, or s. 231, Chota Nagpur Tenancy Act (Beng. VI of 1908), applicable.* In execution of a mortgage-decree, the mortgaged property was sold on 21st December, 1912, and was purchased by the decree-holder and the sale was confirmed on the 15th February 1913. On 28th August, 1914, the judgment-debtor applied to set aside the sale on the ground that under s. 47 of Chota Nagpur Tenancy Act, the sale was null and void: *Held,* that the application was barred by limitation, if not under Art. 166 of the Limitation Act at any rate under s. 231 of the Chota Nagpur Tenancy Act. NILMONI GOSWAMI *v.* ROBAN MAJHI (1916) . . **20 C. W. N. 1243**

———————— *Sale of* raiyati *holding in execution of mortgage-decree, application to set aside—Limitation Act (IX of 1908), Sch. I, Art. 166.* An application to set aside the sale of a *raiyati* holding held in execution of a mortgage-decree must, under s. 231 of the Chota Nagpur Tenancy Act, 1908, be made within one year from the date of the sale. NILMANI GOSWAMI *v.* ROBAN MAJHI
1 Pat. L. J. 483

———— s. 264—

See UNDER s. 74 . **5 Pat. L. J. 697**

———— s. 270—

See UNDER s 211 . **5 Pat. L. J. 468**

CHOWKIDARI ACT (BENG. VI OF 1870).

See VILLAGE CHOWKIDARI ACT.

——— s. 1—*Chowkidari jagir created since the date of settlement if liable to resumption—Suit to* [illegible]

hold at a fixed jama in perpetuity under a *sanad* granted by Government in 1803 which was confirmed by s. 33 of Reg. XII of 1805. The tenures resumed as chowkidari chakran were found to have been mostly recent creations, so that they could not have been assigned by Government for the maintenance of village watchmen at the date of the *sanad* or in 1805: *Held*, that the Chowkidari Act [illegible]

words "otherwise than under a temporary settlement" in the definition of chowkidari chakran lands s. 1 of the Chowkidari Act refer to a settlement by Government, and the party who in that section is pointed to as assigning the land is also Government, such assignment taking place at the date of the settlement. *Per* WOODROFFE, J. Assuming that the grant of the *sanad* in 1803 was equivalent to a settlement by Government, as [illegible]

[illegible]

CHOWKIDARI CHAKRAN LAND.

See CHAUKIDARI CHAKRAN LAND.

CHOWKIDARI CUSTODY.

See ARREST BY PRIVATE PERSON.

I. L. R. 41 Calc. 17

CHRISTIAN.

——— Living like Hindu—

See PARDANASHIN LADY

26 C. W. N. 490

CHRISTIAN MARRIAGE ACT (XV OF 1872).

——— ss. 3, 63—"*Persons professing the Christian religion*"—*Marriage between two bhangi celebrated according to caste rites by two "Christians."* One Maha Ram, whose father was a Christian, but who himself was found not to be a Christian, [illegible] Indian Christian [illegible] ad been baptized [illegible] tend a Christian [illegible] girl according to the rites of the *bhangi* caste. This marriage was conducted by two persons, Bechhan and Mangli, who, although they were apparently Christians [illegible] stantive offence defined in s. 68 of the Indian

CHRISTIAN MARRIAGE ACT (XV OF 1872) —*concld.*

——— s. 3—*concld.*

Christian Marriage Act, 1872, and Maha Ram of abetment of that offence. *Held*, that the conviction could not stand [illegible] the facts appearir[illegible] to be a Christian [illegible] Indian Christian [illegible] *held* by WALSH, J., because the Act in question deals with Christian marriages and Christian marriages only. *Queen-Empress* v. *Paul, I. L. R. 20 Mad. 12, In re Kolandaivelu, I L. R. 40 Mad. 1030* and *Muthusami Mudaliar* v. *Masilamani, I. L. R. 33 Mad. 342,* discussed by WALSH, J. EMPEROR v. MAHA RAM (1918) . I. L. R. 40 All. 393

——— ss. 41 and 46—*Marriage between a Christian and a Jewess divorced according to Jewish Law—Registrar refusing to take any steps—Direction* [illegible]

such steps as are necessary for the solemnization of the marriage. *In re,* HAROLD TUCKER (1912)

16 C. W. N. 417

——— s. 68—*Hindu performing marriage in Hindu mode between persons one of whom is a Christian, whether guilty under.* A Hindu by religion performing a marriage according to the Hindu mode between two persons, one of whom is a Christian, commits an offence under s. 68 of the Christian Marriage Act (XV of 1872). *Madras High* [illegible]

I. L. R. 40 Mad. 103

CHUDASAMA GIRASIAS.

See HINDU LAW—ADOPTION.

I. L. R. 43 Bom. 778

CHUKANI RIGHT.

——— *Contract of sale of a chukani tenure—Misrepresentation by non-disclosure of facts—Suit for rescission by purchaser—Transfer of Property Act (IV of 1882), s. 55—Duty* [illegible]

[illegible] Calc. 28

CHUR LANDS.

See ADVERSE POSSESSION.

23 C. W. N. 389

See LANDLORD AND TENANT.

I. L. R. 37 Calc. 447

CHUR LANDS—*contd.*

———— resumption of—

See NAVIGABLE RIVER.

I. L. R. 46 Calc. 390

———— *Thak and Survey maps —Consent decree in previous suit—Decree not inter parties—Constructive possession of owner of submerged lands during diluvion—Adverse possession—Limitation.* The plaintiffs sued for declaration of their title to certain Chur lands which they alleged were partly reformations on the site of and partly accretions to three mauzas. The Churs were measured in the course of Thak proceedings in the year 1859 and were subsequently measured by way of survey during the following year. The plaintiffs based their title to the disputed land on the Thak map of 1859, the Survey map of 1860, and a consent decree passed in 1879 in a suit instituted by the predecessors-in-interest of the plaintiffs against persons represented by the defendants in consequence of a dispute about the possession of some of the lands of these Churs. *Held,* on the evidence, that the consent decree was as binding on the parties as a decree after a contentious trial, but it cannot have greater validity than the compromise itself: *Held,* on the evidence, that the proceedings in the suit of 1879 were not *bonâ fide;* that the compromise was entered into without authority from the defendants, and that it was not established that the defendants, even though apprised of the compromise, had acquiesced in it. That the rights of property as between two parties cannot be affected by a map drawn for a different purpose—a purpose not relevant to the subject of the dispute between them. That the location of the boundary in the map prepared in the suit of 1879 could not be treated as conclusive between the parties for the purposes of the present controversy, inasmuch as it was not necessary for the disposal of that suit and was outside its scope. *Kerr* v. *Nuzzur Mahamed, 2 W. R. P. C. 28, Kanto Prashad* v. *Jagat Chandra, I. L. R. 23 Calc. 335, Ranjit Sinha* v. *Basanta Kumar, 9 C. L. J. 597, Preo Nath* v. *Durga Tarini, 14 C. L. J. 578,* and *Shib Churn* v. *Nil Kantha, 17 C. L. J. 642,* relied on. No hard and fast rule can be laid down that a Survey map is more reliable than a Thak map. The true principle is that the map which more clearly agrees with the local land-marks is the one that should be followed. That as the Thak map was made in the presence of the parties or their agents, it was *primâ facie* binding on them and in the circumstances of the present case the decree should be based not on the Survey map but on the Thak map after it has been relaid with as much accuracy as practicable. That as the rightful owners must be deemed in law to have been in possession of the submerged lands during the period of diluvion, for the purpose of deciding the question of limitation, the only point for investigation was the period of time when the lands re-appeared and became fit for occupation; and as the possession of the defendants after reformation of the disputed lands did not extend over the statutory period, the claim of the plaintiffs was not barred by limitation in respect of lands which lay within the Thak boundaries of their Churs. That as regards the plaintiff's claim by adverse possession to land lying beyond the Thak boundaries of their Churs, the plaintiffs were bound to establish in respect of specific parcels of land that they have been in occupation thereof to the exclusion of the rightful owner continuously for a period of twelve years, for the theory of constructive possession is applied only in favour of a rightful owner and is not extended in favour of a wrong-doer whose possession is treated as confined to land of which he is actually in possession. AMRITA SUNDARI DEBI *v.* SERAJUDDIN AHMED (1914) . **19 C. W. N. 565**

CHUR LANDS—*concld.*

———— *Chur land thrown up in river within the boundaries of a permanently settled estate, if liable to assessment with revenue—Act IX of 1847, s. 6—Reg. II of 1819, Arts. 3, 31—Reg. I of 1793, Arts. 3, 6—Reg. XIX of 1793, s. 1—Reg. XI of 1825, s. 1 (1), (4).* The intention and effect of Act IX of 1847 was merely to alter the machinery by which lands gained from the sea or rivers by alluvion or dereliction were to be assessed, and not to subject to assessment any lands which would not have been liable thereto under the law in force at the time when the Act was passed. The question whether *chur* lands formed since the Permanent Settlement in beds of rivers belonging to a permanently settled zemindari are assessable as "land added to the estate" within the meaning of s. 6 of the Act IX of 1847, has to be determined by reference to the preexisting law and particularly to Reg. II of 1819. The effect of Reg. II of 1819 is to declare that *churs* formed since the Decennial Settlement upon land which at the time of the Settlement had been river-bed are to be treated as unsettled; and this express provision cannot be excluded by showing that the river-bed from which the *churs* have been thrown up was at the date of settlement the property of the zemindar and that the settlement was imposed upon the zemindari as a whole. In view of Art. 3 of Reg. II of 1819, a river-bed was not intended to be treated as "waste land" coming within the protection of Art. 31 of the Regulation. SECRETARY OF STATE *v.* SIR BIJOY CHAND MAHTAB BAHADUR . . . **26 C. W. N. 620**

CHURCH.

———— *Prevailing form of worship for sixty years, primâ facie the original form—Right to manage—Usage alone not the test—Canon law may be invoked—One trustee cannot eject another—Repudiation by one trustee, good ground for his removal—Removal, amendment of plaint for, allowed, to avoid further litigation—Civil Procedure Code (Act XIV of 1882), s. 30—Defendants on record objecting to represent others—Jurisdiction of Court to allow—Limitation Act (IX of 1908), s. 10—No Limitation against one holding properties as trustee—Whole income used, evidence of dedication of lands—Evidence Act (I of 1872), s. 57—Only proof of notorious facts of public history dispensed with.* When it is found that for a period of more than sixty years before the defendants' (parshioners') secession, the Roman Catholic form of worship prevailed in their parish church the onus is undoubtedly on the defendants to establish by satisfactory evidence that the church was Syro-Chaldean at the inception. As to the right of management of a particular Roman Catholic Church, and its properties besides usage, other things, such as the rights of ecclesiastical authorities according to the canon law can be looked to, though in some churches on the West Coast, parishioners have more or less control over the management of the properties. A single trustee is not entitled to recover possession of the

CHURCH—*contd.*

on behalf of the trust. Even if the defendants or some of them were once entitled to be trustees along with the Vicar: *Held*, that they by their secession from the Catholic Church and by their repudiation of the trusts of the institution which in law works a forfeiture of their office, disentitled themselves to hold the office of trustee and that, they had in law no answer to a suit for their moval. *Marian Pillai* v. *Bishop of Mylapore, I. L. R. 17 Mad. 447*, followed. Even if they offered to return to their allegiance to the Romish Church, it would not be possible to accept their recantation to the extent of holding them to be fit to hold the responsible office of trustee Even if the plaintiff had not asked for the removal of the defendants, an amendment to that effect can be allowed in order to avoid future litigation and in the interests of the trust. A plaintiff may be allowed to sue certain defendants under s. 30, Civil Procedure Code (Act XIV of 1882), as representing certain others in spite of the objection or refusal of the defendants on record to represent the others, the consent of the defendants on record not being necessary. *In re Andrews* v. *Salmon (1888), W. N. 102*, followed. Where a defendant claims to hold certain properties as a trustee and not as his own, there is no period of limitation within which a suit must be brought to recover them on behalf of the trust. Limitation Act (IX of 1908), s. 10. The right to the properties of the trust must go with the right to the office of trustee. *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram, I. L. R. 23 Mad. 271*, and *Gossami Sri Gridharji* v. *Romanlalji Gossami, I. L. R. 17 Calc. 3*, followed. The fact that the entire income of certain properties has always been utilised for a church is very good evidence that the properties belong to it. No deed of endowment is necessary to prove a dedication of certain properties in favour of a trust. Under s. 57 of Evidence Act the Court could dispense with evidence only of what may be regarded as notorious facts of public history, and cannot treat letters though 75 years old without any sort of legal proof, as proof of where certain missionaries were living or when they died. *Taylor on Evidence, tenth edition, volume II, paragraph 1785*, and *Wigmore on Evidence, volume III, s. 1699*, referred to. AMBALAM PARKIYA UDAYAN v. BARTLE (1913) I. L. R. 36 Mad. 418

———————— *Roman Catholic Church —Convert to Roman Catholic religion—Claim for certain exclusive rights in the church by one set of converts over another, on the ground of superiority of caste, unsustainability of—Internal management of church, absolute right of church authorities over.* According to Canon Law a Roman Catholic church becomes, as soon as it is consecrated, the property of the church authorities, irrespective of the fact that any particular worshipper or worshippers contributed to its construction. The Bishop and other church authorities have the exclusive right

the Roman Catholics and no convert to Roman Catholicism can claim any special or exclusive

CHURCH—*concld.*

rights or privileges in the church ...

converts of a place claimed as against the local church authorities and as against another set of converts whom they considered to be of inferior caste, an exclusive right to sit in and worship from a particular portion of the church during time of the service and to take part in certain duties connected with the church service: *Held*, that such a claim was legally unsustainable, however long such privileges might have been enjoyed, whether by reason of any such custom or by reason of any agreement to that effect with any former Bishop of the locality. *Long* v. *The Bishop of Cape Town, 1 Moo. P. C. C. (N. S.), 411*, and *Merriman* v. *Williams, L. R. 7 A. C. 484*, distinguished. MICHAEL PILLAI v. RT REV. BARTLE (1915) . . . . I. L. R. 39 Mad. 1056

CHURCH AUTHORITIES.

See CHURCH . I. L. R. 39 Mad. 1056

CIRCULARS ISSUED BY GOVERNMENT.

See CRIMINAL REVISION.
I. L. R. 40 Calc. 41

CIRCUMSTANTIAL EVIDENCE.

See ADMISSIONS AND CONFESSIONS TO POLICE OFFICERS.
I. L. R. 41 Calc. 601

See JURY, TRIAL BY.
I. L. R. 46 Calc. 635

See PENAL CODE, s. 380.
18 C. W. N. 1144

C. I. F.

See CONTRACT C I. F.

CITY OF BOMBAY MUNICIPAL ACT.

See BOMBAY CITY MUNICIPAL ACT (III OF 1888).

CITY POLICE ACT

See BOMBAY CITY POLICE ACT

See MADRAS CITY POLICE ACT.

CIVIL AND CRIMINAL CONTEMPT.

See CONTEMPT OF COURT.
I. L. R. 45 Calc. 169

CIVIL AND CRIMINAL TRIALS.

See STANDARD OF PROOF.
I. L. R. 40 Calc. 898

CIVIL AND REVENUE COURTS.

See AGRA TENANCY ACT (II OF 1901)—

See CIVIL PROCEDURE CODE, 1908, s. 63
I. L. R. 43 All. 612

See JURISDICTION

See UNITED PROVINCES LAND REVENUE ACT, 1901—

S. 4 . . I. L. R. 43 All. 45

S. 56 . . I. L. R. 43 All. 422

S. 106 . . I. L. R. 43 All. 454

CIVIL AND REVENUE COURTS—*contd.*

Ss. 203 TO 207 **I. L. R. 39 All. 711**
I. L. R. 38 All. 243
S. 233 . . **I. L. R. 41 All. 626**

1. ———— *Jurisdiction—Suit to set aside decree of Revenue Court—Matters within exclusive jurisdiction of Revenue Court.* *Held*, that no suit can be entertained by a Civil Court for the purpose of setting aside a decree of a Court of Revenue in a matter as to which the latter Court has exclusive jurisdiction. *Keshab Deo* v. *Bahori, S. A. No. 883 of 1905,* decided on the 30th of November, 1906, and *Kishen Sahai* v. *Bakhtawar Singh, I. L. R. 20 All. 237,* referred to. CHIRANJI LAL *v.* KEHRI SINGH (1910) **I. L. R. 33 All. 1**

2. ———— *Jurisdiction —Occupancy holding—Usufructuary mortgage—Ejectment of mortgagee—Suit by mortgagee for declaration that surrender was not binding on him.* An occupancy tenant who had made usufructuary mortgage of his holding then proceeded to surrender the holding to the zamindar, who had the mortgagee ejected by the Revenue court. *Held*, on suit by the mortgagee for a declaration, that the surrender of his holding by the mortgagor was not binding on him, that no such suit would lie in the face of the ejectment proceedings in the Revenue Court which were binding on the parties. *Ram Devi Kuari* v. *Bindesri Upadhya, 8 All. L. J. 940,* followed. SHIVA PRAKASH *v.* KARNA (1913)
I. L. R. 35 All. 464

3. ———— *Jurisdiction —Tenant taking a partner in cultivation on agreement to pay half the tenant's rent to him—Suit on such agreement by tenant against partner—Small Cause Court.* Plaintiff, being the tenant of certain plots of agricultural land on a rental of Rs. 60 a year, took the defendant into partnership on the terms that they were to cultivate jointly and divide the produce equally, and that defendant was to pay half the rent annually to the plaintiff. *Held*, that a suit by plaintiff to recover from defendant the share of the rent payable by him was a suit for damages for breach of contract cognizable by a Court of Small Causes, and not a suit for rent within the meaning of the Agra Tenancy, Act, 1901. RAM NATH *v.* SEKHDAR SINGH (1917)
I. L. R. 40 All. 51

4. ———— *Jurisdiction —Suit by zamindar for damages in respect of the felling of trees on agricultural land by tenants—Agra Tenancy Act (II of 1901), ss. 57, 65, 167.* *Held*, that a suit for damages for the alleged wrongful felling by the tenant of trees on an agricultural holding is not a suit which is excluded from the jurisdiction of a Civil Court. *Lachman Das* v. *Mohan Singh, 9 A. L. J. 672,* referred to. MANSUKH RAM *v.* BIRJRAJ SARAN SINGH (1918)
I. L. R. 40 All. 646

5. ———— *Jurisdiction —Suit for ejectment of defendants as trespassers—Defence set up that defendants were tenants of the plaintiff—Act (Local) No. II of 1901 (Agra Tenancy Act), s. 202.* In a suit filed in a Civil Court for ejectment of the defendants as trespassers, the defendants pleaded in effect that they were tenants of the plaintiff. With reference to this plea the civil court held that the suit was not cognizable by it; but instead of returning the plaint for presentation in the proper court, passed a decree dismissing the suit. On the plaintiff's appeal the lower appellate court agreed with the first court that the suit was not cognizable by a civil court and made an order returning the plaint. *Held* that an appeal lay to the High Court against this order. *Held* also that, the suit being on the face of the plaint a suit cognizable by a civil court, the court of first instance should have entertained it, but in view of the defence set up, should have taken action under s. 202 of the Agra Tenancy Act, 1901. RAGHUNATH *v.* GANESH
I. L. R. 42 All. 222

CIVIL CIRCULARS.

See UNDER THE VARIOUS HIGH COURTS.

CIVIL COURT.

See ARMY ACT (44 & 45 VICT. C. 58), ss. 145, 190 . **I. L. R. 43 Bom. 368**

See BOMBAY LAND REVENUE ACT, S. 121.
I. L. R. 45 Bom. 67

See BOMBAY REVENUE JURISDICTION ACT 1876, S. 4. **I. L. R. 45 Bom. 1141**

See CIVIL AND REVENUE COURTS.

See CIVIL PROCEDURE CODE, 1908—

S. 9 . **I. L. R. 45 Bom. 590 & 683**
S. 54 . . **I. L. R. 42 Bom. 689**
S. 68, O. XXI, R. 100.
I. L. R. 37 Bom. 488
S. 92 . . **I. L. R. 42 Bom. 742**
O. XXI, R. 89 **I. L. R. 44 Bom. 50**

See CO-OPERATIVE SOCIETIES ACT, 1912, s. 42 . . **I. L. R. 44 Bom. 582**

See DISTRICT MUNICIPAL ACT (BOM. III OF 1901) . . **I. L. R. 44 Bom. 738**

See HEREDITARY OFFICES ACT (BOM. III OF 1874 AS AMENDED BY BOM. III OF 1910)—

Ss. 25, 36, 63, 64.
I. L. R. 41 Bom. 23
S. 67 . . **I. L. R. 36 Bom. 420**

See JURISDICTION OF CIVIL COURTS.

See LAND REVENUE CODE (BOM. ACT V OF 1879), S. 85 . **I. L. R. 42 Bom. 49**

See MUNICIPAL ELECTION.
I. L. R. 48 Calc. 378
S. 4 . . **I. L. R. 42 Bom. 689**
I. L. R. 45 Bom. 197

See PENSIONS ACT (XXIII OF 1871), ss. 4, 5, 6 . . **I. L. R. 37 All. 338**
I. L. R. 45 Bom. 199

See RAILWAY ACT, 1890, ss. 41, 42
I. L. R. 45 Bom. 1324

See RIGHT OF SUIT.
I. L. R. 40 Bom. 200

See SEA CUSTOMS ACT (VIII OF 1878), ss. 167 (*3*), 182, 188, 191.
I. L. R. 43 Bom. 2218

See VRITTI . **I. L. R. 45 Bom. 234**

———— **Collector's order—**

See BOMBAY REVENUE JURISDICTION ACT, 1876, S. 4.
I. L. R. 45 Bom. 1161

CIVIL COURT—*concld.*

——— general rules of practice for—

See CIVIL PROCEDURE CODE (1908), O. XXI, r. 66 I. L. R. 38 All. 481

——— jurisdiction of—

See ADEN SETTLEMENT REGULATION (VII OF 1900), s. 13 I. L. R. 40 Bom. 446

See ASSESSMENT . I. L. R. 37 Calc. 374

See BOMBAY HEREDITARY OFFICES ACT (BOM. III OF 1874), ss. 25, 36. I. L. R. 40 Bom. 55

See BOMBAY REVENUE JURISDICTION ACT (X OF 1876), s. 4 (a) I. L. R. 43 Bom. 277
I. L. R. 44 Bom. 120, 130 & 261

See MADRAS ESTATES LAND ACT (I OF 1908), s. 6, SUB-S. (6), s. 8. I. L. R. 39 Mad. 944

See MUNICIPAL ELECTION. I. L. R. 48 Cal. 378

See PARTITION . I. L. R. 46 Calc. 23

——— question of title—

See BOMBAY LAND REVENUE CODE, 1879, s. 126 . . I. L. R. 45 Bom. 67

——— right to be carried in Procession—

See CIVIL PROCEDURE CODE, 1908, s. 9 I. L. R. 45 Bom. 683

——— question of commutation of rent—

See BENGAL TENANCY ACT, s. 40. 25 C. W. N. 714

——— *Jurisdiction, ouster of —Onus—Inam, grant of—Kudivaram—Right, ownership of.* A party seeking to oust the jurisdiction of ordinary Civil Courts must establish his right to do so. *Indely China Nagadu* v. *Polu Konchi* [illegible]

[illegible] NATHA CHARYULU v. KUTAMBARAYUDU, (1914) I. L. R. 39 Mad. 21

CIVIL COURTS ACT (XII OF 1887).

See BENGAL, NORTH-WESTERN PROVINCES AND ASSAM CIVIL COURTS ACT, 1887.

See BOMBAY CIVIL COURTS ACT, 1869.

——— ss. 7, cl. (1), 18—

See JURISDICTION I. L. R. 43 Calc. 650

——— s. 8—

See TRANSFER . I. L. R. 48 Calc. 53

——— ss. 8, sub-s. (2), 22, sub-s. (2)—

See TRANSFER . I. L. R. 42 Calc. 842

——— ss. 18, 19, 21—

See MESNE PROFITS 15 C. W. N. 506

——— s. 19—

See MORTGAGE . I. L. R. 33 All. 97

CIVIL COURTS ACT (XII OF 1887)—*concld.*

——— s. 21—

1. ——— *Civil Procedure Code (1908), O. XXXIV, r. 6—Decree over in a mortgage suit—Appeal—Forum of appeal to be decided by valuation of suit. Held,* that an appeal lay to the District Judge and not to the High Court from a decree under O. XXXIV, r. 6, of the Code of C[illegible] the decree w[illegible] the value of [illegible] than Rs. 5,00[illegible] LAL (1919) [illegible]

2. ——— *Jurisdiction of Court to entertain suit—Valuation of plaintiff found incorrect on trial—Appeal, venue of, whether depends on valuation as found or plaintiff's valuation—Plaint amended and presented to another Court under protest, if bars appeal.* Where the Subordinate Judge in whose Court the plaintiff instituted his suit, valuing the same at Rs. 5,100, held, on the defendant's objection, that the proper value was Rs. 1,385 and returned the plaint for presentation in the Court of a Munsif who was empowered to try suits up to Rs. 2,000 in value, and the plaintiff thereupon under protest amended the plaint and presented it, also under protest, in the Court of the Munsif: *Held,* that the plaintiff was not pre[illegible] of the Sub[illegible] HUDA, J., [illegible] lay to the High Court and not to the District Judge's Court. [illegible]

2,077-8 ordered the plaint to be returned to the Court of the Subordinate Judge. TARA KANTA DAS CHOWDHURY v. KALI PROSAD DAS GHORAI (1919) . . . . 23 C. W. N. 942

——— s. 21, cl. (1)—

See JURISDICTION I. L. R. 45 Calc. 926

——— ss. 21, 22—

See SANCTION FOR PROSECUTION. I. L. R. 39 Calc. 774
I. L. R. 49 Calc. 37

——— s. 22 (2)—*Criminal Procedure Code* [illegible]

[illegible] Judge. HARI MANDAL v. KESHAB CHANDRA MANNA (1912) . . . 16 C. W. N. 903

——— s. 32—*Jurisdiction of Court to execute its own decree.* The Court which passed the decree has jurisdiction to proceed with the execution notwithstanding that after the decree the Court of Wards has become a party to the execution proceeding. BANDOO KRISHNA v. NARSINGRAO I. L. R. 38 Bom. 662

CIVIL DISPUTE.

See Complaint . **I. L. R. 46 Calc. 854**

CIVIL PROCEDURE CODE (ACT VIII OF 1859).

———— **when applicable—**

See Jurisdiction . **18 C. W. N. 994**

———— **s. 15**—*15 and 16 Vict., c. 86, s. 50—Specific Relief Act (I of 1877), s. 42—Suit by plaintiff for mere declaration that the minor defendant was not his son—Investigation of claim without delay.* A talukdar-plaintiff brought a suit for a declaration that defendant No. 2 a minor, was not his son and that he was born to the plaintiff's wife, defendant No. 1, and for an injunction restraining defendant No. 1 from proclaiming to the world that defendant No. 2 was plaintiff's son, and from claiming maintenance for him as such son. The defendants contended that the suit was not maintainable under the provisions of the Specific Relief Act (I of 1877), and that it was premature. *Held,* that the suit was maintainable, it being within the provisions of s. 42 of the Specific Relief Act (I of 1877). *Held,* further, that in the interests of justice it was of the highest importance that such claims should be investigated and decided without unnecessary delay, and when the controversy had once been brought to trial the decision should ordinarily follow the usual course. *Yool* v. *Ewing, Ir. Rep. 1 Ch. 434,* distinguished. Bai Shri Vaktuba *v.* Thakore Agarsinghji Raisinghji (1910) . . . . **I. L. R. 34 Bom. 676**

———— **s. 69—**

See Special Appeal.

I. L. R. 37 Mad. 443

———— **s. 246**—*Judgment-debtor not served with notice not necessarily a party to an investigation under—Scope of s. 246—Ss. 278 to 282 of Act X of 1877 and Act XIV of 1882 (Civil Procedure Code) discussed.* A judgment-debtor upon whom notice has not been served cannot be regarded as necessarily a party to an investigation under s. 246 of the Code of Civil Procedure (Act VIII of 1859). A comparison of s. 246 of Act VIII of 1859 with ss. 278 to 282 of Acts X of 1877 and XIV of 1882 clearly lead to the conclusion that under s. 246 of Act VIII of 1859 the Court could only make an order releasing the property from attachment or disallow the claim which must be one objecting to the sale of the property in execution. Kunyil Kanaran *v.* Varanakot Ganapathi (1911)

I. L. R. 35 Mad. 168

CIVIL PROCEDURE CODE (ACT X OF 1877).

———— **s. 583—**

———— [*Decree for redemption reversed on appeal restitution—Jurisdiction of Court to which application for restitution is made to award mesne profits which are not given by Appellate Court decree—Suit to redeem.* A Mortgagor sued for redemption of a usufructuary mortgage and obtained a decree from the Subordinate Judge, under which, on payment of the sum decreed to the mortgagee, he was put in possession of the mortgaged property, but the mortgagee appealed to the High Court, which increased the amount payable on redemption by a sum which the mortgagor failed to pay and the mortgagee thereupon applied to the Subordinate Judge for possession and for mesne profits for the period during which

CIVIL PROCEDURE CODE (ACT X OF 1877) —*concld.*

———— **s. 583**—*concld.*

he had been out of possession. *Held* (upholding the decisions of the Courts in India), that the Subordinate Judge had power under s. 583 of the Code of Civil Procedure, 1877, to award mesne profits, although they had not been expressly given by the decree of the High Court. If the decree was wrong the parties aggrieved had their remedy either by appeal to the High Court or by an application for revision. The proceedings taken under the decree of the Subordinate Judge, culminating in the sale at which the mortgagee purported to purchase the equity of redemption, were valid, and the appellant, an assignee of the rights of the mortgagor, was held not entitled to redeem. Parbhu Dayal *v.* Makbul Ahmad

I. L. R. 38 All. 163

CIVIL PROCEDURE CODE (ACT XIV OF 1882).

See Jurisdiction . **18 C. W. N. 994**

———— **Attachment under—**

See Limitation Act (XV of 1877) Arts. 178, 179.

I. L. R. 36 Mad. 553

———— **Execution of decree—** *Attachment, withdrawal of—Striking-off of execution case—Alienation.* In execution of a decree passed against *H*, his property was attached under Act XIV of 1882. The application for execution was struck off on default by the decree-holder in the payment of process fees. He then made a gift of the said property in favour of his mother who sold it to the defendants. *Held,* that the attachment must be presumed to have subsisted and the gift was void. Daud Ali *v.* Ram Prasad (1915).

I. L. R. 37 All. 542

———— **Amendment of Plaint** At the hearing of a suit brought by the plaintiff for recovery of a sum due at the foot of an account the defendant raised a plea of limitation. The plaintiff thereupon applied for leave to amend his plaint by setting out an acknowledgment in writing signed by the defendant within the period of limitation and his application was allowed. Gunnaji Bhawaji *v.* Makanji Khoosalchand

I. L. R. 34 Bom. 250

———— **Sale of property of person who had died pending attachment** *without making the legal representatives of deceased parties, if valid—Objection not taken in application to set aside sale, if may be taken by suit.* Under the old Civil Procedure Code of 1882 an attachment once made did not necessarily fall with the dismissal of the application for execution. Also if a judgment-debtor died before the sale but after attachment, the sale was not necessarily invalid merely because the legal representative of the judgment-debtor had not been brought on the record. The omission was regarded, at most, as an irregularity which might lay the sale open to attack under the provisions of s. 311 of the Code. Where in a proceeding to set aside an execution sale the applicants set up the case that the person whose property purported to have been sold and whose legal representatives they were had died before the decree and did not put forward the case upon which they later on sued to set aside the sale, *viz.,*

CIVIL PROCEDURE CODE (ACT XIV OF 1882)
—*contd.*

that the judgment-debtor died after the decree but before attachment: *Held, per* RICHARDSON, J., that the suit was barred by the rule of *res judicata*. JAGADISH BHATTACHARJEE *v.* BAMA SUNDARI DASYA (1919) . 23 C. W. N. 608

———— s. 2—

See APPEAL . . 15 C. W. N. 862

———— ss. 2, 102—

See AGRA TENANCY ACT (II OF 1901), ss. 176 AND 177.
I. L. R. 32 All. 373

———— ss. 2, 244 (c), 294 (16), 540, 588, 617.

See APPEAL . I. L. R. 38 Calc. 717
15 C. W. N. 862

———— ss. 2, 474—Interpleader suit—*Order dismissing interpleader suit as not maintainable appealable as a decree within the meaning of s. 2—Under what circumstances a tenant can bring an interpleader suit against his landlord.* An order dismissing an interpleader suit is a decree within [illegible]

[illegible] not claiming through him does not apply [illegible]

———— ss. 10, 102 and 103—*Suit dismissed for default of appearance—Date fixed, not for hearing of case but for appointment of a guardian to a minor defendant only—Order of dismissal ultra vires.* Consequent on the death of one of the defendants to a suit, the plaintiff applied to bring the heirs of the deceased defendant on to the record, and, as one of them was a minor, nominated as his guardian his elder brother. The brother declined to act as guardian, and the Court fixed a date upon which the plaintiff was to appear and nominate another person as guardian. Upon the date so fixed the [illegible] Court dismissed [illegible] lso rejecting an [illegible] *Held*, that the [illegible] smiss the whole suit, as the only matter then before it was the appointment of a guardian to the minor defendant. DEBI SAHAI *v.* SARASWATI (1911)
I. L. R. 33 All 560

———— ss. 12, 13—

See ACCOUNT, SUIT FOR.
15 C. W. N. 930

———— s. 13—

See ACCOUNT . . 15 C. W. N. 930

See CAPACITY OF PARTIES TO SUE.
I. L. R. 34 Bom. 416

See COMPANIES ACT, 1882, ss. 0, 40, 41.
I. L. R. 40 Calc. 1

See ENHANCEMENT OF RENT.
I. L. R. 40 Calc. 29

See HINDU LAW—PARTITION.
L. R. 41 I. A. 247

CIVIL PROCEDURE CODE (ACT XIV OF 1882)
—*contd.*

———— s. 13—*contd.*

See MORTGAGE . I. L. R. 39 Calc. 527

See RES JUDICATA
I. L. R. 34 Bom. 416
I. L. R. 45 Calc. 442

1. ———— Mortgage decree for redemption—*Not providing for extinction of mortgagor's rights upon non-payment—Second suit for redemption.* Where a mortgagor brings a suit for redemption and obtains a conditional decree but omits to fulfil the condition imposed upon him, he is not debarred from bringing a second suit for redemption unless the decree lays down that if he fails to fulfil these conditions the property will be sold or he will be debarred of all his rights to redeem. *Rugad Singh* v. *Sat Narain Singh, I. L. R. 27 All. 178*, distinguished. NAKTA RAM *v.* CHIRANJI LAL (1910) . . . . I. L. R. 32 All. 215

2. ———— Decision of Probate Court—*on the existence of a relationship if is—Jurisdiction, nature of, of Probate Court—Probate Court, proceedings before, if suit.* The plaintiffs having applied for letters of administration to the estate of a deceased person on the allegation that they were nephews of the deceased, it was found by the Probate Court on a caveat being entered by the defendant that their relationship was not proved and the application was accordingly refused; in a subsequent suit for the declaration of title and recovery of khas possession of a specific property left by the deceased on the allegation that the plaintiffs as his nephews were entitled to the same: *Held*, that the decision of the Probate Court on [illegible]

15 C. W. N. 1021

3. ———— Mulgeni tenure—Estoppel—*Person claiming under, who is—Tests to determine interest represented—Landlord does not represent interest of mulgeni tenant—Estoppel—No estoppel where party not misled.* The mulgeni tenure is a permanent heritable tenure and mulgeni interest is not an interest subordinate to that of the lessor. In order to estop a party in a subsequent suit by the decision in a former suit against another party on the ground that the former claims under the latter within the meaning of s. 13 of the Civil Procedure Code, it must be shown that the party in the former suit represented the interest claimed in the latter suit. A party represents all interests owned by him at the time of the action as also interests belonging to others which are subordinate to his. A decision against him will bind interests acquired from him subsequently and all subordinate interests whensoever acquired. A mulgeni tenant will not be bound by a decision against his lessor as his interest is not subordinate to that of the lessor. To estop a party, it must be shown that his acts or representations misled the party setting up the estoppel. SESHAPPAYA *v.* VENKATRAMANA UPADYA (1910) I. L. R. 33 Mad. 459

4. ———— Capacity of parties—*Res judicata—Matter substantially in issue.* The plaintiff in conjunction with another had in 1902 filed a suit against the defendant for possession of certain property, basing his claim on the allegation that he was owner. He succeeded in the first Court, but the Court of Appeal held that the property

CIVIL PROCEDURE CODE (ACT XIV OF 1882) —*contd.*

——— s. 13—*concld.*

had been dedicated to charity, and refused to uphold his claim as owner. The plaintiff declined to adopt the Court's suggestion to modify his claim and be content to ask for a decree for possession as manager, and his suit was therefore dismissed. Five years later he filed the present suit, claiming possession as manager. *Held*, that his title as manager was one which might and ought to have been put forward in the previous suit, and that his present claim was therefore *res judicata*. If a plaintiff is suing in a capacity in which he is a stranger to the capacity in which he sued in a former suit, his claim has no proper connection with that former suit, and the Civil Procedure Code (Act XIV of 1882), s. 13, does not apply. HARGOVAN RAMJI *v.* MULJI MARJIVAN (1909)

I. L. R. 34 Bom. 416

5. ——— **Maintenance successive suit for**—*Brittipatra, held not binding in previous suit —Claim based on same document in later suit, if maintainable.* Where a previous suit of the plaintiff for recovery of maintenance alleged to have been charged on property in the hands of the defendants by a *brittipatra* was dismissed upon the finding that the document had as between the parties no effectual binding power over the estate and did not affect it in any way, a second suit by the plaintiff for a declaration of his right to receive maintenance under the *brittipatra* and of the same being a charge on the property and for recovery of arrears of maintenance was barred by the rule of *res judicata*. DURGA PRASAD LAHIRI CHOWDHURI *v.* SASHIBALA DEBI (1911) . **16 C. W. N. 603**

6. ——— Where in a previous suit the Court held that the rent was liable to enhancement but dismissed the suit on the ground that the rent paid by the defendants was not lower than the rate at which rent was paid by tenants of adjoining lands: *Held, that* the decision that the suit was not maintainable was not *res judicata*. PARBATTY DEBYA *v.* MATHURA NATH BANERJEE (1912) . **16 C. W. N. 877**

7. ——— *Decree, if may be set aside as fraudulent, on proof that if it was based on perjured evidence—Res judicata, bar of—Review of judgment upon newly discovered evidence showing previous evidence perjured.* A decree obtained in a suit cannot be set aside in a subsequent action brought for that purpose on mere proof that the previous decree was obtained by perjured evidence. If evidence not originally available comes to the knowledge of a litigant and he can show thereby that evidence on which a decree against him was obtained was perjured, his remedy lies in seeking a review of judgment. But the rule of *res judicata* prevents him from re-agitating the matter on the same materials, or on materials which might have been laid before the Court in the first instance. *Abdul Huq* v. *Abdul Hafez, 14 C. W. N. 695*, followed. *Lakhmi Charan Saha* v. *Nur Ali, I. L. R. 38 Calc. 936 ; s. c. 15 C. W. N. 1010, Venkatappa Naick* v. *Subba Naick, I. L. R. 29 Mad. 179*, dissented from. *Flower* v. *Lloyd, L. R. 10 Ch. D. 327, Patch* v. *Ward, 3 Ch. App. 203, Baker* v. *Wordsworth, 67 L. J. R. Q. B. D. 301*, relied on. *Abouloff* v. *Openheimer, L. R. 10 Q. B. D. 295, Vadala* v. *Lawes, L. R. 25 Q. B. D. 310, Priestman* v. *Thomas, 9 P. D. 210, Cole* v. *Langford, [1898], 2 Q. B. 36*, referred to. MOSUFUL HUQ *v.* SURENDRA NATH RAY (1912) . **16 C. W. N. 1002**

CIVIL PROCEDURE CODE (ACT XIV OF 1882) —*contd.*

——— ss. 13, 30—*Decree in suits under s. 30—Order in execution not binding on persons not actually brought on record—Res judicata—When judgments obtained in one capacity binding on the same persons in another capacity.* Where a party to a suit is allowed to represent others under s. 30 of the Civil Procedure Code, the decree will be binding on those whom he is allowed to represent. But an injunction is personal in its nature, and where such a party disobeys an injunction and is proceeded against in execution for such disobedience, an order in such proceedings will not be binding on those whom he was allowed to represent in the suit. Where a trustee is a member of a sect and his rights as trustee are linked with and subordinate to the rights of the sect, a decision on the rights of his sect fairly obtained in a suit between his sect and a rival sect will be binding on him in his special capacity as trustee in a subsequent suit between him in such capacity and the rival sect. Judgments *in personam* in general bind only parties and their privies. But the relation established between them by a judgment is, in the absence of fraud or collusion, conclusive against third parties. SRINIVASA AIYANGAR *v.* ARAYAR SRINIVASA AIYANGAR (1910)

I. L. R. 33 Mad. 483

——— ss. 13, 43—

——— *Mortgage—Prior and subsequent mortgagees—Mortgaged property brought to sale and purchased by each mortgagee separately, the other not being made a party—Suit by prior mortgagee to bring to sale part of the mortgaged property in the hands of the subsequent mortgagee to recover unsatisfied balance of the mortgage debt.* The prior mortgagee of mortgaged property brought the whole of it to sale without impleading the subsequent mortgagee of a portion and purchased the mortgaged property himself. The subsequent mortgagee in turn brought a portion of the mortgaged property to sale without impleading the prior mortgagee and also himself became the purchaser. The prior mortgagee, after an unsuccessful attempt to recover from the subsequent mortgagee possession of the mortgaged property so purchased, sued to bring that property to sale for the realization of the unrecovered balance of the original mortgage money. *Held*, that the suit was maintainable and was not barred by either s. 13 or s. 43 of the Code of Civil Procedure (1882). SHAM DEI *v.* BALJIT SINGH (1909)

I. L. R. 32 All. 119

——— *Res judicata—Dismissal of suit for redemption of a mortgage—Second suit for redemption of another mortgage of the same properties—Civil Procedure Code, 1908, s. 11 ; O. II, r. 2.* *Held*, that the dismissal of a previous suit for redemption of an alleged oral mortgage was no bar to the institution of another suit for redemption of a written mortgage in respect of the same properties of a different date. *Thrikaikat Madathil Raman* v. *Thiruthyil Krishen Nair, I. L. R. 29 Mad. 553*, followed. RAM SAHAI *v.* AHMADI BEGAM (1910) . **I. L. R. 33 All. 302**

——— ss. 13 and 44—

——— *Suit by a Mahomedan to recover a portion of the house—Prior suits with respect to other portions—Res judicata—Gift—No estoppel by judgment in suit commenced after the gift*

CIVIL PROCEDURE CODE (ACT XIV OF 1882) —*contd.*

———— ss. 13 and 44—*concld.*

—*Privity in estate—Misjoinder of causes of action.* A prior donee of property cannot be estopped as [illegible]

he was entitled to the property as the daughter's father. *Mercantile Investment and General Trust Company* v. *River Plate Trust, Loan and Agency Company, (1894) 1 Ch. 578, 595, The Natal Land, etc., Company* v. *Good, L. R. 2 P. C. 132,* and *Naiz-Ullah Khan* v. *Nazir Begam, I. L. R. 15 All. 108,* followed. ABDUL ALLI *v.* MIAKHAN ABDUL HUSAIN (1911) . . I. L. R. 35 Bom. 297

———— ss. 13, 206—

See DECREE, AMENDMENT OF.
I. L. R. 39 Calc. 265

———— ss. 13, 244—

See RES JUDICATA.
I. L. R. 37 All. 485

———— ss. 13, 462—*Res judicata—Consent decree—Lands—Tenants-in-common paying land* [illegible]

[illegible] terms of a compromise. A minor was a party to it [illegible]

Government and the tenants-in-common could not be regarded as determination of the relations between the tenants *inter se.* *Held,* further, that the decision in the previous suit was passed in the terms of a compromise, but there was no issue [illegible]

party. The mere fact that the parties settled among themselves by compromise that the lands should not be divided, but that they should enjoy the profits, could not in law impart the character of impartibility to the estate. Impartibility must arise out of some special tenure or by some general, family or local custom. Parties cannot make an estate impartible which is partible. It is opposed to public policy. *Vinayak Waman Joshi Rayarikar* v. *Gopal Hari Joshi Rayarikar, L. R. 30 I. A. 77,* followed. PIROJSHAH BHIKAJI *v.* MANIBHAI NICHHABHAI (1911) . I. L. R. 36 Bom. 53

CIVIL PROCEDURE CODE (ACT XIV OF 1882) —*contd.*

———— ss. 13, 525, 526—*Res judicata—Order refusing to file an award on the ground of misconduct of arbitrators—Subsequent suit to enforce the award.* *Held,* that the refusal of a Court to file a private award on the ground of misconduct of the arbitrators will not operate as *res judicata* in respect of a subsequent suit brought to enforce the award. *Bhola* v. *Gobind Dayal, I. L. R. 6 All. 186, Kalik Ram* v. *Babu Lal, All. Weekly Notes (1903) 234,* and *Basant Lal* v. *Kunji Lal, I. L. R. 28 All. 21,* followed. *Ghulam Khan* v. *Muhammad Hossain, I. L. R. 29 Calc. 167,* referred to. KUNJI LAL *v.* DURGA PRASAD (1910)
I. L. R. 32 All. 484

———— ss. 13, 539—*Res judicata—Suit for declaration of trust and of property comprised in it—Party to such suit not competent subsequently to deny existence of trust.* *Held,* that a person who had been a party to a suit under s. 539 of the Code of Civil Procedure, 1882, in which suit the existence of a waqf and the property comprised therein had been declared, was not competent in a subsequent suit for ejectment of the defendant from a part of the waqf property to plead that the property was not waqf. *Ghazaffar Husain Khan* v. *Yawar Husain, I. L. R. 28 All. 112,* referred to. MANOHARI *v.* MUHAMMAD ISMAIL (1911)
I. L. R. 33 All. 752

———— *Civil Procedure Code, 1908, s. 92—Waqf—Alienation of waqf property—Suit to set aside such alienation and for declaration that property is waqf—Right to sue.* *Held,* that a suit by two Muhammadans for a declaration that a certain property is waqf and to set aside the alienation of such property by the persons in [illegible]

I. L. R. 33 All. [illegible]

———— s. 15—This section refers to procedure only and does not affect the jurisdiction of Courts of higher grade. TANJOR MAJHI *v.* JALADHAR DEARI (1909) . . . 14 C. W. N. 322

———— s. 19—

See JURISDICTION . L. R. 41 I. A. 197

———— s. 28—*Test for misjoinder—No misjoinder where claims against several defendants in respect of same matter—Limitation Act, Sch. II, Art. 62—Suit to recover purchase-money where sale ab initio void governed by Art. 62.* A suit to recover the consideration paid for a sale, which is *ab initio* void is governed by Art. 62 of Sch. II of the Limitation Act and must be brought within 3 years from the date when the purchase-money was paid. *Hanuman Kamat* v. *Hanuman Mandur, I. L. R. 19 Calc. 123,* followed. *Krishnan Nambiar* [illegible]

second sale was concluded, *D* undertook to get back the purchase-money from *B,* which was not

CIVIL PROCEDURE CODE (ACT XIV OF 1882)
—*contd.*

———— **s. 28**—*concld.*

done. *A*, who had paid the purchase-money twice brought a suit against *B*, *C*, and *D* to recover from *B* the amount paid to him, if he should be found not to be the owner or in the alternative, if he should be the true owner, to recover from *C* and *D* the amount paid for the second sale: *Held*, that the suit was not bad for misjoinder. S. 28 of the Civil Procedure Code authorises the joinder in one suit of several defendants where the relief claimed is sought in the same matter, although the causes of action against them may be different. *Aiyathurai Rowthen* v. *Santem Meera Rowthen, I. L. R. 31 Mad. 252*, followed. KOVVURI BASIVI REDDI *v.* TALLAPRAGADA NAGAMMA (1910)
I. L. R. 35 Mad. 39

———— **s. 30**—

See CHURCH . **I. L. R. 36 Mad. 418**
See s. 13. . **I. L. R. 33 Mad. 483**

———— *Right to a village pathway—Distinction between a public highway and a village road.* There is a distinction between a public highway and a village road, and a suit under s. 30, Civil Procedure Code, 1882, is maintainable when a right to a village pathway is the subject-matter of litigation even in the absence of special damage. *Chuni Lal* v. *Ram Kishen Shahu, I. L. R. 15 Calc. 460*, referred to. KALI CHARAN NASKAR *v.* RAM KUMAR SARDAR (1912)
17 C. W. N. 73

———— *Parties—Persons having the same interest in the subject-matter of the suit.* Where numerous persons are similarly interested in the subject-matter of a suit, a suit brought by one or more of such persons for the protection of the rights of all is not bad because the plaintiffs may not have obtained the permission of the Court under s. 30 of the Code of Civil Procedure, 1882, to sue on behalf of all the persons so interested. *Zafaryab Ali* v. *Bakhtawar Singh, I. L. R. 5 All. 497*, and *Baiju Lal Parbatia* v. *Bulak Lal Pathuk, I. L. R. 24 Calc. 315*, followed. GULBA *v.* BASANTA (1910) . **I. L. R. 32 All. 234**

———— **ss. 30, 375**—*Subsequent suit filed after breach of condition on which permission to withdraw previous suit given—Righ of one not a tenant to sue for himself and other tenants under s. 30, Civil Procedure Code.* Where permission to withdraw from a suit with leave to bring a fresh suit was given to a party, on condition of costs being paid within a certain time, such party, on failing to fulfil the conditions, is precluded from bringing a fresh suit. *Abdul Aziz Molla* v. *Ebrahim Molla, I. L. R. 31 Calc. 965*, distinguished. A person, who is not a tenant, cannot maintain a suit on behalf of tenants under s. 30, Civil Procedure Code. ROBERT FISHER *v.* NAGAPPA MUDALY (1909) . . . . **I. L. R. 33 Mad. 25**

———— **ss. 30, 539**—*Held*, that a suit by 2 Mahomedans for a declaration that a certain property is waqf and to set aside the alienation of such property by persons in charge thereof is not a suit contemplated by s. 539 of the Code of 1882 or s. 92 of the 1908 Code and is maintainable without permission under s. 30 DASON DHAY *v.* MUHAMMAD ABU NASAR
I. L. R. 33 All. 660

CIVIL PROCEDURE CODE (ACT XIV OF 1882)
—*contd.*

———— **s. 31**—

See LIMITATION ACT, 1877, ss. 22, 28.
I. L. R. 34 Bom. 91

———— **ss. 32, 53, 582**—

See PARTIES . **I. L. R. 37 Calc. 229**

———— **ss. 36, 37**—"*Pleader duly appointed.*"—*Appointment of authorized agent—Signature to execution petition.* Where a party to a suit authorizes an agent by special power of attorney to appoint a pleader to sign execution petitions, a pleader so empowered by the agent, is a "pleader duly appointed to act on his" (the party's) "behalf," within s. 36 of the Code of Civil Procedure, and the petition signed by the pleader but not signed by the party, is a duly presented petition even if neither the agent nor the pleader is a "recognized agent" within s. 37. [*Judgment of the. High Court reversed.*] THIRUVENKATASAMI IYENGAR *v.* PAVADAI PILLAI (1921)
I. L. R. 44 Mad. (P. C.) 736

———— **s. 37 (a)**—

See ATTORNEY . **I. L. R. 38 Mad. 134**

———— **ss. 42, 43**—

See HUSBAND AND WIFE.
I. L. R. 38 Calc. 629

———— **s. 43**—

See s. 13 . . **I. L. R. 32 All. 119**
See MORTGAGE . **I. L. R. 37 Calc. 589**
See PARTITION . **I. L. R. 36 Mad. 151**

1. ———— *Civil Procedure Code, 1908, Sch. I, O. II, r. 2—Competence to give leave to omit remedies or split claims not limited by pecuniary jurisdiction of Court—Suit for surplus collections made by mortgagee—Limitation—Act No. IX of 1871, Sch. II, Art. 105—Act No. XV of 1877, Sch. II, Arts. 105, 109—Act No. IX of 1908, Sch. I, Arts. 105, 109.* The competence of a Court to give leave to a plaintiff to omit to sue for a relief to which he may be entitled is not affected by the pecuniary value of the relief in respect of which such leave is sought. A suit by a mortgagor after the mortgage has been satisfied to recover surplus collections received by the mortgagee may be brought within three years from the time when the mortgagor re-enters on the mortgaged property under Art. 105 of the second Schedule to the Limitation Act of 1877 (Sch. I to the Limitation Act of 1908) and there is no restriction as to the way in which the mortgagor may obtain possession. *Ram Din* v. *Bhup Singh, I. L. R. 30 All. 225*, discussed. MUHAMMAD FAIYAZ ALI KHAN *v.* KALLU SINGH (1910) . **I. L. R. 33 All. 244**

2. ———— *Suit for injunction—Suit dismissed upon the ground that plaintiff had failed to prove his possession—Subsequent suit for possession. Held*, that the dismissal of a suit for an injunction in respect of certain property upon the ground that the plaintiff has not proved his possession of the property in respect of which the injunction is sought is no bar to a subsequent suit for possession of the same property. The principle of the decisions in *Darbo* v. *Kesho Rai, I. L. R. 2 All. 356*, *Sarsuti* v. *Kunj Behari Lall, I. L. R. 5 All. 345*, and *Mohan Lal* v. *Bilaso, I. L. R. 14 All. 512*, followed. BANDE ALI *v.* GOKUL MISIR (1911) . **I. L. R. 34 All. 172**

CIVIL PROCEDURE CODE (ACT XIV OF 1882) —*contd.*

——— s. 43—*concld.*

3. ——— *Portion of claim —Intentional omission—Civil Procedure Code (1908), O. II, r. 2 (2).* *G*, who was the tenant of a holding, died, leaving a mother and a daughter, both of the same name. The plaintiff sued the mother, as representing *G*, for arrears of rent for 1313 Fasli and obtained an *ex parte* decree. In respect of the year 1314 he sued the daughter and obtained a decree. The decree in respect of 1313 was set aside and at the rehearing the daughter was made a party. It was found that at the time the plaintiff brought the suit in respect of 1314 he was not aware that the daughter was the tenant in 1313. *Held*, that the plaintiff having no knowledge, when he brought his suit in respect of 1314, that the daughter was the tenant in 1313, could not be said to have omitted to sue in respect of that year and the suit for 1314 was not barred by the provisions of s. 43 of the Code of Civil Procedure (1882). *Amanat Bibi* v. *Imdad Husain, I. L. R. 15 I. A. 106 : I. L. R. 15 Calc. 800*, referred to. BATUL KUNWAR *v.* MUNNI LAL (1910)

I. L. R. 32 All. 625

4. ——— *Contract Act, s. 43—Omission of part of cause of action in a suit against a joint promisor—Effect of such omission in subsequent suit against other promisors.* The omission in a previous suit against one of several joint promisors of a part of the cause of action is no bar under s. 43 of the Civil Procedure Code to a subsequent suit against another joint promisor for the portion so omitted. The subsequent suit will not be barred by the rule laid down in *King* v. *Hoare, 13 M. & W. 494*, as that rule is based on the merger of the cause of action in the judgment. There can be no such merger when the cause of action has not been sued upon. The effect of s. 43 of the Indian Contract Act on the rule laid down in *King* v. *Hoare, 13 M. & W. 494*, that a judgment against one of several joint promisors is a bar to a suit against the others, considered. RAMANJULU NAIDU *v.* ARAYAMUDU AIYANGAR (1909)

I. L. R. 33 Mad. 317

——— ss. 43 and 50—*Transfer of Property Act (IV of 1882), s. 90—Suit to recover mortgage debt by sale of mortgaged and unhypothecated property—Decree against mortgaged property alone—Sale—Amount realised not sufficient—Application for supplemental decree to recover balance by sale of other property—Limitation—Putting forward allegations at a late stage* In a suit upon a mortgage dated the 18th April 1887 the plaintiff claimed, on the 18th April 1899, to recover the mortgage-debt by sale of the mortgaged property and the balance, if any, from the non-hypothecated property of the mortgagor. The decree was passed in plaintiff's favour against the mortgaged property alone. The amount realised by the sale of the mortgaged property being insufficient to satisfy the decree, the plaintiff applied under s. 90 of the Transfer of Property Act (IV of 1882) for a supplemental decree against the other property of the mortgagor. The first Court found that the claim for a personal decree against the mortgagor was time-barred. On appeal by the plaintiff he attempted to prove that the claim was within time owing to an intermediate payment by the defendant but the Appellate Court found that the plaintiff failed in his attempt and confirmed the decree. On second appeal by the

CIVIL PROCEDURE CODE (ACT XIV OF 1882) —*contd.*

——— ss. 43 and 50—*contd.*

plaintiff: *Held*, confirming the decree, that the mortgage in suit being of the year 1887 and the suit of the year 1899, the plaintiff's right to a personal decree against the mortgagor was time-barred, the plaintiff having failed to show the ground on which exemption from the law of limitation was claimed. *Held*, further, that the plaintiff could not be allowed at a late stage of the suit to bring forward for the first time allegations which it was necessary to prove in order to show that he was entitled to a further decree against the defendant personally. GULAM HUSSAIN *v.* MAHAMADALLI IBRAHIMJI (1910)

I. L. R. 34 Bom. 540

——— ss. 44, 45—

See PRE-EMPTION . **I. L. R. 32 All. 14**

——— s. 50—

See s. 43 . **I. L. R. 34 Bom. 540**

——— ss. 50, 211, 212—

See JURISDICTION **I. L. R. 43 Calc. 650**

——— s. 53—

See PARTIES . **I. L. R. 37 Calc. 229**

——— s. 53— *Amendment of plaint by referring to document not included in list of documents relied on.* At the hearing of a suit brought by the plaintiff for the recovery of a sum due at the foot of an account the defendant raised a plea of limitation. The plaintiff thereupon applied for leave to amend his plaint by setting out an acknowledgment in writing signed by the defendant within the period of limitation. The lower Court refused the application. On appeal: *Held*, that the amendment should have been allowed. GUNNAJI BHAWAJI *v.* MAKANJI KHOOSALCHAND (1909)

I. L. R. 34 Bom. 350

——— *Plaint if may be returned for amendment after issues framed.* The mere fact that issues have been framed does not stand in the way of the return of the plaint by the Court for amendment under s. 53 of the Civil Procedure Code (Act XIV of 1882) *Port Canning and Local Improvement Co.* v. *Dharanidhar, 9 C. W. N. 608, Baroda Prasad* v *Girija Nath, 2 C. L. J. 11*, referred to. *Ganga Sahai* v. *Mahamad Ali, I. L. R. 20 All. 444n*, followed. SASI BHUSAN DAS *v.* RASIK LAL RAY (1912)

17 C. W. N. 989

——— s. 54—*Power of Court to extend time allowed—Time, if may be extended* ex poste facto—*Court Fees Act (VII of 1870), s 28—Limitation.* The Court has the power to extend the time allowed by it to put in deficit court-fees *ex poste facto.* A plaint was filed one day before the last day of limitation on an insufficiently stamped paper and the Court allowed a week's time to put in the balance of court-fee. The court-fee was put in one day later than the time allowed and later on a petition was put in praying for extension of time and the plaint was registered: *Held*, that this amounted to an extension of the time which the Court was quite competent to grant. *Held*, further, that in the circumstances the plaintiff would have the benefit of s. 28 of the Court Fees Act and the suit was not barred. AMIR HOSSAIN KHAN *v.* BABU NANAK CHAND (1910)

14 C. W. N. 882

CIVIL PROCEDURE CODE (ACT XIV OF 1882) —*contd.*

———— **s. 102**—

See AGRA TENANCY ACT, II OF 1901, ss. 176, 177 . **I. L. R. 32 All. 373**

See APPEAL . **I. L. R. 37 Calc. 426**

———— Dismissal of a suit under s. 102, Civil Procedure Code, does not operate as *res judicata* in favour of the defendant. *Chand Kour* v. *Partab Singh, L. R. 15 I. A. 156; s. c. I. L. R. 16 Calc. 98*, referred to. But read with s. 103 it precludes a fresh suit in respect of the same cause of action. SANKAR NATH PANDIT *v.* MADAN MOHUN DAS (1909) **14 C. W. N. 298**

———— **ss. 102 and 103**—

See s. 10 . . **I. L. R. 33 All. 560**

———— **ss. 102, 157, 158**—*Circumstances under which ss. 157 and 158 are applicable—On party's default to appear, Court must proceed under s. 157 and not under s. 158.* Ss. 157 and 158 of the Code of Civil Procedure are independent and mutually exclusive and neither can be treated as an exception to the other. When a case is set down for hearing on the original or adjourned date, the first question for the Court is "Are the parties in attendance." If both or either of the parties be not present, the Court is bound to deal with the case under Chapter VII or under that chapter read with s. 157, as the case may be, whether or not there has been default of the kind referred to in s. 158. *Shrimant Sagaji Rao* v. *Smith, I. L. R. 20 Bom. 736*, referred to. *Marianissa* v. *Ramkalpa Gorain, I. L. R. 34 Calc. 235*, referred to. CHANDRAMATHI AMMAL *v.* NARAYANASAMI AIYAR (1909) . . . . **I. L. R. 33 Mad. 241**

———— **s. 103**—

See s. 102 . **I. L. R. 33 All. 560**

See WILL . . **14 C. W. N. 924**

———— *Section not applicable where plaintiff in former suit is not the plaintiff in the latter suits—Limitation Act, XV of 1877, Sch. II, Art. 120—Right to sue for declaration accrues when causes of action complete.* S. 103 of the Code of Civil Procedure bars a subsequent suit only when the plaintiff in the latter suit actually was, or represented by the plaintiff in the former suit. Where the plaintiff in the latter suit was a contesting defendant in the former, s. 103 does not bar the latter suit. The right of junior members of a tarwad to sue for a declaration that an alienation by the karnavan is not binding on the tarwad, accrues the moment the document is completed and not when the plaintiff obtains knowledge of the alienation and in the absence of fraudulent concealment a suit for such declaration will be barred under Sch. II, Art. 120 of the Limitation Act at the expiry of six years from such date. OTTAPURAKKAL THAZHATE SOOPI *v.* CHERICHIL PALLIKKAL UPPATHUMMA (1909) . . **I. L. R. 33 Mad. 31**

———— **s. 108**—

See LIMITATION . **I. L. R. 33 All. 264**

See RIGHT OF SUIT **I. L. R. 37 Calc. 197**

———— *Application under, if bars suit to set aside decree.* Where an application under s. 108 of the Civil Procedure Code of 1882 to set aside an *ex parte* decree dismissed for default, it does not bar a suit by the applicant to set aside the decree for fraud or other valid reason. BALKESEN LAL *v.* TAPESUR SINGH (1911) **17 C. W. N. 219**

———— **s. 111**—

See SET OFF.

1. ———— *Claim for money—Amount which defendant jointly with a third party can claim by way of contribution from plaintiff if may be set off.* A defendant is not entitled to set off against a claim for money by the plaintiff any portion of an amount in respect of which the defendant jointly with one not a party to the suit can claim contribution from the plaintiff. UMANATH DASS *v.* MONSURALI HOWLADAR (1910) **14 C. W. N. 786**

2. ———— *Technical and general—Plea of payment—Set off-time of barred debts.* The words "ascertained sum" in s. 111, Civil Procedure Code, do not mean a sum admitted by the plaintiff but a sum of money the amount of which is known. Where defendant set up an agreement to the effect that the rents payable on account of lands held by plaintiffs under defendants were credited to the plaintiff on account of rent due to him from the defendants. *Held*, that the plea was one of payment and of account and set off in a general sense and not one of technical set-off under s. 111, Civil Procedure Code. *Held*, further, that the true issue in the case being as stated above the case could not be disposed of by saying that there could be no "set off" in a technical sense of a time-barred debt. EDWARD DALGLEISH *v.* RAMDIN SINGH CHOWDHURY (1909) **14 C. W. N. 170**

———— **s. 149**—*Transfer of Property Act (IV of 1882), s. 59—Mortgage deed—"Attestation," meaning of—Attestation upon acknowledgment, if sufficient—Issues, framing of additional, after arguments heard and judgment reserved—Court's inherent jurisdiction—Court's duty to raise issue necessary for determining controversy.* Where in a suit to enforce a mortgage, after arguments had been heard and judgment reserved, it appeared from the evidence of the witnesses of the mortgage deed that they were not present at the execution but had put their names on the document of the acknowledgment of the mortgagors, and the Court framed a supplemental issue as to whether the deed had been properly attested: *Held*, that the Court was empowered to frame and try the additional issue under s. 149 of the Civil Procedure Code of 1882. *Held*, further, that apart from that section, every Court trying civil causes has inherent jurisdiction to take cognizance of questions which cut at the root of the subject-matter of controversy between the parties. Whilst the first part of s. 149 of Act XIV of 1882 leaves it in the discretion of the Court to frame such additional issues as it thinks fit, the latter part makes it imperative on the judge to frame such additional issues as may be necessary to determine the controversy between the parties. SHAMU PATTER *v.* ABDUL KADIR RAVUTHAN (1912) **16 C. W. N. 1009**

———— **ss. 157, 158**—

See s. 102 . **I. L. R. 33 Mad. 241**

CIVIL PROCEDURE CODE (ACT XIV OF 1882) *—contd.*

———— s. 169—*Held*, that s. 169 is not applicable to the order of the liquidating Judge reducing the remuneration of an employee of the official liquidators, sanctioned by the predecessor of the Judge and consequently no appeal for such an order can be entertained. GHANSHAM DAS *v.* HINDUSTAN BANK. I. L. R. 1 Lah. 73

———— s. 170—*Appeal—Contempt of Court—Property of person in contempt sold to realize a fine, but sale afterwards set aside on the submission of the person in contempt.* No appeal lies from an order refusing to confirm a sale held by the Court to realize a fine imposed by it for contempt under s. 170 of the Civil Procedure Code, 1882. The Court has power to refuse to confirm such a sale if the fine and costs are paid in by the person guilty of contempt, and the Court considers that the contempt is purged. BADRI PRASAD *v.* TEJ SINGH (1910) . . . I. L. R. 33 All. 68

———— s. 206—*Decree of first Court reversed on appeal with costs of both Courts—Costs stated as incurred, in superseded decree, if may be recovered—Construction.* Where in decreeing a suit in the plaintiff's favour the first Court directed the defendants to pay the plaintiff's costs, but following the direction in s. 206 of the Civil Procedure Code (Act XIV of 1882), set out at the end of the ordering portion of the decree the amounts of costs respectively incurred by the several defendants; and on the defendants' appeal to the High Court, the decree was reversed and the plaintiff was directed to pay to the "defendants-appellants the costs of the appeal" and "the costs incurred by them in the lower Court." *Held*, on a construction of the High Court's decree, that the defendants were entitled to recover in addition to the costs of the appeal the several amounts entered against their names in the decree of the first Court as their costs. RAGHU NANDAN LALL *v.* RAJENDRA PROSAD NARAIN SINGH (1909) 14 C. W. N. 556

———— s. 206—

See DECREE, AMENDMENT OF. I. L. R. 39 Calc. 265

———— ss. 208, 209—

See DECREE . I. L. R. 32 All. 295

———— ss. 210, 257A, 525, 526—*Arbitration, reference to, by executing Court—Award modifying decree for money—Instalment decree upon* [illegible]

[illegible] arbitrator before whom the judgment-debtor withdrew his objections and the decree-holder consented to have the decretal amount paid in certain instalments. The arbitrator purported to embody these terms in an award and the Court subsequently passed a modified decree in terms thereof. The decree-holder having applied for execution of this decree more than 12 years after the original decree was passed in his favour, the judgment-debtor objected, *inter alia*, that the application was time-barred, that the agreement embodied in the award and the decree based thereon were void under s. 257-A, and that this decree was not in compliance with s. 210 of the Code and was otherwise *ultra vires* of the executing Court. *Held*,

CIVIL PROCEDURE CODE (ACT XIV OF 1882) *—concld.*

———— ss. 210, 257A, 525, 526—*concld.*

per CHATTERJEE, *J.*, agreeing with TEUNON, *J.* (COXE, *J.*, *contra*), that assuming that the proceeding referring the matter to arbitration was altogether null and *ultra vires*, the arbitration might be treated as a private arbitration, so that the award would be one under s. 525 and the decree under s. 526 which it was not open to the parties to challenge or dispute. *Per* CHATTERJEE, *J.*, that executing Court had inherent jurisdiction over the subject-matter of the dispute and any irregularities in the procedure leading to the decree having been waived, the party waiving such irregularities cannot be allowed to deny its validity. NAGENDRA CHANDRA BANERJEE *v.* HARENDRA NATH MUKHERJEE (1911) . 16 C. W. N. 34

———— s. 211—

See JURISDICTION. I. L. R. 43 Calc. 650

———— *Mesne profits—Assessment—Principle—Trespasser settling land with tenants if liable only to the extent of rent realised—Joint liability of lessor and lessee—Joint tortfeasors.* Mesne profits have to be assessed according to the express provisions of the Statute with reference to what the wrong-doer received, or might with ordinary diligence have realised, and not with reference to what the rightful owner was receiving before wrongful eviction. Where more persons than one are concerned in the commission of a wrong, the wronged person has his remedy against all or any one or more of them at his choice. Every wrong-doer is liable for the whole damage and it does not matter whether they acted as between themselves as equals or one of them as agent or lessee of another. *Held*, therefore, that a trespasser is liable jointly with his lessees for the entire amount of mesne profits and not merely to the extent of the rents realised by him from his lessees. BIRESSHUR DUTT CHOWDHURY *v.* BARODA PROSAD RAY CHOWDHURY (1906) 15 C. W. N. 825

———— ss. 211, 212 and 244—*Application to ascertain mesne profits—Application in execution—Limitation.* An application for ascertainment of mesne profits is an application for execution of a decree and is governed by Art. 182 of the Limitation Act, 1908. GANGADHAR *v.* BALKRISHNA (1920) . . I. L. R. 45 Bom. 819

———— s. 212—

See JURISDICTION. I. L. R. 43 Calc. 650

———— s. 214—

See PRE-EMPTION I. L. R. 44 Calc. 675

———— ss. 215A, 216—*Principal and Agent—Suit for rendition of accounts and payment of sum found due to principal—Defence that per contra money was due to Agent—Court competent to grant a decree to Agent.* In a suit brought by the principals against an agent for rendition of accounts the agent expressed himself ready and willing to render accounts, but alleged that on such accounts being taken money would be found to be due to him; he did not, however, specifically pray for a decree for the sum alleged to be due to him. The Court granted a decree to the agent upon the finding that money was in fact due to him. *Held*, that the decree was justified with reference to the

CIVIL PROCEDURE CODE (ACT XIV OF 1882) —*contd.*

——— **ss. 215A, 216**—*concld.*

provisions of ss. 215-A and 216 of the Code of Civil Procedure, 1882. PARMANAND *v.* JAGAT NARAIN (1910) . . . . . **I. L. R. 32 All. 525**

——— **s. 223**—

See LIMITATION ACT (IX OF 1908), SCH. I, ART. 128 . **I. L. R. 35 All. 389**

——— **ss. 223 and 224**—

See LIMITATION ACT, 1908, ART. 182. **I. L. R. 39 Mad. 640**

——— **ss. 223, 224, 235, 248, 249**—

See REVIVOR . **I. L. R. 43 Calc. 903**

——— **s. 229A**—

See POLITICAL AGENT AT SIKKIM, COURT OF . . . **I. L. R. 38 Calc. 859**

——— **s. 229B**—

See FOREIGN DECREE **I. L. R. 40 Bom. 551**

——— **s. 230**—

1. ——— *Execution of decree—Limitation—Abatement of appeal—Terminus a quo.* *Held,* that an order declaring an appeal to have abated is in effect an affirmation of the decree of the Court below, and limitation only begins to run against the decree-holder from the date of such order and not from the date of the decree under appeal. *Mahomed Mehdi Bella* v. *Mohini Kanta, I. L. R. 34 Calc. 874,* followed. *Kewal* v. *Tikha, 3 All. L. J. 8, Rup Singh* v. *Mukhraj Singh, I. L. R. 7 All. 887,* and *Akshoy Kumar Mondi* v. *Chunder Mohun Chathati, I. L. R. 16 Calc. 250,* referred to. *Fazal Husain* v. *Raj Bahadur, I. L. R. 20 All. 124,* doubted. MUHAMMAD RAZI *v.* KARBALAI BIBI (1909) **I. L. R. 32 All. 136**

2. ——— *Execution of decree—Limitation—Application for transfer of decree—Subsequent application for execution not in continuation of application for transfer.* *Held,* that an application for execution can in no sense of the words be regarded as an application in continuation of an application for transfer of a decree from one Court to another. In order that an application may be a continuation of an other application, it is necessary that the two applications must be of the same nature, and the application for transfer being an application of an entirely different nature from that for execution of a decree does not suspend the operation of s. 230 of the Code of Civil Procedure, 1882. *Sundar Singh* v. *Doru Shankar, I. L. R. 20 All. 78,* applied. *Ram Sahai* v. *Nanni, All. Weekly Notes, 1886, p. 137,* dissented from. KHETPAL *v.* TIKAM SINGH (1912) . **I. L. R. 34 All. 396**

3. ——— *Execution of decree—Decree upon compromise against lessees, and on their failure to pay against the property of their surety—Execution against lessees after the lapse of twelve years.* A decree for rent was passed upon a compromise against certain lessees and their surety. The decree provided that the amount of it should be realised in the first instance from the lessees by annual instalments and in the event of failure it would be recoverable by the sale of certain immoveable property which the surety had hypothecated. The decree was put into execution against the lessees as a simple money decree more than 12 years after the date of its passing: *Held,* that s. 230 of the Code of Civil Procedure of 1882 applied and the decree could not be executed after the expiration of 12 years from the date thereof. *Pahalwan Singh* v. *Narain Das, I. L. R. 22 All. 401,* distinguished. MAHARAJA OF BENARES *v.* LALJI SINGH **I. L. R. 34 All. 636**

4. ——— *Decree for land and mesne profits in favour of a minor—Execution after 12 years, after decree for ascertaining mesne profits—Limitation—Limitation Act (IX of 1908), s. 6—Policy of Limitation Acts.* The prohibition contained in Civil Procedure Code (Act V of 1908), s. 48, *viz.*, that certain classes of decrees cannot be executed after 12 years, applies even to the case of minors who are decree-holders. S. 6 of the Limitation Act cannot be invoked to extend the period as s. 6, Act X of 1908, is expressly limited to cases where the limitation is provided for in the Limitation Act itself: nor is there any law apart from s. 6 to the effect that minority is a ground of exemption from the operation of the law of limitation. *Moro Sadashiv* v. *Visaji Raghunath, I. L. R. 16 Bom. 536,* not followed. *Jhandu* v. *Mohan-Lal 29 P.R. 489* followed. English decisions on the policy of Limitation Acts referred to. Limitation being the result of Statute Law no exemption from it can be recognised except what the Statute itself provides. Under the old Civil Procedure Code (Act XIV of 1882) even where the decree directed that mesne profits should be ascertained in execution, the application for the ascertainment of mesne profits was one in execution only, and not in suit; so that the limitation applicable for such an application was that applicable for execution applications. An application for the ascertainment of mesne profits directed by a decree under the old Civil Procedure Code, but made after 12 years after decree, is barred by the Civil Procedure Code (Act XIV of 1882), s. 230. The new Civil Procedure Code which directs an enquiry as to the mesne profits, before passing a final decree is not applicable to such a case. The effect to be given to a document and to the proceedings of a Court must be decided by the law in force when the document was executed or the proceedings were passed. *Mutiah Chettiar* v. *Ramaswami Chettiar (Second Appeal No. 117 of 1911),* followed. Applicant's mother, as next friend of the applicant, obtained a decree in his favour for partition which was confirmed with certain modifications by the High Court on 3rd August 1897. The decree left the mesne profits subsequent to suit to be ascertained in execution. The decree also declared as follows:— "The plaintiff do recover, when collected, his one-third share of such debts as have been or can be collected with due diligence out of the debts due to the family." Various applications for execution of the decree were made by the applicant's mother and she entered into a compromise on 21st January 1900 with the judgment-debtors regarding all the matters mentioned in the decree and others and the Court passed on 6th February 1903 a final decree in terms of the compromise. Applicant became a major on 29th November 1909 and made the present execution application

CIVIL PROCEDURE CODE (ACT XIV OF 1882)—*contd.*

——— s. 230—*concld.*

for partition and ascertainment of mesne profits and outstandings on 1st November 1910, repudiating the compromise on various grounds: *Held*, that the applications were barred by the 12 years' rule of limitation, contained in Civil Procedure Code (Act XIV of 1882), s. 230 corresponding to Civil Procedure Code (Act V of 1908), s. 48. RAMANA *v.* BABU (1914)

I. L. R. 37 Mad. 186

——— ss. 230, 235—*Execution of decree—*

[illegible]

of limitation prescribed by s. 230 and has been granted, that is, execution has been ordered in accordance with the prayer of the decree-holder's application, the right of the decree-holder to obtain execution will not necessarily be defeated, if, by reason of objections on the part of the judgment-debtor or action taken by the Court or other cause for which the decree-holder is not responsible final completion of the proceedings in execution initiated by the application under s. 235 cannot be obtained within the period limited by s. 230.

[illegible]

applications merely ancillary to the substantive [illegible] be ob- [illegible] 'han v. [illegible] RAM

I. L. R. 33 All. 517

——— s. 231—

See HINDU LAW—SUCCESSION.

I. L. R. 37 All. 545

——— *O. XXI, r. 15, Civil Procedure Code (Act V of 1908)—Execution application by one only of the decree-holders, maintainability of—Civil Procedure Code (Act V of 1908), O. XXI, r. 2—Uncertified adjustment, not recognizable by Court executing the decree—Judgment-debtor's counter-petition equivalent to application if within time.* Under s. 258, Civil Procedure Code (Act XIV of 1882), corresponding to O. XXI, r. 2, of Civil Procedure Code (Act V of 1908), a payment or adjustment of a decree cannot be recognized by any Court executing the decree unless the same has been certified in the manner allowed by law. The clause is applicable where in answer to an application for execution an [illegible]

absence of any [illegible] of the adjustm[illegible] *Reddi, I. L. R.* [illegible] *v. Armugam* [illegible] *Periatambi Udayan v. Vellayya Gounden, I. L. R.* 21 Mad. 409, followed. *Ramayyar v. Ramayyar, I. L. R. 21 Mad. 356*, distinguished and commented on. *Gadadhara Panda v. Shyam Churn Naik, 12 C. W. N. 485*, distinguished. HEATON, J.'s judgment in *Trimback v. Hari Laxman, 12 Bom. L. R. 686*, not followed. Under s. 236, Civil Procedure Code (Act XIV of 1882), corresponding to O. XXI, r. 15, Civil Procedure Code (Act V of 1908), execution in favour of one only of the several decree-holders cannot be allowed unless there is sufficient cause to do so; when so allowed it is duty of the Court to pass such orders as it deems necessary for protecting the interests of the persons who have not joined in the application. BUDRUDDIN *v.* GULAM MOIDEEN (1913 . . . **I. L. R. 36 Mad. 357**

——— s. 232—

See SPECIFIC PERFORMANCE.

I. L. R. 43 Calc. 990

1. ——— *Transfer of portion of decree valid—Decree for maintenance, assignability of.* The transferee of a portion of a decree is a transferee of the decree within the meaning of s. 232 of the Code of Civil Procedure of 1882. The transfer of a decree for maintenance to the extent of the arrears, that had accrued due up to the date of transfer, is valid and may be recognised by the Court if the judgment-debtor will not be prejudiced by such recognition. ENDOORI VENKATARAMANIAH *v.* VENKATACHAINULU (1909)

I. L. R. 33 Mad. 80

2. ——— *Mortgage decree assignment to one of several judgment-debtors—Execution by assignee, if lies—Discharge of debt by one judgment-debtor—Right if only to contribution.* The expression "a decree for money against several persons" in s. 232 of the Civil Procedure Code of 1882 means a personal decree for payment of money against two or more defendants jointly. A mortgage decree even though it may direct the judgment-debtor to pay the decretal amount, is not a "decree for money" within the meaning of that section, and one of the judgment-debtors having obtained an assignment of such a decree may proceed to execute the decree by putting the mortgaged property to sale. Where, however, one of the judgment-debtors had paid off the decree before taking an assignment, although the payments were not certified, th[illegible]

20 C. W. N. 132

3. ——— *Benami purchase of decree by co-judgment-debtor—Failure to execute if bars right to sue for contribution.* Where a co-judgment-debtor purchases a rent decree, such a purchase is equivalent to paying off the decree, and the purchaser is entitled [illegible] contribution from the ot[illegible] although he tried to evade [illegible] of the Code of Civil Proce[illegible] by trying to execute the [illegible] [illegible]idar. RAM LAL [illegible] DASI (1913) .

CIVIL PROCEDURE CODE (ACT XIV OF 1882) —*contd.*

——— ss. 232, 266—

See MAINTENANCE ALLOWANCE.

I. L. R. 38 Calc. 13

——— s. 234—*Hindu Law—Joint Hindu family—Decree obtained against uncle executed against nephews—Legal representative—Limitation Act (XV of 1877), Sch. II, Art. 170—Application against persons not the legal representatives.* A simple money decree was passed against one Raja Suchit Prasad Singh. He died leaving a widow and two nephews. Application for execution was made against the two nephews, but was dismissed, upon the ground that the property sought to be taken in execution was ancestral. A second application for execution was made against other property, alleged to be self-acquired, and this time against the widow as well as the nephews. *Held*, that the nephews were not legal representatives of the deceased judgment-debtor, and this being so, an application for execution against them could not be held to keep the decree alive as against the widow, with respect to whom it was otherwise barred by limitation. *Veerappa Chettiar* v. *Ramaswami Aiyar, I. L. R. 27 Mad. 106*, referred to. *Ramanuj Sewak Singh* v. *Hingu Lal, I. L. R. 9 All. 517, Gopal* v. *Har Prasad, All. Weekly Notes (1892) 241*, and *Hari* v. *Narayan, I. L. R. 12 Bom. 427*, distinguished. GYANENDRA NATH BASU *v.* RANI NIHALO BIBI (1910)

I. L. R. 32 All. 404

——— s. 235—

See REVIVOR . **I. L. R. 43 Calc. 903**

See s. 230. . **I. L. R. 33 All. 517**

——— ss. 235, 238, 245—

See LIMITATION ACT, 1877, SCH. II, ART. 179 . . **14 C. W. N. 481**

——— ss. 235, 320—*Gujarat Talukdar's Act (Bom. Act VI of 1888), ss. 28, 29-B and 29-E—Decree against Talukdar—Execution—Decree transferred to Talukdari Settlement Officer—Notification of management—Submission by persons having claims—Application for the continuance of the execution proceedings against the legal representative of the deceased judgment-debtor—Certificate under s. 29E of the Gujarat Talukdar's Act (Bom. Act VI of 1888)—Managing Officer—Talukdari Settlement Officer.* When execution proceedings are commenced against a judgment-debtor, they can be continued after his death by substituting the name of the legal representative in place of that of the deceased judgment-debtor in the application for execution. It is not necessary to file a fresh application under the provisions of s. 235 of the Civil Procedure Code (Act XIV of 1882). *Hirachand Harjivandas* v. *Kasturchand Kasidas, I. L. R. 18 Bom. 224*, explained. The effect of s. 29E of the Gujarat Talukdar's Act (Bom. Act VI of 1888) is that before the execution of a decree can be proceeded with, the Court must be satisfied that the decree claim has been duly submitted. If the officer certifies that it has been duly submitted there is an end of the matter. If he does not so certify, the Court must wait for one month from the date of the receipt by the officer of an application for a certificate, and upon being satisfied that the claim has been duly submitted in accordance with the provisions of s. 29B of the

CIVIL PROCEDURE CODE (ACT XIV OF 1882) —*contd.*

——— ss. 235, 320—*contd.*

Gujarat Talukdar's Act (Bom. Act VI of 1888) it may then proceed with the execution. The expression "managing officer" in s. 29E of the Act is merely a compendious term for "the Talukdari Settlement Officer or any other officer appointed by Government to take charge of the Talukdar's estate and keep the same in his management" referred to in s. 28 of the Act, and where the officer who takes charges of the estate and keeps the same in his management is the Talukdari Settlement Officer, the "managing officer" is merely a synonym for "Talukdari Settlement Officer." Where an application relating to a claim is presented to the Subordinate Judge and is forwarded by him to the Talukdari Settlement Officer, it amounts to a submission of the claim in writing within the meaning of s. 29B of the Act, if the Talukdari Settlement Officer is also the managing officer. PURUSHOTTAM *v.* RAJBAI (1909)

I. L. R. 34 Bom. 142

——— s. 238—

See LIMITATION ACT (XV OF 1877), SCH. II, ART. 179 . .

I. L. R. 37 Bom. 317
14 C. W. N. 481

——— *Limitation Act (XV of 1877), Arts. 142 and 144—Suit to recover possession—Dispossession—Discontinuance of possession—Possession as an agent of minors—Decree by the minors on attaining majority against the agent for possession of the property—Decree not executed and barred by limitation—Agent wrongfully dispossessed by a third person—Money decree against the original owners—Decree-holder seeking to attach property—Adverse possession.* *N* died in 1879 leaving behind him two minor sons *R* and *D*, and a mistress *A*. The latter looked after the minors and managed their property. When they arrived at the age of majority they found that *A* claimed the property in her own right. In 1891, *R* and *D* sued *A* for the possession of the lands and obtained a decree on the 30th of August 1892, which was confirmed on appeal on the 15th of June 1894. This decree was sought to be executed on the 26th June 1897, but the application was dismissed as barred by limitation. *A* was then wrongfully deprived of the possession of the property by *V*, who sold it to *B* in 1908. *B* mortgaged the property to *E* in 1900. In the same year, the plaintiff obtained a money decree against *R* and *D*, and in execution of it he had an attachment placed on the property, but the attachment was removed in 1904 at the instance of *B* and *E*. In 1905, the plaintiff brought a suit for a declaration that the property was liable to be attached and sold in execution of his decree against *R* and *D*. The defendants *B* and *E* contended that the suit was barred under Art. 142 of the Limitation Act, 1877, inasmuch as neither the plaintiff nor his predecessors-in-title *R* and *D* were in possession of the property within twelve years preceding the suit: *Held*, that the suit having been brought by the plaintiff under s. 283 of the Civil Procedure Code of 1882, to establish his right to attach and sell the property in dispute as that of his judgment-debtors *R* and *D* in execution of his money decree, all that he had to prove was that on the date of attachment the judgment-debtors had a subsisting right to the property; and that the suit must,

CIVIL PROCEDURE CODE (ACT XIV OF 1882) —*contd.*

———— s. 238—*concld.*

therefore, be tried as if it were a suit for possession by the judgment-debtors. *Held*, also, that as *A's* possession must be deemed to have begun in 1879 as that of bailiff or agent for the minors *R* and *D* and to have continued as such until after they had arrived at the age of majority, and as there had never been any dispossession by *A* of *R* and *D*

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489, followed; *Taylor* v. *Horde, Sm. L. C. Vol. II, 10th Edn., pp. 644, 645,* followed; *Lallubhai, Bapubhai* v. *Mankuvarbai, I. L. R. 2 Bom. 388, at p. 413,* followed; and *Dadoba* v. *Krishna, I. L. R. 7 Bom. 34,* followed. *Held,* further, that *though the decree for possession obtained by R* and *D* against *A* had become incapable of execution by reason of their failure to apply to the Court for its execution within the period prescribed by the law of limitation, the right established by it remained; and though that right could not be enforced as against *A* by execution through the Court, the decree-holders could enter by ousting any trespasser, *A* included. *Bandhu* v. *Naba, I. L. R. 15 Bom. 238,* followed *Held,* therefore, that there having been no allegation of possession in *R* and *D* lost by dispossession or discontinuance of possession, but the case put forward having been a title in them established by their decree against *A* and a wrongful possession obtained from her after the decree by *V* under whom *B* and *E* claimed, the limitation applicable to the suit [illegible]

possession or discontinuance of possession. It is a general principle that any one suing in ejectment must prove possession within twelve years: the reason for this, however, is that possession is commonly the effective assertion of title which is relied on: but it is not the only one. There is another which in some cases is equally good, and that is an assertion of title made in Court and established by a decree. That is good against those who are party defendants to the suit; and if the same title is re-asserted and made good in a later suit against other opposing parties, it is good against them also and entitles to possession whether the title claimant has or has not been in possession within twelve years, unless the opponent can defeat the title by adverse possession. VASUDEO ATMARAM JOSHI *v.* EKNATH BALKRISHNA THITE (1910) . . . . I. L. R. 35 Bom. 79

———— ss. 240, 276, 295—

See ATTACHMENT . I. L. R. 44 Calc. 662

———— s. 244—

See APPEAL . I. L. R. 38 Calc. 717

See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XI, R. 5.

I. L. R. 39 Mad. 541

See MORTGAGE I. L. R. 41 Mad. 403

CIVIL PROCEDURE CODE (ACT XIV OF 1882) —*contd.*

———— s. 244—*contd.*

See OCCUPANCY HOLDING.

I. L. R. 42 Calc. 172

See RES JUDICATA.

I. L. R. 37 All. 485

See TRANSFER OF PROPERTY ACT (IV OF 1882), ss. 88, 89.

I. L. R. 40 Bom. 321

See s. 211 . I. L. R. 45 Bom. 211

1. ———— Execution of decree—*Interpretation. Held,* that s 244 of the Code of Civil Procedure, 1882, does not apply to a dispute between the decree-holder and a person against whom, though a party to the suit, no decree has been passed. *Kalka Prasad* v *Basant Ram, I. L. R. 23 All. 346.* SHEO PARGASH SINGH *v.* NAWAB SINGH (1910) . . . I. L. R. 32 All. 321

2. ———— Compromise—*Sale, application to set aside, on ground of fraud—Compromise purporting to be made by the applicants—Right of one of* [illegible] *compro* [illegible] decree [illegible] Proced [illegible] their property in execution of the decree. The proceeding terminated in a compromise made on an application which purported to be signed by all the judgment-debtors. One of the judgment-debtors subsequently applied under s. 244 of the Code of Civil Procedure (Act XIV of 1882) to show that she was no party to the petition and was not bound by the compromise: *Held,* that there was no bar in law to the hearing of such an application. *Rajib Panda* v. *Lalhan Sendh, I. L. R. 27 Calc. 11,* referred to. ASABAN BANU *v.* ANANDA CHARAN DUTTA (1909)

14 C. W. N. 823

3. ———— Decree, revivor of — *Civil Procedure Code (Act XIV of 1882), ss. 244, 258—Limitation Act (XV of 1882), Sch. II, Art. 180—Step in aid of execution—Order in Council, if includes provisions of decree affirmed—Limitation—Payments in satisfaction of decree made out of Court, if may be proved.* In order that any proceeding in execution may operate as a revivor there must be expressly or by implication a determination that the decree is still capable of execution and the decree-holder is entitled to enforce it. Where a decree-holder applied for execution and on the judgment-debtor's objecting to the execution on the ground of the decree being time-barred, their objection was overruled but the decree-holder did not proceed with the application any further: *Held,* that this order operated as a revivor of the decree. SRIMATI KAMINI DEBI *v.* AGHORE NATH MUKERJI (1909) . . . 14 C. W. N. 357

4. ———— Suit by previous purchaser—*at private sale if barred.* A money decree was obtained against the heirs of one *N.* Some of the heirs subsequently transferred their interest in the disputed property to *K* and it was a found that the transfer was *bonâ fide* and for value. The decree-holder then attached the property and purchased it himself in execution of the decree. In a suit by the heirs of *K* for declaration of title and recovery of possession on the ground that the property attached having been sold to *K* could not be attached in execution of the decree:—*Held,* that the suit was not barred by s. 244 of the

CIVIL PROCEDURE CODE (ACT XIV OF 1882) —*contd.*

———— **s. 244**—*contd.*

Civil Procedure Code, 1882, the purchaser not being a representative of the judgment-debtor within the meaning of that section. *Gour Sunder Lahiri* v. *Hem Chandra Chowdhury, I. L. R. 16 Calc. 355 ; Ishan Chandra Sirkar* v. *Beni Madhab Sirkar, I. L. R. 24 Calc. 62 ; Akhoy Kumar Soor* v. *Bejoy Chand, I. L. R. 29 Calc. 813,* distinguished. KALI KUMAR VIDYARATNA *v.* MISRIJAN (1911)

15 C. W. N. 711

5. ———— **Under-statement of value in sale proclamation**—*Application to amend proclamation must be considered before sale.* Proceedings under s. 287, cl. (*c*) of the Civil Procedure Code of 1882, fall under the provisions of s. 244 of the Code, and are appealable as such. Where the lower Court dismissed as premature an application made before the sale for amendment of sale proclamation on the ground that the property had been under valued: *Held,* that under-statement of value in a sale proclamation being a material irregularity, where an application is made by a debtor objecting to the value of the property as stated in the sale proclamation it is the duty of the Court to make an enquiry and to satisfy itself that the value as stated in the sale proclamation is correct. As the sale had already taken place and the appeal thus made unfructuous the Court dismissed the appeal with these observations. LACHMAN PERSHAD SINGH *v.* GANGA PERSHAD SINGH (1910) . . . **15 C. W. N. 713**

6. ———— **Suit by party or representative against auction-purchaser**—*To raise question within section not maintainable—Auction-purchaser as such not representative of decree-holder or of the judgment-debtor.* A suit by a party to a suit as his representative against an auction-purchaser raising questions which, as between the parties, must be decided in execution under s. 244 of the Code, is not sustainable. The prohibition is not based on the ground that the auction-purchaser is the representative of the decree-holder. The auction-purchaser is not such representative. *Manickka Odayan* v. *Rajagopala Pillai, I. L. R. 30 Mad. 507,* not approved. *Per* WALLIS, *J.*—The prohibition is based on the general intention of the Legislature as gathered from the section. *Per* KRISHNASWAMI AIYAR, *J.*—A party to the execution proceedings can impeach a sale only by an application to set it aside ; and where the sale not being so impeached, is confirmed the possession of the auction-purchaser cannot be disturbed by suit. The true ground for the prohibition is not that s. 244 bars the suit as the *auction-purchaser* is the representative of the decree-holder, but that s. 244 being a bar to setting aside the sale except by a proceeding between the parties, the suit against the purchaser is not maintainable until it is to set aside. A stranger purchaser at an auction sale in execution of a money decree is not the representative of the decree-holder or of the judgment-debtor. NADAMUNI NARAYANA IYENGAR *v.* VEERABHADRA PILLAI (1910).

I. L. R. 34 Mad. 417

7. ———— **If bars suit to set aside decree and sale as fraudulent.** *Held,* that s. 244 of Act XIV of 1882 did not apply to a suit to set aside a decree and sale thereunder on the ground that they had been obtained by fraud. BHAIJI THAKUR *v.* JHARULA DAS (1914) . . **18 C. W. N. 1029**

CIVIL PROCEDURE CODE (ACT XIV OF 1882) —*contd.*

———— **s. 244**—*contd.*

8. ———— **Partition of Joint Family Property**—*Sale of a judgment-debtor's share in joint Hindu family property in execution of decree—Decree-holder being the purchaser—Subsequent suit by latter for partition—Whether competent.* One *G R* obtained a money decree against one *L.* He applied for attachment and sale of *L's* share in certain property which belonged to a joint Hindu family of which *L* was a member. This share was ascertained to be one-sixth of the property, and was sold and purchased by *G R* himself. The sale was duly confirmed and the sale certificate issued. *G R* then applied for possession by partition of the share, the other members of the family objected, and the executing Court, on 22nd November 1902, ordered that *G R* should sue for partition in a separate suit, as partition could not be effected in execution proceedings. In 1913 the son of *G R* brought the present suit for partition. The Lower Courts held that a separate suit was barred by s. 47 of the Code of Civil Procedure, 1908. *Held,* that s. 244 of the old Code of Civil Procedure, which was applicable, *did not give the executing* Court power to effect a partition, and that the present suit was, therefore, necessary and competent. *Yelmualai Chetti* v. *Srinivasa Chetti, I. L. R. 29 Mad. 294,* and *Bhagwati* v. *Banwari Lal, I. L. R. 31 All. 82 F. B.,* followed. *Bhagga Shah* v. *Bura Shah, 58 P. R. 1888,* distinguished. *Sheo Narain* v. *Nur Muhammad, I. L. R. 30 All. 72,* not followed; being overruled by *Bhagwati* v. *Banwari Lal, I. L. R. 31 All. 82 F. B.* BRIJ LAL *v.* DURGA . . . **I. L. R. 1 Lah. 134**

———— **ss. 244, 252, 647—Parties**—*Execution—Death of judgment-debtor—Legal representatives of the judgment-debtor brought on record—Dispute as to property—Legal representatives should put forward their claim under s. 244—They cannot raise the defence in a separate suit for possession by auction-purchaser.—Auction-purchaser as a stranger.* *C* sued *M* on a money-bond. *M* having died during the pendency of the suit, his widow *R* and his brother *N* were brought by *C* on the record as his representatives. A decree was passed awarding the claim out of the property of the deceased. After the passing of the decree but before it could be executed both *R* and *N* died. *C* then brought on the record the defendants as the legal representatives of *M.* The latter denied that they were *M's* legal representatives or that they had any property of *M's* which could be liable for the decree. The Court overruled the objections, and in execution of the decree attached and sold the property in dispute. The plaintiff purchased the property at the sale, and filed this suit to recover possession thereof from the defendants. The lower Court disallowed the plaintiff's claim on the ground that the property having been joint property of *M* and defendants, survived to the latter at *M's* death ; and that the plaintiff obtained no title at the Court-sale which he could legally assert as against the defendants. In the lower appellate Court the plaintiff contended unsuccessfully that the defendants were debarred by the provisions of s. 244 of the Code of Civil Procedure, 1882, from asserting their title. *Held, that* as *the property* was sold by the Court at *C's* instance as that of *M,* the question so far was one relating to the execution of the decree arising between the decree-holder

CIVIL PROCEDURE CODE (ACT XIV OF 1882) —*contd.*

———— **s. 244**—*concld.*

and the defendants as judgment-debtors under s. 252 of the Civil Procedure Code of 1882. It was, therefore, a question in relation to them falling within s. 244 of the Code by reason of the explanation to s. 647 that applications for the execution of the decree were proceedings in suits. The defendants were consequently bound to object to the attachment and sale under that section, so far as the decree-holder's action was concerned. It was contended that whatever might have been the result if the decree-holder had been a party to the suit, the present dispute was between the auction- [illegible] ious suit and the [illegible]: *Held,* that though an auction-purchaser at a Court-sale in execution of a decree was not a party to the suit in which the decree was passed and though he was not a representative of either the decree-holder or the judgment-debtor for the purposes of s. 244, yet if the question raised by the judgment-debtor as to the legality of the Court-sale was virtually one between the parties to the suit, that is, between the decree-holder and the judgment-debtor, and if in the decision and result of that question the auction-purchaser was interested, the judgment-debtor ought not to be allowed to attack the sale in a suit. The test in all such cases is whether the ground upon which the Court-sale is attacked as conferring no title upon the auction-purchaser affects the parties to the suit and could have as between them been raised and determined under s. 244 and whether the auction-purchaser, though not a party to that suit, is a party interested in the result. GOKULSING BHIKARAM *v.* KISANSINGH (1910) . . . **I. L. R. 34 Bom. 546**

———— **ss. 244, 258**—

See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXI, R. 2.
I. L. R. 40 Bom. 333

———— **ss. 244, 278**—

See EXECUTION OF DECREE.
I. L. R. 39 Calc. 298

———— **ss. 244, 283**—*Property attached in execution of a decree purchased while under attachment—Decree set aside—Purchaser not the representative of the judgment-debtor.* Where a decree is set aside in appeal everything done in pursuance of that decree comes to an end. Hence where property which was subject to an attachment was purchased, but the decree under which the attachment was levied was set aside, it was *held* that the purchaser was not the representative of the judgment-debtor within the meaning of s. 244 of the Code of Civil Procedure, 1882. GHAFUR-UD-DIN *v.* HAMID HUSAIN (1909)
I. L. R. 32 All. 129

———— **ss. 244, 295 (c)**—

See LIMITATION . **I. L. R. 41 Calc. 654**

———— **s. 245**—

See LIMITATION ACT, 1877, SCH. II, ART. 179 . . **14 C. W. N. 481**

———— **s. 248**—

See LIMITATION ACT (IX OF 1908), SCH. I, ART. 183. **I. L. R. 40 Mad. 1127**

CIVIL PROCEDURE CODE (ACT XIV OF 1882) —*contd.*

———— **s. 248**—*contd.*

———— *Execution—Res judicata—Notice under s. 248, Civil Procedure Code (Act XIV of 1882), issued by Court on application for transfer of decree—Limitation, bar of, not raised.* In sending a decree for execution to another Court, the Court which passed the decree is not called upon to consider whether the decree is still capable of execution. That is a question for determination by the Court to which the decree is transferred upon a proper application for execution presented to it. Notice under s. 248, Civil Procedure Code, is to be issued by the Court which has seizin of the application for execution, [illegible]

Code, issued by the Court upon an application for transfer of the decree, but it is not possible for him to take this step. SRIPATI CHARAN CHOUDRY *v.* R. BELCHAMBERS (1910)
15 C. W. N. 661

———— *Attachment under decree known to judgment-debtor—Application for sale more than a year after previous application—Sale without notice to judgment-debtor, validity of.* A sale of a judgment-debtor's property is not void for want of notice to him of the application for sale made more than a year after a prior application for execution, if the sale is held in pursuance of a subsisting attachment known to the judgment-debtors. *Raghunatha Das* v. *Sundar Das Khetri, (1915), I. L. R. 42 Calc. 72 (P. C.),* and *Shyam Mandal* v. *Satinath Banerjee, (1917). I. L. R. 44 Calc. 954,* distinguished. SITARAMAYYA *v.* GOPALAKRISHNAMMA (1920)
I. L. R. 43 Mad. 57

———— **ss. 248, 249**—

See REVIVOR . **I. L. R. 43 Calc. 903**

———— **s. 252**—

See ss. 244, 252, 647 **I. L. R. 34 Bom. 546**

———— *Decree against assets of deceased in the hands of representative is a decree against representative—Such decree executable only against such representative or his representative.* In a suit brought against *A*, the widow of a deceased person as his representative, a decree was passed [illegible] the [illegible] her [illegible] ainst [illegible] the deceased and having obtained a decree in his favour took possession of the estate. The decree-holder sought to execute the decree against *B* under s. 252 of the Code of Civil Procedure:—*Held,* that the decree was not against the estate but against *A*, the legal representative and was capable of execution only against *A* and her representatives. *Subbanna* v. *Venkatakrishnan, I. L. R. 11 Mad. 405,* followed. KALIAPPAN SERVAIKARAN *v.* VARADARAJULU (1909)
I. L. R. 33 Mad. 75

———— **ss. 256, 488, 490**—

See ATTACHMENT . **I. L. R. 38 Calc. 418**

———— **s. 257**—*Death of decree-holder, if relieves judgment-debtor of duty of payment—Mode of payment—Delay in payment of instalment—*

CIVIL PROCEDURE CODE (ACT XIV OF 1882) —*contd.*

——— s. 257—*contd.*

terest. The death of the decree-holder does not relieve the judgment-debtor of the duty of paying up the decretal debt in one of the several modes specified in s. 257 of the Civil Procedure Code (Act XIV of 1882). He should either deposit the amount in Court as directed in cl. (*a*) or should take directions from the Court under cl. (*c*). Where the judgment-debtor upon the death of the decree-holder failed to deposit the balance due under an instalment decree till long after the date fixed for the payment of the instalment: *Held*, that the judgment-debtor was liable to pay interest for the period during which the instalment remained unpaid. NARENDRA CHANDRA LAHIRI *v.* CHARU CHANDRA SINGH (1908)
14 C. W. N. 146

——— s. 257A—

See STATUTE, CONSTRUCTION OF.
I. L. R. 35 Bom. 307

See s. 210 . . **16 C. W. N. 34**

——— *Mortgage decree silent as to interest—Petition by judgment-debtor for time wherein he agrees to pay interest—Assent by decree-holder—Court's order granting time, if sanctions agreement to pay interest—Judicial order, construction of—Decree if can be altered by agreement of parties.* Where a mortgage decree contained no provision for interest on the decretal amount from the expiry of the period of grace to the date of realisation, and the decree was made absolute, the mortgaged properties being ordered to be sold in execution thereof, whereupon the judgment-debtor presented a petition, assented to by the decree-holder, asking for time and agreeing to pay interest on the decretal amount at the bond rate till the date of realisation, and the Court passed an order on the petition granting time: *Held*, that the order of the Court granting time must be taken as passed under s. 257A of the Civil Procedure Code of 1882. Judicial orders must be reasonably construed and judicial acts must be presumed to have been regularly performed. *Held*, therefore, that the sanction of the Court covered not merely the prayer for adjournment but also the agreement to pay interest, although this matter was not specifically referred to in the order. *Saroda Prosad* v. *Luchmiput, 10 B. L. R. 214, Bourne* v. *Gatliff, 11 Cl. & F. 45, 80,* and *Banwari Das* v. *Mahammad Mashiat, I. L. R. 9 All. 702,* referred to. A decree must ordinarily be executed as originally made and the parties cannot be permitted to make a substantial alteration therein. But where the parties have acted upon the decree as altered for a number of years and treated it as valid, the judgment-debtor, who has substantially benefited thereby, cannot be permitted to take exception to its validity. Parties litigants cannot be allowed to assume inconsistent positions in Court to the detriment of their opponents; where they have elected to adopt a certain course of action, they will be confined to the course they have deliberately adopted. *Dino Nath Sen* v. *Guru Charan Pal, 14 B. L. R. 287; 21 W. R. 310, Ram Ranjan* v. *Jawhuru Juma, 23 W. R. 129, Bhoopendra Nath* v. *Kalee Prasanna, 24 W. R. 205, Heera Lal* v. *Dhunputh Singh, 24 W. R. 282,* referred to. GOKHAI PADHAN *v.* BEHARI LAL PANDIT (1912)
17 C. W. N. 565

CIVIL PROCEDURE CODE (ACT XIV OF 1882) —*contd.*

——— s. 257A—*contd.*

——— *Decree—Satisfaction—Decree not carrying interest—Mortgage passed in satisfaction of decretal debt made payable in instalments—Interest payable on failure to pay instalments—Covenant for interest can be severed from the covenant as to repayment of principal—Agreement not void so far as concerned principal.* The plaintiff obtained a decree against the defendant for Rs. 800 without interest, but with costs which amounted to Rs. 89-12-0. In satisfaction of the decretal debt and in consideration of a cash advance of Rs. 10-4-0, the defendant passed a mortgage-deed for Rs. 900 in favour of the plaintiff. The amount of Rs. 900 was repayable in nine annual instalments of Rs. 100 each. On failure to pay any one instalment interest was to be charged at the rate of $1\frac{1}{4}$ per cent. per mensem; and the whole amount became payable on failure to pay any two instalments. None of the instalments having been paid, the plaintiff sued to recover Rs. 900 principal and Rs. 900 as interest. The lower Courts held that the mortgage-deed contravened the provisions of s. 257A of the Civil Procedure Code (Act XIV of 1882), but they passed a decree for Rs. 900 in plaintiff's favour, as the covenant to pay interest was quite distinct and severable from the covenant to pay principal. The defendant having appealed: *Held*, confirming the decree, that the primary and main agreement was to pay a sum of money which was not in excess of the decretal amount, and that it was only on failure to fulfil that agreement that interest was to be charged, that is, it was only something which came into operation when there was a breach of the agreement; and that the primary agreement was therefore not void under s. 257A of the Civil Procedure Code, 1882. *Bhagchand* v. *Radhakisan, I. L. R. 28 Bom. 62,* followed. CHATRU *v.* KONDAJI VITHAL (1913)
I. L. R. 38 Bom. 219

——— ss. 257A, 258—

See LIMITATION ACT (XV OF 1877), SCH. II, ART. 179 (4).
I. L. R. 32 All. 257

——— s. 258—

See CIVIL PROCEDURE CODE, 1908, O. XXI, R. 2 . **I. L. R. 40 Bom. 333**

See EXECUTION OF DECREE.
I. L. R. 35 All. 178

1. ——— Payments made out of Court in satisfaction of a decree and not certified to the Court under s. 258, Civil Procedure Code, cannot be proved under s. 244, Civil Procedure Code. KAMINI DEBI *v.* AGHORE NATH MUKERJI (1909) . . **14 C. W. N. 357**

2. ——— *Adjustment not certified to the Court—Decree-holder acting upon the adjustment and receiving money—Application to execute the decree—Estoppel by conduct—Indian Evidence Act (I of 1872), s. 115.* A decree was adjusted outside the Court. No notice was given to the Court of the adjustment; and its sanction was not taken under s. 258 of the Civil Procedure Code of 1882. The decree-holder received payments under the adjustment and after some time applied to execute the decree irrespective of the adjustment. The judgment-debtor pleaded the adjustment as a bar to execution. The decree-holder contended that

CIVIL PROCEDURE CODE (ACT XIV OF 1882) —*contd.*

——— s. 258—*contd.*

the adjustment not having been certified to the Court, it could not recognise it as valid but was bound to execute the decree. The Subordinate Judge overruled the contention holding that as the decree-holder had, after the adjustment, received for several years moneys under it, he was estopped by conduct under s. 115 of the Indian Evidence Act, 1872. *Held*, that the view of the Subordinate Judge gave the go-by to the plain language of the last paragraph of s. 258 of the Civil Procedure Code, 1882. There is no room left by the law for the operation of the law of estoppel in the matter of execution. The last paragraph of s. 258 enacts a special law for a special purpose whereas s. 115 of the Indian Evidence Act, 1872, relates to the general law of estoppel; and the principle is that a special law overrides for its purposes the general law. *Per* CHANDAVARKAR, *J.*—Fraudulent executions of decree must be discouraged by the Courts whenever they come to their notice; and decree-holders who enter freely into adjustments outside the Court and do not certify them as required by law, but fraudulently apply for execution, ignoring the adjustment, should be dealt with under the criminal law. *Per* HEATON, *J.*—The purpose of s. 258 of [illegible] hat the Court [illegible] that is done [illegible] c. TRIMBAK [illegible]))

I. L. R. 34 Bom. 575

3. ——— *Civil Procedure Code (Act V of 1908), O. XXI, r. 2—Mortgagee decree-holder left in possession under decree—* [illegible]

[illegible]

the decree-holders (mortgagees) were to be in possession of the mortgaged property for six years, to render accounts every year and to give credit for any surplus income accruing from the [illegible] s the judgment- [illegible] accounts and [illegible] ls: *Held*, that [illegible] of the income from the lands were not payments under, or adjustments of, the decree, under s. 258 of the Civil Procedure Code (Act XIV of 1882) corresponding to Order XXI, rule 2 of the new Code, and did not require to be certified to the Court within ninety days from the dates when the incomes were received by the decree-holders. *Vaidhinadasamy Ayyar* v. *Samasundram Pillai, I. L. R. 28 Mad. 473, 478*, followed. *Ramasami Naik* v. *Ramasami Chetti, I. L. R. 30 Mad. 255, 265* and *Nistarini Dasi* v. *Kazim Alini, 12 C. L. J., 65* distinguished. YELLA REDDI *v.* SYED MUHAMMADALLI (1915) . . I. L. R. 39 Mad. 1026

——— ss. 263, 264, 318, 319—*Civil Procedure Code (Act V of 1908), O. XXI, r. 5 (2)—Court-sale—Symbolical possession by purchaser—Judgment-debtor remaining in actual possession—Limitation.* Merely formal possession of immoveable property by a purchaser at a Court-sale cannot prevent limitation running in favour of the judgment-debtor where the latter remains in actual possession and the property is not in the

CIVIL PROCEDURE CODE (ACT XIV OF 1882) —*contd.*

——— ss. 263, 264, 318, 319—*contd.*

occupancy of a tenant or other person entitled to occupy the same. Symbolical possession is not real possession nor is it equivalent to real possession under Civil Procedure Code except where the Code expressly or by implication provides that it shall have that effect. *Gopal* v. *Krishna Rao, I. L. R. 25 Bom. 275*, and *Mahadeo* v. *Parashram Bhawan Chand, I. L. R. 25 Bom. 358*, overruled. MAHADEV SAKHARAM *v.* JANU NAMJI HATLE . . . . I. L. R. 36 Bom. 373

——— s. 266—

See AGRA TENANCY ACT (II OF 1901), s. 20 (2) . . I. L. R. 33 All. 136

See MAINTENANCE ALLOWANCE.

I. L. R. 38 Calc. 13

——— ss. 268, 274—*Usufructuary mortgage—Debt—Immoveable property—Execution of money decree—Attachment.* Where a deed of mortgage with possession provided that the mortgagee was to enjoy the profits in lieu of interest for ten years and was to be redeemed on the expiration of the term by payment of the mortgage money, *held*, that the document created a purely usufructuary mortgage. *Held*, further, that in the case of a [illegible]

[illegible]

I. L. R. 26 Bom. 305, explained. MANILAL RANCHOD *v.* MOTIBHAI HEMABHAI (1911)

I. L. R. 35 Bom. 288

——— ss. 268, 278, 283—*Civil Procedure Code (Act V of 1908), O. XXI, rules 58 and 63—Transfer of Property Act (IV of 1882), s. 132, illustration (i)—Decree—Execution—Garnishee—Attachment of debt—Objections by garnishee unsuccessful—Purchase by judgment-creditor—Suit by purchaser against garnishee—Garnishee cannot raise the same defence—Suit by garnishee, period of one year from the date of adverse order—Equity of cross-debt—Setting up without payment of Court-fee—Garnishee's right of set off—Prompt decision—Garnishee trustee for the judgment-debtor.* A brought a suit against B and in execution of the decree attached a debt alleged to be due to B by T under s. 268 of the Civil Procedure Code (Act XIV of 1882). T's objection to the attachment having failed, A applied for the sale of the debt and having purchased it himself at the Court sale brought a suit against T, the garnishee, for the recovery of the debt. Garnishee having set up the same facts in defence as he had set up when he unsuccessfully objected to the attachment: *Held*, that the equity arising from the cross-debt could be set up by the defendant without payment of Court-fee as on a counter claim, that if a cross-debt were due to a garnishee, there should be a right to setoff in his favour. *Held*, however, that it was not open to the garnishee to plead a defence which had already, in an execution inquiry, been

CIVIL PROCEDURE CODE (ACT XIV OF 1888) —*contd.*

—— s. 268—*contd.*

unsuccessful, except in a suit instituted within one year from the date of the adverse order that the property attached could be regarded as property in the possession of the garnishee in trust for the judgment-debtor, and, therefore, could be attached. *Held*, further, that a garnishee's claims and objections should be decided as promptly as other objections to the attachment. *Chidambara Pattar v. Ramsawamy Patter, I. L. R. 27 Mad. 67*, followed. *Rambutty Kooer v. Kamessur Pershad, 22 W. R. 36*, not followed. TAYABALLI GULAM HUSEIN v. ATMARAM SAKHA RAM (1914).

I. L. R. 38 Bom. 631

—— s. 269—*Rule framed under—Binding until rules made under new Civil Procedure Code—Bond given under rules deemed to be given by order of Court, stamp of—"Otherwise provided for by the Court Fees Act"—Court Fees Act (VII of 1870), Sch. II, Art. 6—Stamp Act (II of 1899), Sch. I, Art. 15.* Until rules are framed by the High Court under the new Civil Procedure Code (Act V of 1908), the rules made by Government under s. 269 of the old Civil Procedure Code (Act XIV of 1882) are in force, though they may be inconsistent with O. XXI, r. 43 of the first schedule to the new Civil Procedure Code. A bond given in pursuance of the rules made under power conferred by a section of the Code must be deemed to be given in pursuance of an order made by a Court under a section of Civil Procedure Code and is consequently "otherwise provided for by the Court Fees Act" (see Sch. II, Art. 6, Court Fees Act VII of 1870, and Sch. I, Art. 15, of the Indian Stamp Act II of 1899). The stamp is an eight-anna stamp under the Court Fees Act. *Re* The DISTRICT MUNSIF OF TIRUVALLUR (1914) . I. L. R. 37 Mad. 17

—— s. 273—*Civil Rules of Practice Rule 184—Mortgagee of mortgage decree entitled to sell mortgaged property by executing the mortgage decree—Effect of s. 273 on sale of mortgage decree—Pledge of mortgage decree, validity of.* *A* mortgaged certain properties to *B* who sued on his mortgage and obtained the usual decree directing payment and sale in default. *B* mortgaged the decree to *C* who sued *B* in the Court which passed the decree mortgaged and obtained a decree directing the sale of the decree obtained by *B* against *A*. *C* became the purchaser of the decree at the auction and applied for execution of the decree as the transferee thereof: *Held*, that *C's* application was sustainable and neither s. 273 of the Civil Procedure Code nor r. 184 of the Civil Rules of Practice debarred him from doing so. *Per* CHIEF JUSTICE.—The interest mortgaged to *C* included the right which *B* had to sell in default of payment. No order for sale of the decree obtained by *B* was necessary to enable *C* to execute his decree and neither s. 273 nor r. 184 applied. *Per* ABDUR RAHIM, *J.*—For the purpose of s. 273 of the Civil Procedure Code, a decree on a mortgage is a money decree and the section by implication prohibits the sale of such decree when attached. Such prohibition is not however based upon any grounds of public policy so as to render the sale an absolute nullity. S. 273 merely lays down a rule of procedure and it cannot be so construed as to interfere further than is necessarily called for by its language with the substantive rights conferred upon the creditor by s. 266 of the Code or with the right of alienation

CIVIL PROCEDURE CODE (ACT XIV OF 1888) —*contd.*

—— s. 273—*contd.*

recognised by s. 232 of the Code. S. 273 has no application where attachment of the decree is not asked for. S. 232 of the Code recognises the validity of pledges of decrees and it must be within the competence of a Court, in the exercise of its general power of enforcing contract to order the sale of the decree pledged. SUBBARAYA ROWTHU *v.* KUPPUSAWMI AIYANGAR (1909).

I. L. R. 34 Mad. 442

—— *Where decree attached the decree-holder cannot take any steps to execute the decree.* S. 273 of the Code of Civil Procedure prohibits the holder of a decree which has been attached in execution from applying for execution of the decree attached and any such application by him will be infructuous as it could not be granted and will not have the effect of saving limitation. The only person competent to execute will be the attaching creditor, who will be liable in damages if he allows the decree to become barred by limitation. *Adhar Charan Dass v. Lal Mohan Dass, I. L. R. 24 Calc. 778*, not followed. UNNI KOYA *v.* UMMA (1912). . I. L. R. 35 Mad. 622

—— s. 274—

See s. 268 . I. L. R. 35 Bom. 288

—— s. 276—

See ATTACHMENT I. L. R. 44 Calc. 662

See MORTGAGE I. L. R. 33 Mad. 429

—— ss. 276, 295—*Attachment—Private assignment—Claims enforceable under an attachment—Claim for rateable distribution of assets—Position of creditors attaching property after a prior attachment and a private assignment subsequent to such prior attachment—Validity of private alienations of property under attachment as against subsequent attachments by other creditors in the event of the withdrawal of the prior attachment—Necessity for the existence of assets realised by sale or otherwise in execution of a decree to give a right to claim rateable division under s. 295.* In 1894, *A* brought a suit against *B*, obtained a decree and in execution of the decree attached the right, title and interest of *B* in certain properties. After the attachment, in 1896, *B* assigned the whole of his right, title and interest to the first defendant. In 1898, the plaintiffs sued B and obtained a decree. In 1909, *B* took the benefit of the Insolvency Act, and his insolvency, with a small break not material in this suit lasted up to the date of the present suit. In 1904, the plaintiffs levied an attachment on the right, title and interest of *B* in the property already subject to the attachment by *A*. In 1907, *A* was paid off and the attachment by him was accordingly withdrawn and thereafter, in 1910, on the application of the first defendant to the Judge in Chambers, the attachment by the plaintiffs was raised by an order dated the 15th of April 1910. On the plaintiffs suing for a declaration that the interest of *B* in the said property at the date of the several attachments was liable to be attached and sold in execution of the plaintiffs' decree, that the order of the 15th of April 1910 should be set aside, that the said interest of *B* should be sold in execution of the plaintiffs' decree and the proceeds thereof applied according to law: *Held*, that the essential condition of enforcement of claims under

CIVIL PROCEDURE CODE (ACT XIV OF 1888) —*contd.*

———— **s. 276**—*contd.*

s. 295 of the Civil Procedure Code of 1882, was that there should be assets realised by sale or otherwise in execution of a decree, but that in the present case there were no such assets realised by sale or otherwise in execution of a decree which could have been divided rateably among the creditors who had applied for execution of their decree. *Held*, further, that the plaintiffs were not the possessors of a claim enforceable under s. 295 or as a consequence enforceable under the attachment by *A*, within the meaning of s. 276, and therefore, that the assignment to the first defendant was not void against the plaintiffs. JETHA BHIMA & CO. *v.* LADY JANBAI (1912)

I. L. R. 37 Bom. 138

———— **ss. 276, 295, 320, 325A**—*Execution of decree—Attachment of property—Transfer of execution proceedings to Collector—Property re-attached under another decree between same parties—Second execution proceedings transferred to Collector—Claim under the first decree satisfied by compromise—Collector asked to return the darkhast as disposed—Judgment-debtor alienating the property—Claim for rateable distribution under another decree—Claims enforceable under the attachment—Bills of sale Act, 1878, s. 8—Practice and procedure* In execution of a money decree which the plaintiff obtained against *B*, certain property was attached and ordered to be sold The execution proceedings were thereafter transferred to the Collector under s 320 of the Civil Procedure Code of 1882 In the meanwhile, the plaintiff obtained another money decree against *B*, in execution of which the property was again attached These execution proceedings were also transferred to the Collector. While the Collector was taking steps for the execution of the first decree, the plaintiff informed the Mamlatdar, who was carrying on the execution work on behalf of the Collector, that his claim under the first decree was satisfied by *B*, and that the *darkhast* should be returned to the Court as disposed of. The Collector did so. Ten days after this, *B* sold the property to the defendant, who out of the consideration moneys satisfied the plaintiff's first decree and other debts of *B*. The plaintiff obtained a third money decree against *B*, in execution of which the property was sold through the Civil Court and purchased by the plaintiff himself at the Court sale. He then sued to recover possession of the property from the defendant. In support of the plaintiff's claim, it was contended: (i) that the deed of sale relied on by the defendant was invalid, having regard to the provisions of s. 325A of the Civil Procedure Code (Act XIV of 1882); (ii) that the Collector was not warranted in acting upon the plaintiff's admission that the decree had been satisfied, because the satisfaction was one made out of Court, and not having been certified to the Court, it could not be recognized as a payment of the decree under s. 258 of the Code; and (iii) that the sale to the defendant was illegal and void under s 276, because the property was on the date of the sale under attachment in the plaintiff's *darkhast* ultimately disposed of by the Collector, on the strength of the plaintiff's application that it should be returned to the Court as "disposed of" in consequence of the decree *Held*, (i) that the sale to defendant was not void under the provision of s 325A, inasmuch as ss. 322 to 325 presupposed

CIVIL PROCEDURE CODE (ACT XIV OF 1888) —*contd.*

———— **s. 276**—*contd.*

a decree which had to be satisfied and which was therefore capable of execution. That could not be said of a decree which its holder by his declaration to the Collector acknowledged to have been satisfied (ii) That the intimation to the Collector who was in charge of the execution, amounted to a due certifying of the adjustment of the decree, which satisfied the conditions of s. 258 *Muhammad Said Khan v Payag Sahu, I. L. R. 16 All. 228*, followed. (iii) That s 276 did not apply: for though the attachment had existed at the date of the sale to the defendant and was never formally raised, the *darkhast* claim having been satisfied was no longer enforceable under it *Held*, further, that the second attachment itself was illegal under the provisions of the last portion of the first paragraph of s. 325A; and it could not affect the private sale to the defendant by *B*. *Held*, also, that the sale to the defendant was not illegal and void under s 276 of the Code by reason of the second *darkhast*. The moment the attachment of the plaintiff came to an end by reason of the satisfaction of his first decree sent to the Collector for execution, all claims enforceable under the attachment ceased to be enforceable under it A claim under another decree cognizable under s. 295 ceased to be operative for the purposes of ss. 276 and 295, the same being dependent upon the continuance of the said attachment *Sorabji E Warden v Govind Ramji, I L. R 16 Bom 91*, distinguished. *Umesh Chunder Roy v Raj Bullubh Sen, I L. R 8 Calc 279, Gobind Singh v Zalim Singh, I L. R. 6 All 33*, and *Kunhi Mossa v Makki, I L R. 23 Mad 478*, followed. When a decree-holder intimates to the Collector that his decree has been satisfied and that the necessity for its execution by the Collector has ceased to exist, the Collector's powers under ss 322 to 325 also cease, because the very foundation of them consisting in the fact of a decree which is alive and capable of execution, has disappeared The provisions of s 276 of the Civil Procedure Code (Act XIV of 1882) make the private alienation void not absolutely but only "as against all claims enforceable under the attachment" referred to in it Where the execution proceedings, in the course and for the purpose of which the attachment was made, have come to an end on account of satisfaction of the decree by the judgment-debtor, and in consequence the decree is no longer alive, the attachment also ceases and there is no longer any claim "enforceable" under the attachment to make the private alienation effected by the judgment debtor under the attachment void. The person for whose protection s. 276 was primarily intended has had his claim in that event satisfied otherwise than by the attachment. As to any claim under another decree, cognizable under s 295, that had been dependent on the continuance of the said attachment, when that attachment was swept away, all other claims cognizable under it ceased to be operative for the purposes of ss. 276 and 295. The only bar in the way of the private alienation was removed as if it never existed in law; and the question as to the private alienation made by the judgment-debtor to the defendant during the attachment became reduced to one between that judgment-debtor and his alienee. KHUSHALCHAND *v.* NANDRAM SAHEBRAM (1911)

I. L. R. 35 Bom. 516

CIVIL PROCEDURE CODE (ACT XIV OF 1888)
—contd.

——— s. 278—

See s. 268 . **I. L. R. 38 Bom. 631**

See EXECUTION OF DECREE.
I. L. R. 39 Calc. 298

See VOLUNTARY PAYMENT.
I. L. R. 40 Calc. 598

——— When a claim under s. 278, Civil Procedure Code, is dismissed without adjudication it is not obligatory on the claimant so bring a regular suit. *Sardhari Lal* v. *Ambika Pershad, L. R. 15 I. A. 123 : s. c. I. L. R. 15 Calc. 521 ; Kunj Behari* v. *Kandh Prashad, 6 C. L. J. 252,* referred to. But if such suit is brought, the claimant is bound by its result and cannot be heard to say that the suit was unnecessary. SANKER NATH PANDIT *v.* MADAN MOHAN DAS (1909) . . . . **14 C. W. N. 298**

——— ss. 278 to 283—*Execution of decree—Attachment—Objection to attachment—Objection dismissed—Suit to recover possession—Jurisdiction. Held,* on a construction of ss. 278, 279, 280 and 281 of the Code of Civil Procedure, 1882, that an objector may raise an objection to an attachment not only on the ground that he is in possession of the property attached but also on the ground that he has an interest in it, and that, when an executing Court disallows the claims of an objector under s. 281, the Court has jurisdiction to do so, notwithstanding the fact that it erroneously does not go into the question of possession but disallows the objection on some other ground. BHAGWAN DAS *v.* RAJ NATH (1912)
I. L. R. 34 All. 365

——— *Bar under s. 283, applies to parties to proceedings though subsequent to the order they become representatives of judgment debtor.—Orders under ss. 280, 281, 282, may deal with questions of titles.* Parties to proceedings under s. 278 of the Civil Procedure Code of 1882 and persons claiming through them who would be estopped by orders passed under ss. 280—282 do not cease to be parties to such proceedings and to be so estopped because subsequent to such order they acquire rights which enable them to stand in the shoes of the judgment-debtor. Orders under s. 280, 281 and 282 may determine questions of title. The power of the Courts in passing such orders is not confined to determining which of the parties is in possession. RAMU AIYAR *v.* PALANIAPPA CHETTY (1910) . **I. L. R. 35 Mad. 35**

——— ss. 278, 282, 283, 287—*Civil Procedure Code (Act V of 1908), O. XXI, rr. 62 and 63—Attachment of mortgaged property—Application to sell the property subject to mortgage lien—Property ordered to be sold free of mortgage—Order not referable to s. 283—Suit on mortgage a year after the date of the order—Limitation Act (IX of 1908), Art. 11.* The property in dispute was attached by the defendant's father under a decree passed by him in a suit of 1882. The plaintiff's father in response to a notice from the Court applied to have the property sold subject to his mortgage lien. In 1883 the Court rejected the application and directed that the property should be sold free from the alleged mortgage claim. Thereupon, in 1910, the plaintiffs sued to recover the amount due on the mortgage. Both the lower Courts held that the order of 1883 was passed under s. 282 of the Civil Procedure Code, 1882, and the same became

CIVIL PROCEDURE CODE (ACT XIV OF 1888)
—contd.

——— s. 278—*contd.*

conclusive under s. 283 of the Code and hence the suit was barred under Art. 11 of the Limitation Act, 1908. *Held,* (i) that the suit was not barred as from the terms of the application itself it was clear that it must be referred to s. 287, and not to s. 278 of the Civil Procedure Code ; 1882, and (ii) that, apart from the character of the application the Court's order of 1883 could not properly be referred to s. 283 of the Civil Procedure Code, 1882. With such an order as that s. 282 of the Code had no concern. *Durga Prasad* v. *Mansa Ram, 1 All. L. J. 531,* followed. *Nemagauda* v. *Paresha, I. L. R. 22 Bom. 640,* distinguished. GANESH KRISHNA *v.* DAMOO (1916)
I. L. R. 41 Bom. 64

——— ss. 278, 283—
See s. 268 . **I. L. R. 38 Bom. 631**

——— ss. 282, 287—*Decree—Execution—Attachment—Application to raise attachment by a third person—Court declaring lien in his favour—Property sold subject to lien—Third party suing the auction-purchaser for amount of lien—Auction-purchaser can question the existence of lien.* In execution of a money decree obtained by *G* against *H* certain property belonging to the latter was attached. *U* intervened in those proceedings and asked to raise the attachment on the ground that the property was his. The Court investigated the claim under ss. 280 and 281 of the Civil Procedure Code of 1882 and held that the property belonged to *H* and that *U* was entitled to a lien on the property for Rs. 687-11-3. The property was then sold at a Court sale subject to the lien and purchased by *N*. *U* sued *N* to recover the amount of his lien. *N* contended that the order passed in the miscellaneous proceedings did not bind him and that he was entitled to question the existence of the lien :—*Held,* that *N* was not bound by the order passed in the miscellaneous proceedings, for he could not be regarded as a party to it being not a representative either of the judgment-debtor or of the judgment-creditor. *Vasanji Haribhai* v. *Lallu Akhui, I. L. R. 9 Bom. 285, Vishvanath Chardu Naik* v. *Subraya Shivapa Shetti, I. L. R. 15 Bom. 290,* followed. *Held,* further, that *N* was entitled to question the existence of the lien, inasmuch as the order passed by the Court as to the lien could not be regarded as one passed under s. 282, but as one passed under s. 287 of the Civil Procedure Code of 1882. NARAYAN SADOBA *v.* UMBAR ADAM MEMON (1911) **I. L. R. 35 Bom. 275**

——— s. 283—

See s. 244. **I. L. R. 32 All. 129**

See ss. 268 AND 278.
I. L. R. 38 Bom. 631

See s. 278 . **I. L. R. 41 Bom. 64**

——— *Civil Procedure Code (Act XIV of 1882), ss. 278, 283—Suit by defeated claimant who had purchased property attached pending creditor's suit—Plea in defence that transfer fraudulent, if competent—Creditor if may act for himself—Transfer of Property Act (IV of 1882), s. 53—Property of greater value than debt—Relief, form of.* Where in a proceeding under s. 278, Civil Procedure Code, the Court held that the judgment-debtor and not the claimant was in

CIVIL PROCEDURE CODE (ACT XIV OF 1882) *—contd.*

——— s. 283—*contd.*

possession: *Held*, that a suit by a claimant under s. 283, Civil Procedure Code, should be decreed if it is found in that suit that the claimant *was in possession after a purchase for valuable* consideration—unless there is anything in the pleadings outside the scope of s. 283, Civil Procedure Code, to restrain or restrict such a result. It is competent to the defendant in such a suit to set up the defence that the transfer to the plaintiff was with intent to defraud him so in effect was not binding as against him. *Clough* v. *London and North-Western Railway Co., L. R. 7 Exch. 26, The Eastern Mortgage and Agency Co.* v. *Rebati Kumar Ray, 3 C. L. J. 260,* referred to. A creditor who *has already recovered judgment on his debt is* entitled to show that a transfer by the debtor was void as against his own claim; he is not bound to act on behalf of all the creditors. *Smith* v. [illegible]

ditor's demand, the latter cannot complain if his right to avoid the transfer is confined to that part of the property or if the transferee be made to satisfy his demand. The title of the plaintiff in the property purchased by him was declared subject to a direction that he should pay the amount of the defendant's decree within a period [illegible]

(1912) . . . . . 16 C. W. N. 717

——— ss. 285, 295—*"Claim or objection" entertainable under s. 285, nature of—Application for rateable distribution, if within.* An application for rateable distribution of proceeds of property realised in execution cannot be deemed to be an application for determination of any "claim to the attached property or of any objection to attachment thereof," within the meaning of s. 285 of the Civil Procedure Code (Act XIV of 1882). These words refer to claims and objection of the sort which can be summarily inquired into and decided in execution proceedings as provided in *the immediately preceding section or elsewhere* [illegible]

sidered. RAMJAS AGARWALA v. GURU CHARAN SEN (1909) . . . . 14 C. W. N. 396

——— s. 287—

See s. 282 . I. L. R. 35 Bom. 275

——— *Execution of decree—Mortgage on property sold notified at time of sale—Subsequent suit on mortgage—Auction purchaser not estopped from questioning validity of mortgage.* In proceedings in execution of a decree, a person alleging himself to be the mortgagee of property about to be sold asked the executing Court to notify the existence of his prior incumbrance on the property to be sold, and the Court, without apparently making any inquiry as to the genuineness of the mortgage, did so, but did not sell the property subject to the prior incumbrance. The property was sold and purchased by the decree-holder. *Held*, on suit by the mortgagee, that the decree-holder, auction purchaser, was not estopped from contesting the validity of the mortgage so notified. *Shib Kunwar Singh* v. *Sheo Prasad Singh, I. L. R. 28 All. 418,* followed. JAIRAJ MAL v. RADHA KISHAN (1913)

I. L. R. 35 All. 257

——— ss. 287, 291—

See SALE IN EXECUTION OF DECREE.

I. L. R. 39 Calc. 26

——— ss. 287, 293—*Execution of decree—Attachment of a house—Proclamation of sale—Auction sale—Default in payment of price by auction purchaser—Proclamation of re-sale—Errors in the proclamation of re-sale—Application by plaintiff's widow to recover from the defaulting purchaser the deficiency of price in the re-sale—Liability creature of statute relating to procedure—At the re-sale statute not complied with.* One Shivlal brought a suit against Bai Samrath. The suit was dismissed and a decree for defendant's cost, namely Rs. 96-2-10, was passed against the plaintiff. The defendant sold the decree to one Nathu, who, in execution attached Shivlal's house. A proclamation of sale was published and at the auction sale one Gangadas Dayabhai purchased the house for Rs. 1,325 and deposited one-fourth of the purchase-money. The purchaser, however, made a default in the payment of the balance in time and the house was again put up to sale. A second proclamation of sale was issued, but the description contained in this proclamation were discrepant and did not tally with those in the previous one. At the re-sale only Rs 260 were realized. Subsequently Shivlal's widow Bai Suraj having applied to recover from the defaulting purchaser the loss on the re-sale: *Held*, that the liability of the defaulting purchaser was the creature of a statute relating to procedure and that statute laid down in very clear terms that in the proclamation of sale the proclamation should *specify as fairly and accurately as possible the property to be sold.* The first proclamation did not [illegible]

show that the statute had not been complied with and that it could not be said that there was a re-sale of the property which was put up in the first instance. GANGADAS DAYABHAI v. BAI SURAJ (1911) . . . . I. L. R. 36 Bom. 329

——— ss. 287, 311, 312, 588, 591 to 596—

See APPEAL TO PRIVY COUNCIL.

I. L. R. 40 Calc. 635

——— s. 291—

See MORTGAGE . I. L. R. 37 Calc. 897

See SALE IN EXECUTION OF DECREE.

I. L. R. 39 Calc. 26

——— s. 293—

See ss. 287, 293 . I. L. R. 36 Bom. 329

CIVIL PROCEDURE CODE (ACT XIV OF 1888) *—contd.*

———— **s. 294—**

See APPEAL . **I. L. R. 38 Calc. 373**

———— **s. 295—**

See s. 276. **I. L. R. 37 Bom. 138**
I. L. R. 35 Bom. 516

See s. 285 . . **14 C. W. N. 296**

See ATTACHMENT. **I. L. R. 44 Calc. 662**

See LIMITATION . **I. L. R. 41 Calc. 654**

———— *Rateable distribution under several decrees—"Same judgment-debtor"—Decree against judgment-debtor—Subsequent decree against his legal representatives to be satisfied out of his estate.* *A* obtained a decree against one Maruthamuthu Pillai; subsequently, *B* obtained a decree against the legal representatives of Maruthamuthu Pillai and his estate in their hands. *B* applied under s. 295, Civil Procedure Code, to share rateably in the proceeds of property sold in execution of *A's* decree: *Held,* that *B* was not entitled to do so. *Govind Abaji Jakhadi* v. *Mahonivaj Vinayak Jakhadi, I. L. R. 25 Bom. 404,* followed. When a decree is obtained against the legal representatives of a deceased person, they are the judgment-debtors. *Kaliappan Servaikaran* v. *Varadarajulu, 19 Mad. L. J. 651* referred to. SRINIVASA AIYANGER *v.* KANTHIMATHI AMMAL (1910) . **I. L. R. 33 Mad. 465**

———— **s. 295, and O. XXI, rr. 63, 73 of the Code of 1908**—*Realisation of assets—Transfer of decree not necessary for rateable distribution of sale-proceeds of attached property—Application for rateable distribution may be made though copy of decree not received.* Where the same property is attached in execution of decrees by two Courts of different grades, the decree-holder in the inferior Court who had attached prior to realisation, may apply to the superior Court for rateable distribution of the sale-proceeds of the attached property and the transfer of his decree for execution to the superior Court is not necessary to enable him to do so. Assets are realised not when the deposit is made by the purchaser, but only when the balance of the purchase money is paid into Court. An application for execution to the superior Court is an essential pre-requisite of a general claim to rateable distribution. Where the lower Court has ordered the transfer of the decree for execution to the superior Court, an application after such order to the superior Court before it has received a copy of the decree would be sufficient to satisfy the requirements of O. XXI, r. 73, and to entitle the applicant to rateable distribution. ARIMUTHU CHETTI *v.* VYAPURI PANDARAM (1912) . **I. L. R. 35 Mad. 588**

———— **s. 306**—*Civil Procedure Code (Act XIV of 1882), ss. 306, 244, 311—Execution sale—Sale confirmed though balance of purchase-money not deposited—Sale, void or voidable.* Where a purchaser at an execution-sale failed to deposit the balance of the purchase-money as required by s. 306 of Act XIV of 1882, and yet the sale was confirmed: *Held,* that the balance of the purchase money not having been paid at all the sale was a nullity and not merely an irregular sale for which remedy might be had by application under s. 244 or 311 of this Code. *Ahmad Bakhsh* v. *Lalta Prasad, I. L. R. 28 All. 238; Bhim Singh* v. *Sarwan Singh, I. L. R. 16 Calc. 33,* distinguished. ALI MEAH *v.* KIBRIA KHATUN (1911).
15 C. W. N. 350

CIVIL PROCEDURE CODE (ACT XIV OF 1888) *—contd.*

———— **s. 306**—*contd.*

———— **s. 308—**

See CIVIL PROCEDURE CODE, 1908, O. XXI, R. 89 . **I. L. R. 32 All. 380**

———— **s. 310A—**

See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXI, R. 89.
I. L. R. 37 Bom. 387

See CONTRIBUTION. **I. L. R. 38 Calc. 1**

See JURISDICTION OF HIGH COURT.
I. L. R. 38 Calc. 832

See LIMITATION ACT, 1877, s. 3, SCH. II ARTS. 13 AND 14.
I. L. R. 33 All. 93

———— **ss. 310A, 312, 588—**

See APPEAL . **I. L. R. 38 Calc. 339.**

———— **s. 311—**

See APPEAL TO PRIVY COUNCIL.
I. L. R. 40 Calc. 635

See PARTIES . **I. L. R. 39 Calc. 881**

———— *Application to set aside sale—Dismissal for default—Appeal—Adjournment—Illness.* An order dismissing an application under s. 311, Civil Procedure Code, on the ground of the non-appearance of the applicant, is appealable. Where the parties were ready with their witnesses but the case was adjourned for want of time, and on the date fixed for hearing, the applicant wanted time on the ground of illness supported by a medical certificate from a Civil Hospital Assistant, but the Court refused the application: *Held,* that in the circumstances of the case the order was bad, and the case was remanded. BROJA SUNDAR ROY CHOWDHURY *v.* MOTI LAL MOZUMDAR (1910).
14 C. W. N. 573

———— *Understatement of value in sale-proclamation, if material irregularity.* Deliberate understatement of value of property in a sale-proclamation is a material irregularity within the meaning of s. 311, Civil Procedure Code, and a sale may be set aside on that ground. *Sadatmand Khan* v. *Phul Kuar, I. L. R. 20 All. 412: s. c. 2 C. W. N. 550,* followed. SIVADURGA DEBI *v.* RAJMOHAN PODDAR (1910).
15 C. W. N. 577

———— **ss. 311, 312—**

See APPEAL TO PRIVY COUNCIL.
I. L. R. 40 Calc. 635

See SECOND APPEAL.
I. L. R. 39 Calc. 687

———— **s. 312—**

See APPEAL . **I. L. R. 38 Calc. 339**

———— **ss. 313, 315—**

See SALE IN EXECUTION OF DECREE.
I. L. R. 37 Calc. 67

———— **auction-sale under—**

See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXI, R. 93.
I. L. R. 40 Mad. 1099

CIVIL PROCEDURE CODE (ACT XIV OF 1882)
—*contd.*

———— ss. 313, 318—

See Execution of decree.
I. L. R. 43 All. 520

———— s. 315—

See Sale in execution of decree.
I. L. R. 37 Calc. 67

———— *Execution of decree—Sale in execution—Auction purchaser deprived of property purchased owing to failure of judgment-debtor's title—Suit to recover purchase money—Limitation—Limitation Act (IX of 1908), Sch I, Arts. 62 and 120.* *Held*, (i) that an auction purchaser seeking to recover the purchase-money paid by him upon the ground that he has been deprived of the property purchased owing to failure of the judgment-debtor's title thereto has no right outside the Code of Civil Procedure; and (ii) that the remedy given by the Code of Civil Procedure is not a suit for money had and received, to which Art. 62 of the first Schedule of the Indian Limitation Act, 1908, would apply, but is a suit falling within the purview of Art. 120. *Munna Singh* v. *Gajadhar Singh, I. L. R. 5 All 577*, and *Mohiuddin Ibrahim* v. *Mahomed Mira Levai, 23 Mad. L. J. 457*, followed. *Ram Kumar Shaha* v. *Ram Gour Shaha, 13 C. W. N. 1050*, not followed. *Hanuman Kamat* v. *Hanuman Mandur, I. L. R. 19 Calc. 123*, distinguished. Sidheshar Prasad Narain Singh v. Goshain Mayanand (1913)
I. L. R. 35 All. 419

———— *Execution of decree—Sale in execution—Auction-purchaser deprived of property purchased owing to failure of judgment-debtor's title—Suit to recover purchase money.* Where property of a judgment debtor had been sold twice over in execution of decrees against him and purchased twice by different purchasers it was *held* that the second purchaser took no title by his purchase, inasmuch as at the time of sale the judgment-debtor's title was extinct, and that he was entitled to recover the purchase money which he had paid, and to follow it into the hands of other creditors of the judgment-debtor amongst whom it had been rateably distributed. Girdhari Das v. Sidheshwari Prasad Narain Singh (1918) . **I. L. R. 40 All. 411**

———— s. 316—

See Pre-emption . **I. L. R. 33 All. 45**

———— *Execution of decree—Purchase at auction sale—Date of accrual of auction purchaser's title.* *Held*, that under the Code of Civil Procedure, 1882, the title of a purchaser of immoveable property at a sale in execution of a decree to mesne profits arising therefrom does not accrue until the date of the confirmation of such sale. *Amir Kazim* v. *Parlan Mal, I. L. R. 24 All. 475*, and *Prem Chand Paul* v. *Purnima Dasi, I. L. R. 15 Calc. 546*, followed. Shiam Lal v. Nathe Mal (1910) . . **I. L. R. 33 All. 63**

———— s. 317—

See Estoppel . **I. L. R. 36 Mad. 564**

See Hindu Law—Joint Family Property. . . **I. L. R. 40 All. 159**
L. R. 44 I. A. 201

1. ———— *Civil Procedure Code (Act V of 1908), s. 66—Court-sale in execution—Certified purchaser—Benami—Mortgagee of certified*

CIVIL PROCEDURE CODE (ACT XIV OF 1882)
—*contd.*

———— s. 317—*contd.*

purchaser—Protection—Doctrine of constructive notice—Transfer of Property Act (IV of 1882), ss. 3 and 41. The mortgagee of the certified purchaser at a Court-sale is entitled to rely upon the title of his mortgagor including such immunity from suit as the law provides in support of the statutory title. S. 66 of the Civil Procedure Code (Act V of 1908) which may be called in aid for the purpose of assisting in the construction of s. 317 of the Civil Procedure Code (Act XIV of 1882)—supports this conclusion. *Hari Govind* v. *Ramchandra, I. L. R. 31 Bom. 61*, followed. The doctrine of
cases, first, whe
notice that the
incumbered or in
he is deemed to have notice of the facts and instruments to a knowledge of which he would have been led by an inquiry after the charge or incumbrance of which he actually knew, and, secondly, where the Court had been satisfied from the evidence before it that the party charged had designedly abstained from inquiring for the very purpose of avoiding notice. This does not conflict in any way with the statutory definition of notice in s. 3 of the Transfer of Property Act (IV of 1882). A purchaser of property is under no legal obligation to investigate his vendor's title. But in dealing with real property as in other matters of business regard is had to the usual course of business, and a purchaser who wilfully departs from it in order to avoid acquiring a knowledge of his vendor's title is not allowed to derive any advantage from his wilful ignorance of defects which would have come to his knowledge if he had transacted his business in the ordinary way. This is what is meant by "reasonable care" in s. 41 of the Transfer of Property Act (IV of 1882). Occupation of property which has not come to the knowledge of the party charged is not constructive notice of any interest in the property. Manji Karimbhai v. Hoorbai (1910)
I. L. R. 35 Bom. 342

2. ———— *Prior and subsequent mortgages—Purchase of part of mortgaged property in execution of decree on prior mortgage—Suit on second mortgage—Auction purchaser alleged to be benamidar of mortgagor—Transfer of Property Act (IV of 1882), s. 43.* A portion of certain mortgaged property was purchased by a third party at auction sale in execution of a decree on a prior mortgage. *Held*, on suit for sale by the subsequent mortgagee, that it was not open to the subsequent mortgagee to bring this portion again to sale upon the ground that the auction-purchaser was merely a *benamidar* for the mortgagor. *Ram Narain* v. *Mohamed, I. L. R. 26 All. 82*, followed. Sarju Prasad v. Bindeshri Bakhsh Pal Singh (1911) . . . . **I. L. R. 33 All. 382**

3. ———— *Public Demands Recovery Act (Ben. Act I of 1895, as amended by Ben. Act I of 1897), s. 19, sub-s. (2)—Suit to declare defendant's purchase of land at certificate sale benami for plaintiff if maintainable—Civil Procedure Code (XIV of 1882, s. 317), if applies.* By virtue of sub-s. 2 of s. 19 of the Public Demands Recovery Act, 1895, as amended by Act I, B. C., of 1897, the provisions of s. 317 of the Civil Procedure Code of 1882 (which correspond with those

CIVIL PROCEDURE CODE (ACT XIV OF 1888) —contd.

——— **s. 317**—*contd.*

of s. 66 of the Code of 1908) apply to the case of a purchaser at a sale in enforcement and execution of a certificate issued under the Public Demands Recovery Act and a suit by the plaintiff for a declaration that the defendant's purchase of certain lands in execution of such a certificate was *benami* on behalf of the plaintiff, was barred by the provisions of s. 317 of the Civil Procedure Code of 1882. *Ambika Prasad* v. *Gopal Buksh Das, 1 C. L. J. 550*, not followed. *Hari Charan Singh* v. *Chandra Kumar Dey, I. L. R. 34 Calc. 187 : s. c. 11 C. W. N. 745*, followed. BANGA CHANDRA NANDI *v.* TARA KINKAR PAL (1912).

16 C. W. N. 973

4. ——— *Co-decree-holder purchasing at execution sale, trustee for other decree-holders—Scope and object of s. 317.* Where one of several joint decree-holders applied for execution of the decree subject to the rights of the others and properties put up to sale in pursuance thereof was purchased by him: *Held*, that the purchase was for the benefit of all the decree-holders and the purchaser could not be allowed to retain the property as his exclusively and perpetrate a fraud against his co-decree-holders under cover of s. 317 of the Civil Procedure Code of 1882. The provisions of s. 317 of the Civil Procedure Code of 1882 were designed to create some check on the practice of making what are called *benami* purchases at execution sales for the benefit of judgment-debtors and in no way affect the title of persons otherwise beneficially interested in the purchase. *Bodh Singh Doodhooria* v. *Ganesh Chunder Sen, 12 B. L. R. 317*, referred to. GANGA SAHAI *v.* KESRI (1915) . . . . . **19 C. W. N. 1175**

——— **ss. 317 and 231**—

See HINDU LAW—INHERITANCE.

I. L. R. 37 All. 545

——— **ss. 318 and 319**—

See ss. 263, 264, 218, 219.

I. L. R. 36 Bom. 373

——— **s. 320**—

See s. 235 . **I. L. R. 34 Bom. 142**
See s. 276. . **I. L. R. 35 Bom. 516**

——— **ss. 324A, 272, 285**—*Execution of decree—Money lying with Collector—Prohibitory order upon Collector by another Court—The executing Court attaching the money in execution of another decree—Payment to the decree-holder—Remedy of the first decree-holder at whose instance prohibitory order was issued—Practice and procedure.* Ramchandra and others obtained a decree against Sambhu and another in the Court of the Subordinate Judge, Second Class, at Chalisgaon. Those decree-holders having applied for execution by attachment and sale of certain lands, the Court transferred the decree for execution to the Collector under s. 320 of the Civil Procedure Code (Act XIV of 1882). The Collector executed the decree and held the amount for payment to the decree-holders. In the meantime, the plaintiff obtained a decree for money against Ramchandra and others in the Court of the Subordinate Judge, First Class, at Dhulia; and in execution of the decree obtained attachment of the amount with the Collector by means of a prohibitory order under s. 272 of the Code. About this time, the defendant obtained a decree against Ramchandra and others in the Court of the Subordinate Judge, Second Class, at Chalisgaon; and in execution of his decree obtained an order of attachment of the said amount. In obedience to this second order the amount was remitted to the Chalisgaon Court, where it was paid to the defendant. The plaintiff sued to recover the money. The lower appellate Court applied the provisions of s. 285 and decreed the plaintiff's claim. *Held*, dismissing the plaintiff's suit, that it was governed not by the provisions of s. 285 but by those of s. 324A of the Civil Procedure Code (Act XIV of 1882). *Held*, further, that the prohibitory order passed by the Dhulia Court under the provisions of s. 272 was *ultra vires* and could not bind the Collector in view of the provisions of s. 234A under which he was acting. *Held*, also, that in virtue of s. 324A of the Civil Procedure Code (Act XIV of 1882) the Collector held the amount "at the disposal of the Court" (at Chalisgaon) which had transferred to him the decree for execution and which was bound to dispose of the amount in the manner and for the purposes mentioned in the third paragraph of that section; that it was open to the plaintiff to apply to the Court at Chalisgaon through the Court at Dhulia for rateable distribution under s. 295; and that according to the provisions of s. 324A, the Collector owed a special duty to the Chalisgaon Court and that Court alone had jurisdiction to deal with all questions as to the disposal of the amount. GOVINDJI VIRAMJ *v.* SAKHARAM GODINDA (1911)

I. L. R. 36 Bom. 519

——— **s. 325A**—

See s. 276 . **I. L. R. 35 Bom. 516**

——— *Disability of judgment-debtor to mortgage the property attached in execution of decree whilst under management of the Collector—Proper interpretation of section is to give it the exact and plain sense of the words used—No implied limitation can be read into it.* The incompetency imposed on a judgment-debtor by s. 325 of the Civil Procedure Code, 1882, to mortgage the property attached in execution of a decree whilst it is in the possession and under the management of the Collector, is, on the proper interpretation of the section in the exact and plain sense which the words imply, absolute, and no implied limitation can be read into it. Where, therefore, a judgment-debtor executed a mortgage of such property during the period of the Collector's management, the mortgage is void, notwithstanding it might have been intended only to be effective over any residue that might belong to the judgment-debtor after the management of the Collector came to an end. *Murray* v. *Murat Singh, 3 Nagpur L. R. 171*, and *Salu Bai* v. *Rajat Khan, 13 Nagpur L. R. 130*, upheld. *Magniram Vithuram Marwadi* v. *Bakubai, I. L. R. 36 Bom. 510*, dissented from. GAURISHANKAR BALMUKAND *v.* CHINNUMAYA (1918).

I. L. R. 46 Calc. 183

——— *"Alienation"—Mahomedan Law—Gift during marz-ul-maut—Will. Held* that a gift made by a Mahomedan during death illness is (i) under the Mahomedan Law a will and therefore valid as to one-third of the property comprised in it, and (ii) is not an alienation which

CIVIL PROCEDURE CODE (ACT XIV OF 1888) —*contd.*

——— s. 355A—*contd.*

might fall under the prohibition contained in s. 325A of the Code of Civil Procedure, 1882. MUHAMMAD SAYEED v. MUHAMMAD ISMAIL (1910).

I. L. R. 33 All. 233

——— *Transfer of Property Act (IV of 1882), s. 43—Specific Relief Act (I of 1877), s. 18—Attachment of lands—Transfer of execution proceedings to Collector—Letting out by Collector—Cesser of Collector's powers—Sale by the owner of his interest—Sale effective in favour of the purchaser.* The plaintiff was a creditor of the family of the defendants. The plaintiff's separated brother was also a creditor. The plaintiff's brother attached the family lands. The matter went in execution to the Collector who leased the lands to one Piraji. Subsequently the plaintiff and the defendants came to an understanding by which the plaintiff agreed to remit his mortgage debt and pay off his brother—the judgment-creditor—and the defendants agreed to sell him one of the lands. The plaintiff then obtained possession of the family lands from which he was ejected by the defendants. Thereupon, the plaintiff having brought a suit to recover possession. *Held,* allowing the claim, that the interest which the sale-deed purported to transfer to the plaintiff was the interest which the defendants had in the lands at the time of the transfer, and the Collector's powers having ceased by reason of the proceedings in attachment being closed, the conveyance of the defendant's interest to the plaintiff took effect in his favour. *Gangabai* v. *Baswant, I. L. R. 34 Bom. 175,* and *Udey Kunswar* v. *Ladu, 6 B. L. R. 283,* distinguished. *Per* SCOTT. *C.J.* 'There is no doubt that the effect of s. 324-A would have to invalidate such a sale as we now have

does not dispose of the question whether, after the Collector's powers have ceased by reason of the proceedings in attachment being closed, the conveyance of the defendants' interests will not take effect in favour of the purchaser. The statutory provisions bearing upon the point are s. 43 of the Transfer of Property Act and s. 18 of the Specific Relief Act which provide that where a person contracts to sell certain property having only an imperfect title thereto, the purchaser has the right, if the vendor has subsequently to the sale acquired any interest in the property to compel him to make good the contract out of such interest." MAGNIRAM VITHURAM v. BAKURAI (1912).

I. L. R. 36 Bom. 510

——— s.332—*Delivery of possession to decree-holder—Proceeding under s. 332, decision under, against decree-holder—Limitation—Act (XV of 1877), Sch. II, Arts. 11, 13, 120, 142.* Where in execution of a decree for possession the plaintiffs were put in possession of immoveable property and were then dispossessed by reason of a proceeding under s. 332 of the Civil Procedure Code being decided against them: *Held,* that a subsequent suit by the plaintiffs to recover possession was governed by Art. 142 of Sch. II of the Limitation Act, and not by Arts. 11, 13, or 120 thereof. *Ayyasami* v. *Samiya, I. L. R. 8 Mad. 82,* approved. MAINDI SARDAR v. GORA CHAND GHOSH (1912).

16 C. W. N. 971

CIVIL PROCEDURE CODE (ACT XIV OF 1888) —*contd.*

——— s. 332—*contd.*

——— s. 335— The only order under s. 335, Civil Procedure Code (Act XIV of 1882), upon which the character of finality is impressed is an order upon enquiry, and by parity of reasoning, the same effect can attach to an order under s. 332 only when an investigation has been made. *Kunj Behari* v. *Kandh Prashad, 6 C. L. J. 362,* relied upon. GOURI CHARAN PATNI v. SITA PATNI (1909) . . . . 14 C. W. N. 346

——— *Decree in terms of compromise—Execution of decree—Person in possession of property, a party to the suit but not a party to the decree—Purchaser in execution of decree trying to recover possession—Obstruction by the person in possession—Order for removal of obstruction in execution proceedings—Order not questioned by a suit—Finality of the order.* In a suit by a mortgagee against the mortgagor to recover the money due on the mortgage, defendant No. 2 who had purchased the equity of redemption from the mortgagor was made a party defendant. Ultimately the suit was compromised between the mortgagor and mortgagee and a decree passed in terms of the compromise. Neither to the compromise nor to the decree recording the compromise was defendant No. 2 a party. In execution of the decree, the mortgaged property was sold at a Court-sale and purchased by the plaintiff. When the plaintiff attempted to recover possession of the property, he was obstructed by defendant No. 2 who was in possession. On an application to remove the obstruction, the Court made an order for the removal of the obstruction in February 1908. The plaintiff recovered possession of the property in March 1908, but was dispossessed in June 1908. The plaintiff filed a suit in 1913 to recover possession of the property from defendant No. 2: *Held,* that the order for removal of obstruction was referable to s. 335 and not s. 331 of the Civil Procedure Code of 1882; that it was binding on defendant No. 2; and that as defendant No. 2 took no steps to have the same set aside within one year of its date it had become final. BHIMAJI RAMCHANDRA v. BHIMAPAI (1920).

I. L. R. 45 Bom. 573

——— ss. 341, 340—*Execution of decree—Arrest of debtor—Discharge pending an insolvency petition—Re-arrest in execution of the same decree—Indian Limitation Act (XV of 1877), Sch. II, Art. 179.* Where a judgment-debtor who has been arrested and sent to jail in execution of a decree obtains an *interim* release under s. 340 of the Code of Civil Procedure, 1882, such a release is not a discharge under s. 341 of the Code and does not exempt the judgment-debtor from liability to be re-arrested in execution of the same decree. An application, therefore, for execution in such circumstances of the decree by re-arrest of the judgment-debtor is one in accordance with law and saves limitation. *Shamji Devkaran* v. *Poonja Jairam, I. L. R. 26 Bom. 652,* followed. *Secretary of State for India* v. *Judah, I. L. R. 12 Calc. 652,* dissented from. SURAJ DIN v. MAHABIR PRASAD (1910) . . . . I. L. R. 33 All. 279

——— ss. 344 to 360A—

See PROVINCIAL INSOLVENCY ACT, s. 11, cl. (3) . . . 5 C. W. N. 213

CIVIL PROCEDURE CODE (ACT XIV OF 1888)
—*contd.*

——— s. 349—

See s. 341 . **I. L. R. 33 All. 279**

——— s. 351—*Application to be adjudged insolvent by person against whom certificates issued under the Public Demands Recovery Act (I of 1895)—District Judge if may entertain application—Refusal—Appeal—Revision.* The District Judge had jurisdiction to entertain an application under Ch. XX of the Civil Procedure Code to be adjudged an insolvent notwithstanding that the debts, in respect of which relief is sought, have been certified and in part recovered against him under the provisions of the Public Demands Recovery Act. There is no appeal from an order refusing to entertain such an application. But such an order may be set aside by the High Court in exercise of its revisional powers. KEDAR BANS LAL MISSER *v.* MAHARANI JANKI KOER (1909).
14 C. W. N. 143

——— *Insolvency—Insolvent discharged without a schedule of debts being framed—Attempt on the part of a creditor to proceed against after-acquired property.* Where an insolvent had taken advantage of the provisions of Ch. XX of Code of Civil Procedure, 1882, and had been discharged under s. 351, but no schedule of debts had been framed, it was *held* that a judgment-creditor of the insolvent could not thereafter have recourse against property which had come into the hands of the insolvent subsequently to his discharge. AMIN-UD-DIN HAIDAR *v.* SHEORAJ SINGH (1913) . . . **I. L. R. 35 All. 402**

——— ss. 351 and 357—

See LIMITATION ACT (XV OF 1877), SCH. II, ART. 179. **I. L. R. 39 Bom. 20**

——— ss. 361, 582—*Abatement of appeal on death of defendant-respondent—Actio personalis moritur cum persona—Application of rule to appeal by plaintiff—Costs.* In a personal action for an injunction a decree was given for the defendant with costs. Plaintiffs appealed. During the pendency of the appeal, the defendant-respondent died: *Held,* that the right to prosecute the appeal against the respondent's legal representative does not survive to the appellants. The rule *actio personalis moritur cum persona* is not interfered with merely because the person injured incurred his life-time some expenditure of money in consequence of the personal injury. *Pulling* v. *Great Eastern Railway Company, 9 Q. B. D. 110,* approved. *Kishna Behary Sen* v. *The Corporation of Calcutta, I. L. R. 31 Calc. 406,* approved. This rule applies as against the estate of a deceased respondent. *Paraman Chetty* v. *Sundararaja Naick, I. L. R. 26 Mad. 499,* distinguished. If an action fails what is incidental fails also and if an appeal abates as regards an injunction sought for it abates as regards the costs incurred by the appellant as a consequence of the dismissal of his suit. An appellant cannot be allowed to show that the decree refusing the injunction was wrong for the more purpose of getting rid of the direction as to costs. JOSIAM TIRUVENGACHARIAR *v.* SWAMI IYENGAR (1910).

I. L. R. 34 Mad. 7

CIVIL PROCEDURE CODE (ACT XIV OF 1888)
—*contd.*

——— ss. 366, 368, 371—

See LIMITATION . **L. R. 44 I. A. 218**
I. L. R. 45 Calc. 94

——— ss. 366, 371—*Abatement of suit—Mortgage—Joint Hindu family—Redemption suit by the mortgagor in his personal right—Second suit to redeem by coparceners not barred by abatement.* One *V*, a member of an undivided Hindu family, instituted in the year 1881 a suit for redemption against the mortgagee, but pending the suit he died on the 9th July 1883. On the 15th October 1883, the Court directed that the suit should abate. Subsequently in the year 1912 *T V's* son, and three grandsons filed a second suit for redemption of the same property alleging that the property being ancestral they had interest in it by birth. It was also alleged that an adult brother of *V* was interested as a coparcener in the same property. The trial Court dismissed the suit on the strength of the order of abatement passed on the 15th October 1883. On appeal, the District Court reversed the decree and remanded the suit for disposal. On appeal to the High Court: *Held,* that there being no indication that *V's* suit was brought in a representative capacity it would certainly be defective as a redemption suit according to all canons of procedure, and if the suit was defective *V's* personal right to sue did not embrace the rights of his coparceners and none of them would be concluded by the application of s. 371 of Civil Procedure Code (Act XIV of 1882). *Held,* also, that apart from the question raised upon s. 371, there was sufficient authority for the conclusion that since the introduction of the Code of 1877 no legal proceedings by *V* short of actual redemption would deprive his coparceners of their right to redeem against the mortgagee. *Per* CURIAM: The right of a mortgagee to enforce his security by sale in a suit against the person who executes with authority, express or implied, a mortgage of family property, without joining the coparceners interested, results from the authorized mortgage which carries with it the all embracing remedy. It does not follow that the defect of one co-owner who desires to redeem will bar the exercise of the same right by another: hence arises the necessity for joining all parties interested in one suit. RAMCHANDRA NARAYAN *v.* SHRIPATRAO (1915).
I. L. R. 40 Bom. 248

——— ss. 366, 371 and Act V of 1908, O. XXII, rr. 2, 9—*Judgment passed after death of party not absolute nullity—Such judgment not liable to collateral attack but must be set aside only by proper proceedings and unless so set aside bars a fresh suit.* A decree was passed in favour of a deceased plaintiff on the day of his death which occurred before the case was taken up for disposal and heard. In a suit brought by the representative of the plaintiff on the same cause of action and for the same relief, it was urged that the decree so passed was a nullity and that the subsequent suit was maintainable: *Held,* that the suit was barred. It is only when the representative of a deceased plaintiff fails to apply within the time allowed by law that a suit abates under

CIVIL PROCEDURE CODE (ACT XIV OF 1882) —*contd.*

———— **s. 366**—*contd.*

O. XXII, r. 2 of Act V of 1908 or that the Court could have passed an order under s. 366 of Act *XIV of 1882 that the suit shall abate.* A decree passed after death is not therefore an absolute nullity. The intention of the legislature in enacting s. 371 of Act XIV of 1882 and O XXII, r. 9 of Act V of 1908 is clearly that where a suit has *abated, no fresh suit shall be brought on the same* cause of action, and that any remedy which the representative of a deceased plaintiff may have is by application to the Court in which the suit was pending. GOODA COOPOORAMIER *v.* SOONDARAMMALL (1909) . . . **I. L. R. 33 Mad. 167**

———— **ss. 367, 368**—*Plaintiff's duty to bring proper representative of deceased defendant on record—Decree against wrong person—Suit against proper party based on justment, if lies—Limitation.* When a defendant dies it is for the plaintiff to choose against whom he purposes to proceed, and if some one else with an adverse claim to the nominee wishes to be made the repesentative, *he should be added as a party.* The *provisions* of s. 367 of Act XIV of 1882 applied only in the [illegible] had no appli- [illegible] a defendant [illegible] JANESHWARI [illegible] **W. N. 129**

———— **s. 368**—

See LIMITATION . **I. L. R. 45 Calc. 94**

———— *Abatement of appeal—Death of a respondent pending appeal—Representative not brought on record—Decree against all—Cause of action not surviving in favour of other respondents—Pre-emption.* One of the defendants respondents in a suit for pre-emption died pending appeal. No application was made within limitation to bring his representatives on to the record, but the appeal was decreed as against all the respondents *Held,* that the suit being one in which the cause of action did not survive against the other respondents, the decree must be set aside as a whole. *Raj Chunder Sen v. Ganga Das Seal, I. L. R. 31 Calc. 487,* referred to. *Imdad Ali v. Jagan Lal, I. L. R. 17 All. 478,* distinguished. IMAM-UD-DIN *v.* SADABARTH RAI (1910). **I. L. R. 32 All. 301**

———— **s. 371**—

See s. 366 . **I. L. R. 40 Bom. 248**

See LIMITATION **I. L. R. 45 Calc. 94**

———— **s. 372**—

See EXECUTION PROCEEDINGS. **14 C. W. N. 752**

———— **s. 373**—

See JURISDICTION. **I. L. R. 44 Calc. 367**

———— *Legal representative—Abatement of suit—Withdrawal of suit with permission to bring a fresh one—Its effect on the representative not on record.* When a suit has abated against a defendant by reason of his legal representative not having been brought on the record within the time allowed by law and when the plaintiff thereupon withdraws his suit with permission to bring a fresh one, such a permission can only empower him to bring a fresh suit against those defendants who were on the record on the date of the withdrawal and not against the legal representatives of a defendant who was dead at the time of the withdrawal and whose said representatives had either not been brought on the record or had been removed from the record by an appellate order which set aside the order of the first court bringing them on the record. *Perumal v Karuppan, 21 Mad L J 574,* dissented from. SESHAMMA *v* SURYANARAYANA (1913). **I. L. R. 33 Mad. 643**

CIVIL PROCEDURE CODE (ACT XIV OF 1882) —*contd.*

———— **s. 373**—*contd.*

———— **ss. 373 and 375A**—*Execution of decree—Procedure—Leave to withdraw with permission to make a fresh application not permissible with regard to proceedings after decree* *Held,* that the provisions of Ch XXII of the Code of Civil Procedure (1882), which allowed withdrawal of a suit with permission to bring a fresh suit, did not apply to any application subsequent to the decree, and did not permit the withdrawal of an application for execution with permission to make a fresh application. MATA PALAT *v* BENI MADHO (1914) **I. L. R. 36 All. 172**

———— **s. 375**—

See s. 30 . **I. L. R. 38 Mad. 25**

See CIVIL PROCEDURE CODE (ACT V OF 1908), s 89, O. XXXIII, r. 3 **I. L. R. 40 Bom. 386**

See COMPROMISE . **I. L. R. 34 Bom. 502**
14 C. W. N. 451
I. L. R. 48 Calc. 469

See REGISTRATION OF DOCUMENTS, **L. R. 48 I. A. 240**

1. ———— *Dekkhan Agriculturists' Relief Act (XVII of 1879), s 12—Compromise of the case—Court's duty to record the compromise and pass decree in its terms—Pleader's compromising without authority from his client—Client to apply to cancel the compromise* There is nothing in the provisions of s. 12 or in any other section of the Dekkhan Agriculturists' Relief Act, 1879, which expressly deprives the parties to a suit of the power of entering into a compromise and having that compromise recorded under s. 375 of the Civil Procedure Code of 1882, which is the same as O XXIII, r. 3 of the Code of 1908 A compromise means the settlement of a disputed claim Where a party complains that a compromise *effected in his name by his pleader* was unauthorised, he must move the Court to cancel all that has been done and to revive the suit. *Eranagowda v. Chanabasappa, I. L. R. 31 Bom. 195,* followed PIRAJI *v.* GANAPATI (1910) **I. L. R. 34 Bom. 502**

2. ———— *"Relates to the suit," construction of—Res judicata—Wrong decision on question of law, no bar to subsequent decision—Registration Act, ss. 3, 17—Provisions of Act do not relate to judicial proceedings—Precise, effect of—Transfer of Property Act, ss 107, 108 (b)—Possession of right to recover rent. Mortgages.* The words "relates to the suit" in s. 375 of the Code of Civil Procedure mean "relates to the matter of the claim in the case" and there is nothing in the section to restrict the relief granted by the compro-

CIVIL PROCEDURE CODE (ACT XIV OF 1888) —*contd.*

——— s. 375—*contd.*

mise to what is prayed in the plaint or less. Where the parties to a suit litigate as lessor and lessee for the ownership and possession of land, it is open to the parties to provide by compromise in what manner such land should be owned and enjoyed and such provision, although different from and even inconsistent with the plaint, "relate to the suit" within the meaning of s. 375 of the Code. *Venkatappa Nayanim* v. *Thimmappa Nayanim, I. L. R. 18 Mad. 410,* not followed. *Muthu Vijaya Raghunatha Udayana Thevar* v. *Thandavaraya Tambiran, I. L. R. 22 Mad. 214,* not followed. *Joti Kuruvetappa* v. *Izari Sirusappa I. L. R. 30 Mad. 478,* followed. An order or decree based on a mistake of law does not operate as *res judicata* in a subsequent proceeding in which the operation of such decree or order is not called in question. *Mangalathammal* v. *Narayanaswami Aiyar, I. L. R. 30 Mad. 461,* referred to. The provisions of the Registration Act do not apply to proper judicial proceedings whether consisting of pleadings filed by the parties or orders made by the Court. A compromise petition is a pleading filed by parties and can be sued on although not registered. *Bindeseri Naick* v. *Ganga Surani Sahu, I. L. R. 20 All. 171,* followed. Cases which are clearly outside the scope of an enactment cannot be brought within it by any inference drawn from the terms of a proviso. Decree and orders generally are outside the scope of sub-s. 1 of s. 3 of the Registration Act. Decrees and orders relating to leases, which are governed by cl. (*d*) of sub-s. (1) to s. 17 cannot be brought within sub-s. (1) of s. 3 merely because sub-s. 2 of s. 17, which is in the nature of a proviso, expressly exempts certain orders and decrees relating only to cls. (*b*) and (*c*) of sub-s. (1) to s. 17 of the Act. When the subject-matter of a lease is the rents and profits of land, the possession which a lessor, under s. 108 (*b*) of the Transfer of Property Act, is bound to give the lessee, is sufficiently given by giving notice of the lease to the ryots or other persons in occupation and requiring them to attorn and pay rent to the lessee. Attornment by the tenants and actual receipt of rent is not necessary to give the transferee possession of the rent. Such notice will amount to delivery of possession, only where the transferor himself has possession to give and not where he is himself out of possession. NATESA CHETTI *v.* VENGU NACHIAR (1909).
I. L. R. 33 Mad. 102

——— *Compromise agreed on behalf of minors by guardian appointed by the Court of Wards—Compromise, if binding, when not examined and approved by Court—Court of Wards Act (IX of 1879, B. C.), s. 14.* A guardian appointed by the Court of Wards on behalf of infants has power to compromise proceedings in the Civil Court to which the infants are parties, and such compromise has to be registered by the Court without the necessity of the Court examining and assenting to its terms. NAKIMO DEWANI *v.* MUSAMMAT PEMBA DICHEN (P.C.)
25 C. W. N. 797

——— s. 375-A—

See s. 373 . **I. L. R. 36 All. 172**

——— ss. 375 and 464—

See COMPROMISE . **I. L. R. 42 All. 469**
I. L. R. 48 Calc. 469

CIVIL PROCEDURE CODE (ACT XIV OF 1883) —*contd.*

——— ss. 376, 506, 508, 510—

See ARBITRATION **I. L. R. 33 All. 743**

——— s. 392—

See CIVIL PROCEDURE CODE, 1908, O. XXVI, R. 9 **I. L. R. 44 Mad. 640**

See RIGHT OF SUIT.
I. L. R. 39 Mad. 501

——— s. 396—*Partition—Preliminary decree in plaintiff's favour—Resistance to commissioner—Refusal of plaintiff's application for re-issue of commission.* A preliminary decree for partition of a house having been made, the Court appointed a commissioner to view the house and prepare a scheme for partition. In this he was resisted by the husband of the plaintiff and was unable to execute the commission. The plaintiff applied for the issue of a fresh commission, but the Court refused this and dismissed the suit altogether. *Held,* that the Court had no authority to nullify its decree by totally dismissing the suit, but ought to have acceded to the request of the plaintiff to re-issue the commission and to have seen that its order was obeyed. MASUM-UN-NISSA *v.* LATIFAN (1910) . . . **I. L. R. 32 All. 319**

——— s. 411—*Suit for dower pending execution of decree for sale upon mortgage.* Respondents obtained a decree for sale of their mortgage on 17th December 1895. Pending execution the wife of the mortgagor brought a suit *informa pauperis* against her husband and his mortgagees for dower claiming a prior charge. It was found that the dower debt was not charged and on the 11th May 1897 her suit was dismissed as against the mortgagees and a money decree passed and under s. 411 of the Civil Procedure Code the amount of Court fees due to Government was made. First charge on the amount decreed. The Collector in order to get the Court fees brought the property to sale. Respondents got it again put up for sale in execution of the decree of the 17th December 1895. *Held,* that the second sale was good and took priority. RAGHO PRASAD *v.* MEWA LAL
I. L. R. 34 All. 223

——— s. 424—

See CIVIL PROCEDURE CODE (ACT V OF 1908), s. 80 . **I. L. R. 37 Mad. 113**

1. ——— *Suit against Government—Notice—Bhagdari and Narvadari Act (Bom. Act V of 1862), s. 3—Mortgage of a narva—Collector declaring the mortgage invalid—Suit against Collector without notice.* The plaintiff filed a suit against the Collector of Kaira to obtain a declaration that an order passed by that officer under s. 3 of the Bhagdari and Narvadari Act (Bom. Act V of 1862), declaring some mortgages in plaintiff's favour null and void, was inoperative. No notice was given to the defendant as provided for by s. 424 of the Civil Procedure Code of 1882: *Held,* that the notice required by s. 424 of the Civil Procedure Code of 1882 was necessary to be given; for the declaration was a distinct act of the Collector, done in the exercise of a statutory power and therefore in his official capacity. *Per* CURIAM: "The true test of an action for the purposes of s. 424 is whether the wrong complained of as having been done by the public officer sued amounts, first, to a distinct act on his part, and secondly, whether that act purported to have been

CIVIL PROCEDURE CODE (ACT XIV OF 1882) *—contd.*

——— s. 424—*contd.*

done by him in his official capacity. Both these elements must combine to render necessary the giving of notice under s. 424 as a condition precedent to suit." CHHAGANLAL KISHOREDAS *v.* THE COLLECTOR OF KAIRA (1910).

I. L. R. 35 Bom. 42

2. ——— *Suit for injunction—Suit against Secretary of State for India—Notice—Inam—Resumption.* The plaintiff, an Inamdar of a village was called upon by the Col-

[illegible]

upon, without giving the notice required by s. 424 of the Civil Procedure Code (Act XIV of 1882), filed a suit against the Secretary of State for India in Council for a declaration that he was entitled to hold the village in *inam*, and for a permanent injunction restraining the defendant from resuming the village. *Held*, that the suit was bad in s 424 of the Civil Procedure Code (Act XIV of 1882). The term "act" used in s. 424 of the Civil Procedure Code in 1882 relates only to the public officers, not to the Secretary of State. The expression "no suit shall be instituted against the Secretary of State in Council" is wide enough to include suits for every kind, whether for injunction or otherwise. *Per* HEATON, *J.*—Where there is a serious injury so imminent that it can only be prevented by an immediate injunction, a Court will not be debarred from entertaining the suit and issuing the injunction though the section requires previous notice, if it is owing to the immediate need of the injunction that the plaintiff has come to the Court for relief before giving the required notice. *Flower* v. *Local Board of Low Leyton, 5 Ch. D. 347,* followed. SECRETARY OF STATE *v.* GAJANAN KRISHNARAO (1911) . . . . I. L. R. 35 Bom. 362

——— s. 443—*Decree in terms of award—Decree passed by consent of minor's mother—Mother not appointed guardian* ad item*—Decree not binding on the minor.* In 1896, the plaintiff's father mortgaged his house to defendant No. 1 for Rs 1,000. After his death, his widow, on behalf of her minor son (plaintiff), referred the mortgage claim to arbitration. The arbitrators settled the claim at Rs. 1,200. Defendant No. 1 applied to the Court for a decree in terms of the award; and the widow having consented, a decree was passed. In execution of the decree the house was put up to sale and purchased by defendant No. 1 for Rs. 1,700 The plaintiff attained majority in September 1911 and sued in August 1912 for a declaration that the decree was null and void, and for taking accounts of the mortgage of 1896 under the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879). He alleged that the arbitrators in taking accounts did not give him the benefit of the Dekkhan Agriculturists' Relief Act; that in the Court proceedings that followed on the award no guardian was appointed for him; and that at the Court-sale the house was sold at an undervalue: *Held*, that inasmuch as the plaintiff's interest had not been duly protected the absence of a guardian *ad litem* in the Court proceedings of 1901 rendered the decree null and void under s. 443 of Civil Pro-

CIVIL PROCEDURE CODE (ACT XIV OF 1882) *—contd.*

——— s. 443—*contd.*

cedure Code of 1882. *Held*, therefore, that the plaintiff was entitled to accounts of the mortgage of 1896, under the provisions of the Dekkhan Agriculturists' Relief Act, 1879. SADASHIV RAMCHANDRA *v.* TRIMBAK KESHAV (1919).

I. L. R. 44 Bom. 202

——— ss. 443, 456—

See MINOR . . I. L. R. 32 All. 287

——— ss. 443, 456, and 462—

See MINOR . . I. L. R. 35 All. 487
L. R. 34 Bom. 502

——— s. 456—

See MINOR . I. L. R. 35 All. 287
I. L. R. 35 All. 487

——— *Application for appointment of guardian—Absence of affidavit, whether sufficient to invalidate proceedings—Minor, suit by, to invalidate proceedings in which he was duly represented by a guardian, whether competent—Limitation—Indian Limitation Act, IX of 1908, Art. 12. Held*, that the absence of an affidavit such as is required by the provisions of s. 457 of the Code of Civil Procedure of 1882 is not sufficient to render the proceedings illegal and void as against the minor on the ground that he was not properly represented. *Mannu Lal* v. *Ghulam Abbas, I. L. R. 32 All. 287, P. O.,* referred to. *Held*, also, that where a decree has been made against a minor duly represented by his guardian and the minor on attaining his majority seeks to set aside that decree was a separate suit he can succeed only on proof of fraud or collusion on the part of his guardian. If the guardian neglected to support the case of the minor and there is nothing to show that he did so deliberately that circumstance alone would not entitle the minor to avoid the operation of the decree. *Raghubar Dyal* v. *Bhikya Lal, I. L. R. 12 Calc. 69,* and *Chandar Sekhar* v. *Balakdhar (15 Indian Cases 611),* referred to. *Hira Singh* v. *Ghulam Qadir, 19 P. R. 1918, Narsing Narain* v. *Jahi Mistry, (13 Indian Cases 414),* and *Khiaraj Mal* v. *Daim, I. L. R. 32 Calc. 296,* distinguished. *Held*, further, that a suit for possession of the property sold in execution of such a decree is governed by Art. 12 of the Limitation Act. IMAM DIN *v.* PURAN CHAND.

I. L. R. 1 Lah. 27

——— s. 462—

See s. 13 I. L. R. 36 Bom. 53

See MINOR . I. L. R. 35 All. 487

See TRUSTEE . I. L. R. 39 Mad. 115

1. ——— *Minor—Compromise—Sanction of Court not obtained—Compromise not binding on minor.* When a suit, to which a minor is a party, is compromised and no leave of the Court is obtained under s. 462 of the Civil Procedure Code (Act XIV of 1882) the compromise does not bind the minor and is voidable. The fact that it is for the benefit of the minor, or that he has derived benefit from it, makes no difference. BHIWA *v.* DEVCHAND (1911).

I. L. R. 35 Bom. 322

2. ——— *When leave of Court not obtained, compromise not binding on minor—Hardship to other party on* [illegible] *upheld*"

CIVIL PROCEDURE CODE (ACT XIV OF 1882) —*contd.*

——— s. 462—*contd.*

compromise—Minor not bound to return any benefit under compromise before it is set aside—Joint contract, liability on. A compromise entered into on behalf of a minor without obtaining leave of the Court under s. 462 of the Code of 1882, is unenforceable against the minor. It cannot be treated as binding upon him on the ground that its being set aside would work hardship on the other party. It is also *no ground for not setting it aside* that it is impossible to place the parties in the position in which they were when the compromise was effected. The withdrawal from the suit by the other party cannot be considered as service rendered to the minor, for which the minor ought to pay compensation before the compromise is set aside. *Aman Singh* v. *Narain Singh, I. L. R. 20 All. 98,* not followed. The fact that a joint contract is not enforceable against one of the parties does not absolve the other party from liability. SETHURAM SAHIB *v.* VASANTA RAO ANANDA RAO DHYBAR (1910) . . . . **I. L. R. 34 Mad. 314**

3. ——— *Compromise of decree made in partition suit by guardian* ad litem *without leave of Court—Suit by minor on attaining his majority to set it aside—Father of Hindu joint family made guardian* ad litem *of his son, being also himself a defendant in partition suit—Powers of head of Hindu joint family—Decree in partition suit in favour of father—Form of decree in setting aside compromise.* S. 462 of Civil Procedure Code (Act XIV of 1882) provides that "no next friend or guardian for the suit shall, without the leave of the Court, enter into any agreement or compromise on behalf of a minor with reference to the suit in which be acts as next friend or guardian." Where in a suit for partition by a member of a joint family, the father was made third defendant, and his son, a minor, was made sixth defendant, and the Court appointed the father guardian *ad litem* of the minor: *Held* (reversing the decisions of the Courts in India), that the powers of the father were controlled by the provisions of s. 462 of the Code, and he could not without leave of the Court, do any act in his capacity of father, or managing member of the joint family which he was debarred from doing as guardian *ad litem.* To hold otherwise would be to defeat the object of the enactment. A compromise made, without the leave of the Court, by the father with the second defendant, of a decree passed against the latter, was held therefore, in a suit brought by a minor on attaining his majority to be not binding on him. The fact that the money was by the decree made payable, not to the minor, but to the father who was admittedly representing the family, made no difference in the duty which lay on him to obtain the leave of the Court to an agreement which was clearly intended to affect the rights and interests of the minor. The decree made by their Lordships was to the effect that the compromise was not binding on the minor, and he was remitted to his original rights under the decree in the partition suit. *Manohar Lal* v. *Jadunath Singh, I. L. R. 28 All. 585, 589 ; L. R. 33 I. A. 198, 131,* followed. GANESHA ROW *v.* TULJARAM ROW (1913). **I. L. R. 36 Mad. 295**

4. ——— *Compromise of suit on behalf of minor made without obtaining leave of the Court—Liability of other party to a joint bond so executed as part of the compromise.* A compromise made on behalf of a minor without having complied with the requirements of s. 462 of the Civil Procedure Code, 1882, as to obtaining leave of the Court, is not enforceable against the minor. The fact that a joint bond executed as a part of the compromise was not enforceable against the minor did not absolve the other obligee from liability. JAMNA BAI *v.* VASANTA RAO (1916). **I. L. R. 39 Mad. 406**

CIVIL PROCEDURE CODE (ACT XIV OF 1882) —*contd.*

——— s. 462—*concld.*

——— ss. 462, 464—

See COMPROMISE . **I. L. R. 44 Calc. 829**

——— s. 464—

See COMPROMISE . **I. L. R. 48 Calc. 469**

——— ss. 470 to 474, 578—

See INTERPLEADER **I. L. R. 37 Calc. 552**

——— s. 474—

See s. 2 . . **I. L. R. 33 Mad. 220**

——— s. 488—

See ATTACHMENT . **I. L. R. 38 Calc. 448**

——— s. 490—

See ATTACHMENT **I. L. R. 38 Calc. 448**

——— s. 492—

See CIVIL PROCEDURE CODE, 1908, O. XXXIX, R. 1 . **I. L. R. 33 All. 79**

——— s. 503—*Receiver appointed under section, powers of—Cannot recover from third parties whose rights date prior to his appointment.* A receiver appointed under s. 503 of the Code of Civil Procedure in respect of any movable or immovable property is entitled to take possession of it from the parties to the suit to manage it, etc. He is not entitled to recover possession from a third party a stranger to the suit whose rights date prior to his appointment. Such a receiver has no right to recover property sold before his appointment by the judgment-debtor on the ground that the sale is voidable as against the creditors on the principle embodied in s. 53 of the Transfer of Property Act. MAHAMED KASIM SAHIB *v.* PANCHAPAKESA CHETTI (1912). **I. L. R. 35 Mad. 578**

——— ss. 503, 505—

See LEASE . . **I. L. R. 45 Calc. 940**

——— s. 506—

See ARBITRATION. **I. L. R. 33 All. 743**
I. L. R. 37 Calc. 63

——— s. 508—

See ARBITRATION. **I. L. R. 33 All. 743**

——— s. 510—

See ARBITRATION. **I. L. R. 33 All. 743**

——— *Appeal to His Majesty in Council—Valuation of appeal—Attempt to raise valuation by adding interest to the amount decreed by the Court of first instance.* A plaintiff claimed a sum which, principal and interest, amounted to more than Rs. 10,000. He obtained in the court of first instance a decree for less than Rs. 10,000 with interest. The defendants, however, appealed to the High Court, and the plaintiffs' suit was dismissed. The plaintiff applied for leave to

CIVIL PROCEDURE CODE (ACT XIV OF 1882)
—*contd.*

———— s. 510—*contd.*

appeal to His Majesty in Council. *Held*, that the plaintiff could not bring his appeal above the statutory limit by adding to the amount decreed to him by the Court of first instance interest at the rate given by that Court. *Bank of New South Wales* v. *Owston, L. R. 4 A. C. 270*, distinguished. RAM KUMAR *v.* MUHAMMAD YAKUB
I. L. R. 42 All. 445

———— s. 521 (c)—

See ARBITRATION . I. L. R. 38 Calc. 522

———— s. 522—*Decree made in confirmation of an award of arbitrators, appeal if lies on the ground of invalidity of award—Art. 158 of Sch. II of the Limitation Act (XV of 1877).* There is no appeal against a decree made under s. 522, Civil Procedure Code, in confirmation of an award of arbitrators even when that decree is assailed on the ground that there was no award valid in law. *Ghulam Khan* v. *Muhammad Hassan, I. L. R. 29 Calc. 167 : s. c. 6 C. W. N. 226*, followed. The decision of the Judicial Committee in *Harnarain Singh* v. *Bhagwant Kuar, I. L. R. 13 All. 300*, cannot be treated as in any way in conflict with the later decision of the Judicial Committee in the case of *Ghulam Khan* v. *Muhammad Hassan, I. L. R. 29 Calc. 167 : s. c. 6 C. W. N. 226*, inasmuch as in the former case no question as to the competency of the appeal was raised either before the Judicial Committee or in the High Court. Where no application to set aside the award was made to the lower Court within the period of limitation prescribed by Art. 158 of the Limitation Act by the guardian *ad litem* of the appellant who was a minor at the time: *Held*, that the appellant could not be allowed to invite the High Court to interfere with the decree in the exercise of its revisional jurisdiction even on the ground that the reference to arbitration was made with the concurrence of a person who had no authority to act on behalf of the guardian of the appellant and that the award had therefore no existence in the eye of the law. SURYA NARAIN JHA *v.* BANWARI JHA (1912) . . 16 C. W. N. 626

———— s. 525—

See APPEAL . I. L. R. 38 Calc. 143

See s. 210 16 C. W. N. 34

———— *Arbitration—Award going beyond terms of reference, if valid—Party benefited if may repudiate award.—Acceptance of award in part, if permissible.* The plaintiff's right of passage along a pathway across the defendant's land being disputed by the latter, the question of its existence was referred to an arbitrator who

greater latitude than Courts of law in departing from rules of practice which Courts have adopted for general convenience, and an arbitrator's award is not open to interview on the merits upon grounds of error of law as well as of facts, an arbitrator cannot go beyond the precise questions submitted. But even though the arbitrator may have exceeded his authority, it is not open to the party benefited by the award to take exception to it on that ground, and the defendant therefore was bound

CIVIL PROCEDURE CODE (ACT XIV OF 1882)
—*contd.*

———— s. 525—*contd.*

by the award in this case. In a proceeding under s. 525, Civil Procedure Code (Act XIV of 1882), it is not competent to the Court to direct the award to be filed in part. If the award is bad in part, the Court should refuse the application to file it altogether. NARSINGH NARAYAN SINGH *v.* AJODHYA PROSAD SINGH (1911) . 16 C. W. N. 256

———— s. 539—

See s. 13 . . I. L. R. 32 All. 484

See s 30 . . I. L. R. 33 All. 660

See MAHOMEDAN LAW—ENDOWMENT.
I. L. R. 43 Calc. 1085

See RELIGIOUS ENDOWMENT.
I. L. R. 48 Calc. 493
I. L. R. 44 Mad. 233

1. ———— *Suit relating to public religious property—Ejectment of trespasser—Party of suit—Joinder of parties—Practice and procedure.* Where a breach of trust is complained of and where the alienee of trust property denies that the property is the subject of a public trust for religious purposes, he is a proper and necessary party to a suit brought under the provisions of s. 539 of the Civil Procedure Code of 1882, though no relief can be given as against him by way of a a decree in ejectment. COLLECTOR OF POONA *v.* BAI CHANCHALBAI (1911) . I. L. R. 35 Bom. 470

2. ———— *Trust for public religious purpose—Dedication of property as Shivar-*

not fall within the purview of s. 539 of the Civil Procedure Code of 1882. *Lakshmandas Parashram* v. *Ganpatrao Krishna, I. L. R. 8 Bom. 365*; *Vishwanath Govind Deshmane* v. *Rambhat, I. L. R. 15 Bom. 148*; *Kazi Hassan* v. *Sagun Balkrishna, I. L. R. 24 Bom. 170*; *Ravichand* v. *Samal (1886) P. J. 273*, followed. Where the trustees named by the testator for the purpose of making and completing the trust at the point of time fixed by him are dead, and the object of the trust as named by him is specific and definite, the Court will take the administration of the trust. *Moggridge* v. *Thackwell, 7 Ves. Jun. 36*; and *In re Pyne, Lilley* v. *Attorney-General, (1903) 1 Ch. 83*, followed. Where a Hindu who has directed a trust of his property for a religious purpose dies before giving effect to it, the Hindu law authorises his heir to take steps for carrying out his directions after recovering the property from a trespasser. Where the testator merely directs that his property should be endowed for a certain purpose at a certain time by certain persons after his death, then until the arrival of the time and the complete dedication of it in the manner and for the object pointed out by the testator, the property must be regarded, in the eye of law, as part of his estate but impressed with a trust or an obligation on the part of those taking that estate as heirs to carry out his directions at the appointed time. He who succeeds him as heir, has the right to do what the owner himself would have done or has directed to be done so as to complete the trust with the sanction of the Court, if

CIVIL PROCEDURE CODE (ACT XIV OF 1888) —*contd.*

———— s. 539—*contd.*

do that, he must first secure the property from the wrong-doer into whose possession it has passed. GHELABHAI GAVRISHANKAR *v.* UDERAM ICHARAM (1911) . . . . . **I. L. R. 36 Bom. 29**

3. ———— *Trust—"Public charitable or religious purposes"—Trust for benefit chiefly of a particular sect not necessarily not a public trust.* Where it was clearly established by evidence that certain property had been held for very many generations for the purpose of supporting and maintaining *fakirs*, entertaining visitors and for the giving of alms, and there was no evidence that the property was ever held for any other purpose, it was *held* that the Court ought to presume the existence of a charitable or religious trust within the meaning of s. 539 of the Code of Civil Procedure, 1882, and the trust was none the less a trust for a public purpose if its main object was in fact the support of *fakirs* of a particular sect and the propagation of the tenets of that sect. MAHANT PURAN ATAL *v.* DARSHAN DAS (1912)

I. L. R. 34 All. 468

4. ———— *Decree, effect of, for scheme under, bar to private rights—Specific Relief Act (I of 1877), s. 42—Consequential relief—suit for recovery of office of trustee and injunction substantially valued—Actual possession with tenants who were willing to pay to whomsoever was a trustee—Prayer for possession unnecessary.* Where the lands of a temple were in the actual possession of tenants who were willing to pay rent to whomsoever was the trustee, a suit which merely prays for the recovery of the office of trustee and for an injunction against the defendants who were in possession of the office, which injunction was valued at a substantial figure, *viz.*, Rs. 2,600, does not offend against the proviso to s. 42 of the Specific Relief Act (I of 1877) as the plaintiff had asked for such possession as he could under the circumstances and as the possession of the tenants would not be diverse to the plaintiff after his recovery of office. *Kunj Behari* v. *Keshavlal Hiralal, I. L. R. 28 Bom. 567,* followed. *Rathnasabapathi Pillai* v. *Ramasami Ayyar, I. L. R. 33 Mad. 452, Abdulkadar* v. *Mahomed, I. L. R. 15 Mad. 15, Narayanan* v. *Shankunni, I. L. R. 15 Mad. 255,* and *Jagannatha Charry* v. *Rama Rayar, I. L. R. 28 Mad. 238,* distinguished. *Subramanyan* v. *Paramaswaran, I. L. R. 11 Mad. 116,* and *Jagadindra Nath Ray* v. *Hemanta Kumari Debi, I. L. R. 32 Calc. 129,* referred to. Where an office of trustee was held by the members of a certain family for nearly a hundred years and by nobody else, the office must be held to be hereditary in that family. S. 539, Civil Procedure Code (Act XIV of 1882), corresponding to s. 92, Civil Procedure Code (Act V of 1908), is not applicable to a suit to enforce a private right such as an hereditary trusteeship of a certain family, and it is no bar to such a suit. *Budree Das Mukim* v. *Chooni Lal Johurry, I. L. R. 33 Calc. 789,* referred to. A scheme once settled by a Court cannot be altered except by the Court and then only on substantial grounds. *Attorney-General* v. *Worcester (Bishop), 9 Hare 328, In re Betton's Charity, 77 L. J. Ch. 193, Re Brown's Hospital* v. *Stamford, 60 L. T. 288,* and *Re Sekeford's Charity, 5 L. T. 488,* followed. A scheme framed under s. 539, Civil Procedure Code, is binding on all (whether worshippers or not) including even one who might have claimed a hereditary trusteeship and have brought a suit to enforce such a right before the settlement of the scheme; and a decree framing a scheme is a bar to a suit by such a person, even though the denial of such a right of suit might act very prejudicially to his interests and even though his application to be made a party to the scheme suit might have been rejected. S. 539 confers upon the Courts in this country the same powers that the Courts in England possessed at the time of its enactment, and the principles of English law are applicable. *Prayag Doss Ji Varu, Mahant* v. *Tirumala Srirangacharlavaru, I. L. R. 28 Mad. 319, 324, Chintaman Bajaji Dev* v. *Dhonda Ganesh Dev, I. L. R. 15 Bom. 612, Annaji* v. *Narayan, I. L. R. 21 Bom. 556,* and *Prayag Doss Ji Varu* v. *Tirumala Srirangacharla Varu, I. L. R. 30 Mad. 138,* referred to. RAMADOS *v.* HANUMANTHA RAO (1913) . . . . **I. L. R. 36 Mad. 364**

CIVIL PROCEDURE CODE (ACT XIV OF 1888) —*contd.*

———— s. 539—*concld.*

5. ———— *Held,* that the Advocate General can give a qualified sanction under this section and no fresh sanction was necessary for continuing the suit after the death of original plaintiffs and for the purposes of determining the scheme the suit could be revised against the son of the hereditary trustee who was the original defendant on latter's death. RAJA ANAND RAO *v.* RAMDAS DADURAM . **25 C. W. N. 794**

———— s. 545—

See EXECUTION OF DECREE. **I. L. R. 42 All. 158**

———— s. 546—

PROCEDURE . **I. L. R. 46 I. A. 228**

———— s. 551—

See JURISDICTION OF CIVIL COURTS. **I. L. R. 34 Bom. 267**

———— ss. 551, 577, 586—

See MORTGAGE (FORECLOSURE). **I. L. R. 39 Calc. 925**

———— ss. 562, 564—

See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XLI, R. 33. **I. L. R. 37 Bom. 289**

———— s. 564—

See REMAND . **I. L. R. 37 Calc. 171**

———— s. 568—

See WILL . . **I. L. R. 36 All. 93**

1. ———— *Appeal, admission of fresh evidence on—Court's power.* An appeal Court ought not to admit fresh evidence which, it is not suggested, was not available during the pendency of the trial in the Court of first instance. *Kessowji Issur* v. *Great Indian Peninsula Railway Co., I. L. R. 31 Bom. 381,* and *Krishnama Chariar* v. *Narasimha Chariar, I. L. R. 31 Mad. 114,* relied on. MIDNAPUR ZEMINDARY COMPANY, LD. *v.* MUKTAKESHI DASI (1912)

I. L. R. 40 Calc. 402
17 C. W. N. 615

2. ———— *"Or for any other substantial cause," effect of—Power of an appellate Court to admit additional evidence—"Other" not*

CIVIL PROCEDURE CODE (ACT XIV OF 1888)
—*contd.*

——— s. 568—*contd.*

ejusdem generis—"*To enable it to pronounce judgment,*" *meaning of—Appellate Court, all powers of original Court vest in.* An Appellate Court has power to admit further evidence under the clause "or for any other substantial cause" in s. 568, Civil Procedure Code, which cause need not be *ejusdem generis* with the causes stated in the previous part of the section *Kessowji Issur* v. *G. I. P. Railway Company, I. L. R. 31 Bom 381,* explained and distinguished. *Per* SADASIVA AYYAR, J.—The expression "to enable it (the Appellate Court) to pronounce judgment" means to enable it to pronounce a *satisfactory* judgment; an Appellate Court has all the powers of an original Court. ANDIAPPA PILLAI *v.* MUTHUKUMARA THEVAN (1913) . . I. L. R. 36 Mad. 477

3 ——— *Admission of evidence to impeach witness's credit—Opportunity to be given for explanation.* Where on appeal the Appellate Court admitted fresh evidence to prove that on a date on which a witness deposed to

and no witness, whatever his standing, would be safe from adverse judicial comment under such procedure. JAGRANI KOER *v.* KUAR DURGA PARSAD (1913) . . . 18 C. W. N. 521

——— s. 575—

See SALE FOR ARREARS OF REVENUE.
I. L. R. 39 Calc. 353

——— s. 578—

See INTEREST LEADER.
I. L. R. 37 Calc. 552

——— *Suit tried on merits in spite of defective verification—Defect, if material.* Where a plaint was verified by three out of six plaintiffs, who were adults, and by one of them on behalf of the next friend of the three remaining plaintiffs who were minors but without the next friend's authority, and the Court held that the plaint was not properly verified but nevertheless proceeded to try the case on the merits and dismissed it: *Held,* that the defect in the verification was cured by the provisions of s. 578 of the Code of Civil Procedure. *Bisheo* v. *John Smith, I. L. R. 22 All. 55, Shama Soondures* v. *Rohimuddin, 21 W. R. 71,* referred to. SASI BHUSAN DAS *v.* RASIK LAL RAY (1912)
17 C. W. N 869

——— s. 582—

See s. 391 . . I. L. R. 34 Mad. 76

——— s. 583—

See CIVIL PROCEDURE CODE, 1877, s. 583.
I. L. R. 38 All. 163

See ASSIGNEE OF A MONEY-DECREE.
I. L. R. 29 Mad. 33

——— *Decree reversed on appeal—Restitution—Mesne profits—Jurisdiction of Court to which application for restitution is made.*

CIVIL PROCEDURE CODE (ACT XIV OF 1888)
—*contd.*

——— s. 583—*contd.*

It is the legal effect of a decree of reversal that the party against whom the decree was given is to have restitution of all that he has been deprived of under it. A Court of Appeal does not necessarily enter into the question whether a decree, it is about to reverse, has been executed or not. *Hurro Chunder Roy Chowdhry* v. *Shoorodhonee Debia, 9 W. R. 402, Dorasami Ayyar* v. *Annasami Ayyar, I. L. R. 23 Mad. 306,* and *Collector of Meerut* v. *Kalka Prasad, I. L. R. 26 All. 665,* referred to. *Kalka Singh* v. *Paras Ram, I. L R. 22 Calc. 434,* distinguished. A mortgagor obtained a decree for redemption and in execution thereof recovered possession of the mortgaged property. On appeal, however, the High Court enhanced the sum payable by the plaintiff mortgagor and on his failure to pay, the suit was dismissed. The mortgagee thereupon applied to the Court of first instance asking to be restored to possession of the mortgaged property and also for mesne profits for the period during which he was out of possession. *Held,* that the Subordinate Judge had jurisdiction, not only to make restitution by restoring possession, but also to award mesne profits, although the decree of the High Court did not specifically provide for mesne profits. PARBHU DAYAL *v.* ALI AHMED (1909)
I. L. R. 32 All. 79

——— s. 584—

See REMAND . I. L. R. 43 Calc. 1104

See SPECIAL APPEAL.
I. L. R. 37 Mad. 443
I. L. R. 46 Calc. 186

——— ss. 584, 585—

——— *Second appeal—Questions of law and facts—Construction of document—Wajib-ul-arz—Land holder and tenant—Rights of Zamindars in respects of house sites and groves.* In a suit for a declaration of the proprietary title of the appellants to certain lands in a village, the first Court dismissed the suit on the ground that the respondent was the Zamindar, and the appellants only tenants of the lands The Subordinate Judge found on the construction of the Wajib-ul-arz of the village and other documentary evidence that the appellants were the owners of the lands in suit. On second appeal to the High Court it was contended that the Court was bound under s. 584 of the Civil Procedure Code, 1882, to accept the finding of the Subordinate Judge as conclusive, the question being one of fact, but the High Court rejected that contention *Held* (affirming that decision), that the Subordinate Judge's finding was arrived at by inferences drawn from a misconstruction of the Wajib ul arz. The right construction of documents was a question of law which the Court on second appeal was not precluded from considering under s. 584 and 585 of the Civil Procedure Code. On the true construction it was clear from the documentary evidence that the appellants were only tenants of the land, and not proprietors. FATEH CHAND *v.* KISHAN KUNWAR (1912) . . I. L. R. 34 All. 579

——— *Second appeal—Finding of fact upon misconstruction of documentary evidence, if conclusive—Construction of document, question of law—Wajib-ul-arz, as evidence of proprietary right—Extension of* [illegible] (AX

CIVIL PROCEDURE CODE (ACT XIV OF 1888) —*contd.*

——— s. 584—*contd.*

of 1858), to mouzah, if alters proprietary rights. The right construction of documents is a question of law which Judges in second appeal are not, by ss. 584 and 585 of the Civil Procedure Code, precluded from considering by any finding of a lower Appellate Court based upon such documents. Where the Court of first appeal found on its construction of the *wajib-ul-arz* and other documentary evidence that the plaintiffs were the owners of the lands in suit, and the High Court on second appeal, on their construction of the *wajib-ul-arz* and other documents in the suit, held that the plaintiffs were not the owners: *Held*, that the Court of first appeal having misconstrued the *wajib-ul-arz*, the High Court in second appeal was not bound to accept as correct its finding based upon such misconstruction. The *wajib-bl-arz* is cogent evidence of the rights as they existed when it was made of those holi holding proprietary or other rights of property within the mouzah. The Government by applying the Chaukidari Act to the mouzah did not alter and could not have altered proprietary rights in the mouzah or any part thereof. FATCH CHAND *v.* KISHEN KUAWAR . . 16 C. W. N. 1033

——— s. 586—

See MORTGAGE . I. L. R. 39 Calc. 926
16 C. W. N. 1033

——— s. 588—

See APPEAL . I. L. R. 38 Calc. 339

See APPEAL TO PRIVY COUNCIL.
I. L. R. 40 Calc. 635

——— s. 591—*Appeal ostensibly in suit but solely with reference to interlocutory application dismissed—No necessity to appeal separately from every interlocutory order.* An interlocutory application by a plaintiff in a suit to amend his plaint was refused and his suit decreed for part only of his claim. His appeal in that suit was directed solely against the refusal to amend: *Held*, that the appeal was directed against the decree in the suit within the meaning of s. 591 of the Code of Civil Procedure, Act XIV of 1882, though the only reason for the appeal was the erroneous decision in regard to the interlocutory order. *Sher Singh* v. *Diwan Singh, I. L. R. 22 All. 366*, not followed. *Sheo Nath Singh* v. *Ram Din Singh, I. L. R. 18 All. 19, 22*, not followed. *Maharaja Moheswar Singh* v. *The Bengal Government, 7 Moo. I. A. 283, 302*, relied on. DHAMARA KUMARA THIMMA NAYANIM *v.* BUKKAPATNAM VENKATACHARLU (1910) . . I. L. R. 34 Mad. 228

——— ss. 594 to 596—

See APPEAL TO PRIVY COUNCIL.
I. L. R. 40 Calc. 635

——— s. 596—Where a concurrent finding of fact was sought to be challenged before the Privy Council the ground that the Court of first instance had misdirected itself inasmuch as in the course of a long judgment certain materials of a most elementary character for arriving at a conclusion had not been set out in the narrative which the judgment contained: *Held*, that there was no ground for the suggestion that the Court had not taken these circumstances into account. That it would be to misconstrue entirely the provisions of s. 596 of Act XIV of 1882 as to concurrent findings of fact if the Judges of India were to have impliedly the duty laid upon them of making their narrative

CIVIL PROCEDURE CODE (ACT XIV OF 1888) —*contd.*

——— s. 596—*contd.*

of the circumstances minutely and completely exhaustive under the penalty that if they failed to do so, the absence from their mind of elementary considerations might be presumed. SAJJAD HUSAIN *v.* NAWAB WAZIR ALI KHAN (1912)
16 C. W. N. 889

——— s. 608—

See PRIVY COUNCIL, PRACTICE OF.
I. L. R. 38 Calc. 335

——— s. 622—

See ARBITRATION BY COURT.
I. L. R. 38 Calc. 421

——— *Religious Endowments Act, XX of 1863, s. 18—District Judge may, in disposing of petitions under s. 18, make inquiries.* An order of a District Judge under s. 18 of Act XX of 1863 is not open to revision under s. 622 of Act XIV of 1882, unless he acts illegally in the exercise of his jurisdiction. *In re Venkataswara, I. L. R. 10 Mad. 98*, referred to. A District Judge acting under s. 18 of Act XX of 1863 has power to make enquiries before disposing of the application for leave to sue and is not bound to decide on a bare perusal of the application. RAMANATHAN CHETTIAR *v.* ANANTHANARAYANA AYYAR (1909) . . . I. L. R. 33 Mad. 412

——— ss. 62 6, cl. (b), 629—

See REVIEW . I. L. R. 42 Calc. 830

——— ss. 629, 630—*Application for review granted if reopens whole case or only the special questions found wrongly decided—Final decree, appeal against—Grounds on which order for review may be questioned.* When an application for review is granted and the case re-heard, in an appeal against the final decree the propriety of the order whereby the review was granted can be challenged on the ground specified in s. 629 of the Code of Civil Procedure. When no such ground can be made out, but the order is sought to be challenged on the ground that it was made without jurisdiction, the proper course for the aggrieved party is to move the High Court in revision. When the application for review has been granted, the Court is not restricted at the re-hearing to a consideration of that question alone which has been argued upon the rule for review and found to have been erroneously decided. The whole case is re-opened unless the Court directs under the latter part of s. 630 that the case is to be heard only upon special points. What was intended to be decided in *Dhuronidhar Sen* v. *The Agra Bank, I. L. R. 5 Calc. 86* was that it was competent to the Court in its discretion to refuse to entertain at the re-hearing a question which had not been placed before the Court when the review was granted *Hurro Chunder Chakraburtty* v. *Ram Kissor Chukraburtty, W. R. (1864) 142, Byjnath Sahay* v. *Wuzeer Narain, 24 W. R. 427*, explained. *Sainal Ran Chhod* v. *Dullav Dvarka, 10 Bom. H. C. 360, Emperor* v. *Naryan Raghunath Patki, I. L. R. 32 Bom. 111, Hurbans Sahye* v. *Thakoor Purshad, I. L. R. 9 Calc. 209*, referred to. SADARUDDIN *v.* EKRAMUDDIN (1913) . . 18 C. W. N. 22

——— s. 635—

See PRACTICE . I. L. R. 37 Calc. 853

——— s. 647—

See ss. 244, 252, 647—
I. L. R. 34 Bom. 54

A comparative table showing the Sections of Act XIV of 1882 and the Corresponding Sections and Rules of Act V of 1908.

Section of Act XIV of 1882.	Corresponding Section of Act V of 1908.
1	1.
2	2.
3	154; 156; 157; 158.
4	4.
4-A	5.
5	7.
6, para. (c) and (d)	Omitted.
6, last para.	6.
7	Cf. 4.
8	8.
9	Omitted.
10	Omitted.
11	9.
12	10.
13	11.
Expln. VI	14.
14	13.
15	15.
16	16.
16-A	18.
17	20.
18	19.
19	17.
20	Omitted.
21	Omitted.
22	22; 23 (1).
23	22; 23 (2).
24, paras. 1 and 3	22; 23 (3).
24, para. 2	Omitted.
25	24.
26	O. I, rr. 1, 4 (a).
27	„ r. 10 (1).
28	„ r. 3, 4 (b).
29	„ r. 6.
30	„ r. 8 (1).
31	„ r. 9.
32	„ rr. 8 (2), 10 (2), (3), (5), 11.
33	„ r. 10 (4).
34	„ r. 13.
35	„ r. 12.
36	O. III, r. 1.
37	„ r. 2.
38	„ r. 3.
39	„ r. 4.
40	„ r. 5.
41	„ r. 6.
42	O. II, r. 1.
43	„ r. 2.
44	„ rr. 4, 5.
45	„ rr. 3, 6.
46 47	Cf. O. II, rr. 6, 7.
48	26, O. IV r. 1.

Section of Act XIV of 1882.	Corresponding Section of Act V of 1908.
49	Cf. 137.
50	O. VII, rr. 1, 2, 4,5, 6.
51	O. VI, rr. 14, 15 (1).
52	„ r. 15).
53	O. VII, r. 17.
54	O. VII, r. 11; Cf. O. VI, r. 18.
55	„ r. 12.
56	„ r. 13.
57	„ r. 10.
58	„ r. 9.
58, last para.	O. IV, r. 2.
59	O. VII, r. 11.
60	„ r. 15.
61	„ r. 16.
62	„ r. 17.
63	r 18.
64	27, O V, r. 1.
65	O. V. r. 2.
66	„ r. 3.
67	„ r. 4.
68	„ r. 5.
69	„ r. 6.
70	„ r. 7.
71	„ r. 8.
72	„ r. 9
73	„ r. 10.
74	„ r. 11.
75	„ r. 12.
76	„ r. 13.
77	„ r. 14.
78	„ r. 15.
79	„ r. 16.
80	„ r. 17.
81	„ r. 18.
82	„ rr. 19, 20 (1)
83	„ r. 20 (2).
84	„ r. 20 (3).
85	S 28 rr. 21, 23.
86	O. V. r. 22.
87 88	„ rr. 24, 29.
89	„ r. 25.
90	„ r. 26.
91	„ r 30 (1) (2).
92	„ r. 30 (3).
93	O. XLVIII, r. 1.
94	142, O. XLVIII, r. 2
95	143, O, XLVIII, r. 3
96	O. IX, r. 1.
97	„ r. 2.
98	„ r. 3.
99	„ r. 4.
99-A	„ r. 5.

A comparative table showing the Sections of Act XIV of 1882 and the Corresponding Sections and Rules of Act V of 1908—contd.

Section of Act XIV of 1882.	Corresponding Section of Act V of 1908.
100	O. IX, r. 6.
101	„ r. 7.
102	„ r. 8.
103	„ r. 9.
104	Omitted.
105	O. IX, r. 10.
106	„ r. 11.
107	„ r. 12.
108	„ r 13.
109	„ r. 14.
110	O. VIII, r. 1.
111	„ r. 6.
112	„ r. 9.
113	„ r. 10.
114	Cf. O. VI, r. 2.
115	„ rr. 14, 15.
116	„ rr. 16, 17.
117	O. X, r. 1.
118	„ r. 2.
119	„ r. 3.
120	„ r. 4.
121	O. XI, r. 1.
122	Cf. O. XLVIII, r. 2.
123	O. XI, r. 3.
124	„ r. 5.
125	„ r. 6.
126	„ r. 8.
127	„ r. 11.
128	O. XII, r. 2.
129	O. XI, r. 12, 13.
130	„ r. 14.
131	„ r. 15.
132	„ r. 17.
133	„ r. 18 (1).
134	„ r. 18 (2).
135	„ r. 20.
136	„ r. 21.
137	O. XIII, r. 10.
138	„ r. 1 (1).
139	„ r. 2.
140	„ rr. 1 (2), 3.
141	„ r. 4.
141-A	„ r. 5.
142	„ r. 6.
142-A	„ r. 7.
143	„ r. 8.
144	„ r. 9.
145	„ r. 11.
146	O. XIV, rr. 1, 2.
147	„ r. 3.
148	„ r. 4.
149	„ r. 5.
150	„ r. 6.
151	„ r. 7.

Section of Act XIV of 1882.	Corresponding Section of Act V of 1908.
152	O. XV, r. 1.
153	„ r. 2.
154	„ r. 3.
155	„ r. 4.
156	O. XVII, r. 1.
157	„ r. 2.
158	„ r. 3.
159	O. XVI, r. 1.
160	„ r. 2.
161	„ r. 3.
162	„ r. 4.
163	„ r. 5.
164	„ r. 6.
165	„ r. 7.
166	„ r. 8.
167	„ r. 9.
168	„ r. 10.
169	„ r. 11.
170	„ r. 12.
171	„ r. 14.
172	„ r. 15.
173	„ r. 16.
174 }	„ rr. 10 to 13,
175 }	17, 18.
176	„ r. 19.
177	„ r. 20.
178	„ r. 21.
179	O. XVIII, rr. 1, 2 (1).
180	„ rr. 2 (2), (3), 3.
181	„ r. 4.
182	„ r. 5.
183	„ r. 6.
184	„ r. 8.
185	„ r. 9.
185-A, 1st & 2nd paras.	S. 138.
185-A, 3rd para.	O. XVIII, r. 7.
186	„ r. 10.
187	„ r. 11.
188	„ r. 12.
189	„ r. 13.
190	„ r. 14.
191	„ r. 15.
192	„ r. 16.
193	„ r. 17.
194	O. XIX, r. 1.
195	„ r. 2.
196	„ r. 3.
197	139.
198	S. 33, O. XX, r. 1.
199	O. XX, r. 2.
200 }	Cf. S. 137.
201 }	
202	O. XX, r. 3.
203	„ r. 4.

A comparative table showing the Sections of Act XIV of 1882 and the Corresponding Sections and Rules of Act V of 1908—contd.

Section of Act XIV of 1882.	Corresponding Section of Act V of 1908.
204	O. XX. r. 5.
205	„ r. 7.
206, 1st & 2nd paras.	„ r. 6.
206, 3rd para.	.152
207	O. XX, r. 9.
208	„ r. 10.
209	34.
210	O. XX, r. 11.
211	} 2 (12), O. XX, r. 12.
212	
213	O. XX, r. 13.
214	„ r. 14.
215	„ r. 15.
215-A	„ r. 16.
216	„ r. 19.
217	„ r. 20.
218	} Cf. 35, O. XX, r. 6 (3).
219	
220	
221	
222	
223, 1st para.	58.
223, 2nd & 3rd paras.	39
223, 4th para.	41.
223, 5th para.	O. XXI, r. 4.
223, 6th paras.	„ r. 5.
224	„ r. 6.
225	„ r. 7.
226	„ r. 8.
227	„ r. 9.
228	42.
229	43.
229 A	45.
229-B	44.
230, 1st para.	O. XXI, r. 10.
230, 2nd para.	„ r. 21.
230, 3rd & 4th paras.	48.
231	O. XXI, r. 15.
232	„ r. 16.
233	49.
234	50.
235	O. XXI, r. 11 (2).
236	„ r. 12.
237	„ r. 13.
238	„ r. 14.
239	„ r. 26 (1), (2).
240	„ r. 26 (3).
241	„ r. 27.
242	„ r. 28.
243	„ r. 29
244	47.
245	O. XXI, r. 17.
245-A	56.

Section of Act XIV of 1882.	Corresponding Section of Act V of 1908.
245-B	O. XXI, r. 37.
246	„ r. 18.
247	„ r. 19.
248	„ r. 22.
249	„ r. 23.
250	„ r. 24 (1).
251	„ rr. 24 (2), (3), 25 (1).
252	52.
253	Cf. 145.
254	O. XXI, r. 30.
255	„ r. 42.
256	„ r. 11 (1).
257	„ r. 1.
257-A	Omitted.
258	O. XXI, r. 2.
259	„ r. 31.
260	„ r. 32.
261	„ r. 34 (1) to (4).
262	„ r. 34 (5).
263	„ r. 35.
264	„ r. 36.
265	54.
266	60.
267	O. XXI, r. 41.
268	„ r. 40.
269	„ r. 43.
270	„ r. 51.
271	62.
272	O. XXI, r. 52.
273	„ r. 53.
274	„ r. 54.
275	„ r. 55.
276	64.
277	O. XXI, r. 56.
278	„ r. 58.
279	„ r. 59.
280	„ r. 60.
281	„ r. 61.
282	„ r. 62.
283	„ r. 63.
284	„ r. 64.
285	63.
286	O. XXI, r. 65.
287	„ rr. 66, 70.
288	Omitted.
289	O. XXI, r. 67.
290	„ r. 68.
291	„ r. 69.
292	„ r. 73.
293	„ r. 71.
294	„ r. 72.

A comparative table showing the Sections of Act XIV of 1882 and the Corresponding Sections and Rules of Act V of 1908—contd.

Section of Act XIV of 1882.	Corresponding Section of Act V of 1908.
295	73.
296	O. XXI, r. 76.
297	,, r. 77.
298	,, r. 78.
299	,, r. 79 (1).
300	,, r. 79 (2).
301	,, r. 79 (3).
302	,, r. 80.
303	,, r. 81.
304	,, r. 82.
305	,, r. 83.
306	,, r. 84.
307	,, r. 85.
308	,, r. 86.
309	,, r. 87.
310	,, r. 88.
310-A	,, r. 89.
311	,, r. 90.
312	,, r. 92.
313	,, r. 91.
314	,, r. 92.
315	,, r. 93.
316	65, O. XXI, r. 94.
317	66.
318	O. XXI, r. 95.
319	,, r. 96.
320	68, 70 and 71.
321, 322, 322-A, 322-B, 322-C, 322-D, 323, 324, 324-A, 325, 325-A, 325-B, 325-C	Schedule III
326	72.
327	67.
328	O. XXI, r. 97.
329	,, r. 98.
330	,, r. 98.
331	,, r. 99.
332	,, rr. 100, 101.
333	,, r. 102.
334	,, rr. 97, 98.
335	,, rr. 97, 99, 103.
336	55.
337	O. XXI, r. 38.
337-A	,, r. 40.
338	57.
339	O. XXI, r. 39 (1) to (4).
340	,, r. 39 (5).
341, 342	58.
343	O. XXI, r. 25.
344—360-A	Repealed by the Provincial Insolvency Act, III of 1907.
361	O. XXII, r. 1.
362	,, r. 2.
363	,, r. 3 (1).
364	Omitted; repealed by Act VII of 1888, s. 32 (1).
365	O. XII, r. 3 (1).
366	,, r. 3 (2).
367	,, r. 5.
368	,, r. 4.
369	,, r. 7.
370	,, r. 8.
371	,, r. 9 (1), (2).
372	,, r. 10.
372-A	,, r. 9 (3).
373	O. XXIII, r. 1.
374	,, r. 2.
375	,, r. 3.
375-A	,, r. 4.
376	O. XXIV, r. 1.
377	,, r. 2.
378	,, r. 3.
379	,, r. 4.
380	O. XXV, r. 1. (1), (3).
381	,, r. 2.
382	,, r. 1 (2).
383	O. XXVI, r. 1.
384	,, r. 2.
385	,, r. 3.
386	76, O. XXVI, r. 4.
387	O. XXVI, r. 5.
388	,, r. 6.
389	,, r. 7.
390	,, r. 8.
391	78.
392	O. XXVI r. 9.
393	,, r. 10.
394	,, r 11.
395	,, r. 12.
396	,, rr. 13, 14.
397	,, r. 15.
398	,, r. 16.
399	,, r. 17.
400	,, r. 18.
401	O. XXXIII, r. 1.
402	Omitted.

A comparative table showing the Sections of Act XIV of 1882 and the Corresponding Sections and Rules of Act V of 1908—contd.

Section of Act XIV of 1882.	Corresponding Section of Act V of 1908.
403 . . .	O. XXXIII, r. 2.
404 . . .	„ r. 3.
405 . . .	„ r. 5.
406 . . .	„ r. 4.
407 . . .	„ r. 5.
408 . . .	„ r 6.
409 . . .	„ r. 7.
410 . . .	„ r. 8.
411 . . .	„ r. 10.
412 . . .	„ r. 11.
413 . . .	„ r. 15.
414 . . .	„ r. 9.
415 . . .	„ r. 16.
416 . . .	79, O. XXVII, r. 1.
417 . . .	„ r. 2.
418 . . .	„ r. 3.
419 . . .	„ r. 4.
420 . . .	„ r. 5.
421 . . .	„ r. 6.
422 . . .	O. V, r. 27.
423 . . .	O. XXVII. r. 7.
424 . . .	80.
426, 427 . . .	O. XXVII, r. 8.
428 . . .	81.
429 . . .	82.
430 . . .	83.
431 . . .	84.
432 . . .	85.
433 . . .	86.
434 . . .	87.
435 . . .	O. XXIX, r. 1.
436 . . .	„ rr. 2, 3.
437 . . .	O. XXXI, r. 1.
438 . . .	„ r. 2.
439 . . .	„ r. 3.
440 . . .	O. XXXII, rr. 1, 4 (2)
441 . . .	„ r. 5 (1).
442 . . .	„ r. 2.
443 . . .	„ rr. 3 (1), 4 (2).
444 . . .	„ r. 5 (2).
445 . . .	„ r. 4 (1).
446 . . .	„ r. 9.
447 . . .	„ r. 8.
448 . . .	„ r. 10 (1).
449 . . .	„ r. 10 (2)
450 . . .	„ r. 12 (1).
451 . . .	„ r. 12 (2), (3)
452 . . .	„ r. 12 (4).
453 . . .	„ r. 12 (5).
454 . . .	O XXXII, r. 13.

Section of Act XIV of 1882.	Corresponding Section of Act V of 1908.
455 . . .	O. XXXII, r. 14.
456 . . .	„ rr. 3 (2), (3). 4 (4).
457 . . .	„ r. 4 (1).
458 . . .	„ r. 11 (1).
459 . . .	„ r. 11 (2).
460 . . .	Omitted.
461 . . .	O. XXXII, r. 6.
462 . . .	„ r. 7.
463 . . .	„ r. 15.
464 . . .	„ r. 16.
465 . . .	O. XXVIII, r. 1.
466 . . .	„ r. 2.
467 . . .	„ r. 3.
468 . . .	O. V, rr. 28, 29.
470 . . .	68.
471 . . .	O. XXXV, r. 1.
472 . . .	„ r. 2.
473 . . .	„ r. 4.
474 . . .	„ r. 5.
475 . . .	„ r. 6.
476 . . .	„ r. 3.
477, 478 . . .	O. XXXVIII, r. 1.
479 . . .	„ r. 2.
480 . . .	„ r. 3.
481 . . .	„ r. 4.
483, 484 . . .	„ r. 5.
485 . . .	„ r. 6.
486 . . .	„ r. 8.
487 . . .	„ r. 9.
488 . . .	„ r. 10.
489 . . .	„ r. 11.
490 . . .	„ r. 12
491 . . .	95.
492 . . .	O. XXXIX, r. 1.
493 . . .	„ r. 2.
494 . . .	„ r. 3.
495 . . .	„ r. 5.
496 . . .	„ r. 4.
497 . . .	95.
498 . . .	O. XXXIX r. 6.
499 . . .	„ r. 7.
500 . . .	„ r. 8.
501 . . .	„ r. 9.
502 . . .	„ r. 10.
503 . . .	O. XL, rr. 1 to 3.
504 . . .	„ r. 5.
505 . . .	Omitted.
506 to 526 . .	Schedule II.
527 . . .	O. XXXVI, r. 1.
528 . . .	„ r. 2.

A comparative table showing the Sections of Act XIV of 1882 and the Corresponding Sections and Rules of Act V of 1908—concld.

Section of Act XIV of 1882.	Corresponding Section of Act V of 1908.
529	O. XXXVI, r. 3.
530	,, r. 4.
531	,, r. 5.
532	O. XXXVII, r. 2.
533	,, r. 3.
534	,, r. 4.
535	,, r. 5.
536	,, r. 6.
537	,, r. 7.
538	,, r. 1.
539	92 and 93.
540	96.
541	O. XLI, r. 1.
542	,, r. 2.
543	,, r. 3.
544	,, r. 4.
545	,, r. 5.
546	,, r. 6.
547	,, r. 7.
548	,, r. 9.
549	,, r. 10.
550	,, r. 13.
551	,, r. 11.
552	,, r. 12.
553	,, r. 14.
554	,, r. 15.
555	,, r. 16.
556	,, r. 17.
557	,, r. 18.
558	,, r. 19.
559	,, r. 20.
560	,, r. 21.
561	,, r. 22.
562	,, r. 23.
564	Omitted.
565	O. XLI, r. 24.
566	,, r. 25.
567	,, r. 26.
568	,, r. 27.
569	,, r. 28.
570	,, r. 29.
571	,, r. 30.
572 and 573	Cf. 135.
574	O. XLI, r. 31.
575	98.
576	O. XLI, r. 34.
577	,, r. 32.
578	99.
579	O. XLI, r. 35.
580	,, r. 36.
581	,, r. 37.
582	107 (2). O. XXII, r. 11.
582-A	Cf. 146.
583	144 (1).
584	100.
585	101.
586	102.
587	103.
588	104. O. XLIII.
589	106.
590	108. O. XLIII.
591	105.
592	O. XLIV, r. 1
593	,, r. 2.
594	O. XLV, r. 1.

Section of Act XIV of 1882.	Corresponding Section of Act V of 1908.
595	109.
596	110.
597	111.
598	O. XLV, r. 2.
600	,, r. 3.
601	,, r. 6.
602	,, r. 7.
603	,, r. 8.
604	,, r. 9.
605	,, r. 10.
606	,, r. 11.
607	,, r. 12.
608	,, r. 13.
609	,, r. 14.
610	,, r. 15.
611	,, r. 16.
612	Omitted.
613	Omitted.
615	Omitted.
616	
617	112. 113, O. XLVI, r. 1.
618	,, r. 2.
619	,, r. 3.
620	,, r. 4.
621	,, r. 5.
622	115.
623	114. O. XLVII, r. 1.
624	,, r. 2.
625	,, r. 3.
626	,, r. 4.
627	,, r. 5.
628	,, r. 6.
629	,, rr. 7, 9.
630	,, r. 8.
631	116.
632	117.
633	122.
634	118.
635	119.
636	O. XLIX, r. 1.
637	128 (2) (i).
638	120 (1). O. XLIX, r. 3.
639	120 (2).
640	132.
641	133.
642	135.
643	Omitted.
644	O. XLVIII, r. 4.
645	137.
645-A	140.
646	Omitted.
646-A	O. XLVI, r. 6.
646-B	,, r. 7.
647	141.
648	136.
649	36, 37.
650	Omitted.
650-A	29.
652	122, 129, 130 and 131.
6[illegible]3	[illegible]9.

CIVIL PROCEDURE CODE (ACT V OF 1908).

See APPEAL . . 23 C. W. N. 223.

See PRESIDENCY SMALL CAUSE COURTS (ACT XV OF 1882), s. 19, CL. (*s*).
I. L. R. 39 Mad. 219.

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— As the body of the Code creates jurisdiction (while the rules indicate the mode in which it is to be exercised) it is expressed in more general terms but has to be read in conjunction with the more particular provisions of the rules. MANI MOHAN MANDAL *v.* RAMTARAN MANDAL . **I. L. R. 43 Calc. 148**

——— It is not necessary in every case to have the support of a section of the Code to empower a Court to pass an order not expressly or impliedly forbidden and which is essential in the interest of Justice. ABDUL RAHAMAN SHAH *v.* SHAHANA. **I. L. R. 1 Lah. 339**

——— The Code is not exhaustive. RAGHUNANDAN SINGH *v.* PARMESHWAR DAYAL SINGH . . **2 Pat. L. J. 306.**

——— *Held,* that the Code provides no appeal from an order dismissing the application of a person to be brought on the record as legal representative of the plaintiff and that such an order is not a decree

I. L. R. 1 Lah. 493

——— 1 (2,—

See EXECUTION OF DECREE.

I. L. R. 40 Calc. 704

——— s. 1 (3)—

See JURISDICTION **I. L. R. 42 Mad. 813**

——— ss. 1, 48, 154—

See EXECUTION OF DECREE.

I. L. R. 40 Calc. 704

——— s. 2 (2) (1882 Code, s. 2)—

See DECREE, 1882 CODE, s. 2.

3 Pat. L. J. 67

4 Pat. L. J. 57 & 431

See KAMAUN RULE, 1894, No. 17.

I. L. R. 42 All. 642

See SUCCESSION ACT, 1865, s. 214

I. L. R. 35 All. 448

——— An order by an appellate Court rejecting an appeal before it on the ground that it was presented out of time, is a decree within the meaning of the definition in s. 2, Civil Procedure Code, and a second appeal lies from the order. RAKHAL CHANDRA GHOSH *v.* ASUTOSH GHOSH (1913) . **17 C. W. N. 807**

——— "*Decree*"—*Decree ex parte—Appeal—Dismissal of appeal for default—Application to Court of first instance for rehearing of case—Merger.* An order dismissing an appeal for default does not amount to a decree within the meaning of s. 2 of the Code of Civil Procedure and, consequently, the decree of the lower Court does not merge in the decree of the Appellate Court. Where a decree is passed *ex parte*, and an appeal against the decree is dismissed for default, it is still open to the judgment-debtor to apply to the Court which passed the decree to set it aside. *Gajrajmati Tiwarin v. Swami Nath Rai, I. L. R. 29 All. 13,* and *Abdul Majid v. Jawahir Lal, I. L. R. 36 All. 350,* referred to. RIFAQAT HUSAIN *v.* BIBI TAWAIF (1917)

I. L. R. 39 All. 293

CIVIL PROCEDURE CODE (ACT (V OF 1908) —*contd.*

——— s. 2 (2)—*contd.*

——— *Decree—Order refusing to recognize a person as legal representative of deceased plaintiff—Appeal from order, maintainability of.* An order rejecting the claim of a person to be the legal representative of a deceased plaintiff and to continue the suit amounts to a decree dismissing the suit and thus gives him a right of appeal from the order. As he would not be a party to the subsequent order of abatement of the suit, he would have no right of appeal from that order. *Rama Rao v. The Rajah of Pittapur, (1919) I. L. R. 42 Mad. 219,* applied; *Lakshmi Achi v. Subbarama Ayyar, (1916) I. L. R. 39 Mad 488,* distinguished; *Suppu Nayakan v. Perumal Chetty, (1916) 30 M. L. J. 486,* considered. AYYA MUDALI VELAN *v.* VEERAYEE (1920) . . . **I. L. R. 43 Mad. 812**

——— ss. 2 (2), 47—

See APPEAL . **I. L. R. 41 Calc. 160**

See DECREE . **I. L. R. 37 Mad. 29**

——— Orders staying or refusing to stay execution are not orders determining questions relating to the execution of a decree and no appeal lies for such orders. RAJENDRA KISHORE CHOUDHURY *v.* MATHURA MOHAN . . . . **25 C. W. N. 555**

——— "*Decree*"—*decision on question of valuation in sale proclamation.* A decision under s 47 of the Code of Civil Procedure, 1908, is not a decree within the meaning of s 2 (2) unless it in some way determines the rights of the parties with regard to all or any of the matters in controversy. A decision on a question of the valuation to be inserted in a sale proclamation is merely an interlocutory order and although the Court acts judicially in coming to its conclusion that does not in itself make the decision a decree and, therefore, it is not appealable. SAURENDRA NATH MITRA *v.* MRITUNJAY BANARJI

5 Pat. L. J. 270

——— ss. 2 (2), 47 and 73—*Rateable distribution, when applications for, may be made—Whether order refusing is appealable—Revision, whether High Court will interfere with order refusing rateable distribution.* An application for rateable distribution of assets is not liable to be dismissed merely on the ground that the execution sale is proceeding An order under s. 73 of the Code of Civil Procedure, 1908, is neither a decree within the meaning of s 2 nor an appealable order under s. 47 unless all the conditions enumerated in that section are present. When assets have already been distributed an applicant for rateable distribution has his remedy by suit under s. 73 (2) and, therefore, the High Court will not interfere in revision with an order refusing rateable distribution. MUSSAMMAT HURMOOZI BEGUM *v.* MUSSAMMAT AYSHA . . **5 Pat. L. J. 415**

——— ss. 2 (2), 47 and 96, O. XXXIV, r. 5, cl. (2)—*Suit for sale—Preliminary decree—Final decree, application for—Order of dismissal—Appeal whether competent—Limitation Act (IX of 1908), s. 19 and Art. 181, applicability of—Acknowledgment, sufficiency of.* An order dismissing an application for a final decree in a suit for sale on a mortgage, is not an order under s. 47 of the Civil Procedure Code but a decree in the

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— ss. 2 (2) 47—*contd.*

suit and is appealable as a decree under s. 96 of the Code. Where a mortgagee, having obtained a preliminary decree for sale, applied for a final decree more than three years after the date fixed for payment in the former decree, but it appeared that, in a previous application by the decree-holder for sale, the mortgagor applied for adjournment of the sale stating in his petition that he had asked the decree-holder for an extension of time to pay the decree amount and that the latter had consented thereto: *Held* (on objection being taken that the application was barred by limitation), that Art. 181 and s. 19 of the Limitation Act were applicable to an application for final decree in a mortgage suit; and that there was sufficient acknowledgment within the terms of s. 19 of the Act. The right to take legal steps for enforcing a right need not be expressly acknowledged, if the right itself is acknowledged. *Sukhamoni* v. *Ishan Chunder Roy, I. L. R. 25 Calc. 844,* applied. *Venkatrav Bapu* v. *Bijesingh Vithalsingh, I. L. R. 10 Bom. 108,* followed. SUBBALAKSHMI AMMAL *v.* RAMANUJAM CHETTY (1918) . . . . **I. L. R. 42 Mad. 52**

——— **ss. 2 (2), 47, 151 ; O. XXXIV, r. 5**—

See APPEAL . **I. L. R. 41 Calc. 418**

——— **ss. 2, (2), 49, 104 (2), O. XXI, rr. 89, 92 ; O. XLIII, r. 1 (j)**—

See SECOND APPEAL.

I. L. R. 38 Calc. 339

——— **ss. 2 (2), 96, 104, O. XLIII, r. 1**—

See EXECUTION OF DECREE.

I. L. R. 42 Calc. 440

——— ss. 2 (2), 47 and 109—An order of the High Court setting aside an order of a Subordinate Court refusing to execute decrees on the ground that the Court had no jurisdiction to execute same is not final within the meaning of s. 109. RAJKUMAR GIRWAR PRASAD SINGH *v.* RAMESWAR LAL BHAGAT . . . **4 Pat. L. J. 461**

——— ss. 2 (2), 97—

1. ——— *Preliminary decree—Finding on a preliminary issue whether a party is an agriculturist—In what cases is the finding a preliminary decree—Dikkhan Agriculturists' Relief Act (XVII of 1879), s. 13.* The finding on a preliminary issue, whether a party is or is not an agriculturist, can be the basis of a preliminary decree, only when it necessarily involves a conclusive determination of the rights of the parties with regard to the matter in controversy. That is to say, it is a preliminary decree in those cases where it necessarily involves the result that the accounts should be taken under s. 13 of the Dekkhan Agriculturists' Relief Act, 1879, despite the terms of the contract to the contrary. It is not a preliminary decree, when there are other questions yet to be determined before the parties could be held entitled to have accounts taken under s. 13 of the Act. MUNICIPAL COMMITTEE OF NASIK CITY *v.* THE COLLECTOR OF NASIK (1915) . . . **I. L. R. 39 Bom. 422**

2. ——— *Preliminary decree, decision that plaintiff can maintain suit if—Court's refusal to embody its findings in formal decree—Right of appeal.* A decision merely holding that the plaintiff's suit is maintainable is not a preliminary decree. It is not an adjudication on "matters in controversy" in the suit. The intention of the Legislature appears to be that there should be only one preliminary decree in the suit to be followed by one final decree. The preliminary decree ascertains what is to be done whilst the final decree states the result achieved by means of the preliminary decree. The cases in which the Legislature contemplated the preparation of a preliminary decree are specified in rr. 12 to 18 of O. XX of the Civil Procedure Code. *Sidha Nath Dhonddeb* v. *Gonesh Govind, I. L. R. 37 Bom. 60,* dissented from. *Bharut Indu* v. *Yakub Hasan, I. L. R. 35 All. 159,* referred to. The mere omission on the part of the Court to embody the effect of its judgment in a formal decree would not negative the right of the party affected to prefer an appeal. KAMINI DEBI *v.* PROMOTHA NATH MUKERJEE (1914)

19 C. W. N. 755

——— **ss. 2(2), 97, O. XXVI, rr. 11, 12 (2)** —*Dekkhan Agriculturists' Relief Act (XVII of 1879)—Redemption suit—Direction to a Commissioner to take account—The direction not a preliminary decree.* In a redemption suit tried under the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879), the first Court, on the 15th August 1910, referred the taking of the account to a Commissioner and on the 30th August 1910 passed a decree for the plaintiffs for possession free from incumbrances, the defendants having received profits for 25 years after the debt had been paid off. One of the defendants having appealed on the 10th October 1910, the Appellate Court dismissed the appeal as time-barred on a preliminary objection taken by the plaintiff-respondents, namely, that the period of 30 days for the appeal ran from the date when the Court issued the commission to the Commissioner on the 15th August 1910 because the issue of commission constituted a preliminary decree within the definition of s. 2 of the Civil Procedure Code (Act V of 1908). The defendant having appealed to the High Court: *Held*, reversing the decree of the Appellate Court and remanding the case for disposal on the merits, that there was nothing in the Civil Procedure Code (Act V of 1908) which prevented the Appellate Court from entertaining the appeal inasmuch as there was not a preliminary decree within the meaning of s. 97 of the Code, that in applying the definition of the decree contained in s. 2 of the Civil Procedure Code (Act V of 1908), the right of the parties in respect to matters in controversy should be taken to mean the general rights in relation to status, in relation to jurisdiction, in relation to limitation, in relation to frame of the suit and in relation to liability to account which, if decided, must have a general effect upon the proceedings in the suit and could be decided preliminary to the investigation of the matters in dispute between the parties upon the merits. *Krishnaji* v. *Maruti, 12 Bom. L. R. 762,* explained. NARAYAN BALKRISHNA *v.* GOPAL JIV GHADI (1914)

I. L. R. 38 Bom. 392

——— ss. 2 (2), 104, 148—*Pre-emption—Decree in pre-emption suit fixing time for payment—*

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

———— ss. 2 (2), 104, 148—*contd.*

Order extending time—Appeal—"Decree"—"Order" *Held*, that s. 148 of the Code of Civil Procedure, 1908, does not entitle the Court to extend the time fixed by the decree for payment of the purchase money in pre-emption cases. *Held*, also, that an order made under s. 148 of the Code of Civil Procedure, 1908, is not a decree within the meaning of s. 2 of the Code, nor is it appealable as an order under s. 104. *Rahima* v. *Neyal*, *I. L. R. 14 All 420*, distinguished. SURANJAN SINGH *v.* RAM BAHAL LAL (1913) I. L. R. 35 All. 582

———— ss. 2 (2), proviso (a), 141 and 15, and Order IX, r. 13—*Whether applicable to petition under Companies Act to set aside ex-parte payment orders.*—*See* INDIAN COMPANIES ACT, 1882 ss. 150, 160 . . . I. L. R. 1 Lah. 187

———— s. 2 (2), O. XXI, r. 22—

See DECREE . I. L. R. 44 Calc. 954

———— *Decree against a judgment-debtor who dies—Execution against his legal representative—True legal representative not brought on record—Sale of property in execution—Suit by auction purchaser to recover possession of property from true legal representative—Sale not binding on true legal representative.* The plaintiff having obtained a decree applied after the death of the judgment-debtor, for execution against the property of the deceased, bringing the latter's brother's widow on the record as legal representative. At that time, the plaintiff knew that the debtor had bequeathed his property by will to his mistress *R*. The executing Court made no inquiry as to who the real legal representative was, and the widow not appearing, the judgment-debtor's property, valued at Rs. 120, was sold to the plaintiff's brother-in-law for Rs. 11 and subsequently resold by him to the plaintiff. In the meantime *R* obtained probate of the will and sold the property to defendant No. 10, putting him in possession. The plaintiff having sued to recover possession of the property from defendant No. 10: *Held*, that defendant No. 10 was entitled to ask the Court to hold that as against him the auction purchaser had obtained no title to the property. *Held*, further, that the right of defendant No. 10 to dispute the fact that the estate was properly represented had still been preserved; and as he had clearly shown that the estate as a matter of fact had not been properly represented, the sale could not be binding upon him. *Mallarjun* v. *Narhari* (1900), *25 Bom. 337* and *Khairajmal* v. *Daim* (1904), *32 Calc. 296*, discussed. *Held*, also, that *R* was, from the date of the testator's death, his true legal representative; and that the inference to be drawn from the facts found was that the plaintiffs were endeavouring to acquire a right to the debtor's property in fraud of *R*. *Per* MACLEOD, *C. J.*—"An execution-creditor seeking execution against a party can serve notice under O. XXI, R. 22 (of the Civil Procedure Code), on a person intermeddling with the estate of the deceased, and that would be service on the legal representative. It does not follow that he thereby secures himself against any objection that may be raised in the execution proceedings which continue after the service of such notice. He is liable to be met with the objection afterwards, either that

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

———— s. 2 (2), O. XXI, r. 22—*contd.*

the person on whom notice was served was not as a matter of fact intermeddling with the estate, or that as a matter of fact there was a true legal representative in existence at the time. It cannot be that execution proceedings can be good against [illegible]

for an executor or executrix under a will executed by a Hindu to obtain probate. That is not compulsory in this country. It is only when proceedings have to be taken in a Court of Justice and when it is necessary in such proceedings for the plaintiff to prove his title under the will to the reliefs he claims that the Court will insist upon probate or letters of administration being granted before the plaintiff can take advantage of the decree." SHANKAR DAJI *v.* DATTATRAYA VINAYAK . . . I. L. R. 45 Bom. 1186

———— s. 2 (2), O. XXI, r. 90 and O. XLIII—

See APPEAL . . 3 Pat. L. J. 647

———— s. 2 (2), O. XLI, r. 17—

See DECREE . I. L. R. 39 Calc. 341

———— s. 2 (5)—Meaning of "Foreign Court" discussed. SHAIK ATHAM SAHIB *v.* DAOUD SHAHIB . . . I. L. R. 32 Mad. 466

———— s. 2 (11),—

See HINDU LAW—REVERSIONER I. L. R. 33 All. 15

———— ss. 2 (11), 53—*Legal representative—Surviving co-parceners in a joint Hindu family are not legal representatives of deceased co-parceners—Decree for injunction—Decree cannot be enforced against co-parceners who were not parties to the suit.* The plaintiff obtained decree for injunction against two defendants, who were members of a joint Hindu family, with three other co-parceners. After the death of both defendants, the plaintiff sought to execute the decree against the three surviving co-parceners: *Held*, dismissing the application, that the surviving co-parceners were not bound by the decree for on no construction of the term "legal representative" could members of a joint Hindu family be brought within its definition as contained in s. 2 (*11*) of the Civil Procedure Code of 1908. *Per* BEAMAN, *J.* "S. 53 (of the Civil Procedure Code) has been enacted, in my opinion, expressly to enforce one recognised rule of the Hindu law, namely, that members of a joint Hindu family may not escape the payment out of the joint family property of any debt incurred and decree against their father before his death provided that such debt is not tainted by immorality. The object of the section is limitative and is intended to give effect to a well-known rule of the Hindu law referable to a religious rather than legal sanction which might otherwise have been rendered nugatory by the definition of 'legal representative'." CHUNILAL HARILAL *v.* BAI MANI (1918) . . I. L. R. 42 Bom. 504

———— s. 2, cl. (11); O. XXII, r. 1—*Legal Representative—Survival of right to sue—Daughter's suit for possession of father's estate—Death of daughter—Right of father's heirs to continue suit.* Pending a suit by a daughter brought after the

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— s. 2, cl. (11); O. XXII, r. 1—*contd.*

death of her mother to recover possession of her father's property as his heir from strangers whom she alleged to be trespassers, the plaintiff (daughter) died. In an application by the grandsons of the deceased plaintiff's father's brother as his heirs to continue the suit: *Held*, (i) that the right to sue survived within the meaning of O. XXII, r. 1, Civil Procedure Code (Act V of 1908), and (ii) that the applicants were her legal representatives within the meaning of s. 2, cl. (*11*) of Civil Procedure Code. *Premmoyi Choudhrani* v. *Preonath Dhur, I. L. R. 23 Calc. 636*, and *Rikhai Rai* v. *Sheo Pujan Singh, I. L. R. 33 All. 5*, followed. RAMASWAMI *v.* PEDAMURNAYYA (1914)

I. L. R. 39 Mad. 382

——— s. 2 (11) and O. XXII, r. 3.—*Legal representatives of a deceased member of a joint Hindu family—Court-fees—Suit to enforce right to share in joint family property—Court-Fees Act, VII of 1870, s. 7 (IV) (b)—reference to arbitration by manager of joint Hindu family—Whether binding on members—Status of after-born sons to challenge such reference and the award arbitrator—Whether controlled in his decision by the parties' personal law.* R K died, and a dispute arose between his two sons K K and J G as to his property. They referred their dispute to arbitration by means of an agreement, dated the 8th of August 1909. At the time J G was sonless, but on the 26th of December 1909 a son J N was born to him. On the 9th of March 1910 the arbitrator gave his award and on the 25th of July 1910, upon an application made by K K to have the award filed in Court, the parties agreed to a compromise by which they accepted the award with certain modifications in favour of J G. Upon this a decree was passed. D D the second son of J G was born on the 4th of August 1913. The present suit was instituted by J N and D D, the minor sons of J G, on the 16th of June 1914 for a declaration to the effect that the entire arbitration proceedings were null and void, and praying to be awarded joint possession of the property in dispute and they valued the relief sought at Rs. 2,500. The property was valued for purposes of jurisdiction at a sum exceeding 8 lakhs, and it was contended that the suit should be valued for purposes of Court-fees at the actual value of the plaintiff's share. During the pendency of the appeal J N died. An application was then made under O. XXII, r. 3, Civil Procedure Code, praying that his brother D D and his mother *Mst.* P D should be brought on the record as his legal representatives. This application was accepted subject to all just exceptions. *Held*, that there in no such thing as succession properly so called in an undivided Hindu family and the order in chambers making D D and *Mst.* P D the legal representatives of J N deceased must consequently be set aside. *Chunilal* v. *Bai Mani* (*I. L. R. 42 Bom. 104*), followed, also Mayne's Hindu Law, 8th Edition, page 339. *Held also*, that the present suit is not for partition and for possession of a definite share of joint property, but is one to enforce the right to share in joint family property. This being so the value of the suit is the amount stated in the plaint, *viz.*, Rs. 2,500, *vide* s. 7 (IV) (*b*) of the Court Fees Act. *Dagdu* v. *Totaram* (*I. L. R. 33 Bom. 658*), *Hari Chand* v. *Jiwan Mal* (*28 P. R. 1903*), and *Bidhata Roy* v. *Ram Charitra* (*6 Cal. L. J. 651*), distinguished. *Held*, that under Hindu Law a son conceived is the same as a son born for all purposes, and as J N deceased, who was conceived before the reference to arbitration could therefore have maintained the present suit, the later born son D D was also competent to do so. *Sabapathi* v. *Somasundaram*, (*I. L. R. 16 Mad. 76*), and *Tulshi Ram* v. *Babu* (*I. L. R. 33 All. 654*), followed, also Mulla's Hindu Law, 3rd Edition, page 242, and Mayne's Hindu Law, 8th Edition, page 461. *Held further*, that family arrangements or references to arbitration entered into in good faith by the manager of a joint Hindu family or by a father in such a family bind the other members or the minor sons in the absence of fraud or other good reasons to the contrary. And if the reference cannot be objected to, the award cannot be objected to merely on the ground of inequality of benefit. *Balaji* v. *Nana* (*I. L. R. 27 Bom. 287*), *Jagan Nath* v. *Mannu Lal* (*I. L. R. 16 All. 231*), *Jai Nath* v. *Kamala Nath* (*7 Indian Cases 31*), *Ramdas* v. *Chabildas* (*7 Indian Cases 134*, *Venkatagiri* v. *Subbarayalu* (*24 Indian Cases 491, 496*), *Ramdayal* v. *Motiram* (*24 Indian Cases 863*), *Uppara Chingappa* v. *Gaddam* (*50 Indian Cases 471*), and *Gandharp Singh* v. *Nirmal Singh* (*54 Indian Cases 325*), followed, also Banerji's Law of Arbitration, 2nd Edition, pages 73 to 75. Mayne's Hindu Law, page 451, referred to. *Held also*, that in proceedings for filing an award the parties are competent to compromise by altering, amending or adding to the award. *Behari Lal* v. *Dhollan Das* (*5 Indian Cases 994*), followed. *Held*, that in the absence of any stipulation to that effect an arbitrator is not controlled in his decision by the rules of the personal law of the parties. *Muhammad Nawaz Khan* v. *Alam Khan* (*70 P. R. 1891 P. C.*) followed DWARKA DAS *v.* KISHAN KISHORE . . I. L. R. 2 Lah. 114

——— s. 2 (12)—A Trespasser is only liable to mesne profits from the date on which he take wrongful possession and an assignee for him only of the date he took possession. DAMADAR NARAIN CHAUDHRY *v.* S. A. MILLAR (1921)

6 Pat. L. J. 166

——— ss. 2 (17), 60 (1) (i) and O. XXI, r. 48—

See ATTACHMENT . I. L. R. 43 Bom. 716

——— ss. 2 (17) and 80—*Receiver—Suit against a receiver—Receiver, public officer—Notice necessary—Provincial Insolvency Act (III of 1907), ss. 19, 20.* The plaintiff brought a suit against the defendant who had been appointed a receiver in an insolvency application to get it declared that the property in suit belonged to her. The suit was dismissed by the lower Appellate Court on the ground that no notice under s. 80, Civil Procedure Code, was given. On appeal to the High Court: *Held*, confirming the decision, that as soon as the receiver was appointed under the Provincial Insolvency Act, he became a public officer within the meaning of s. 2, sub s. 17, Civil Procedure Code 1908, and he was protected by s. 80 of the Civil Procedure Code against any plaintiff who filed a suit against him with regard to any act done by him as such receiver without giving the requisite notice. DE SILVA *v.* GOVIND BALVANT (1920) . . I. L. R. 34 Bom. 895

CIVIL PROCEDURE CODE (ACT V OF 1908) *—contd.*

——— **ss. 2 (17), 80**—*contd.*

———*Public officer—Suit against public officer—Notice of claim necessary—Cantonment Committee is public officer—Cantonments Act (XIII of 1889), s. 89, applies to actions* ex delicto *and not to actions* ex contractu. A Cantonment Committee constituted under the Indian Cantonments Act (XIII of 1889) is a "public officer" within the meaning of s. 2, cl. (17) of the Code of Civil Procedure (Act V of 1908). Before the Committee can be sued, notice prescribed by s. 80 of the Code must be given. The notice contemplated by s. 80 has to be given for actions sounding substantially in tort; and it makes no difference that those actions are, by operation of law, treated, for certain purposes, as actions *ex contractu*. *Rajmal* v. *Hanmant, I. L. R. 20 Bom. 697*, considered. CECIL GRAY *v.* THE CANTONMENT COMMITTEE OF POONA (1910)

I. L. R. 34 Bom. 583

——— **ss. 2 (2), 115, 151 and 152, O. VII**—*Held* (1) an order rejecting a plaint under O. VII, r. 11, is not appealable when based on a question of valuation only unless the order involves a question of jurisdiction. (2) When the order necessarily involves a decision of the category or class under which a suit falls even though it incidently decides a question of valuation the order is appealable. CHANDRAMANI KOER *v.* BASDEO NARAIN SINGH

4 Pat. L. J. 57

——— **ss. 3, 115**—*Mamlatdars' Courts Act (Bom. Act II of 1906)—Mamlatdar's decree—Reversal by the Collector on evidence—Collector's judicial junctions—Superintendence and control by the High Court—Courts subordinate to the High Court.* The Mamlatdars' Courts Act (Bom. Act II of 1906) expressly constitutes the Collector (taking proceedings under that Act) a Court and when he exercises judicial junctions, he is subject to the superintendence and control of the High Court under s. 115 of the Civil Procedure Code (Act V of 1908). The Collector has no authority to reverse the decision come to by the Mamlatdar upon the evidence. S. 3 of the Civil Procedure Code (Act V of 1908), in which certain Courts are stated to be subordinate to the High Court, does not exclude all other Courts from the category of Courts subordinate to the High Court. *The Collector of Thana* v. *Bhaskar Mahadev Sheth, I. L. R. 8 Bom. 264*, referred to. PURSHOTTAM JANARDAN *v.* MAHADU PANDU (1912)

I. L. R. 37 Bom. 114

——— **s. 4 (1882 Code, s. 4)**—

See SPECIAL OR SECOND APPEAL.

I. L. R. 38 Bom. 310

——— **ss. 4, 60 (2) (b); O. XXI, r. 48**—

See ARMY ACT, ss. 145, 190

I. L. R. 43 Bom. 368

——— **ss. 4, 98, sub-s. 2**—*Bombay High Court—Original Civil Jurisdiction—Appeal—Disagreement of Judges—Procedure.* S. 36 of the Letters Patent of the Bombay High Court which provides that if the Judges composing a division bench are equally divided in opinion, the opinion of the senior Judge is to prevail, is not affected by s. 98, sub-s. 2 of the Code of Civil Procedure, 1908, which provides a different procedure in these circumstances. BHAIDAS SHIVDAS *v.* BAI GULAB (1921) . **I. L. R. 45 Bom. 718**

CIVIL PROCEDURE CODE (ACT V OF 1908) *—contd.*

——— **ss. 7, 24**—

See CIVIL PROCEDURE CODE (ACT V OF 1908), s. 24 . **I. L. R. 38 Mad. 25**

——— **ss. 7 (b), 94**—

See ATTACHMENT BEFORE JUDGMENT.

I. L. R. 46 Calc. 717

——— **s. 7 (1) (b), ss. 69, 70, Sch. III**—*Decree—Interest awarded up to realisation—Execution—Interest calculated in darkhast up to its date—Collector carrying on execution and paying interest and amount as prayed in darkhast—Court directing Collector to continue execution till payment of interest up to realisation—Discretion of Collector—Jurisdiction of Court.* The plaintiffs obtained a money-decree against the defendants which awarded interest on the decretal amount up to its realisation. They applied to execute the decree and calculated interest over the decretal amount up to the date of the application. The Collector, to whom the execution-proceedings were transferred, placed the defendants' estate under his management; and when the decretal amount and interest as calculated in the plaintiffs' application were paid up, he treated the decree as satisfied and returned the execution-proceedings to the Court. The Court sent back the proceedings to the Collector, asking him to continue in management till interest over the decretal amount from the date of the application to the date of realisation was paid to the plaintiffs. The District Court held on appeal that the Court had no jurisdiction to interfere with what lay completely within the Collector's jurisdiction and reversed the order. On second appeal: *Held*, restoring the order passed by the first Court, that under the provisions of s. 7 (*1*) (*b*) of the third schedule of the Civil Procedure Code of 1908, the Collector had to take into account the whole amount, with the total interest awarded by the decree; and that that would include not merely interest up to the date of the application but also interest which would run according to the decree thereafter. *Per* CHANDAVARKAR, J.—The Civil Procedure Code (ss. 69 and 70) of 1908 gives authority to the Collector for the purpose of enabling him to determine the best mode or modes of satisfying the decree, whether it is to be satisfied by management by the Collector himself of the land attached in execution of the decree, or whether it is to be by its sale or letting. So far, therefore, as the machinery necessary for the satisfaction of the decree is concerned the Collector is the sole authority. The discretion is his, and no Civil Court can interfere with that discretion. But that discretion does not extend to any jurisdiction in the Collector to determine whether the decree itself has been satisfied or not. The latter jurisdiction is the Civil Court's. It is that Court above which is competent to determine the question judicially. BAYECHAND HANSRAJ *v.* VIRA CHHATRA (1912) . . . . **I. L. R. 37 Bom. 32**

——— **s. 8, and 114 and O. XLVII**—

See PRESIDENCY SMALL CAUSE COURTS ACT, 1882, Ch. VII, s. 45 . **I. L. R. 45 Bom. 972**

CIVIL PROCEDURE CODE (ACT V OF 1908) *—contd.*

——— **s. 9 (1882 Code, s. 11)**—

See Act of State **I. L. R. 39 Calc. 615**
See Church . **I. L. R. 39 Mad. 1056**
See Compensation **I. L. R. 44 Calc. 87**
See Decree . . **3 Pat. L. J. 465**
See Election . **I. L. R. 41 Calc. 384**

1. ——— *Suit for declaration and injunction—Right to perform Ram Lila, such performance not being connected with any shrine or temple and being supported by purely voluntary contributions—Suit not maintainable—Jurisdiction.* The plaintiff, a minor, sued for a declaration that he had the right to perform certain religious pageants in Benares and to receive subscriptions in connection therewith, and claimed an injunction to restrain the defendant from interfering with that right. It was found that these pageants had been performed for many years past by the plaintiff's father, grandfather and great-grandfather with the aid of voluntary subscriptions from the Hindu community. But the pageants were not connected with any particular temple, shrine or sacred spot, nor did the plaintiff or his ancestors hold any office by virtue of which they were under any obligation to perform such pageants. The performance thereof was in fact wholly voluntary. *Held,* that the plaintiff's suit would not lie. *Tholappala Charlu* v. *Venkata Charlu, I. L. R. 19 Mad. 62, Srinivasa* v. *Tiruvengada, I. L. R. 11 Mad. 450,* and *Hur Lall* v. *Jeorakhan Lall, (1862), S. D. A., N.-W. P. 314,* referred to. Chunnu Datt Vyas *v.* Babu Nandan (1910) . . . . **I. L. R. 32 All. 527**

2. ——— *Specific Relief Act (I of 1877), s. 42—Suit for declaration that the plaintiff is the Honorary Secretary of an association—Suit maintainable—Jurisdiction.* Although, the fact that an office is of a purely honorary nature is not by itself sufficient to render a suit respecting such office unmaintainable in a Civil Court, yet where a plaintiff complained of his eviction from the office of Secretary to a society which was an honorary office and his continuance wherein depended upon rules which the society had power to alter at any moment, it was *held* that a Civil Court ought not to entertain a suit for a declaration that the plaintiff had been illegally deprived of such office, inasmuch as such Court could not give any decree in his favour which might not be immediately rendered nugatory by the action of the society. *Chunnu Datt* v. *Babu Nandan, I. L. R. 32 All. 527,* referred to. Maharaj Narain Shepuri *v.* Shashi Shekhareshwar Roy (1915) . . . **I. L. R. 37 All. 313**

3. ——— *Right to officiate at funeral ceremonies, suit for declaration of—"Right of office."* The plaintiff, a Hindu priest of Patna, sued for a declaration that he had by custom a right to officiate at all funeral ceremonies performed upon the banks of the Ganges between certain points, and for recovery of a sum of money paid to the defendant by the members of a household situate within the plaintiff's *birt* for officiating at the funeral ceremony of a member of such household. *Held,* that no suit for a declaration lay. The plaintiff did not claim that any "legal character" vested in him within the meaning of s. 42 of the Specific Relief Act, 1877, or that he was entitled to any "right of office" within the meaning of s. 9 of the Code of Civil Procedure, 1908. The freedom of the subject entitles all Hindus to call in at any time any priest whom they may prefer to perform any ceremony, and so long as that inherent freedom exists, there can vest in no one any legal character or any right to the office of performing ceremonies in private houses. *Held, further,* that the plaintiff was not entitled to recover the money paid to the defendant unless he could prove that there was a contract between himself and the defendant, whereby the defendant had bound himself to pay to the plaintiff all sums received from ceremonies performed within the plaintiff's *birt.* Mere proof of a custom that among the Brahmin priests of Patna there was an implied contract not to interfere with the rights of each other, did not amount to proof of a contract by the defendant to pay to the plaintiff sums of money received for officiating at ceremonies within the plaintiff's *birt.* Hira Panday *v.* Bachu Panday **1 Pat. L. J. 381**

4. ——— *Suit of a civil nature—Right to worship—Temple—Right to carry processions through public streets with music—Practice.* A suit to establish the right to worship a deity according to one's own belief and to carry processions accompanied with music through a public street is a suit of a civil nature within the meaning of s. 9 of the Civil Procedure Code, 1908. Waman Balwant *v.* Balu Harshet (1919) **I. L. R. 44 Bom. 410**

5. ——— *Right to be carried in procession—Claim to dignity and honour—Right claimed as Jagadguru—Alternative claim made as a member of the public—Inconsistent claim—Plaint—Amendment—Civil Court—Jurisdiction.* A suit claiming a right to be carried in a cross-palanquin procession with Panch-Kalash and Birudavali is not maintainable in a Civil Court without proof of special damage. *Madhusudan Parvat* v. *Shri Shankaracharya (1908) 33 Bom. 278,* referred to. The plaintiff alleged that he was one of the Jagadgurus of the Lingayats and as such he claimed the right of going in procession seated in a cross-palanquin adorned with and accompanied by Panch-Kalash and Birudavali. One of the issues raised in the trial Court was, "Is the right to parade in cross-palanquin as described in the plaint a general right exercisable by any subject of His Majesty ?" On this issue it was contended in second appeal by the plaintiff that the lower Courts which dismissed his suit on the ground that it was not maintainable in a Civil Court should have dealt with the case as if the plaintiff was suing as a member of the public claiming as such to be entitled to be carried in a cross-palanquin if he chose to adopt that method of procession. The plaintiff also asked that he should be allowed to amend his plaint accordingly. *Held,* refusing the amendment, (1) that the claim made as a member of the public was inconsistent with the plaintiff's original claim that he was entitled to be carried in procession as Jagadguru, and (2) that on the pleadings the issue raised in the trial Court was irrelevant and ought not to have been admitted. *Mahomed Buksh Khan* v. *Hosseini Bibi (1888) L. R. 15 I. A. 81,* relied on. Andaniswami *v.* Totadswami (1920) . . . **I. L. R. 45 Bom. 590**

CIVIL PROCEDURE CODE (ACT V OF 1908)—*contd.*

———— ss. 9 and 92—*Offerings made by devotees at a temple—Suit by* pujaris *to recover offerings from* gurvas *of the temple—Suit of civil nature—Suit under the purview of s. 92.* A suit by the heredit[illegible] from the *gurvas* [illegible] by devotees be[illegible] ture within the meaning of s. 9 of the Civil Procedure Code, 1908. Such a suit, however, falls within the purview of s. 92 of the Code of Civil Procedure, where the temple is under the management of the Devasthan Committee and the funds of the temple including the offerings to the deity are administered under a scheme by the members of that Committee. *Per* SHAH *J.*—The principle adopted is apparently that the scheme once settled by a Court cannot be altered except by the Court. This would seem to preclude suits between parties to establish a private right which, if established, would interfere with a charitable scheme settled by the Court. *Ramdas* v. *Hanumantha Rao (1911) 36 Mad. 361,* referred to. SAKHARAM DAJI *v.* GANU RAGHU (1920) . .

I. L. R. 45 Bom. 683

———— s. 9, and O. XXI, rr. 89 to 92—

See BENGAL TENANCY ACT, s 174.

3 Pat. L. J. 122

———— s. 9, Sch. II, s. 20—*Dispute as to* mánpán—*Suit of civil nature—Award by arbitrators settling dispute out of Court—Application to file award—Award can be filed though referring to* mánpán—*Agreement to distribute cash allowance—Pensions Act (XXIII of 1871).* S. 20 of the second Schedule to the Civil Procedure Code (Act V of 1908) is devised for the purpose of enabling, where the subject-matter of the award lies within more than one jurisdiction, any Court within whose jurisdiction a part of the subject-matter lies to direct that the award be filed. It does not contemplate that the Court has no jurisdiction to order an award to be filed, only because it deals with *mánpán*, that is, matters relating to a complement or dignity about which the Courts would have no jurisdiction to entertain suits. *It is the policy of law to enable parties* who by private arrangement settle a dispute to have that settlement made legally effective If there is something to arbitrate on, and there is a reference and an award, the policy of the law is that that award should be given effect to without minute inquiry by the Court. Disputes about *mánpán* which cannot be settled in the Courts can often only be effectively settled by arbitration. The parties are at liberty without in any way going against the words or the spirit of the Pensions Act (XXIII of 1871) to agree amongst themselves that when the cash allowance is received from Government it shall be distributed among them in a certain way. RAGHAWENDRA AYYAJI *v.* GURURAO RAGHAWENDRA (1913) . . . . I. L. R. 37 Bom. 442

———— s. 10 (1882 Code, s. 12)—

See JURISDICTION I. L. R. 42 Calc. 926

See STAY OF SUIT I. L. R. 43 Calc. 144

1. ———— *"For the same relief"*—[illegible] *Majesty* [illegible] *to first* [illegible] *mate.* [illegible]

CIVIL PROCEDURE CODE (ACT V OF 1908)—*contd*

———— s. 10 (1882 Code, s. 12)—*contd.*

does not apply to a claim relating to a period subsequent to the claim in the former suit. It is contemplated by that section that if all the matters in dispute are substantially the same in both suits, then the fact that the relief claimed in the subsequent suit is not identical with the relief claimed in the previous suit shall not operate to enable the parties to continue the litigation. The mere fact that the question of title is raised in both suits and decided in the first suit is not sufficient to attract the operation of s. 10. In order to attract that section it is necessary that *every matter in dispute should be directly and* substantially in issue in the two suits. *Obiter.* The proper stage for making an application for stay under s. 10 is after the defence has been disclosed and issues have been framed. MAHARAJA KESHO PRASAD SINGH *v.* SHIVA SARAN LALL

4 Pat. L. J. 557

2. ———— *Application by defendant for stay of plaintiff's suit, defendant having filed an earlier suit in a mofussil Court—Plaintiff's application for injunction to restrain defendant from proceeding with his suit—Matter "directly and substantially in issue in a previously instituted suit," meaning of—Jurisdiction of High Court to order a party before it not to proceed with a suit in another—Practice of Court of Chancery to make an order* in personam *against a party residing out of the Court's jurisdiction.* On the 25th of March 1919, the plaintiffs, commission agents in Bombay, filed a suit in the High Court against the defendants, cotton merchants at Bijapur, claiming a sum of Rs. 82,372-1-0 as being due to them in respect of advances made to the defendants against cotton from time to time. The defendants had, however, on the 13th of March 1919, filed a suit in the Court of First Class Subordinate Judge at Bijapur against the plaintiffs and seven other persons, praying *inter alia* that the accounts between them and the various defendants in that suit be taken after fixing the rate at which their cotton should have been sold in Bombay and that a decree be passed against the several defendants for such amounts as may legally and properly be found due from them respectively. On the 29th of April 1919, the defendants applied to the High Court for a stay of the plaintiffs' suit under s 10 of the Civil Procedure Code. The plaintiffs opposed the application and asked that an order *in personam* be made against the defendants restraining them from proceeding with their suit in the Bijapur Court. The trial Judge holding that s. 10 of the Civil Procedure Code did not apply dismissed the defendants' [illegible] suit and made [illegible] restraining the [illegible] Bijapur suit as [illegible] dants appealed, contending (1) that the High *Court suit ought to have been stayed as the matter* in issue therein was involved in the earlier suit in the Bijapur Court and (2) that High Court had no jurisdiction to restrain them from proceeding with their suit in Bijapur where they resided and carried on business. *Held,* (1) that the High Court suit should not be stayed inasmuch as the matter in issue therein was not "directly and substantially in issue in the previously instituted suit" at Bijapur within the meaning of

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— **s. 10 (1882 Code, s. 12)**—*concld.*

s. 10 of the Civil Procedure Code; (2) that the High Court had jurisdiction to order a party contesting a suit before it to restrain him from prosecuting a suit filed by him in another Court. *Mungle Chand* v. *Gopal Ram (1906) 34 Calc. 101*, referred to; *Narayan Vithal Samant* v. *Jankibai (1915) 39 Bom. 604*, distinguished. MULCHAND RAICHAND *v.* GILL & Co., (1919)

I. L. R. 44 Bom. 283

——— **ss. 10 and 11**—*Stay of suit—Issue common to two suits, but parties not occupying the same position.* *Z* and *J* brought a suit against *W* and other heirs of *W's* deceased husband, claiming certain property in virtue of a deed of gift from the mother of the deceased. This suit was decreed, and the defendant filed an appeal in the High Court. Pending this appeal, *W* brought a suit against *Z* and *J* and another in which she claimed one-sixth of her dower debt, exempting the other heirs of her late husband. In the second suit the deed of gift in favour of *Z* and *J* was again brought in question, the plaintiff alleging that it was invalid and inoperative. In this suit the Court, at the instance of the defendants, made an order under s. 10 of the Code of Civil Procedure, 1908, staying proceedings until the appeal in the former suit should be decided. *Held*, on application by *W* for revision of the order staying proceedings, that the Court below had properly applied s. 10 of the Code; but it would be necessary, when the hearing of the second suit should proceed, to consider carefully the effect of s. 11 of the Code with reference to the facts and circumstances of the two litigations. WAHID-UN-NISSA BIBI *v.* ZAMIN ALI SHAH

I. L. R. 42 All. 290

——— **ss. 10 and 115**—*Revision Interlocutory order staying a suit—"Case."* An application under s. 10 of the Code of Civil Procedure for the stay of a suit is not a "case," and an order for stay passed on that application is not the decision of a "case" within the meaning of that word in s. 115 of the Code, and no revision lies from such an order. The word "case" in s. 115 is not confined to a suit, but cannot be construed to mean an interlocutory order in a suit, such as an order under s. 10 of the Code of Civil Procedure, although the order may be of such a nature that it cannot be interfered with even under the provisions of s. 105 of the Code when an appeal is preferred from the final decree in the suit. *Muhammad Ayub* v. *Muhammad Mahmud, I. L. R. 32 All. 623*, applied. *Bhargava and Co.* v *Jagganath Bhagwan Das, I. L. R. 41 All. 602*, doubted and distinguished. SULTANAT JAHAN BEGAM *v.* SUNDAR LAL . **I. L. R. 42 All. 409**

——— **s. 11 (1882 Code, s. 13)**—

See s. 10 . . **I. L. R. 42 All. 290**

See ADOPTION . **I. L. R. 37 All. 496**

See BENGAL TENANCY ACT, 1885 s. 105 A

See BENGAL TENANCY.

3 Pat. L. J. 379
I. L. R. 48 Calc. 460

See BOMBAY LAND REVENUE CODE, 1879, ss. 216 AND 217.

I. L. R. 45 Bom. 1260

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— **s. 11 (1882 Code, s. 13)**—*contd.*

See HINDU LAW—ADOPTION.

I. L. R. 40 All. 593

See HINDU LAW—JOINT FAMILY

I. L. R. 42 Bom. 69

See HINDU LAW—REVERSIONER.

I. L. R. 43 Bom. 869

See LANDLORD AND TENANT.

I. L. R. 42 Mad. 702

See LIMITATION ACT 1877, ss. 5, 7.

I. L. R. 34 Bom. 589

See MESNE PROFIT **I. L. R. 44 Bom. 954**

See MORTGAGE . **2 Pat. L. J. 118**

See RES JUDICATA

26 C. W. N. 504

See SARANJAM . **I. L. R. 40 Bom. 606**

See THIRD PARTY NOTICE.

I. L. R. 45 Bom. 24

See U. P. LAND REVENUE ACT s. 233.

I. L. R. 42 All. 309

See WILL . . **I. L. R. 46 Calc. 485**

1. ——— **Res judicata**—*'Former suit'—Application of rule of* res judicata *unaffected by question in which Court an appeal lies.* The rule of *res judicata* so far as it relates to the retrial of an issue, refers not to the date of the commencement of the litigation but to the date when the Court is called upon to decide the issue. *Balkishan* v. *Kishan Lal, I. L. R. 11 All. 148*, followed. *Held*, also, that it is the competency of the Court of first instance to entertain the two suits which regulate the application of the rule of *res judicata:* the fact that in the two suits appeals may lie in different Courts does not affect the application of the rule. BENI MADHO *v.* INDAR SAHAI (1909)

I. L. R. 32 All. 67

2. ——— **Delay** —— *Limitation Act (XV of 1877), ss. 5 and 7—Application to file an appeal in* formâ pauperis*—Delay in making the application—Minor applicant—Excuse of delay—Probate—Grant of probate—Question of title not affected by the grant*—Res judicata. A suit filed in *formâ pauperis* was decided on the 10th February 1908. An application for leave to appeal in *formâ pauperis* was presented to the High Court on the 13th April 1908; but as it was beyond time it was rejected. On an application to excuse the delay, it was excused on the ground that the applicant having been a minor, s. 7 of the Limitation Act, 1877, applied. At the hearing, it was objected that the application for permission to appeal in *formâ pauperis* must be treated as an appeal, and that s. 5, and not s. 7 of the Limitation Act, applied to it. *Held*, overruling the contention, that whether the application was treated as falling under s. 5 or under s. 7 of the Limitation Act, 1877, the result was the same. If it fell under s. 5, as an appeal, then under the second paragraph of that section, which applied to appeals, the Court had jurisdiction to excuse delay, after the period of limitation prescribed for the presentation of an appeal had expired. If on the other hand, it be treated as an application and fell under s. 7 of the Limitation Act,

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

———— s. 11 (1882 Code, s. 13)—*contd.*

it was clearly within time and there was no need of excusing delay because the section provided that a minor could apply after he had attained the age of majority within a certain period. The probate is conclusive only as to the appointment of executors and the validity and the contents of the will; and *on the application for probate* it is not the province of the Court to go into the question of title with reference to the property of which the will purports to dispose, or the validity of such disposition CHINTAMAN VYANKATRAO *v.* RAMCHANDRA VYANKATRAO (1910)

I. L. R. 34 Bom. 589

3. ———— **Same issue decided in two connected suits**—*Appeal in one only.* The same issue was decided between the same parties in each of two connected suits. The party against whom the decision was appealed in the one case, but not in the other, the decree in which became final before his appeal was heard. *Held*, that the hearing of the appeal was barred. *Zaharia* v. *Debia, I. L. R. 33 All. 51*, followed. DAKHNI DIN *v.* SYED ALI ASGHAR (1910) . .

I. L. R. 33 All. 151

4. ———— **Decision of first suit on merits but its dismissal for not paying**—*Second suit for trial on same merits.* A previous suit between the parties failed on the ground that the claim was undervalued and the plaintiff when called upon to pay the deficient Court-fees omitted to do so. There were issues on merits also decided. In a subsequent suit for trial on the same merits the desicion in the first suit was pleaded as *res judicata*. *Held*, that the rejection of the suit on the ground of undervaluation at any stage of it did not make it *res judicata*, for the purposes of a subsequent suit on the same cause of action or litigating the same title. *Held*, further, that the dismissal of the suit on the ground of undervaluation having been sufficient by itself, the findings on the issues on the merits were not necessary for the decision of the suit and could not have the force of *res judicata*. IRAWA KOM LAXMANA MUGALI *v.* SATYAPPA BIN SHIDAPPA MUGALI (1910) . . . . I. L. R. 35 Bom. 38

5. ———— **Two suits—One judgment, but two decrees**—*Appeal against one decree before the decision of which the other decree becomes final.* *M* and *Z* each filed a suit for pre-emption in respect of the same sale, each claiming a right of pre-emption preferential to that of the other. Each plaintiff was made a party defendant to the suit brought by the other. A judgment was delivered in the suit of *M* and a copy thereof was placed on the record as the judgment in the suit of *Z*, but a separate decree was framed in each suit. The suit of *M* was decreed; that of *Z* dismissed. *Z* appealed from the decree in his own suit but not from the decree in the suit brought by *M*, which became final before *Z's* appeal was decided. *Held*, that the doctrine of *res judicata* applied and *Z's* appeal was barred. *Chajju* v. *Sheo Sahai, I. L. R. 10 All. 123*; *Bal Kishan* v. *Kishan Lal, I. L. R. 11 All. 148*; *Ram Lal* v. *Chhab Nath, I. L. R. 12 All. 578*; *Mangli* v. *Narain, All. Weekly Notes (1893) 190*; *Kesho Tiwari* v. *Sarju Kunwar, All. Weekly Notes (1893), 221*; *Abdul Bari* v. *Asfaq Husain, All. Weekly Notes (1908), 211*, and other (unreported) cases of the Allahabad High Court approved and followed. *Damodar Das* v. *Sheo Ram Das, I. L. R. 29 All. 730*, overruled. *Abdul Majid* v. *Jew Narain Mahto, I. L. R. 16 Calc. 233*; *Mariamnissa Bibi* v. *Joynab Bibi, I. L. R. 33 Calc. 1101* and *Panchananda Velan* v. *Vaithinatha Sastrial, I. L. R. 29 Mad. 333*, dissented from. *Gurural jammah* v. *Venkatakrishnama Chetti, I. L. R. 24 Mad. 350*, referred to. ZAHARIA *v.* DEBIA (1910) . . . . I. L. R. 33 All. 51

6. ———— **Consent decree**—*amount to res judicata*—*Consent decree between predecessors-in-title of parties in suit*—*Injunction granted in former suit*—Res judicata *and estoppel distinguished.* A consent decree has to all intents and purposes the same effect as *res judicata* as a decree passed *per invitum* and this notwithstanding the words in s. 11 of the Civil Procedure Code "has been heard and finally decided." *In re South American and Mexican Company, (1895) 1 Ch. 37*, followed. A consent decree come to between the predecessors-in-interest of the present parties touching matters now substantially and directly in issue between them is *res judicata*. *Res judicata* ousts the jurisdiction of the Court while estoppel does no more than shut the mouth of a party. Estoppel never means anything more than that a person shall not be allowed to say one thing at one time and the opposite of it at another time; while *res judicata* means nothing more than that a person shall not be heard to say the same thing twice over. BHAISHANKER NANABHAI *v.* MORARJI KESHAVJI & Co. (1911) . I. L. R. 36 Bom. 283

7. ———— **Co-plaintiff**—res judicata as *between*—*Civil Procedure Code (Act XIV of 1882), s. 26*—*Joinder of parties.* The plaintiff *D* and his step-mother *R* (defendant) brought a suit against *C* to recover possession of certain ornaments which formed part of the estate of *M* the father of *D* and husband of *R*. It was held by the Court of first instance that *R* was entitled to the ornaments, because they were her *stridhan*, but the Appellate Court *held* that she was entitled to them not because they were her *stridhan*, but because she was the absolute owner of the property. *D* then sued *R* for a declaration that he, as son and heir to *M*, was entitled to hold the decree. The defendant in reply contended, *inter alia*, that the suit was barred by *res judicata*: *Held*, that the bar of *res judicata* did not apply, inasmuch as there was no final adjudication as between *R* and *D*, and in the first suit it was a matter of no consequence to the defendant therein for the purposes of the relief to be given against him whether *R* succeeded or whether *D* succeeded. A finding to become *res judicata* as between co-plaintiffs must have been essential for the purpose of giving relief against the defendants. *Ramchandra Narayan* v. *Narayan Mahadev I. L. R. 11 Bom. 216*, followed. The Court ought not to hold a point to be *res judicata* unless it is clear from the pleadings and the findings in the previous suit. No Court ought to infer *res judicata*. by [illegible] a previous suit [illegible] *Tulega* v. *I* [illegible] ICKERSINI *v.* [illegible]

I. L. R. 33 Bom.

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— s. 11 (1882 Code, s. 13)—*contd.*

7. (*a*). ——— **Res Judicata**—*Mortgage—Dekkhan Agricultural Relief Act.* In a suit brought by a mortgagee to recover interest on his mortgage money the amount was found to be Rs. 350 and interest was awarded on that sum. The mortgagee subsequently brought another suit to foreclose the mortgage under the provisions of the Dekkhan Agriculturist Relief Act. The mortgage amount was found to be Rs. 400 and relief granted accordingly. It was contended in the appeal that the finding as to the mortgage amount in the first suit operated as *res judicata* in the second suit. *Held,* that the Dekkhan Agriculturist Relief Act, 1879, was in relief of certain class of His Majesty's subjects and therefore the finding in the first suit could not affect and be *res judicata* in the second which was under a special law unless the previous suit also came within that law. VITHAL RAMCHANDRA *v.* SITABAI **I. L. R. 36 Bom. 548**

7. (*b*). ——— Certain Puisne mortgagees brought a suit for sale on their mortgage in which although they impleaded the prior mortgagees they simply asked for sale of the property and the prior mortgagees did not set up their rights. *Held,* that s. 11 of the Code was a bar to the prior mortgagees after suing for sale of their property. . . **I. L. R. 34 All. 599**

8. ——— **First suit by widow**—*alleging that the property was her husband's separate property—Suit, decision of—Appeal by widow—Withdrawal of appeal—The widow's daughter contending in a subsequent suit that the property was her father's self-acquisition—Plea barred by* res judicata. In a suit brought against her husband's nephew, a Hindu widow alleged that certain property was her husband's separate property. The Court *held* that the property was joint property; but allowed the widow to be in possession of it in lieu of her rights to maintenance. The widow appealed against the decree, but she subsequently withdrew the appeal. On the widow's death, the property passed into the possession of her daughter who claimed it as heir to her father. The nephew filed the present suit to recover possession of the property from the daughter, who resisted the claim on the ground that the property having been the separate property of her father had descended to her and that the decision in the first suit was not binding on her. *Held,* that the first decree operated as *res judicata* against the defendant inasmuch as it was a decree against the widow as representing her husband's estate. *Held,* further, that so far as the first suit was concerned the case was fairly contested and the mere withdrawal of the appeal by the widow was not sufficient to deprive the decree of its operative character in law. *Katama Natcheir* v. *The Rajah of Shivagunga, 9 Moo. I. A. 539,* followed. GHELABHAI *v.* BAI JAVER (1912) **I. L. R. 37 Bom. 172**

9. ——— **First suit for partition**—*Declaratory decree—Second suit by other members for partition of their share*—Res judicata *does not bar the second suit.* A Khoti village was owned by two families known as Varang and Desai. In 1854, two members of the Desai family brought a suit for partitioning the one-half share of the Desai family in the village. That suit ended in a decree which awarded them the share. The decree remained unexecuted. In 1904, the plaintiff, a member of the Varang family, sued the Varang as well as the Desai members to obtain his $\frac{1}{84}$th share by partition of the village. Some of the defendants in both families admitted the plaintiffs' claim and asked that their shares also should be awarded to them on partition. It was contended that the claim of the defendants to obtain their share in the village was barred as *res judicata* in virtue of the decree of 1854, which awarded to them half a share in the village:—*Held,* that the first decree was a declaratory decree and did not operate as *res judicata* in the present suit. *Babaji Parshram* v. *Kashibai, I. L. R. 4 Bom. 157* and *Nasrat-ullah* v. *Mujibullah, I. L. R. 13 All. 309,* followed. *Soni Maganlal* v. *Munshi Himatbhai, 3 Bom. L. R. 94,* distinguished. JAGU BABAJI *v.* BALU LAXMAN (1912) **I. L. R. 37 Bom. 307**

10. ——— **Letters Patent, cl. 12**—*Evidence Act (I of 1872), s. 44—Suit for restitution of conjugal rights—Previous suit for similar relief—Competency of the Court to try the previous suit—Dismissal of the suit for want of jurisdiction after raising and deciding issues on the merits—No bar of res judicata.* The plaintiff filed a suit for restitution of conjugal rights against the defendant and for an injunction restraining her from marrying any other person pending the disposal of the suit. The defendant raised the plea of *res judicata* urging that the plaintiff had filed a previous suit against her in the High Court for similar relief and had failed in it. The previous suit was filed without obtaining the leave of the Court under cl. 12 of the Letters Patent, the residence of the parties being outside the jurisdiction of the Court. The Court, therefore, dismissed the suit for want of jurisdiction though issues on the merits were raised and decided. The first Court disallowed the plea of *res judicata* on the ground that the judgment in the previous suit was delivered by the Court not competent to do so in consequence of the absence of leave. On appeal by the defendant, the Judge dismissed the suit holding that the absence of leave did not go to the root of the jurisdiction of the Court and therefore the judgment of the Court was the judgment of a Court having jurisdiction. *Held,* on second appeal by the plaintiff, that the judgment in the previous suit was delivered by a Court not competent to deliver it within the meaning of s. 44 of the Evidence Act (I of 1872), and therefore the plea of *res judicata* could not prevail. ABDUL KADIR *v.* DOOLANBIBI (1913) **I. L. R. 37 Bom. 563**

11. ——— **Prior and subsequent mortgagees**—*Suit by first mortgagee impleading second but no decree as to rights of first mortgagee—Suit or sale by prior mortgagee not barred.* A second mortgagee brought a suit for sale on his mortgage, in which he impleaded the first mortgagee and asked to redeem. The first mortgagee did not appear. The plaintiff got a decree for sale but the decree did not either give him redemption of the first mortgage or direct the property to be sold subject to the first mortgage. *Held,* that the first mortgagee was not precluded from subsequently bringing a suit for sale on his mort-

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

———— **s. 11 (1882 Code, s. 13)**—*contd.*

gage. *Srinivasa Rao Saheb* v. *Yamuna bhai Ammall, I. L. R. 29 Mad. 84, Katchalai ; Mudali* v. *Kuppanna Mudali, Mad. W. N. 1912, 41,* followed. *Sri Gopal* v. *Pirthi Singh, I. L. R. 24 All. 429, Natu Krishnama Chariar* v. *Annangara Chariar, I. L. R. 30 Mad. 353,* and *Gopal Lal* v. *Benarasi Pershad Chowdhry, I. L. R. 31 Calc. 428,* distinguished. AJUDHIA PANDE *v.* INAYAT-ULLAH (1912) . **I. L. R. 35 All. 111**

12. ———— **Issue in a former suit heard and decided but not necessary for this decision of suit**—The plaintiff as the daughter of one *B* sued to recover possession of properties, alleging that they formed part of a *bhag* in the village of Rahad, of which *B* had become the owner. In a former suit between the parties the defendant claimed the property as the nearest male agnate and heir of *B*. An issue was raised whether the custom of the daughter's exclusion by a *pitrai* heir was proved to have been in existence in the *bhagdari* village of Rahad and it was heard and decided but the suit was dismissed on the ground that the defendant, who was the plaintiff in that suit, was not proved to be the nearest *pitrai* heir to *B*. It was contended that by reason of this finding the plaintiff's suit was barred by *res judicata,* within the meaning of s. 11 of the Civil Procedure Code 1908. *Held,* that the suit was not barred by *res judicata* because although the issue was heard and decided, it was not finally decided as it was not necessary for the decision which the Court came to dismissing the suit and the plaintiff had no necessity of appealing against the Court's finding on that issue. BAI NATHI *v.* NARSI DULLABH (1919) **I. L. R. 44 Bom. 321**

13. ———— **Two suits, one judgment and two decrees**—*Two appeals, one of which abates before the other is heard.* A plaintiff instituted, on the same day and in the same Court, two suits, in each of which the claim was for a declaration that he was the *mahant* of a certain *math.* The one was against defendant *A* only, the other against defendants *A* and *S*. Both suits were decided by a single judgment, but a separate decree was framed in each. In the former suit *A* appealed. In the latter *S* appealed but *A* did not. Pending *A's* appeal *S* died and his appeal abated and judgment in the case became final. *Held,* that the hearing of *A's* appeal was barred. *Zakaria* v. *Debia, I. L. R. 33 All. 51,* followed. ANANT DAS *v.* UDAI BHAN PARGAS (1913) . . **I. L. R. 35 All. 187**

14. ———— **Previous rent suits**—*Question of area of holding and amount of rent decided previous suit if* res judicata *in subsequent suit.* In a previous suit for rent, the plaintiffs alleged that the defendants besides holding certain plots of land originally forming their own holding also held certain other plots belonging to another tenant *S* who had abandoned his holding at a consolidated *jama* of Rs. 30. Defendants denied holding the latter plots and contended that their *jama* was only Rs. 16 per year. It was held that the defendants were liable to pay rent at the rate of Rs. 16 per annum for a holding which included the lands alleged to have formerly belonged to *S* : *Held,* that the questions, whether the lands alleged to have been formerly held by *S* formed part of the defendant's holding and of

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

———— **s. 11 (1882 Code, s. 13)**—*contd.*

the amount of rent payable were directly and substantially in issue in that suit and were *res judicata* in a subsequent suit by the plaintiffs against the defendants for establishment of their title to the plots alleged to have formerly belonged to *S* and for rent in the alternative. The authorities reviewed. MANE MAHAMMAD NASYA *v.* DHANI MAHAMMAD (1912) . **17 C. W. N. 76**

15. ———— **Provincial Insolvency Act**—*(III of 1907), ss. 22 and 46—Insolvency Court—Application for recovery of property attached by Court—Subsequent suit for same purpose.* A person claiming as his own property attached by the Judge of an Insolvency Court as property of an insolvent may apply to the Insolvency Court under s. 22 of the Provincial Insolvency Act 1907, for a declaration of his title and for possession of the property claimed, or he may sue to recover the same in the ordinary way. But where such person has elected to pursue his remedy under s. 23 of the Provincial Insolvency Act, and the claim has, after a full inquiry, been decided against him, and he has not appealed from the decision under s. 46, he cannot afterwards file a separate suit with the same object. *Ram Kirpal* v. *Rup Kuari, I L. R. 6 All. Ex. parte Swinbank, 11 Ch D 525,* and *Ex parte Butters, 14 Ch. D. 265.* PITA RAM *v.* JUJHAR SINGH (1917) **I. L. R. 39 All. 626**

16. ———— **Specific Relief Act**—*(I of 1877), s. 9—Suit for possession in Munsif's Court—Subsequent suit for damages in Court of Small Causes.* The plaintiffs filed a suit under s. 9 of the Specific Relief Act, 1877, in the Court of a Munsif, and obtained a decree on the finding that they had in fact been wrongfully dispossessed by the defendants. They then sued in a Court of Small Causes for damages on account of the same wrongful dispossession. *Held,* that the finding of the Munsif that the plaintiffs had in fact been dispossessed was a *res judicata* in respect of the subsequent suit in the Court of Small Causes. *Ghulappa bin Balappa* v. *Raghavendra Swamirao, I. L. R. 28 Bom. 338,* and *Rasa Simhadri Appa Raw* v. *Ramchandrudu, I. L. R. 27 Mad. 63,* followed. BODLU BHONJA *v.* MOHAN SINGH (1917) . . . . **I. L. R. 39 All. 717**

17. ———— **Probate action**—*Evidence Act (I of 1872), s. 41—Probate and Administration Act (V of 1881), s. 83—Contentious proceeding for probate—Will not proved—Probate refused—Suit for recovery of property from defendants who held as executors—Judgment in the probate proceeding refusing probate not judgment in rem*—Res judicata. In a contentious proceeding for probate, the will produced by the applicants was held not proved and the probate was refused. The applicants appealed to the High Court which dismissed the appeal. The widow of the deceased thereupon brought a suit for the recovery of the property of the deceased from the defendants who held it as executors under the will and the first Court allowed the claim. On appeal by the defendants, two questions having arisen, namely, (i) whether the judgment refusing probate was as much within the scope and intention of s. 41 of the Evidence Act (I of 1872) as a judgment granting probate, and (ii) whether the judgment in the probate proceeding operated as *res* [illegible] *: H* [illegible]

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— s. 11 (1882 Code, s. 13)—*contd.*

the Full Bench, that s. 41 of the Evidence Act (I of 1872) was not applicable to the judgment of the Appellate Court refusing probate. *Held*, further, that the judgment in the probate proceeding operated as *res judicata* between the parties under s. 83 of the Probate and Administration Act (V of 1881) and s. 11 of the Civil Procedure Code (Act V of 1908). KALYANCHAND LALCHAND *v.* SITABAI (1913) . . I. L. R. 38 Bom. 309

18. ——— **Co-defendants**—*Res judicata between co-defendants. Per* SHAH, *J.*—In order that any decision between co-defendants might operate as *res judicata* in any subsequent suit between them, it is necessary to establish that there was a conflict of interests among the defendants, and that there was a judgment defining the real right and obligations of the defendants *inter se.* HARI ANNAJI *v.* VASUDEV JANARDAN (1914) . . . . I. L. R. 38 Bom. 438

19. ——— **Suit as members of the Muhammadan Community**—*for a declaration that certain property was waqf—Previous similar suit by other plaintiffs.* Where a suit had been brought by two persons as members of the public for a declaration that certain property was waqf property, and it had been decided that the property in question was not waqf: *Held*, that this decision operated as *res judicata* in the case of any other similar suit which might be brought by other members of the public as such claiming a similar declaration. MUHAMMAD AMIR *v.* SUMITRA KUNWAR (1914) . I. L. R. 36 All. 424

20. ——— **Benamidar**—*First suit alleging herself to be merely a benamidar, but found in that suit to be real owner—Second suit by persons alleging themselves to be the real owners.* A suit for sale on a mortgage was brought against the ostensible purchaser of the mortgaged property. the pleaded that she was not the real purchaser but was merely a benamidar for her three sons. The Court, however, declined to accept this plea and gave a decree against the defendant upon the record as being the real purchaser. *Held*, in a subsequent suit for possession of the same property brought by the sons, that the previous decision did not operate as *res judicata* in respect of their claim. *Khub Chand* v. *Narain, I. L. R. 3 All. 812, Nand Kishore Lal* v. *Ahmed, Ata, I. L. R. 18 All. 69, Yad Ram* v. *Umrao Singh, I. L. R. 21 All. 380, Kaniz Fatima* v. *Wali-ullah, I. L. R. 30 All. 30,* and *Gopinath Chobey* v. *Bhugwat Pershed, I. L. R. 10 Calc. 697,* referred to. MATA PRASAD *v.* RAM CHARAN SAHU (1914) I. L. R. 36 All. 446

21. ——— **Compromise decree challenged** *on the ground of absence of consent—Application for review dismissed—Fresh suit, if lies.* Where a party to a suit applied for review of a decree passed upon a compromise on the ground that he had not consented to the compromise, and failed: *Held*, that a suit to set aside the decree on the same ground was not maintainable. *Ram Gopal* v. *Prasanna Kumar, 2 C. L. J. 508 : s. c. 10 C. W. N. 527,* followed. *Gulab Koer* v. *Badshah Bahadur, 10 C. L. J. 420 : s. c. 13 C. W. N. 1197,* distinguished, the relief sought in that case having been based on fraud. KAILASH CHANDRA PODDAR *v.* GOPAL CHANDRA PODDAR (1914) . . . . 18 C. W. N. 1204

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— s. 11 (1882 Code, s. 13)—*contd.*

22. ——— **Suit for declaration and recovery of possession**—*Defence of* res judicata—*Parties not adequately represented in the former suit not fully tried—No bar of* res judicata. A suit brought by three plaintiffs as surviving coparceners of a joint Hindu family for a declaration that the property in suit formed part of the joint family property and for possession was met by the plea of *res judicata.* The previous suit, the decision in which was set up as *res judicata*, was filed in the year 1909 by the father of the present plaintiffs 2 and 3, who were minors and who were not joined as parties, against the present defendants and the present plaintiff 1 as defendant 4. The relief claimed in that suit was the same as that claimed in the present suit. The finding in that suit showed conclusively that the father of the present plaintiffs 2 and 3, who were then minors and were not parties, did not adequately represent them and the suit was not fully tried and the suit was accordingly dismissed. *Held*, that the bar of *res judicata* did not arise as the present plaintiffs 2 and 3 were then minors and were not adequately represented. *Held*, further, that the present plaintiff 1, who was defendant 4 in the former suit, was no more than a *pro formâ* defendant and took no active part and was not bound by the result of that suit the decree in which was in his favour. *Raja Rampal Singh* v. *Ram Ghulam Singh, L. R. 32 I. A. 17,* distinguished. SUNDRA *v.* SAKHARAM GOPALSHET (1914) . . . . I. L. R. 39 Bom. 29

23. ——— **Termination of tenancy by decree on prior mortgage.**—The appellant purchased a plot of land at a sale held in execution of a mortgage-decree. In the mortgage-suit the plaintiff-mortgagee's case was that the tenant-defendants to that suit had taken their tenancies from the mortgagor after the date of the mortgage and the mortgagee prayed for the sale of the property free from the tenancies. The case set up by one of the respondents who was the elder brother of the other respondents was that they held a permament tenure created prior to the mortgage which was confirmed by a confirmatory lease after the mortgage and that they had created a masonry building on the land. Issues were framed on this point and the Court found in favour of the plaintiff mortgagee, and in execution of the mortgage-decree the property was sold free of all encumbrances and purchased by the appellant. Subsequently a portion of the land so purchased by the appellant was acquired under the Land Acquisition Act and the respondents put in a claim for the compensation-money alleging that they had a permanent *mokurari maurasi* interest in the land, the tenancy standing in the name of the elder brother. *Held*, that the matter was directly in issue in the former suit and decided against the respondents and they could not open the question again. KANAI LAL JALAN *v.* RASIK LAL SADHUKHAN (1914) 19 C. W. N. 561

24. ——— **Partition**—*Plaintiff's share declared and separated by metes and bounds—No proceeding by the defendant to correct errors if any in the apportionment—Subsequent suit by the defendant to correct error if lies—Mistake, suit to set aside decree on ground of, if lies.* If any co-sharer applies for a partition of property, he

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

———— s. 11 (1882 Code, s. 13)—*contd.*

must make the other co-sharers defendants, because the partition which is made in his favour is a partition against his co-sharers. That which gives him a portion of the property takes away all right which they would otherwise have to that portion, and therefore it is a decree against them and in favour of himself. Where a decree having been made in a suit for partition declaring the shares of the plaintiffs, a Commissioner under the Court's direction went and on the ground measured out the declared shares and the plaintiffs were put into possession thereof, but the defendants took no proceeding in the suit such as is provided for in the Code of Civil Procedure to correct errors, if any, made in partitioning out: *Held*, that, apart from such proceedings none of which were taken, the decree was *res judicata*, and a suit instituted by the defendants in the previous suit with a view to correct the apportionment made in favour of the plaintiffs in the previous suit was barred by *res judicata*. NALINI KANTA LAHIRI *v.* SARNAMOYI DEBYA (1914)
19 C. W. N. 531

25. **———— Rise of value of subject-matter**—*Pro formâ defendant when bound Person not joined as executor when bound as such—Decree against limited owner, upon compromise, when binding on reversion—Decree erroneously declared not* res judicata, *effect of.* To determine, for purposes of *res judicata* whether the Court which decided the former suit had jurisdiction to try the subsequent suit, regard must be had to the jurisdiction of the Court at the date of the former suit and not to its jurisdiction at the date of the subsequent suit. A decree made by a Munsif cannot cease to be *res judicata* by reason of a gradual increase in the value of the subject-matter of the litigation. If a defendant actively contested the plaintiff's claim, the decision of the suit will bind him even though he was merely described as a *pro-formâ* defendant and no relief was asked against him. A defendant who might have been joined both in his personal capacity and in that of an executor to another's estate cannot be treated as having been a party necessarily in his character as an executor when he was not described in the pleadings as such. Where a decision between the parties was considered by the Court and declared not to be *res judicata*, the latter decision even if erroneous in law becomes conclusive between the parties; and it was not open to any of them to plead in a later suit that the former decision still operated as *res judicata*. An adverse decision obtained against a limited owner such as a Hindu daughter, if obtained upon a fair trial, is *res judicata* on the issues decided therein against reversionary heirs. A decree passed on a compromise made *bonâ fide* for the benefit of the estate and not for the personal advantage of the limited owner has the same effect, and such a decree unless successfully, impeached on the ground of fraud, coercion, collusion or any like reason would operate as *res judicata* against the reversioners. MOHENDRA NATH BISWAS *v.* SHAMSUNNESSA KHATUN (1914)
19 C. W. N. 1280

26. **———— Prior suit to claim possession**—*by virtue of the purchase of mortgagee's rights—Subsequent suit for repayment of the money advanced on mortgage—No bar of* res judicata—*Bhagdari Act (Bom. Act V of 1862)—Mortgage of unrecognised share of a bhag—Mortgage void—Unlawful consideration—Indian Contract Act (IX of 1872), s. 24—Indian Limitation Act (IX of 1908), s. 62.* One *K* mortgaged with possession an unrecognised share of a *bhag* with *R* on May 10, 1896, contrary to the provisions of the Bhagdari Act, 1862. The mortgage deed provided that after possession by the mortgagee for eleven years the mortgage amount was to be paid to him whenever he should demand it either out of the property or by the mortgagor or his heirs personally. In 1908 *B* obtained a money decree against the estate of *R* whose mortgage right was put up to sale and purchased by the plaintiff at a Court sale for Rs. 577. In 1910, the plaintiff filed a suit No. 176 of 1910 against the representatives of *R* and *K* to obtain possession. No claim was made in that suit for payment of the amount of the mortgage-debt. The suit failed on the ground that the mortgage was invalid and therefore unenforceable. In 1911, another suit was filed by the plaintiff against the same parties to recover Rs. 788 from the estate of *K* and in the alternative to recover Rs. 577 from the estate of *B*. The defendants Nos. 1 to 3 contended that the suit was barred by *res judicata* and also, pleaded limitation. *Held*, that the subsequent suit for the mortgage-debt was not barred by *res judicata*, as the prior claim of 1910 for possession was not really a claim on the mortgage but a claim by virtue of the purchase by the plaintiff of the mortgagee's rights. *Held*, further, that the consideration for the mortgage being unlawful under s. 24 of the Contract Act, 1872, it failed *ab initio* and the claim for repayment of the money advanced to the mortgagor as money had and received being brought more than three years after the date of the mortgage deed was barred by reason of Art. 62 of Limitation Act, 1908. *Jaterbhai Jorabhai* v. *Gordhan Narsi I. L. R. 39 Bom. 358*, followed. BAI DIWALI *v.* UMEDBHAI BHULABHAI (1916) . **I. L. R. 40 Bom. 61**

27. **———— Prior suit to set aside alienation**—*made by minor's mother—Mortgage created by alienee before suit—Mortgagee not made party to the suit—Partial representation by mortgagor—Subsequent suit by mortgagee to support alienation—Privity between parties—Subsequent suit not barred by* res judicata—*Meaning of words "claiming under."* The property in suit originally belonged to one Devare. In 1883, during the minority of Devare, his mother sold it to the Bhojes from whom one Bavachi received it in exchange for another parcel of land. In 1891, by a simple mortgage Bavachi mortgaged the property to the plaintiff. In 1898, a suit was brought by Davare against his mother Bavachi and the Bhojes in order to set aside the sale by his mother to the Bhojes. That suit was successful and the result was that the sale to Bhojes was set aside. In 1901, the plaintiff obtained a decree on his mortgage against Bavachi. The property was put to sale and was purchased by the plaintiff with permission. But when the plaintiff endeavoured to get possession he was resisted by Davare. The plaintiff, therefore, brought a suit in 1909 against Devare, Bavachi and the Bhojes to recover possession. The defendant Devare contended that the plaintiff's suit was barred by *res judicata*

CIVIL PROCEDURE CODE (ACT V OF 1908)
—*contd.*

———— **s. 11 (1882 Code, s. 13)**—*contd.*

as he was bound by the decree obtained against his mortgagor Bavachi in the suit of 1898. *Held,* that as a mere mortgagee the plaintiff would not be bound by the earlier decision, because his title arose prior to the suit in which the decree against his mortgagor was obtained, and the mortgagor possessing only the equality of redemption had not in him any such estate as would enable him sufficiently to represent the mortgagee in the suit instituted after the mortgage. *Sita Ram* v. *Amir Begam, I. L. R. 8 All. 324, 338,* followed. RAMCHANDRA DHONDO *v.* MALKAPA (1916)

I. L. R. 40 Bom. 679

28. ———— **Applicability of the principle as against co-defendants.** A deposit of money in a firm was owned in equal moieties by *D* and *L*. In a suit brought by *D* in the High Court of Bombay to recover his moiety of the deposit, his brother *L* who was a partner in the firm admitted his claim; but it was contested by the other partners, defendants Nos. 1 and 2. Defendants Nos. 3 to 6 contended that they were not partners in the firm at all. The Court passed a decree against *L* and defendants Nos. 1 and 2. The firm made losses and ceased to work. *L*, thereupon, filed the present suit in the Court of the Subordinate Judge at Surat for a Dissolution of the firm and for taking its accounts. *D* was made a party to the suit as a creditor of the firm. The defendants Nos. 3 to 6 again contended that they were not partners in the firm. A question having arisen whether the contention was *res judicata* in the present suit: *Held,* that the relief given to *D* in the earlier suit did not require or involve a decision of any case between the co-defendants, and, therefore, the co-defendants were not to be bound as between each other by the Court's proceeding and decision which were necessary only to the decree which *D* obtained. *Per* BATCHELOR *J.* "The Court is slow to enforce the principle of *res judicata* as against co-defendants, and the limits of the operation of the principle in such cases seem to me to be narrowly laid down." FAKIRCHAND LALLUBHAI *v.* NAGINCHAND KALIDAS (1915) . **I. L. R. 40 Bom. 210**

29. ———— **Decision embodied in decree**—*operates as* res judicata. In 1900, the defendants obtained a *mulgeni* (permanent) lease of certain lands from the then manager of the temple. In 1910, the plaintiff, the new manager, sued the defendants in ejectment praying that the *mulgeni* lease was not binding on him and that the defendants being annual tenants should be evicted. The Court held in favour of the plaintiff on the first ground, but for want of notice held that he was not entitled at that stage to evict the defendants. Then after due notice given, the plaintiff again sued to eject the defendants. They again pleaded the *mulgeni* lease. The Court held that that defence was not open to them, as it was barred by *res judicata*. On appeal, *held,* that the defence was barred by *res judicata;* for the decision of the Court in the earlier suit in favour of the plaintiff upon the first part of his prayer found a place in the decretal order and was as much decreed as the other part of the prayer which in the second part of that decretal order was rejected. MOTA HOLIAPPA *v.* VITHAL GOPAL 1916) . . . . **I. L. R. 40 Bom. 662**

CIVIL PROCEDURE CODE (ACT V OF 1908)
—*contd.*

———— **s. 11 (1882 Code, s. 13)**—*contd.*

30. ———— **Decision of a Boundary, Settlement Officer**—*Grounds of decision, if* res judicata—*Boundaries Act (XXVIII of 1860) ss. 24 and 25—Estoppel.* Where a Boundary Settlement Officer *mittadar* but to the Government on the ground that they never had formed part of the area of the *mitta,* and no suit was brought by the *mittadar* to contest the decision under s 25 of the Act. *Held,* that the ground of the decision as well as the actual decision was *res judicata* in a subsequent suit instituted by the *mittadar* to recover the lands as having formed part of the *mitta* or in the alternative for a reduction of the *peshkash* of the *mitta Kamaraju* v. *The Secretary of State for India, I. L. R. 11 Mad. 309,* followed. *Per* SESHAGIRI AYYAR. J. The decision of the Survey Officer is binding upon the parties whether it is *res judicata* in the technical sense in which the term is used in the Civil Procedure Code or not. *Krishna Behari Roy* v. *Brojeswari Chowdarnee, L. R. 2 I. A. 283, 286* and *In re Bank of Hindustan, China and Japan (Alison's case), L. R. 9 Ch. App. 1,* referred to. MUTHAMMAL *v.* THE SECRETARY OF STATE FOR INDIA (1916) . . . **I. L. R. 39 Mad. 1202**

31. ———— **Arbitration**—*Award passed into a decree—Finding of arbitrator, not incorporated in the Judgment—Surrender of lease—Subsequent suit for rent for another year covered by lease instituted by the zamindar—Previous judgment, whether* res judicata—*S. 11, Civil Procedure Code, whether a rule of jurisdiction or estoppel.* A decision in a suit for rent, instituted in a Civil Court by the lessee for a term of a zamindari against the tenant, is not *res judicata* in a subsequent suit for rent, instituted by the zamindar after surrender of the lease by the lessee, even though the rent claimed in the later suit was for a period covered by the original lease. Surrender by the lessee does not operate as an assignment of the rights of the lessee in favour of the lessor, but determines the tenancy so as to let in the lessor's rights. RAJAH OF RAMNAD *v.* RAMANATHASWAMI (1921) . . **I. L. R. 44 Mad. 514**

32. ———— **ss. 40 to 43, Evidence Act I of (1872)**—*S. 43, Specific Relief Act (I of 1877)—Judgment not inter parties, whether* res judicata. A judgment operates as a bar only as between the parties thereto or their privies; hence a judgment in a suit by *A* against *B* a rival claimant for an office negativing *A*'s title as against *B* is no bar to a suit by *A* against a third party for the emoluments of the said office. It is only a piece of evidence on the question of title. *Gokul Mandar* v. *Pudmanund Singh (1902) I. L. R. 29 Calc. 707 (P.C.)* and *Peari Mohan Shaha* v. *Durlavi Dassya (1913) 18 C. W. N. 954,* followed. *Srinivasa Aiyangar* v. *Arayar Srinivasa Aiyangar (1910) I. L. R. 33 Mad. 483* and *Ramamurti Dhora* v. *The Secretary of State for India in Council (1913) I. L. R. 36 Mad. 141,* overruled. SECRETARY OF STATE *v.* SYED AHMAD BADSHA (1921)

I. L. R. 44 Mad. (F. B.) 778

33. ———— **Suit by purchaser at revenue sale to recover rent**—*from tenant at rate decreed in favour of ex-proprietor.* A decree for rent obtained by a proprietor of

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

———— s. 11 (1882 Code, s. 13)—*concld.*

a revenue-paying estate against a tenant is not *res judicata* in a suit for rent by a purchaser of the estate at a revenue sale, as the purchaser does not claim under the ex-proprietor within the meaning of s. 11 of the Civil Procedure Code. But the purchaser is not in any worse position than the ex-proprietor and may elect to take advantage of the decree obtained by the latter; and if the purchaser sues the tenant for recovery of rent at the same rate, the tenant whose rights are in no way enlarged by the sale cannot object. NAKUL CHANDRA BASU *v.* SOSHTI CHARAN BISWAS

24 C. W. N. 399

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[illegible]

to recover possession as reversioners of property alienated by a Hindu widow, obtained a decree in respect of a moiety of the property upon a finding that the sale was not for legal necessity, but the suit was dismissed as regards the other moiety on the ground that it had not passed to the plaintiff and afterwards this moiety too having passed to the plaintiff, he again sued the defendant for recovery of this moiety: *Held*, that the decision in the previous suit that the sale was not for legal necessity was *res judicata* in the present suit, as the parties were litigating under the same title in both suits, *viz.*, the plaintiff as the owner of the reversion and the defendant as purchaser from the widow. SURYA KANTA RAY CHOWDHURY *v.* FANI BHUSAN BANARJEE (1913)

18 C. W. N. 833

37. ———— *Prior Mortgagee—Res judicata.* Where in a suit on a subsequent mortgage-bond, a prior mortgagee was made a party and the plaintiff prayed for an account as to the amount due to the prior mortgagee, but the Court on the failure of the prior mortgagee to appear passed an *ex parte* decree, but no order was passed as to plaintiff's prayer for account as against the prior mortgagee: *Held, that the Court in passing this* decree never intended to say that the absence of the prior mortgagee from the trial caused the mortgagee security of the plaintiff to override the prior security which was held by the prior mortgagee. *Ajudhya* v. *Inayet I. L. R. 35 All. 111*, followed. MOHIRUDDIN MONDAL *v.* INDRA KUMARI DASI (1914)

18 C. W. N. 1013

———— s. 11, expl. II—*Res judicata—Question of title—Previous suit a suit of the nature cognizable by a Court of Small Causes, though not tried as a Small Cause Court suit.* The title of the plaintiff to a moiety of a certain grove was put in issue in a suit for damages on account of the appropriation of timber by the defendants. This suit was tried by a Munsif as a regular suit and the question of title was decided in favour of the plaintiff, but the suit was one of the nature cognizable by a Court of Small Causes. Subsequently the plaintiff's title to the same grove was again put in issue between the same parties in a regular civil suit. *Held*, that the decision in the earlier suit operated as *res judicata* in respect of the subsequent suit, notwithstanding that in the earlier suit no second appeal lay. *Musaddi Lal* v. *Jwala Prasad, 10 A. L. J. 106*, approved. RAM FAQIR *v.* BINDESHRI SINGH (1918) . . . . I. L. R. 41 All. 51

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

———— s. 11, expl. IV—"*Might and ought*"—Res judicata *even as regards implied decisions if necessary for the decree—Applicability to issues also.* *A*, a landlord, tendered a patta to *B*, his tenant, who objected to the patta on the ground that the extent of his holding was overstated, some of the lands included in the patta not belonging to *A* but to *B* himself. The issue was raised *whether the patta tendered* was proper; the Court found that it did not contain any objectionable matter and was therefore a proper patta. Decree was accordingly given for rent in favour of *A*. *A* tendered a similar patta to *B*, for a subsequent year and *B* again raised a similar objection to the extent of the holding. In a suit brought by *A* for the rent, *B* objected to the extent of the holding and it was contended that the matter was *res judicata* by reason of the decision in the previous suit: *Held*, by the Full Bench, upholding the contention and agreeing with MUNRO, J. in *Bayya Naidu* v. *Paradesi Naidu, I. L. R. 35 Mad. 216*, (i) that the question of the extent of the defendant's holding was directly and substantially an issue in the previous suit and must be taken to have been heard and finally decided in plaintiff's favour, as such a decision is necessarily involved in the decree passed in plaintiff's favour, seeing that if the decision had been the other way, it would, under the Rent Recovery Act, have been fatal to his suit which must have been dismissed on the ground that the patta was not a proper one; (ii) that even if it was not expressly in question, it must be deemed to have been raised and decided within the meaning of explanation IV to s. 11 of the Civil Procedure Code, as it was ground of defence which might and ought to have been raised by the defendant; (iii) and that it is unnecessary in such a case of failure to raise the available ground of defence, that there should have been an express decision by the Court upon it in order to make it *res judicata*. *Sri Gopal* v. *Pirthi Singh, I. L. R. 21 All. 429*, and *Mahomed Ibrahim Hossain Khan* v. *Ambika Pershad Singh I. L. R. 39 Calc. 527*, followed. BADAY NAIDU *v.* SURYANARAYANA . . I. L. R. 37 Mad. 70

———— *Puisne mortgagee's suit—Prior mortgagee made a party, if bound to set up his mortgage in defence—Test—Necessary party.* A prior mortgagee impleaded as such in a puisne mortgagee's suit is not bound to set up his prior mortgage in defence of his rights. But if he has a subsequent mortgage as well, he is a necessary party in such a suit and he must set up not merely his later but his prior mortgage as well, failing which he will be debarred by the rule of *res judicata* from suing to enforce his earlier mortgage. A decree obtained by a puisne mortgagee in a suit in which a prior mortgagee was impleaded as such is no bar to a suit by the latter to enforce his mortgage which he was not bound to set up as a defence in that suit. The test in all such cases is—was the defendant impleaded as a puisne mortgagee and therefore a necessary party? *Ibrahim Hossain Khan* v. *Ambika Pershad*

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— **s. 11, expl. IV**—*contd.*

I. L. R. 39 Calc. 527; s. c. 16 C. W. N. 505, referred to. A plea of *res judicata* not taken in the written statement was allowed to be taken on appeal under O. XLI, r. 2, C. P., O. VIII, r. 2, being held to be no bar to its being taken at that stage. KRISHNA DOYAL GIR *v.* SYED MD. AMIRUL HASSAN (1914) . . . **19 C. W. N. 942**

——— *Subsequent mortgagee who does not appear in prior mortgagee's suit, if may subsequently set up an earlier mortgage paid off by advances upon his mortgage.* A subsequent mortgagee who has been made a party to a suit on a prior mortgage, but who has failed to appear, cannot afterwards raise the plea that he had paid off a prior lien and was therefore in the position of a prior mortgagee. *Krishna Doyal Gir* v. *Syed Md. Amirul Hassan, 19 C. W. N. 942,* referred to. *Ibrahim Hussain Khan* v. *Ambika Pershad, I. L. R. 39 Calc. 527: s. c. 16 C. W. N. 505,* followed. HANKAR RAY *v.* KAMTA PROSHAD SAHU (1915) **19 C. W. N. 947**

——— *Dekkhan Agriculturists' Relief Act (XVII of 1879), ss. 12 and 13—Prior and subsequent mortgages upon the same property by the same mortgagor to co-parcener mortgagees—Suit on subsequent mortgage without reference to the prior mortgage—Subsequent suit on the prior mortgage—Separate causes of action—Subsequent suit barred—*res judicata—*Finding as a matter of fact that the two mortgages had been transactions "out of which the suit has arisen."* A mortgagee, who has two mortgages of different dates upon the same property, having sued upon a mortgage of the later date and having had the property sold without reference to the prior mortgage, cannot afterwards bring a suit on the prior mortgage though the causes of action for the two suits are distinct. This rule is not the result of O. II, r. 2 of the Civil Procedure Code (Act V of 1908) but it depends upon the principle of *res judicata. Per* HAYWARD, *J.* If the two mortgages had been found as a matter of fact to have been transactions "out of which the suit has arisen," the subsequent suit on the prior mortgage would have further been barred in view of the previous suit on the subsequent mortgage by the provisions of O. II, r. 2, of the Code and the special provisions of s. 13 of the Dekkhan Agriculturists' Relief Act (XVII of 1879). Mahadu v. Rajaram (1887) P. I. 216 ahd *Gopal Purushotam* v. *Yashwantrav (1887) P. I. 273* referred to. DHONDO RAMCHANDRA *v.* BHIKAJI (1914) **I. L. R. 39 Bom. 138**

——— Where a person brings a redemption suit and fails his second suit in ejectment against the same defendant is not barred by *res judicata* the matter involved being essentially different. It is the practice of the Bombay High Court to pass a decree for redemption in a case in which the plaintiff has sued in ejectment. That is purely in the exercise of the Court's discretionary power; and it can hardly be maintained that the plaintiff failing in an ejectment suit ought to pray for the alternative relief by way of redemption, when the Court is not bound to grant it as a matter of right. MAHOMED IBRAHIM *v.* SHEIKH HAMJA (1911) **I. L. R. 35 Bom. 507**

——— A prior mortgagee has a par amount claim outside the controversy of a suit on a subsequent mortgagee unless his mortgage is impugned. RADHA KISHUN *v.* KHURSHED HOSSAIN . . . . **25 C. W. N. 416**

See also THIRD PARTY NOTICE. **I. L. R. 45 Bom. 24**

——— **s. 11, expl. V**

——— Res judicata—*Private right claimed in common by several persons—Suit by some, others being impleaded as defendants—* Bonâ fide *litigation—Decision, whether binding on representative of deceased defendant, not brought on record.* Explanation V to s. 11, Civil Procedure Code, applies not only to cases where leave of Court has been granted under O. I, r. 8, but also to cases where some of the persons claiming a private right in common with others litigate *bonâ fide* on behalf of themselves and such others. A decision in a suit, instituted and conducted *bonâ fide* by some only of the agraharamdars of a village against the zamindar and the other agraharamdars, for a declaration as to the kattubadi payable by them to the zamindar, is *res judicata* against the representative of an agraharamdar who was a defendant but died pending the appeal and whose legal representative was accidentally not brought on record either in the Appeal or the Second Appeal. *Rangamma* v. *Narasimha Charyulu, (1916) 31 M. L. J. 26,* followed. GOPALACHARYULU *v.* SUBBAMMA (1920) . . **I. L. R. 43 Mad. 487**

——— *Mortgage—Suit for sale—Person claiming paramount title impleaded—Decree in favour of mortgagee plaintiff—Suit by paramount owner for declaration of title—*res judicata. In a suit brought by a mortgagee to enforce his mortgage, a person claiming a title paramount to the mortgagor and the mortgagee is not a necessary party, and the question of the paramount title cannot be litigated in such a suit. *Joti Prasad* v. *Aziz Khan, I. L. R. 31 All. 11,* and *Jaggeshar Dutt* v. *Bhuban Mohon Mitro, I. L. R. 33 Calc. 425,* referred to. Two suits for sale on separate mortgages of the same property were filed, and in each the mortgagees impleaded a third party as a subsequent mortgagee of a portion of the property in suit. The party so impleaded was in reality the owner of a considerable portion of the property comprised in the mortgages sued upon, though he was not impleaded in that capacity. In the first suit the puisne mortgagee did not appear. In the second he attempted to set up his paramount title, but was not allowed to do so. The mortgagors likewise attempted to set up the paramount title of the person impleaded as puisne mortgagee, and in their case also the defence was ruled out. In the result, decrees were passed in favour of the plaintiff. The puisne mortgagee then brought a suit for a declaration of his title to part of the mortgaged property. *Held,* that the suit was not barred by anything which had happened in the course of the previous litigation. *Girija Kanta Chakrabutty* v. *Mohim Chndra Acharjya, 35 Indian Cases 294,* referred to. GOBARDAN *v.* MUNNA LAL (1918) **I. L. R. 40 All. 584**

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— **s. 11, expl. V**—*contd.*

—*Suit for possession and mesne profits—Decree silent regarding future mesne profits—Fresh suit for such profits not barred.* The plaintiff claimed possession of immovable property and mesne profits to the date of suit; also mesne profits *pendente lite* and subsequent to decree. The Court gave a decree for mesne profits to the date of suit, but the decree was silent as to mesne profits *pendente lite* or subsequent to decree. *Held,* on suit by the plaintiff for further mesne profits to the date of his obtaining possession, that there was nothing in the present Code of Civil Procedure of 1908, any more than in the former Code of 1882, to bar such a suit. *Ram Dayal* v. *Madan Mohan Lal, I. L. R. 21 All. 425,* followed. *Doraiswami Ayyar* v. *T. Subramania Ayyar, I. L. R. 41 Mad 188,* referred to. MUHAMMAD ISHAQ KHAN *v.* MUHAMMAD RUSTAM ALI KHAN (1918)
I. L. R. 40 All. 292

——— **s. 11, expl. V; s. 47, and O. XX, r. 12**—

See RES JUDICATA **I. L. R. 41 Mad. 188**

——— **s. 11, Expl. VI**—Res judicata "*Right claimed in common*"—*Jus tertii.* In a suit for ejectment in a Revenue Court the defendants denied the title of the plaintiff and set up their own title as to part of the property and a *jus tertii* as to the rest. The Revenue Court elected to try the

in the Civil Court for a declaration of title, that the decision of the Revenue Court, although it constituted a *res judicata* as between the plaintiff and the then defendants, could not amount to a *res judicata* as between the plaintiff and the third parties whose rights those *defendants had set up.* JAIMANGAL DEO *v.* BED SARAN KUNWARI (1911)
I. L. R. 33 All. 493

——— Res judicata—*Joint Hindu family—First suit by managing member with another member as a* pro forma *defendant—Second suit by latter member.* The managing member of a joint Hindu family brought a suit in respect of a house which formed part of the family property asking for an injunction to restrain the defendant from interfering with it. A brother of the plaintiff, who was a member of the joint family, was made a *pro forma* defendant to the suit. This suit was dismissed. Thereafter the brother filed a second suit asking for the same relief in respect of the same house from the same defendant. *Held* that this second suit was barred by the principle of *res judicata.* KUNJ MAN *v.* JAGAN NATH . . . **I. L. R. 42 All. 359**

——— **ss. 11, 13**—Res judicata—*Foreign judgment—Effect of decision in British India as to title to part of an estate on a suit filed in Rampur for possession of another portion of the same estate situated there.* Certain claimants of the estate of a deceased person, which was situated partly in the Bareilly district and partly in the State of Rampur, sued in Bareilly to recover the portion situated there, and obtained a decree. Other claimants filed a similar suit in Rampur in respect of the portion situated there. *Held,* on suit by the plaintiffs in the Bareilly Court for a declaration that the judgment of that Court operated as *res judicata* in

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— **ss. 11, 13**—*contd.*

respect of the suit in Rampur and for an injunction restraining further proceedings in the Rampur Court, that neither relief could be granted. MAQBUL FATIMA *v.* AMIR HASAN KHAN (1914)
I. L. R. 37 All 1.

——— **ss. 11, 15**—*Service inam land—Summary settlement—Alienation—Will—Probate—Decision of Probate Court not to be destroyed by adjudication in a regular suit*—res judicata. *Held,* that under s. 11 of the Code of Civil Procedure it was not open to the Court, after the decision of the District Court granting probate of the will, to try the question of the authority of the widow to adopt, which question was bound up with the question of the revocation of the will in the present suit, inasmuch as the issue decided by the Probate Court had conclusively determined between the parties the question of whether or not the testator had revoked his will before death and whether the statement that he had given the authority to his widow to adopt expressed his wishes at the time of his death, and inasmuch as the District Court, which had tried the probate case, was a Court competent to have tried the present case. BRENDON *v.* SUNDARABI (1913)
I. L. R. 38 Bom. 272

——— **ss. 11, 47, O. XXXIV, rr. 7, 8**—

See MORTGAGE . **I. L. R. 43 Bom. 334**

——— **ss. 11 and 47**—*Mortgage debt—Suit for recovery by sale of mortgaged property—Decree for payment within six months and in default sale—No further action taken under the decree—Continuance of the relation of mortgagor and mortgagee—Suit by mortgagor for redemption—No bar of ss. 11 and 47 of the Civil Procedure Code (Act V of 1908)* The defendant in a suit for sale under a mortgage-decree, who is given six months' time to pay the decretal debt and in default the plaintiff to recover the decretal debt by sale of the mortgaged property, is not in a position of a decree-holder who has a decree to execute. His right of payment within six months is a right which he has in mitigation of his liabilities under the decree. If he does not pay within six months and the mortgagee does not apply for decree absolute, the latter does not get rid of the relationship of mortgagor and mortgagee and there is nothing to prevent the mortgagor or his representative from filing a suit for redemption but he cannot go behind the decree in the mortgagee's suit in so far as it settled the amount of the mortgage debt up to the date of that decree. Such a suit for redemption is not barred either under s. 11 or s. 47 of the Civil Procedure Code (Act V of 1908) RAMA *v.* BHAGCHAND (1914) . . **I. L. R. 39 Bom. 41**

——— *First suit for redemption—Decree for redemption not executed—Second suit for redemption—Bar of* res judicata—*Remedy by execution and not by fresh suit.* On the 8th April 1899, a mortgagor obtained a decree for redemption of a mortgage of 1859, under the provisions of the Dekkhan Agriculturists' Relief Act, 1879. This decree was not executed. The property mortgaged continued to remain in the possession of the mortgagee. The mortgagor again mortgaged the property to the plaintiff on the 26th May 1899. In 1912, the plaintiff sued to enforce his mortgage against the original mortgagor and mortgage-

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— **ss. 11, 47**—*concld.*

The mortgagee contended that the decree of 1899 was a bar to the suit. *Held*, that the suit was barred by the decree of 1899, for if it was treated as a suit for redemption of the mortgage of 1859 it would be barred under s. 11 of the Civil Procedure Code (Act V of 1908), and if it was treated as based on the decree of 1899 taken along with the subsequent conduct of the parties in not executing the decree and in allowing the possession to remain with the mortgagee as before it would be barred under s. 47 of the Code. BAPUJI RAMCHANDRA *v.* GUJA MALU (1917) . **I. L. R. 42 Bom. 246**

——— **s. 11, O. II, r. 2**—

See CIVIL PROCEDURE CODE (1882), ss. 13 AND 43 . **I. L. R. 33 All. 302**

See MORTGAGE . **25 C. W. N. 129**

See U. P. LAND REVENUE ACT, 1901, ss. 111, 112, 233 **I. L. R. 38 All. 302**

——— **s. 11 and Sch. II, r. 20**—*Reference to arbitration out of Court—Award—Refusal by Court to file the award—Separate suit to enforce the award not barred by* res judicata—*Limitation Act (IX of 1908), Art. 120—Limitation for a suit to enforce an award is six years.* The parties to a mortgage referred their dispute to arbitration out of Court. An award was made in due course; but when it was sought to be filed in Court under paragraph 20 of the Second Schedule to the Civil Procedure Code, the Court, without trying the validity of the award, refused to file it. The unsuccessful party then filed a regular suit to enforce the award; but it was resisted on the ground that the refusal by the Court to file the award operated as *res judicata* to the present suit:—*Held*, that the bar of *res judicata* did not apply and that the present suit was maintainable. *Kunjilal v. Durga Prasad (1910) 32 All. 484*, referred to. A suit to enforce an award is a suit not provided by any other Article by the Limitation Act, and the period of limitation for such suit is six years under Art. 120. RAJMAL GIRDHARLAL *v.* MARUTI SHIVRAM (1920). . . . **I. L. R. 45 Bom. 329**

——— **s. 12**—

See BENGAL TENANCY ACT, s. 103B. **14 C. W. N. 364**

——— **s. 13 (1882 Code, s. 14)**—

See S. 11 . . . . **I. L. R. 37 All. 1**

See FOREIGN COURT. **I. L. R. 39 Mad. 733**

See RIGHT OF SUIT. **I. L. R. 36 Mad. 141**

——— *Foreign judgment, suit on—Judgment obtained by plaintiff after defence had been struck out and "defendant placed in the same position as if he had not defended"—Judgment not on "the merits of the case."* The plaintiff (appellant) sued the defendant (respondent) in the Court of King's Bench in London for a sum of money he alleged to be due to him in respect of transactions he had with the defendant as a member of a firm in Madras who under arrangements between them consigned goods to the plaintiff for sale in London. The defendant denied that he was ever a member of the firm in Madras, and also denied that there

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— **s. 13 (1882 Code, s. 14)**—*contd.*

was any money due by him to the plaintiff or that the arrangements had been made under which the plaintiff asserted that his claim arose. The defendant refused to answer interrogatories which the plaintiff was allowed to exhibit calling on the defendant to speak as to some of the material matters in dispute, and the defence was thereupon ordered to be struck out, "and the defendant to be placed in the same position as if he had not defended," and judgment was entered for the plaintiff. In a suit brought in the High Court at Madras on that judgment: *Held* (upholding the decision of the appellate High Court), that it had not been given between the parties "on the merits of the case" within the meaning of s. 13 (*b*) of the Code of Civil Procedure, 1908. KEYMER *v.* VISVANATHAM REDDI (1916) . **I. L. R. 40 Mad. 112**

——— *Natural justice, meaning of the term—Wrong view as to legal liability or onus, whether renders foreign judgment one not given on the merits.* A wrong view as to the legal liability of a party or as to onus does not render a foreign judgment one not given on the merits within the meaning of s. 13 (*b*) of the Civil Procedure Code. The term 'natural justice,' in s. 13 (*d*) of the Code of Civil Procedure with reference to foreign judgments refers rather to the form of procedure than to the merits of the case. *Crawley* v. *Isaacs, 16 L. T. (N. S.) 529*, followed. *Liverpool Marine Credit Co.* v. *Hunter L. R. 3 Ch. App. 479*, applied and followed. *Imrie* v. *Castrique, 8 C. B. (N. S.) 405 ; 141 E. R. 1222*, and *Scott* v. *Pilkington, 2 B. & S. 11 ; 121 E. R. 978*, referred to. RAMA SHENOI *v.* HALLAGNA (1917) **I. L. R. 41 Mad. 205**

——— *Suit on foreign judgment—Judgment whether "given on the merits of the case"—Writ of summons accepted by solicitor on behalf of defendant, but defendant unable to be present in person at the hearing.* A suit for damages on account of personal injuries alleged to have been sustained owing to the negligence of the defendant in the management of a motor car was filed in England. The writ of summons was accepted by a solicitor, who entered an appearance on behalf of the defendant, and the case was set down for hearing before a Judge of the Court of King's Bench and a special jury. Meanwhile the defendant was suddenly and unexpectedly recalled to India; but the case proceeded and resulted in a judgment for the plaintiff. *Held*, on suit by the plaintiff in India based on this judgment, that the judgment of the Court of King's Bench could not be said not to have been given on the merits of the case within the meaning of s. 13 (*b*) of the Code of Civil Procedure, 1908. *Keymer* v. *Visvanatham Reddi, I. L. R. 40 Mad. 112*, distinguished. COLE *v.* HARPER, (1919) . . . . **I. L. R. 41 All. 521**

——— **ss. 14, 151 O. XLVII, r. 1**—*Review of judgment—Application for review in second appeal, based on alleged discovery of new and important evidence.* The High Court cannot in a second appeal entertain an application for a review of judgment based on the ground that since the disposal of the appeal, documentary evidence has been discovered which, if sufficiently proved, would have led the Court below to come to a different finding, although, had such evidence been discovered be-

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

———— ss. 14, 151—*contd.*

fore the disposal of the appeal, the Court might have allowed the appellant to withdraw the appeal with a view to apply to the lower Appellate Court for a review of judgment on the ground of the discovery of fresh evidence. *Panchanan Mookerjee* v. *Radhanath Mookerjee, 4 B. L. R. 213,* and *Raru Kutti* v. *Mamad, I. L. R. 18 Mad. 489,* referred to and followed. NAND KISHORE, *In the matter of the petition of.* (1909) . L. R. 32 All. 71

———— s. 15 (1882 Code, s. 15)—

See s. 11 . I. L. R. 38 Bom. 272

————*Held* that this section provides for procedure and not jurisdi[illegible] triable by a [illegible] Judge. Tı[illegible]

[illegible] N. 322

———— s. 16, (1882 Code s. 16)—

See JURISDICTION I. L. R. 42 Calc. 942

————*Maintenance, suit for—Charge of maintenance—Right or interest in immoveable property—Jurisdiction.* Plaintiff S filed a suit at Poona Court against her daughter-in-law L (defendant No. 1) and her father (defendant No. 2) both of whom resided in a native state beyond the jurisdiction of the Court for a declaration that she was entitled to a maintenance [illegible] the same a charge [illegible] within the juris- [illegible] Court held that [illegible] suit as the claim for maintenance was not one for the determination of any right to, or interest in, the immoveable property as required by clause (*d*) of s. 16 of the Civil Procedure Code. The plaintiff having appealed: *Held*, that the Court had jurisdiction to proceed against defendant No. 1 as the question whether or not plaintiff was entitled to a right or interest in the immoveable property by way of charge as security for maintenance which might be decreed, was a question directly within the terms of s. 16 (*d*) of the Civil Procedure Code, 1908. *Held*, also, that the Court had no jurisdiction against defendant No 2. SITABAI v. LAXMIBAI (1915) . . . I. L. R. 40 Bom. 337

————*Jurisdiction—Suit for dissolution of partnership and for accounts. Held*, that a suit for dissolution of partnership with the usual ancillary relief is not a suit for the "determination of any other right to or interest in immoveable property" within the meaning of cl. (*d*) of s. 16 of the Code of Civil Procedure, 1908. DURGA DAS v. JAI NARAIN (1919) . . . . I. L. R. 41 All. 513

———— s. 17 (1882 Code, s. 19)—

See JURISDICTION.

I. L. R. 42 Mad. 813

———— s. 20 (1882 Code, s. 17)—

See DIVORCE ACT, INDIAN (IV OF 1869), SS. 2, 4, 7 AND 45.

I. L. R. 38 Bom. 125

See TORT . I. L. R. 39 Mad. 433

See s. 9 . . I. L. R. 37 Bom. 442

————*Sale of goods by sample—Vendor and purchaser living in different places—Suit by purchaser for damages for breach of warranty—In which place suit maintainable.* A person residing at Allahabad purchased goods by sample from a firm carrying on business at Bombay. The goods were sent to Allahabad, but on arrival they were discovered to be not according to sample, and the purchaser accordingly instituted a suit for damages against the vendors in the Small Cause Court at Allahabad. The Small Cause Court returned the plaint for presentation in Bombay. *Held*, that the test which the Court ought to have applied to the question was whether delivery of the goods at Allahabad was an essential part of the contract between the parties. SHEO CHARAN LAL v. TAJ BHAI' ALI BHAI AND SONS (1917)

I. L. R. 39 All. 368

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

———— s. 20 (1882 Code, s. 17—*contd.*

————*Cause of action—Jurisdiction—Suit to set aside a decree on the ground of fraud—Decree obtained in Bengal—Suit filed in Agra.* It is competent to a Court in the United Provinces to grant a declaration that a decree passed by a Court in another province is fraudulent and null and void as against the plaintiff, and to grant a perpetual injunction restraining the decree-holder from executing it, provided that some part of the plaintiff's cause of action has arisen within the jurisdiction of the Court in which the suit is brought *Banke Behari Lal* v. *Pokhe Ram, I. L. R. 25 All. 48,* and *Jawahir* v. *Neki Ram, I. L. R. 37 All. 189,* followed. *Umrao Singh* v. *Hardeo, I. L. R 29 All., 418,* and *Dau Dayal* v. *Munna Lal, I. L. R. 36 All. 564,* distinguished KHUSHALI RAM v. GOKUL CHAND (1917)

I. L. R. 39 All. 607

————*Contract between firms at Ranchi and Cawnpore—Goods to be delivered at Ranchi—Suit for damages for breach if lies at Ranchi.* Where the plaintiffs, who owned a shop at Ranchi, signed an order form supplied to them at Ranchi by the defendant Company which had its place of business at Cawnpore, requesting the Company to forward certain specified articles by goods train to their address at Ranchi (packing and freight free) and to be despatched on a specified date, and the Defendant Company agreed to do so: *Held*, that the contract was to be performed by the delivery of the goods at Ranchi and the Court at Ranchi had jurisdiction to entertain a suit by the plaintiffs for damages for breach of the contract by the defendant. A. T. BHUTTACHARYA v. CAWNPORE WOOLLEN MILLS CO., LD. (1911)

16 C. W. N. 325

————*Contract Act (IX of 1872), s. 212—Principal and agent—Suit for compensation for loss caused by negligence of agent—Jurisdiction.* The plaintiffs who were grain dealers, ordered the defendant, who was a commission agent at Karachi, to purchase some grain for them. The latter did so, and the plaintiffs sent him some money on account. In accordance with the direction of the plaintiffs the railway receipt for the goods purchased was sent by value payable post. By some mischance it did not arrive. The defendant instructed the railway authorities not to deliver the goods till the balance due to him was paid. The balance was paid by the plaintiffs to the defendant's agent at Delhi. The Railway officials at Hathras refused to deliver the goods without the

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— s. 20 (1882 Code, s. 17)—*contd.*

defendant's consent and delay occurred. In the meantime the price of the particular kind of grain fell and the speculation resulted in a loss to the plaintiffs. *Held*, on suit by the plaintiffs, for compensation instituted at Hathras, that the case was for compensation under s. 212 of the Contract Act in respect of the direct consequences of the defendant's neglect and misconduct, and that the cause of action arose at Karachi and the suit therefore did not lie in the Court at Hathras. SALIG RAM *v.* CHAHA MAL (1911)

I. L. R. 34 All. 49

——— *Cause of action—Jurisdiction—Suit to set aside a decree on the ground of fraud—Decree obtained in Calcutta—Suit filed in Mainpuri.* The plaintiff instituted his suit in the Court of the Subordinate Judge of Mainpuri alleging that the defendants had by fraud obtained a decree against him in the High Court at Calcutta and praying that the decree might be set aside and an injunction issued restraining the defendants from executing it. *Held*, that, as the defendants resided in Calcutta and the fraud (if any) complained of had been practised there, the Mainpuri Court had no jurisdiction to entertain the suit. *Banke Behari Lal* v. *Pokhe Ram, I. L. R. 25 All. 48*, distinguished. *Read* v. *Brown, 22 Q. B. D. 128*, and *Umrao Singh* v. *Hardeo, I. L. R. 29 All. 418*, referred to. DAN DAYAL *v.* MUNNA LAL (1914) **I. L. R. 33 All. 564**

——— *Cause of action—Jurisdiction—Suit to set aside a decree on the ground of fraud—Decree obtained in Bengal—Suit filed in Agra.* The plaintiff sued in the court of a Munsif in the district of Agra, to set aside on the ground of fraud a decree obtained from a court at Siliguri in Bengal. It was part of the plaintiff's case that the defendant fraudulently prevented the institution of the suit from becoming known to him, by causing the notice of suit to be served on some other person and an incorrect return to be made to the court. The plaintiff further alleged that the defendant had in execution of his decree caused certain property belonging to the plaintiff in the district of Agra to be attached. *Held*, that a material portion of the plaintiff's cause of action arose in the district of Agra and the Munsif had jurisdiction to try the case. *Banke Behari Lal* v. *Pokhe Ram, I. L. R. 25 All. 48, Nanda Kumar Howladar* v. *Ram Jiban Howladar, I. L. R. 41 Calc. 990, Radha Raman Shaha* v. *Pran Nath Roy, I. L. R. 28 Calc. 475, Khagendra Nath Mahata* v. *Pran Nath Roy, I. L. R. 29 Calc. 395, Thakur Prasad* v. *Punkal Singh, 8 C. L. J. 485, Abdul Huq Chowdhury* v. *Abdul Hafiz, 14 C. W. N. 695*, referred to. *Dan Dayal* v. *Munna Lal, I. L. R. 36 All. 564*, and *Kalian Das* v. *Bakshi Ram, F. A. f. O. No. 14 of 1910*, not followed. JAWAHIR *v.* NEKI RAM (1914)

I. L. R. 37 All. 189

——— *Cause of action.* The opposite party sued the petitioner Company in the Court at Feni upon two policies of life insurance issued by them to his deceased father. The assured sent proposal forms for the policies from some place in the Chittagong District to the head office of the Company at Calcutta where the policies were made out and despatched to the assured who subsequently died within the local

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— s. 20 (1882 Code, s. 17)—*concld.*

limits of the Court of Feni in the District of Noakhali. The trial Court and on appeal the District Judge held that the death of the assured being a part of the plaintiff's cause of action and it having taken place within its local limits, the Court at Feni had jurisdiction. *Held*, that in the absence of anything to show that there had been a failure of justice, the trial cannot, in view of s. 21 of the Civil Procedure Code, be set aside as without jurisdiction. *Per* RICHARDSON, *J.* (*semble*). The Court at Feni had jurisdiction under s. 20, cl. (c) of the Code. BENGAL PROVIDENT AND INSURANCE CO. *v.* KAMINI KUMAR CHOWDHURY (1918)

22 C. W. N. 517

——— *Cause of action—Place of suing—Contract for supply of goods—Contract made in Bombay—Delivery and payments to be made at Cawnpore—Suit for refund of price on account of short delivery.* Plaintiff, who carried on business in Cawnpore, went to Bombay and purchased certain goods from the defendant, and it was agreed between the parties that the goods were to be sent to Cawnpore at the plaintiff's expense consigned to a bank there, and that the plaintiff was to pay their price to the Bank and take delivery of the goods. The plaintiff alleged that he paid and took delivery according to his agreement; but, when he came to open the parcel in which the goods had been sent, some of the goods shown in the invoice were not to be found. He accordingly sued the defendant for a refund of the price of the goods which he had not received. *Held*, that the suit was properly instituted at Cawnpore, where the goods were to be delivered and payment was to be paid. ABDUR RASHID *v.* THE SIZING MATERIALS COMPANY, LD.

I. L. R. 42 All. 48

——— *Vendor and purchaser—Goods ordered by letter and sent to puchaser by value payable parcels post—Parcel accepted and paid for, but found not to contain the goods ordered—Suit by purchasers—Place of suing.* The plaintiffs at Kasganj ordered certain goods from the defendants at Delhi. By mutual consent the goods were despatched by value payable post. The plaintiffs received a parcel from the defendants supposed to contain the goods ordered, and paid for it, but, according to their allegation, when the parcel was opened, it was found to contain only clay. The plaintiffs thereupon sued the defendants for damages and brought their suit at Kasganj. *Held*, that the cause of action arose, in part at any rate, at Kasganj, and the suit was rightly brought there. *Suraj Bhan* v. *Punjab Cotton Press Co. Ld., 18 Indian Cases, 130*, referred to. *Salig Ram* v. *Chaha Mal, I. L. R. 34 All. 49*, and *Thanawala* v. *Shahzada Basudeo Singh, 12 Oudh Cases, 17*, distinguished. RAM LAL *v.* BHOLA NATH

I. L. R. 42 All. 619

——— *Dissolution of partnership—Partnership business carried on outside British India—Suit for dissolution in British Indian Court—Jurisdiction of Court.* Where the parties to a suit reside within the jurisdiction of a British Indian Court one of them can sue the other for dissolution of partnership in that Court, even although that partnership commenced and was carried on in foreign territory. ISMAILJI *v.* ISMAIL ABDUL (1921) **I. L. R. 45 Bom. 1228**

CIVIL PROCEDURE CODE (ACT V OF 1908)
—*contd.*

———— s. 21 (1882 Code, s. 16A)—*Want of territorial jurisdiction—Objection whether allowable by appellate or revisional Court—Objection whether allowable in execution proceedings—Powers of executing Court to which decree transferred.* The provisions of s. 21, Civil Procedure Code, apply to objections regarding want of territorial jurisdiction. Such an objection, not taken as provided by the section, must be considered cured for all purposes, and cannot be allowed in execution proceedings. A party who does not raise an objection to jurisdiction when a preliminary mortgage decree is made absolute, is not entitled to plead in execution that the order was passed without jurisdiction. ZAMINDAR OF ETTIYAPURAM *v.* CHIDAMBARAM CHETTY (1920) . . I. L. R. 43 Mad. 675

———— s. 24 (1882 Code, s. 25)—

See CIVIL RULES OF PRACTICE, R. 161 (*a*).
I. L. R. 39 Mad. 485

See DIVORCE ACT (IV OF 1869), ss. 3, 10, 37, 44 . I. L. R. 40 Bom. 109

See EXECUTION OF DECREE
I. L. R. 37 Calc. 574

See PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1904), s. 90
I. L. R. 38 Mad. 47

See PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887),—

s. 17. . . I. L. R. 38 All. 425

s. 32 . . . . 4 Pat. L. J. 13

1. ———— *Bombay Civil Courts Act (XIV of 1869), Part V—Suit cognizable and heard by the First Class Subordinate Judge—Application to the Court of the District Judge for transfer—Transfer of the application to the Assistant Judge—Order of the Assistant Judge for transfer of the suit to the District Court—Jurisdiction.* The plaintiff filed a suit in the Court of the First Class Subordinate Judge claiming Rs. 18,797. The suit was heard by that Judge for some days and then the defendant filed an application in the Court of the District Judge for transfer of the suit to another Court. The District Judge transferred the application to the Assistant Judge for disposal. The Assistant Judge heard the application and ordered that the suit be transferred to the District Court for trial. The plaintiff having objected that the order of the Assistant Judge was without jurisdiction: *Held*, setting aside the order, that under the provisions of the Bombay Civil Courts Act (XIV of 1869), Part V, the limit of the Assistant Judge's jurisdiction for the purpose of hearing suits is Rs. 10,000, and that in case of suits and applications when the value of the subject matter does not exceed Rs. 5,000, an appeal in appealable cases lies to the District Judge. The Assistant Judge is, therefore, not a Judge of co-ordinate jurisdiction to the District Judge. He is, therefore, not a Judge of the District Court and the order complained of was not made by the District Court which alone had jurisdiction. S. 24 of the Civil Procedure Code (Act V of 1908) empowers the District Court to withdraw any suit and try and dispose of it. The suit withdrawn being for a sum exceeding the jurisdiction of the Assistant Judge he could not try and dispose of it. He was, therefore, not a Judge of the District Court as contemplated by the section which must be a

CIVIL PROCEDURE CODE (ACT V OF 1908)
—*contd.*

———— s. 24 (1882 Code, s. 25)—*contd.*

Court of unlimited pecuniary jurisdiction. HAJI UMAR ABDUL RAHIMAN *v.* GUSTADJI MUNCHERJI (1910) . . . . I. L. R. 34 Bom. 411

2. ———— *Small cause suit instituted in a Subordinate Court—Transfer by the District Judge to District Munsif's Court—Order directing trial as an original suit—Subsequent transfer by the District Judge to another District Munsif's Court—Decree by the latter—Appeal against such decree to the District Court—Transfer of appeal to the Subordinate Court—Decree on appeal by the Subordinate Court—Revision to the High Court—Appeal to the District Court incompetent—Decree of [illegible] without jurisdiction [illegible] ts Act (IX of 18[illegible] Cause Court—[illegible] Small Cause Court—Character of Court trying a small cause suit on transfer—Civil Procedure Code (Act V of 1908), ss. 7 and 24.* Where a suit, which was instituted as a small cause suit in a Subordinate Judge's Court, was transferred by the District Court to a District Munsif's Court for trial as an original suit, and was again transferred to another District Munsif's Court for trial and disposal: *Held*, that the decree passed by the latter District Munsif's Court was the decree of a Court of Small Causes, and no appeal lay to the District Court against such decree. A Court invested with the powers of a Court of Small Causes is a Court of Small Causes within the meaning of s. 24 of the Code of Civil Procedure (Act V of 1908), though the suit was not transferred to such Court immediately from a Court of Small Causes. SANKARALINGA *v.* PADMANABHA (1912)
I. L. R. 38 Mad. 25

3. ———— *Provincial Small Cause Courts Act (IX of 1887), s. 35—Transfer of Small Cause Court suit—Appeal—Jurisdiction.* A Small Cause Court suit valued at Rs. 273 was pending in the Court of a Subordinate Judge who had Small Cause Court jurisdiction up to Rs. 500. The Subordinate Judge went on leave and was succeeded by an officer whose Small Cause Court jurisdiction was limited to Rs. 250. Subsequently by order of the District Judge, all Small Cause Court suits above Rs. 250 in value were transferred to the Court of a Munsif. *Held*, that, with reference to s. 24 of the Code of Civil Procedure, the suit so transferred must be deemed to have been tried by the Munsif as a Court of Small Causes, and from his decision no appeal lay. CHATTAR SINGH *v.* MUSAMMAT RAKHI (1918)
I. L. R. 40 All. 525

4. ———— *Transfer of a case by Senior Subordinate Judge to the Junior Subordinate Judge—whether intra vires—jurisdiction of Court to which the case has been transferred cannot be challenged if not objected to at the proper time.* *Held*, that the Court of the Junior Subordinate Judge is not subordinate to that of the Senior Subordinate Judge within the meaning of s. 24 of the Code of Civil Procedure, and the latter cannot therefore transfer a case to the former under sub-s. (1) cl. (a) of that section, notwithstanding that the District Judge has delegated his powers of transfer to him. *Held, however*, that although the transfer of the present case to the Court of the Junior Subordinate Judge was ultra vires,

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— s. 37—*contd.*

as to evade the provisions of the Limitation Act or to validate an invalid application. VENKATASAMI NAIK *v.* SIVANU MUDALI (1918)

I. L. R. 42 Mad. 461

——— ss. 37, 38 and 150— *Mortgage suit of nearly Rs. 2,000 in value—Preliminary decree by Muns*[illegible]*owered, final decree by Subordinate* [illegible] *by Munsif specially empowered, if competent.* In a mortgage suit a preliminary decree for nearly Rs. 2,000 was made by a Munsif with power to try suits up to the value of Rs. 2,000. The Munsif being transferred and his successor not being vested with the same power, the final decree was made by the Subordinate Judge. Execution was however taken out in the Court of the Munsif who meanwhile had been empowered to try suits up to Rs. 2,000: *Held*—That the Munsif's Court had jurisdiction to execute the decree under s. 150 of the Civil Procedure Code, though not under ss. 37 and 38 of the Code. AMINUDDIN MULLIK *v.* ATARMANI DASI . . . **24 C. W. N. 899**

——— *Jurisdiction to execute decree—Pending execution proceedings—Transfer of property sought to be sold to the jurisdiction of another Court—Res judicata in execution proceedings—Ex parte order passed after notice, effect of—Objection petition, when can be treated as application to set aside ex parte order—Order IX, rule 13, application of.* Where, after attachment of property in execution of a decree for money and an order for sale made by the Court which passed the decree, the property was transferred to the local limits of the jurisdiction of another Court, newly established: *Held,* that the Court which passed the decree ceased to have jurisdiction to continue the execution proceedings, and that the new Court, having territorial jurisdiction over the property attached, was the proper Court to entertain an application for execution, by the sale of the property, and pass orders thereon. In such a case no formal order of transfer of a particular case or of all pending cases is necessary. On principle, unless the authority which changes the venue reserves the right to the Court which has lost the jurisdiction to continue pending proceedings affecting the property so transferred to another jurisdiction, such proceedings are also *ipso facto* transferred by the change of venue to the new Court, the records relating to that action becoming part of the records of the new Court. Section 150, Civil Procedure Code, implies that the whole business of a Court might be transferred to another Court, without any order of transfer by a superior Court under s. 24, or any other section of Code, thereby adopting the Calcutta view, that by changes of venue made by the local Government, the business of a Court which loses jurisdiction over a certain area, so far as such area is concerned, will be *ipso facto* transferred to the new Court. The case law on the question considered. An *ex parte* order in execution proceedings passed after issue of notice and after the Court has held that the service of the notice was duly effected is, on general principles, binding as *res judicata. Mungal Pershad Dichit* v. *Grija Kant Lahiri, I. L. R. 8 Calc. 51,* followed. Order IX, rule 13, Civil Procedure Code, applies to *ex parte* orders in execution, and unless they are set aside by application under Order IX, rule 13, or by appeal, they cannot be questioned in the further stages of execution proceedings. An objection statement which is not stamped, which contains no prayer to set aside the order, and which does not show when the objector had notice of the order, cannot be treated as an application to set aside the *ex parte* order. *Mochai Mandal* v. *Mescruddin Mollah, 13 C. L. J. 26,* distinguished. SUBBIAH NAICKER *v.* RAMANATHAN CHETTIAR (1914) **I. L. R. 37 Mad. 462**

——— *Limitation Act (IX of 1908), Art. 182, cl. 5—Application for execution of decree—Proper Court—Transfer of territorial jurisdiction of Court which passed the decree to another Court—Subsequent application for execution to former Court, whether made to proper Court—Jurisdiction of former and latter Court to execute decree—'Include' in s. 37, Civil Procedure Code, meaning of. Held,* by the Full Bench, that the Court which passed the decree is a *proper Court* for execution within the meaning of cl. 5 of art. 182 of the Limitation Act, notwithstanding the fact that the jurisdiction which it had at the time of the decree was taken away from it and assigned to another Court at the time of the presentation of the application for execution. Ss. 37, 38 and 150, Civil Procedure Code, construed. Dicta in *Subbiah Naiker* v. *Ramanathan Chettiar, I. L. R. 37 Mad. 462,* overruled. *Per Wallis, C. J.* "We have to deal with clause (*b*) and where the decree-holder had a right under the Code of 1859 to apply to the Court which passed the decree at least for execution by way of transmission and where the present Code provides expressly that a decree may be executed by the court which passed it, the contention that this important right must be held to have been taken away because of the provision in section 37 that these words shall be deemed to 'include' another Court appears to me to be altogether untenable." SEENI NADAN *v.* MUTHUSAMY PILLAI (1919)

I. L. R. 42 Mad. 821

——— s. 38—

See EXECUTION OF DECREE.

2 Pat. L. J. 113

——— ss. 38, 39, 41 and 50, O. XXI, rr. 16 and 26—*Execution Application—Application to Court which passed the decree after transfer thereof to another Court for execution, whether according to law and to the proper Court—Limitation Act (IX of 1908), Art. 182.* On the application of a decree-holder the Court at Vizagapatam which passed the decree sent it for execution to the Court at Parvatipur which after attaching certain properties dismissed the execution application on 10th March 1905. On 13th December 1907, the decree-holder again applied to the Court at Vizagapatam for sale of the attached properties, and the application was simply recorded. The present application for execution was made to the Vizagapatam Court on 21st April 1910, for attachment and sale of certain properties. *Held,* that the application was barred as the application of the 13th December 1907, though a step in aid of execution [see *Pachiappa Achari* v. *Poojali Seenan, I. L. R. 28 Mad. 577*], was not made to the proper Court, and hence

CIVIL PROCEDURE CODE (ACT V OF 1908)
—*contd.*

———— s. 38—*concld.*

could not serve limitation. The Court to which a decree is sent for execution is the only Court which has seizin of the execution proceedings, and it retains its jurisdiction to execute the decree till it certifies under s. 41, Civil Procedure Code, to the Court which passed the decree, the fact of execution, or if it fails to execute the decree, the circumstances attending such failure. In such a case the Court which passed the decree has no jurisdiction to entertain an execution application unless concurrent execution has been ordered or proceedings in the Court to which the decree was [illegible]

MAHARAJA OF BOBBILI *v.* NARASARAJU PEDA BALIAR SIMHULU (1914) I. L. R. 37 Mad. 231

———— s. 39 (1882 Code s. 223 (2) & (3))—

See GARNISHEE. 4 Pat. L. J. 141

———— s. 41 (1882 Code s. 223 (4))—

See S. 38 . I. L. R. 37 Mad. 231

———— s. 42 (1882 Code s. 228)—

————*Surety for judgment-debtor imprisoned in execution of decree—Appeal.* Where a person who stood surety for the performance by a judgment-debtor of a decree passed against him was arrested and detained in civil jail by order of a Munsif executing the decree of a Small Cause Court: *Held*, that he was entitled to appeal under ss. 42 and 145 of the Civil Procedure Code, the provisions of s. 104, cl. (*h*), of the Code notwithstanding. ADHAR CHANDRA GOPE *v.* PULIN CHANDRA SHAHA (1914).
19 C. W. N. 1085

————*Order filing award against a firm—Execution court—Question whether a certain person is a partner in the firm—Transfer of order to another court for execution—Such court competent to determine the question.* Where an award made under the Indian Arbitration Act, 1899, has been made a rule of court, it may be transferred for execution to another court just in the same way as a decree, and the court to which it is so transferred has, as regards any matters which are to be determined in execution proceedings, the same powers as the "court which passed the decree," *i.e.*, as the court which ordered the award to be filed. *Adhar Chandra v. Pulin Behari, 20 C. L. J., 129,* referred to. SITAL PRASAD *v.* CLEMENT ROBSON AND CO. I. L. R. 43 All. 394

———— s. 43 (1882 Code 229)—

See POLITICAL AGENT AT SIKKIM, COURT OF . . I. L. R. 38 Calc. 859

———— s. 44 (1882 Code s. 229B)—

See DECREE . I. L. R. 40 Bom. 501

See FOREIGN COURT.
I. L. R. 39 Mad. 733

See FOREIGN DECREE.
I. L. R. 39 Mad. 24

See LIMITATION ACT 1908, ART. 182.
I. L. R. 42 Bom. 420

CIVIL PROCEDURE CODE (ACT V OF 1908)
—*contd.*

———— s. 44, O. XXI, r. 7—

See FOREIGN DECREE.
I. L. R. 40 Bom. 551

———— s. 45 (1882 Code s. 229A)—

See EXECUTION I. L. R. 40 Mad. 1069

See POLITICAL AGENT AT SIKKIM.
I. L. R. 38 Calc. 859

———— s. 47 (1882 Code s. 244)—

See S. 2 . .

See O. XXI, R. 2. . 5 Pat. L. J. 70

See O. XXI, R. 95 . 4 Pat. L. J. 716
1 Pat. L. J. 232

See APPEAL . .
I. L. R. 41 Calc. 418, 160

See COMPANIES ACT (VII OF 1913), s. 171 . . I. L. R. 41 All. 432

See DECREE
I. L. R. 37 Mad. 21

See EXECUTION OF DECREE.
1 Pat. L. J. 558
2 Pat. L. J. 193

See MORTGAGE . I. L. R. 43 Bom. 334, 703
I. L. R. 42 Mad. 90
I. L. R. 44 Mad. 483

See MORTGAGE DECREE.
4 Pat. L. J. 207

1. ———— *Execution of decree—Compromise—Allegation by decree-holder that a compromise relating to the execution of a decree has been obtained by fraud—Question to be determined by the Court executing the decree.* As between the decree-holder and the judgment-debtor the question of an alleged fraudulent adjustment of the decree must be gone into and decided by the execution Court. *Adhar Singh v. Sheo Prasad, I. L. R. 24 All. 200,* followed. MUHAMMAD KASIM *v.* RUKHIA BEGAM (1919) I. L. R. 41 All. 443

2. ———— *Execution Court, if may investigate validity of decree—An order improperly passed under s. 47, if appealable.* Where a jurisdiction [illegible]

without jurisdiction. So where a Court purporting to act under s. 47, Civil Procedure Code, directed [illegible]

the minor would not be a party to the decree within meaning of s. 47 and thus the order would not be an order under s. 47 would not make the appeal incompetent. An execution Court must proceed on the assumption that there is a valid decree capable of execution and it is not open to it to investigate the validity of the decree or its binding character. BINDESWARI *v.* THAKUR LAKPAT NATH SINGH (1910) . 15 C. W. N. 725

3. ———— *Limitation Act (IX of 1908), Art. 138—Transfer of Property Act (IV of 1882), s. 90—Purchase by decree-holder—Suit to recover possession—Execution.* In execution of a redemption decree the decree-holder (mortgagee) himself purchased the property at the court-sale. After the confirmation of the sale,

CIVIL PROCEDURE CODE (ACT V OF 1908)
—*contd.*

———— s. 47—*contd.*

the legal representative of the decree-holder (mortgagee auction-purchaser) brought a suit to recover possession of the property so purchased. The defendants (representatives of the mortgagors judgment-debtors) contended that the question involved in the suit related to the execution of the decree; therefore, the suit was not maintainable under s. 47 of the Civil Procedure Code (Act V of 1908) and that the plaintiff's remedy lay under O. XXI, r. 5. The first Court allowed the claim. On appeal by one of the defendants: *Held*, reversing the decree, that (i) The suit was barred by s. 47 of the Civil Procedure Code (Act V of 1908). (ii) A decree-holder by becoming a purchaser at a court-sale did not cease to be a party to the suit within the meaning of s. 47 of the Civil Procedure Code. (iii) Proceedings for delivery of possession of property purchased by the decree-holder were proceedings in execution of the decree and fell within the scope of s. 47 of the Civil Procedure Code. (iv) Art. 138 of the Limitation Act (IX of 1908) did not override the provisions of the Civil Procedure Code. They should be read together. Where the auction-purchaser was also a party to the suit in which the decree was passed, his claim for the delivery of possession of the property purchased must be determined by the Court in the execution department. But where the auction-purchaser was a third party, it was open to him to bring a suit for possession of the property purchased by him and such a suit would be governed by twelve years' limitation under Art. 138 of the Limitation Act. (v) Under s. 90 of the Transfer of Property Act (IV of 1882) the execution proceedings did not terminate with the sale. The execution of the decree being barred at the date of the suit, it was not allowed to be treated as a proceeding in execution. SADASHIV BIN MAHADU *v.* NARAYAN VITHAL *(1911)* . . **I. L. R. 35 Bom. 452**

4. ———— *Execution of decree—Interlocutory order—Appeal.* The Court executing a decree struck off the proceedings upon the ground of wilful default on the part of the decree-holder in prosecuting his claim. Subsequently, however, finding that the decree-holder had not really been in default, the Court cancelled its former order, held that an attachment which was in existence at that time still subsisted, and that execution should proceed. *Held*, that this was not an order to which s. 47 of the Code of Civil Procedure, 1908, applied. Observations of BANERJEE, *J.* in *Jogodishury Debea* v. *Kailash Chundra Lahiry, I. L. R. 24 Calc. 725*, followed. MUKITAR AHMAD *v.* MUQARRAB HUSSAIN (1912)
I. L. R. 34 All. 530

5. ———— *Execution proceedings, orders in, when appealable—Order for delivery of possession to decree-holder auction-purchaser, if appealable.* Whether an order in execution proceedings is within the scope of s. 47, C. P. C., depends upon its nature and contents. An order for delivery of possession to the execution-purchaser was not an order relating to execution, discharge or satisfaction of the decree; nor was such an order one arising between the parties to the suit or their representatives merely because the decree-holder happened to be the execution-purchaser. SASI BHUSAN MOOKERJEE *v.* RADHA NATH BOSE (1914). . . **19 C. W. N. 835**

CIVIL PROCEDURE CODE (ACT V OF 1908)
—*contd.*

———— s. 47—*contd.*

6. ———— *Execution of decree—Partition—Objection that decree-holders had realised certain debts assigned by the decree to the judgment-debtors—Procedure.* The decree in a partition suit, allotted *inter alia*, a sum of money to be paid by the judgment-debtor to the decree-holders and assigned certain debts on account-books to the judgment-debtor. On application by the decree-holders for execution as to the sum allotted to them, the judgment-debtor took objection that the decree-holders had as a matter of fact realized a large amount out of the debts which had been assigned by the decree to him. *Held*, that the question thus raised was not a matter falling within the purview of s. 47 of the Code of Civil Procedure, and that the judgment-debtor's remedy was by a separate suit to recover from the decree-holders the amount alleged to have been illegally realized. MOHAN LAL *v.* JAGAN NATH (1913) . . . . **I. L. R. 35 All. 243**

7. ———— *Execution, application for—Court's order when amounts to adjudication—Subsequent dismissal of application for default—Fresh application by decree-holder—Judgment-debtor if can raise question of limitation.* Where, on the application of the decree-holder for execution, the Court issued notice on the judgment-debtor which was duly served and on the latter's prayer for time to put in objections an adjournment was granted, but the judgment-debtor failed to appear on the 4th January 1908, the date fixed for hearing, and an order was passed by the Court to the following effect: "Decree-holder is to take further steps on or before the 7th January 1908," but on the 7th January the application was dismissed for default. *Held*, that the order passed on the 4th January necessarily implies an adjudication that the decree at the time was capable of execution and it is no longer open to the judgment-debtor to re-open the matter on a subsequent application by the decree-holder for execution and urge that the previous application was made beyond the time allowed by law, and consequently the application for execution was barred by limitation. *Mungal Proshad Dichit* v. *Girija Kanta Lahiri, I. L. R. 8 Calc. 51, Sheikh Budan* v. *Ram Chandra, I. L. R. 11 Bom. 537*, followed. *Held*, further, that it is not essential in such a case that there should be an order for attachment, the principle laid down above being applicable whenever there is an adjudication by the Court upon the rights of the parties to the execution proceedings. *Moazzam Hossain* v. *Sarat Coomari Debi, 11 C. L. J. 357*, relied on: *Tileswar Rai* v. *Parbati, I. L. R. 15 All. 198*, dissented from. *Sheoraj Singh* v. *Kameswar Nath, I. L. R. 24 All. 283*, referred to. If an order has been made which directly or by implication determines the rights of the parties to an execution proceeding, the fact that the decree-holder does not choose to proceed with execution and the case is struck off does not entitle either party to re-open the question upon which there has been a previous adjudication. *Kamini Debi* v. *Aghore Nath, 11 C. L. J. 91*, followed. *Bhagwan* v. *Dhondi, I. L. R. 22 Bom. 83, Monmohan Karmokar* v. *Dwarka Nath Karmokar, 12 C. L. J. 312, Khosal Chandra Roy* v. *Ukiladdi, 14 C. W. N. 114, Mochai Mandal*

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— s. 47—*contd.*

v. *Meseruddin Molla, 13 C. L. J. 26*, distinguished. MURLIDHAR SUKUL *v.* NURSINGH DAS (1911) 17 C. W. N. 113

8. ——— *Order by High Court for removal of attachment pending appeal on furnishing security—Order by lower Court accepting such* ...

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furnishing security to the satisfaction of the Court below for execution of the decree. The case went back to the lower Court which accepted the security that was tendered. Against this order an appeal was preferred to the High Court. *Held*, that the order appealed against determined no rights of the parties that were in controversy and no appeal lay under the Code of Civil Procedure (Act V of 1908). Every order passed in relation to execution need not necessarily be deemed to come within the scope of the definition in s. 2 (2), Civil Procedure Code. SARASWATI BARMANIA *v.* MOTI BARMANYA (1913) . . 17 C. W. N. 1240

9. ——— *Decree irreconcilable, directions in—Decree impossible of execution—Claim on behalf of Deity—Appeal.* The appellant obtained a decree on a mortgage executed by one *G* and had certain properties attached. Thereafter one *Y* brought a suit for declaration that the property was *wakf* and could not therefore be attached and sold and obtained a decree. On appeal to the High Court against this decree, *G* and one *N* were substituted as the heirs of *Y* who had died in the meantime, and the appeal was ultimately dismissed as against *G* and decreed on a compromise as between the appellant and *N*, "allowing the appellant to recover the money due to him by sale of 4 annas share of the properties." On an application for execution of this decree of the High Court without making *G* a party to the execution, *G* appeared and objected that he was the sole mutwalli of the property which was *wakf* and could not be sold in execution of the decree. The lower Appellate Court refused execution, holding that a suit for declaration could not legally terminate in a mortgage-decree and that the decree which could be executed was the original mortgage-decree, but not the compromise decree. *Held*, that as *G* was a party to the suit in his personal capacity as also as mutwalli his objection came within s. 47 of the Civil Procedure Code and an appeal lay from the order refusing to execute the decree. *Kartik Chandra Ghose v. Ashutosh Dhara, I. L. R. 39 Calc. 298; 16 C. W. N. 26*, distinguished. That the ground upon which the application for execution was refused was erroneous; the decree of the High Court in the present case was, however, incapable of execution inasmuch as the decree in so far as it dismissed the appeal as against *G* as a part representative of the former mutwalli was a final decision, that the property was *wakf* and inalienable, and a direction in the same decree that a portion of the property could be sold was irreconcilable with the rest of the decision and made it impossible to carry the whole decree into effect. KALI PRASANNO GHOSH *v.* GOLAM RAHMAN (1913) 18 C. W. N. 910

10. ——— *Execution started against deceased judgment-debtor—Sale, if may be set* ...

... *Practice—Revision-application treated as appeal.* Where proceedings to execute a decree for rent obtained against an occupancy-raiyat having been started more than a year after the judgment-debtor's death, writ of attachment and proclamation of sale were issued in his name and returns were filed that processes had been duly served and thereafter at the sale at which no bidders attended the property was purchased by the decree-holder who, on 8th April 1912, got delivery of possession through Court, and within one month thereof the petitioner who had previously purchased the holding from the tenant applied to have the sale set aside. *Held*, that the execution proceedings were liable to be set aside on the ground of grave irregularity. *Quære* Whether the irregularity was such as rendered the sale absolutely void or voidable only. *Held*, also, that the application came within s. 47 of the Civil Procedure Code and was not time-barred, s. 18 of the Limitation Act being applicable in the circumstances of the case. *Lirinia Ashton v. Madhabmoni Dasi, 11 C. L. J. 489 : s. c. 14 C. W. N. 560*, referred to. *Mallarjun v. Narahari, L. R. 27 I. A. 216 : s. c. I. L. R. 25 Bom. 337, Stowell v. Ajudhia Nath, I. L. R. 6 All. 255, Sheo Prasad v. Hira Lal, I. L. R. 12 All. 440*, distinguished. That it was for the decree-holder to show that the petitioner had on any date earlier than 8th April 1912 knowledge of the sale. That the petitioner from whom rent was received though he might not have been formally registered as a tenant, had *locus standi* to apply under s. 47 to set aside the sale, although he had failed to prove that the holding was transferable by custom. *Prosunno Kumar v. Rama Churn, 13 C. W. N. 652*, distinguished. That a second appeal lay in the case although the claim in the suit for rent was under Rs. 100. The explanation added to s. 153 of the Bengal Tenancy Act by the Amending Act of 1907 has not completely nullified the Full Bench decision in *Kali Mandal v. Ram Sarbeswar, I. L. R. 32 Calc. 957 : s. c. 9 C. W. N. 721.* In this case no question of limitation or court-fees arising, the petitioner's application for revision was treated as a memorandum of appeal. ARJUN DASS *v.* GUNENDRA NATH BASU-MULLICK (1914) 18 C. W. N. 1266

11. ——— *Suit for money—Death of Defendant during suit leaving will—Heirs substituted in ignorance of will and decree against heirs—Execution against estate—Objection by executor upheld—Executor, if bound—Appeal—Remedy of decree-holder—Suit upon judgment, if lies—Limitation Act (IX of 1908), Sch. I, Art. 122.* M. the defendant in a suit for recovery of money having died during its pendency leaving a will whereby he had appointed the wives of his sons executrices to his estate, the plaintiff who was unaware of the existence of the will substituted his sons in his place on the records without objection, and got a decree. Execution of the decree against the estate of M was opposed by the executrices: *Held*, that the executrices were not bound by the decree and the decree could not be executed against the estate in their hands. *Quære*: Whether the order of the executing Court dismissing the

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd

———— s. 47—*contd.*

application on the objection of the executrices was not an order under s. 47, merely because the executrices could not in popular language be called representatives of the sons of the deceased debtor. *Held*, that the executrices were not representatives of the judgment-debtors inasmuch as they were not bound by the decree. That the remedy of the decree-holder was either (i) to have the decree vacated, the suit restored, the executrices brought on the record and a new decree made against them; or (ii) to institute a suit on the judgment and obtain a decree thereon against the executrices. *Ashibhusan* v. *Pelaram, 18 C. L. J. 362; s. c. 18 C. W. N. 173*, and *Prosunno Chander* v. *Kristo Chaitanya, I. L. R. 4 Calc. 342. Quære:* Under what circumstances a suit lies upon a judgment passed by a Court in British India. Where a Court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action to enforce the judgment may be maintained provided the judgment cannot be enforced in some other way. The Limitation Act cannot give rise to a cause of action where none exists independently of the provisions thereof. KALI CHARAN NATH *v.* SUKHODA SUNDARI DEVI (1915) . **20 C. W. N. 58**

12. ———— *Auction purchaser —Whether a representative of the judgment-debtor—Court-sale.* An auction-purchaser at a Court-sale is not a representative of the judgment-debtor within the meaning of s. 47 of the Civil Procedure Code, 1908. NARSINHBHAT *v.* BANDO KRISHNA (1918) . . . **I. L. R. 42 Bom. 411**

13. ———— *Order accepting security proffered by decree-holder and delivering possession to him, if appealable—Interlocutory order.* Where in pursuance of an order of the Court directing that the decree-holder on furnishing security to the extent of Rs. 50,000 in immoveable property was to be at liberty to proceed with the execution, security was offered and accepted by the Court in spite of objection by the judgment-debtor, and an order was made directing delivery of possession to the decree-holder of the property forming the subject-matter of the decree. *Held*, that the order was not an interlocutory order and an appeal lay against it. RUDRA NARAIN JANA *v.* NABA KUMAR DAS (1918)

22 C. W. N. 657

14. ———— *Abandonment of case against defendant properly impleaded, whether dismissal against such defendant—Madras Proprietary Estates Village Service Act (II of 1894), s. 17—Madras Hereditary Village Offices Act (III of 1895), s. 5—Service inam lands—Issue of inam title-deed therefor on one date with notification under s. 17 of Madras Act II of 1894 enfranchising the lands at date subsequent to issue of deed—Mortgage of the lands in the interval, whether valid—Transfer of Property Act (IV of 1882), s. 43, whether applicable to illegal transfers. Held* by the Full Bench: Where a person has been properly impleaded as one of the defendants in a suit but the suit is dismissed as against him on account of the plaintiff's election to abandon his case so far as it affected that defendant, such a person is a "defendant against whom a suit has been dismissed" within s. 47, Civil Procedure Code. *Krishnappa* v. *Periasami, I. L. R. 40 Mad. 964*, distinguished. An alienation of village service inam lands in a proprietary estate made after the grant of an inam title-deed of enfranchisement but before the date of the notification contemplated by s. 17 of the Madras Act II of 1894 is invalid and inoperative on account of the prohibition contained in s. 5 of the Madras Act III of 1895. The alienation being a prohibited and illegal one on the date on which it was made, the subsequent removal of the prohibition by the notification of enfranchisement of the service inam land does not render the alienation valid; s. 43 of the Transfer of Property Act cannot be applied to make a transfer valid which on the date on which it was made was prohibited by a statute. *Narahari Sahu* v. *Korithan Naidu, 24 Mad. L. J. 462*, and *Sri Kakarlapudi Lakshminarayana Jagannada* v. *Sri Raja Kandukuri Balasurya Prasada Rao, 28 Mad. L. J. 650*, followed. *Angannayya* v. *Narasayya, 18 Mad. L. J. 241*, overruled. SANNAMMA *v.* RADHABHAYI (1917)

I. L. Rat. 41 Mad. 418

15. ———— *Sale in execution of mortgage decree—puisne mortgagee impleaded—objection by puisne mortgagee that he is the purchaser of portion of the property—objection dismissed—Appeal.* In a suit on a prior mortgage a person who held a puisne mortgage in respect of one of the items of the mortgaged property was made a defendant. When the mortgaged property had been ordered to be sold in execution of the decree obtained in this suit, the puisne mortgagee objected that another item of the mortgaged property had been purchased by him at a revenue sale and that the result of this was the annulment of the mortgage so far as the second item was concerned. This objection was summarily dismissed. *Held*, that no appeal lay from the order dismissing the application as the objector was not a judgment-debtor so far as the particular property which he desired should be exempted from sale was concerned. SHAM LAL SAHU *v.* AMAR PRASAD CHAUDHURY . . . . **2 Pat. L. J. 129**

16. ———— *Instalment award decree—Decree unregistered—Decretal amount charged on the property of the judgment-debtor—Sale of property by judgment-debtor—Subsequent execution of the decree —Property purchased from judgment-debtor sold in execution—Suit by purchaser to set aside sale—Purchaser whether representative of judgment-debtor—Such purchaser not a representative of judgment-debtor if he could prove that he had no knowledge of the charge created by the decree at the time of his purchase—Transfer of Property Act (IV of 1882), s. 41.* In 1891 defendant No. 1 obtained a decree against one Khanderao. The decree was made payable by instalments and it was declared in the decree that the decretal amount was charged on certain lands of the judgment-debtor. The decree was not registered. In 1896, the judgment-debtor sold three of the lands mentioned in the decree to the plaintiffs and put them in possession. In 1912 defendant No. 1 filed a Darkhast in execution of the decree of 1891 and under that Darkhast lands sold to the plaintiffs in 1896 were put up to sale. The sale was confirmed by the Collector in spite of the objections put in by the plaintiffs. The plaintiffs, thereupon, sued to set aside the sale. Both the lower Courts

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— s. 47—*contd.*

dismissed the suit on the ground that the plaintiffs ought to have proceeded under s. 47 of the Civil Procedure Code as they were representatives of the judgment-debtors. On appeal to the High Court, *held*, remanding the case, that if the plaintiffs could prove that he was an innocent purchaser having had no knowledge of the charge created by the decree at the time he purchased the property it could not be held that he was a representative of the judgment-debtor within the meaning of s. 47, Civil Procedure Code, 1908, and in that case there was nothing to prevent the plaintiff from proceeding with the suit. *Per* MACLEOD, *C. J.* :—"If an outsider buys a property of a person who, as far as he can judge, is the ostensible owner and can give him a good title to the property, the mere fact that the ostensible owner is the judgment-debtor cannot possibly make his purchaser his representative within the meaning of s. 47 of the Civil Procedure Code." BALVANT DASO *v.* UMABAI (1920) **I. L. R. 45 Bom. 812**

17. ——— *Decree—Execution—Money recovered in excess in execution—Application to recover back the excess money—Separate suit not competent—Time taken up in such separate suit can be deducted from the period of limitation—Indian Limitation Act (IX of 1908), s. 14.* The opponent obtained against the applicant a decree for partition in the Zhansi Court, which decree was transferred to the First Class Surbordinate Judge's Court at Ahmednagar for exec [illegible] sum [illegible] filed [illegible] Nov [illegible] back [illegible] the [illegible] the [illegible] the [illegible] execution was still pending in the Ahmednagar Court, the applicant applied to that Court on the 10th May 1915 to obtain refund of the money recovered in excess from him. *Held*, that the application for refund was properly made under s. 47 of the Civil Procedure Code of 1908 to the Ahmednagar Court, which was the executing Court. *Held*, also, that the application was not time-barred, because the time taken up in prosecuting the suit at Shevgaon should be deducted under s. 14 of the Indian Limitation Act, 1908. GANPATRAO SULTANRAO *v.* ANANDRAO JAGADEORAO (1919) **I. L. R. 44 Bom. 97**

17 (*a*). ——— *Instalment award decree—Decree unregistered—Transfer of Property Act (IV of 1882), s. 41.* In 1891 defendant No. 1 obtained a decree against one Khanderao. The decree was made payable by instalments and it was declared in the decree that the decretal amount was charged on certain lands of the judgment-debtor. The decree was not registered. In 1896, the judgment-debtor sold three of the lands mentioned in the decree to the plaintiffs and put them in possession. In 1912 defendant No. 1 filed a Darkhast in execution of the decree of 1891 and under that Darkhast lands sold to the plaintiffs in 1896 were put up to sale. The sale was confirmed by the Collector in spite of the objections put in by the plaintiffs. The plaintiffs, thereupon,

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— s. 47—*contd.*

[illegible] Procedure Code as they were representatives of the judgment-debtors. On appeal to the High Court. *Held*, remanding the case, that if the plaintiffs could prove that he was an innocent purchaser having had no knowledge of the charge created by the decree at the time he purchased the property it could not be held that he was a representative of the judgment-debtor within the meaning of s. 47, Civil Procedure Code, 1908, and in that case there was nothing to prevent the plaintiff from proceeding with the suit. *Per* MACLEOD, *C. J.* :—"If an outsider buys a property of a person who, as far as he can judge, is the ostensible owner and can give him a good [illegible]

I. L. R. 45 Bom. 812

18. ——— *Decree-holder—Auction-purchaser—Resistance to taking of possession of property by judgment-debtor and by a third party—Suit against both to recover possession maintainable.* The plaintiff obtained a decree against defendant No. 1, in execution of which the property in dispute was sold and purchased by the plaintiff with leave of the Court. In seeking to take possession of the property, the plaintiff was obstructed by the judgment-debtor (defendant No 1) as also by a stranger (defendant No. 2). The plaintiff filed a suit to recover possession of the property from both defendants; but it was objected that the suit was barred by s. 47 of the Civil Procedure Code: *Held*, overruling the objection, that the defendant No. 2 not being a party to the original suit, the plaintiff's proper remedy to get possession of the property [illegible] *31 All. 82*, approved. GORA NATHU *v.* SAKHARAM TEPI PATIL (1920) **I. L. R. 44 Bom. 977**

19. ——— When payments have not been certified. Whether question can be reopened under this section discussed. RADHA KANT LAL *v.* MUSAMMAT PARBATI KUER **6 Pat. L. J. 337**

20. ——— *Decree for possession—Possession not obtained either by execution or by private arrangement—Execution of decree barred by limitation—Suit for possession based on decree not maintainable.* [illegible] arrangement. On the 25th of April, 1917, the plaintiffs sued for possession of the property awarded to them by the decree of 1905. *Held*, that the suit was barred by s. 47 of the Code of Civil Procedure. *Dhanraj Singh v. Lakhrani Kuar*,

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

———— s. 47—*contd.*

I. L. R. 38 All. 509, discussed and distinguished. RAMANAND *v.* JAI RAM . **I. L. R. 43 All. 170**

21. ———— *Receiver, appointment of, in execution proceedings—whether appeal lies from subsequent order refusing to discharge.* Where a Receiver is appointed in execution proceedings the question as to his discharge is a question relating to the satisfaction of the decree, and therefore an order refusing to discharge the Receiver is appealable. MAHARAJA SIR RAMESHWAR SINGH *v.* HITENDRA SINGH **3 Pat. L. J. 513**

22. ———— *Sale in execution —Auction purchaser in execution of money decree whether representative of decree-holder—Stranger purchaser in execution of decree—Applicability of s. 47, Civil Procedure Code.* A stranger purchaser at Court-auction is entitled and bound to have any question relating to the execution, discharge or satisfaction of the decree under execution decided under s. 47, Civil Procedure Code. *Per* ABDUR RAHIM, OFFG. *C. J.*—A stranger purchaser by private contract is also so bound and entitled. Whether a purchaser either by private contract or at Court-auction in execution of a money decree is to be considered the representative of the decree-holder or judgment-debtor depends upon the nature of the question raised and on who the contesting party is. *Per* OLDFIELD and SESHAGIRI AYYAR, *JJ.*—The insclusion in the proceedings of a stranger purchaser at Court-auction is justifiable on the ground of his interest in their result and without reference to his possession of any representative character. *Prosunno Kumar Sanyal* v. *Kali Das Sanyal, (1892) I. L. R., 19 Calc., 683. (P.C.),* considered and applied. An auction purchaser of property in execution of a money decree is not a representative of the decree-holder for the purpose of these execution proceedings. *Per* OLDFIELD, *J.*—Such an auction purchaser is the representative of the judgment-debtor for the purpose of inquiring into a question relating to the subsequent execution of a distinct decree against the same judgment-debtor affecting the same property. *Per* SESHAGIRI AYYAR, *J.*—Where question relates to the rights of the parties to the decree, the matter should be decided in execution, although strangers are benefited by or interested in the result of such a decision. VEYINDRAMUTHU PILLAI v. MAYA NADAN (1920) **I. L. R. 43 Mad. (F. B.) 107**

(*a*). ———— *Execution of decree—Compromise.* As between the decree-holder and the judgment-debtor the question of an alleged fraudulent adjustment of the decree must be gone into and decided by the Execution Court. MAHAMED KASSIM *v.* RUKIA BEGAM **I. L. R. 41 All. 443**

23. ———— *Mortgage—Execution of decree—Effect of purchase of a decree for sale by a person who has already purchased part of the mortgaged property at a sale in execution of the same decree.* At a sale in execution of a final decree upon a mortgage part of the mortgaged property was purchased by M. Subsequently to this purchase M also obtained from the mortgagee an assignment of the mortgage decree itself. *Held,* on application being made for further execution of the decree, that the effect of M's purchase was to discharge the mortgage debt *pro tanto,* that is to say, in the ratio which the property purchased bore to the rest of the property mortgaged, and the decree could only be executed for the balance. *Bisheshur Dial* v. *Ram Sarup, I. L. R. 22 All. 284,* and *Khudhai* v. *Sheo Dayal, I. L. R., 10 All. 570,* referred to. SARJU KUMAR MUKERJI *v.* THAKUR PRASAD **I. L. R. 42 All. 544**

24. ———— An order for stay of execution of a decree is not an appealable order. JANARDAN TRIUMBAK *v.* MARTAND TRIUMBAK . . . . **I. L. R. 45 Bom. 241**

25. ———— *Decree for possession—Possession not obtained either by execution or by private arrangement—Execution of decree barred by limitation—Suit for possession based on decree not maintainable.* On the 28th of April, 1905, the plaintiffs obtained a decree in a suit for pre-emption conditional on their paying Rs. 1,000 within three months from the date of the decree. The money was paid, but, for one reason or another, the plaintiffs did not get possession of the property either by process in execution, or by private arrangement. On the 25th of April, 1917, the plaintiffs sued for possession of the property awarded to them by the decree of 1905. *Held,* that the suit was barred by s. 47 of the Code of Civil Procedure. *Dhanraj Singh* v. *Lakhrani Kuar, I. L. R. 38 All.* 509, discussed and distinguished. RAMANAND *v.* JAI RAM **I. L. R. 43 All. 170**

———— *Decree—Execution—Executing Court cannot question the validity of the decree.* Under s. 47 of the Civil Procedure Code, 1908, the Court executing a decree cannot deal with the question whether the decree should stand or whether it should be set aside on any of the grounds on which a decree can be set aside. *Chintaman Vithoba* v. *Chintaman Bajaji (1896) 22 Bom. 475,* followed. RAMCHANDRA GOVIND *v.* JAYANTA (1920) . . **I. L. R. 45 Bom. 503**

26. ———— *Suit to recover possession of undivided share decree—Partition pending suit—Execution of decree—Decree-holder, if may obtain possession of the allotted share in execution—Decree, if must be amended for the purpose—Separate suit, if necessary.* Pending a suit to set aside a sale for arrears of revenue of an undivided share in a Mahal and for joint possession thereof, the Collector effected a partition of the estate under the Estates Partition Act and gave the purchaser separate possession of specific lands. The Court decreed the suit without being informed of the completion of the partition by the Collector. This decree being reversed by the High Court was ultimately restored with certain modifications by the Privy Council. The decree-holder having applied for execution of the decree and for possession of the lands which had been substituted by the partition for the undivided share decreed by the Court: *Held*—That the decree could be executed by giving the decree-holders possession of the substituted lands, the question as to what were the substituted lands being a matter which arose within the meaning of s. 47 of the Civil Procedure Code between the parties relating to the execution and satisfaction of the decree; neither an application to the Judicial Committee to vary their decree nor a separate

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— **s. 47**—*contd.*

suit for establishment of title was necessary. RAI BAIJNATH GOENKA *v.* MAHARAJA SIR R. P. SINGH **26 C. W. N. 906**

——— **ss. 47, 50 and 53**—*Mortgage decree against Hindu father—in execution sons brought on the record—question of their liability to be decided by executing court.* Where a mortgagee has obtained a decree on a mortgage against a Hindu father who has died before the decree is fully executed he is bound to bring the deceased's Judgment-debtor's sons on the record as his legal representatives under ss. 50 and 53 of the Code and any question relating to the Execution satisfaction or discharge of the decree arising between the holder and such representative must be determined by the executing Court under s. 47 and not by separate suit. SHEIKH KAROO *v.* RAMESHWAR SAO . . . . . . **6 Pat. L. J. 451**

——— **ss. 47 and 50, O. XXI, r. 90**—*Transfer of decree to another Court—Judgment-debtor, death of—Application to bring in legal representatives—Jurisdiction of such Court—Minor legal representative—Guardian* ad litem, *not appointed—Sale in execution—Decree-holder and auction-purchaser, fraud of—Sale, validity of—Application under O. XXI, r. 90—Conversion into a suit—Suit for setting aside, if necessary—Limitation Act (IX of 1908), Arts. 12, 95 and 166—Suit for other reliefs on the ground of fraud, if maintainable.* The first defendant obtained decrees in two suits, *viz.*, Original Suits Nos. 555 and 559 of 1903 on the file of the District Munsif's Court of Vizianagram against one S, the husband of the plaintiff and the second defendant. S died subsequent to the passing of the decrees, which were transferred to the District Munsif's Court of Rajam for execution. The first defendant filed an application in the latter Court for bringing on the record the plaintiff and the second defendant as the legal representatives of the deceased judgment-debtor and for execution of the decrees. The Court passed an order as prayed for. The plaintiff (the junior widow of S) was a minor at the time of [illegible]

[illegible] defendant (the decree-holder) and the third defendant (the auction-purchaser) knew at the time that she was a minor. The second defendant (the co-widow) had then ceased to have any interest in her husband's estate. The decree-holder applied for sale in Original Suit No 555 of 1903 of properties which were attached in both the aforesaid decrees. The third defendant, who bid for the properties for Rs. 601, caused the sale to be stopped in Original Suit No. 555 of 1903; the first defendant in collusion with the third defendant brought them to sale in Original Suit No. 559 of 1903, the reserve price was reduced to Rs. 200 and the third defendant purchased the property for Rs. 301; the executing Court was not informed of the sale in Original Suit No. 555 of 1903 and of the third defendant's bid for Rs. 601 therein. The sale was held on 19th October 1906 and was confirmed on 23rd January 1907. The plaintiff (who attained majority in July 1907) filed an application on the 16th March 1909 in Original Suit No 559 of 1903 under s. 47 of the Code of Civil Procedure for setting aside the sale and for a declaration that the sale was invalid and for other reliefs. The petition was converted into a suit under the provisions of s. 47 of the Civil Procedure Code. The defendants contended that the sale was valid, that in any event the sale had to be set aside, and that both the applications under s. 47 of the Civil Procedure Code and the suit were barred by limitation under arts. 162 and 12 of the Limitation Act respectively. *Held*, that the plaintiff who had no guardian *ad litem* appointed for her in the execution proceedings was not a party to the suit in which the sale was made, and was entitled to bring a suit for a declaration that the sale was not binding without regard to the provisions of s. 47 of the Civil Procedure Code That the plaintiff not having been a party to the suit and not having been sufficiently represented by any one who was a party, the sale was not binding on the plaintiff and did not require to be set aside. That the suit which was instituted within three years of the plaintiff's attainment of majority was not barred by limitation. *Per* SADASIVA AYYAR, *J* When a judgment-debtor has to set aside a sale of his property for fraud of the decree holder or of both himself and the auction purchaser, he can only apply under Order XXI, rule 90 of the Civil Procedure Code, subject to the limitation prescribed in art. 166 of the Limitation Act; but he may be entitled to bring a suit for other appropriate reliefs on the ground of fraud against the decree holder and the auction purchaser, such as for damages or for injunction, subject to the limitation prescribed in art 95 of the Limitation Act. PAYIDANNA *v.* LAKSHMINARASAMMA (1914)

I. L. R. 38 Mad. 1076

——— **ss. 47 and 52**—*Execution of decree—Parties impleaded as representatives of a deceased debtor—Sale in execution—Objection by representatives to sale—Procedure.* Persons who are impleaded in a suit as representatives and asset-holders of a deceased party are in the same position as regards s. 47 of the Code of Civil Procedure, 1908, as persons who are parties in their own right. An objection, therefore, raised by such persons to the sale of property in execution of the decree must be taken under the above-mentioned section, and not by way of a separate suit. *Seth Chand Mal* v. *Durga Dei, I. L. R. 12 All. 313, Basti Ram v. Fattu, I. L. R. 8 All. 146,* and *Purchanun Bundopadhya* v. *Rabia Bibi, I. L. R. 17 Calc. 711,* referred to DULLA *v.* SHIB LAL (1916)

I. L. R. 39 All. 47

——— **ss. 47 & 60**—

See O. XXI, r. 53 . **4 Pat. L. J. 335**

——— **ss. 47 and 60, O. II, r. 2 and O. XXI, rr. 69 and 90**—*Civil Procedure Code (Act XIV of 1882), ss. 294, 317 and 319—Decree—Execution—Court-sale—Purchase by a benamidar of* [illegible]

a necessary party to a suit by the benamidar to recover possession of property—Splitting up of cause of action—Suit to recover a portion of property from one set of defendants—Suit to recover another portion of the property from another set of defendants—Maintainability of the suit. At a Court sale held in execution of a decree on mortgage, the plaintiff purchased as a *benamidar* of the mort-

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— s. 47—*contd.*

gagee (decree-holder) the mortgaged property which consisted of a two-anna share in a *khoti takshim* together with *khasgi* lands appertaining to the share. No leave to bid at the Court-sale was taken under s. 294 of the Civil Procedure Code of 1882. A certificate of sale was issued to the plaintiff in due course. The plaintiff recovered possession of the *khoti takshim* under s. 319 of the Code of 1882. In 1910, the plaintiff sued to recover possession of two survey numbers of the *khasgi* lands from some of the defendants in the mortgage suit and obtained a decree. Defendants Nos. 2 and 3 were unnecessarily made party-defendants to the suit. In 1914, the plaintiff brought another suit to recover possession of the other survey numbers which were covered by the certificate of sale and which were in the possession of defendant No. 1 as tenant of defendants Nos. 2 and 3 : *Held*, that the plaintiff, though a *benamidar*, could sue in his own name to recover possession of the property vested in him as a *benamidar*; and that the mortgagee decree-holder was not a necessary party to the suit. *Gur Narayan* v. *Sheo Lal Singh (1916) L. R. 46 I. A. 1.* followed. *Held*, further, that the omission on the part of the decree-holder to obtain leave to bid at the Court-sale, under s. 294 of the Civil Procedure Code of 1882, had not the effect of rendering the *benami* purchase void; though such a purchase was liable to be set aside under the provisions of the Code. *Held*, also, that the suit was not barred under the provisions of Order II, Rule 2 of the Civil Procedure Code of 1908, since the cause of action was not the same as that in the suit of 1910 in which different properties were involved and different defendants were in possession. *Held*, moreover, that the suit was not barred under s. 47 of the Civil Procedure Code of 1908, inasmuch as the plaintiff auction-purchaser was not the decree-holder for the purposes of procedure. *Sadashiv bin Mahadu* v. *Narayan Vithal (1911) 35 Bom. 452*, distinguished. RAMCHANDRA VITHAL *v.* GAJANAN NARAYAN (1919) . **I. L. R. 44 Bom. 352**

——— ss. 47, 73—

See RATEABLE DISTRIBUTION.

I. L. R. 42 Calc. 1

——— ss. 47, 73, 104—*Rateable distribution, order for—Right of appeal—Mortgage-decree—Provision for execution personally against the mortgagor—Application for execution of sale of mortgaged property—Sale held—Application, not disposed of—Sale of other properties by other decree-holders—Proceeds paid into Court—Application for rateable distribution by holder of mortgage decree, if maintainable—Application for execution, not formally disposed of, if pending.* An order for rateable distribution under s. 73 of the Code of Civil Procedure is appealable if it was passed between the parties to the suit in which the decree was passed and related to the execution of the decree and so fell under the provisions of s. 47 of the Code. S. 73 of the Code does not say that no appeal shall lie against orders passed under it; nor does the omission to provide for an appeal against such orders in s. 104 of the Code deprive a party of the right of appeal conferred by other provisions of the Code. Where an application for execution prayed for specific reliefs and they were all granted by the Court and obtained by the decree-holder, but no final order of

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— s. 47—*contd.*

disposal was passed by the Court on the application, it must be deemed to be a pending application for execution for purposes of s. 73 of the Code. KARVETNAGAR, RAJAH OF *v.* VENKATA REDDI (1915) . . **I. L. R. 39 Mad. 570**

——— ss. 47, 73, O. XXI, r. 55—*Decree—Execution—Attachment—Application for execution without issuing attachment—Satisfaction of the attaching judgment-creditor's decree by payment into Court—Withdrawal of attachment—order by Court for rateable distribution and further sale—order illegal—Money paid into Court for one purpose is not assets liable to rateable distribution—Question in execution—Appeal.* At the instance of two judgment-creditors the immoveable property of the judgment-debtor was attached and his other judgment-creditors merely put in applications for execution without issuing attachment. On the date fixed for the sale of the attached property, that is, on the 22nd September, 1909, the decrees of the two attaching judgment-creditors were satisfied by payment of the decretal amounts in Court and the effect was the withdrawal of the attachment under O. XXI, r. 55 of the Civil Procedure Code (Act V of 1908). On the next day after the payment into Court, an *ex parte* application was made to the Court and, according to the prayer in the application, the Court ordered rateable distribution of the money paid into Court and further sale of the properties which had been attached towards further satisfaction of the claim of the judgment-creditors. *Held*, reversing the order, that by virtue of the payment of the 22nd September 1909 the attachment of the property came to an end, and there being no attachment, there could be no order for further sale of the properties. The monies which were paid in to satisfy the attaching creditor's decrees and to raise the attachment could not be treated as assets by the Court and as such distributable among other judgment-creditors who had merely applied for execution. *Vibudhapriya Tirthaswami* v. *Yusuf Sahib, I. L. R. 28 Mad. 380*, referred to. Money paid into Court for a particular purpose, as for example, under O. XXI, r. 55 of the Civil Procedure Code (Act V of 1908), could not be treated as assets distributable under s. 73 of the Code. The "assets" referred to in the section were assets held in the process of execution. The question involved in the appeal was a question in execution between the parties to decrees. Therefore it fell under the provisions of s. 47 of the Civil Procedure Code (Act V of 1908) and the order passed by the lower Court was appealable. SORABJI COOVARJI *v.* KALA RAGHUNATH (1911) . . **I. L. R. 36 Bom. 156**

——— ss. 47, 96, 104 (b), 135 (2)—*Execution of decree—Arrest—Privilege of exemption from arrest under civil process—Appeal.* Certain judgment-debtors, who had come from Bombay to Benares to look after an application which they had made for the rehearing of a case decided against them *ex parte*, were arrested under a warrant taken out by the decree-holder in execution of his decree. At the time of their arrest the judgment-debtors were seated in the train at the Benares railway station and had taken tickets for Allahabad. *Held*, that the judgment-debtors were not exempted from arrest under s. 135 of the Code of Civil Procedure, 1908,

CIVIL PROCEDURE CODE (ACT V OF 1908)
—*contd.*

——— s. 47—*contd.*

also that the order for their arrest was appealable as a decree under s. 96 of the Code. *In the matter of Sita Bux Savuntharam, I. L. R. 4 Mad. 317*, not approved. *Wooma churn Dhole* v. *Teil, 11 B. L. R. App. 13*, referred to. ARDESHIRJI FRAMJI *v.* KALYAN DAS (1909)

I. L. R. 32 All. 3

——— **ss. 47, 104 and O. XXI**—*Execution of decree—Order disallowing application for the arrest of the judgment-debtor—Whether open to appeal. Held*, that an appeal is competent from an order made under rule 40 of Order XXI of the Code of Civil Procedure disallowing an application by a decree-holder for the arrest and imprisonment of his judgment-debtor, such an order coming within the purview of s. 47 of the Code. *Sewa Singh* v. *Dhaunkal (69 P. R. 1895)*, *Abdul Rahman* v. *Mahomed Kassim (I. L. R. 21 Mad. 29)*, *Nayana Naikan* v. *Syed Ghulam (5 Indian Cases 909)* and *Subbarama Ayyar* v. *Arunachellam (32 Indian Cases, 731)*, referred to MUST. RAJ KARNI *v.* KARIM ILAHI . I. L. R. 1 Lah. 77

——— **ss. 47 and 104 (2), O. XXI, rr. 89 92 and O. XLIII (i), (i)**—*Order—Appeal from Order—Second appeal—Practice and procedure.* A second appeal does not lie from an order passed under Order XXI, Rule 89, of the Civil Procedure Code, 1908. The fact that the auction-purchaser is the decree-holder himself makes no difference. KACHU *v.* TRIMBAK KHEMCHAND (1919)

I. L. R. 44 Bom. 472

——— **ss. 47(2) and 109 (a)**—"*Final order*"—*Order directing execution—Question of power to execute is not one relating to execution, discharge, or satisfaction of decree.* An order of the High Court setting aside an order of a Subordinate Court refusing to execute decrees obtained by the plaintiff on the ground that the Court had no jurisdiction to execute the decrees, and directing the Subordinate Court to proceed with the execution, is not a final order within the meaning of s. 109 (*a*) of the Code of Civil Procedure, 1908. Nor is such an order a decree under s. 47 coupled with s. 2. An order directing the executing Court to proceed and determine the question in dispute [illegible] relating solely to jurisdiction does not determine any question relating to the execution, discharge or satisfaction of a decree. RAJKUMAR GIRWAR PRASAD SINGH *v.* RAMESHWAR LAL BHAGAT

4 Pat. L. J. 461

——— **ss. 47 and 109**—*Plaintiff awarded land claimed in plaint—partition proceedings pending the suit—Claim for execution against share allotted in partition—Appeal to His Majesty in Council, maintainability of.* The plaintiffs instituted a suit to set aside a revenue sale of an *ijmali* share and to recover possession and mesne profits, and eventually obtained an order of His Majesty in Council in their favour. At the time the suit was instituted partition proceedings were pending and those proceedings terminated before the appeal to His Majesty in Council was heard. As a result of the partition the plaintiffs in that suit were in many cases allotted other shares and interests in lieu of their original shares in the parent estate. They applied for execution of the order in Council against the substituted shares and interest allotted under the partition and eventually the High Court decided the matter in their favour. The defendants applied for leave to appeal to His Majesty in Council. *Held*, per *Dawson Miller*, C. J., that the question as to whether the decree-holders were or were not entitled to execution against the substituted shares fell within s. 47 of the Code of Civil Procedure, 1908. Leave to appeal to His Majesty in Council was granted. *Held*, per *Chapman* J.—That the order of the Court was an interlocutory order directing procedure and was, therefore, not a final order. RAI BAIJNATH GOENKA *v.* MAHARAJA SIR RAMESHWAR SINGH . . . . 3 Pat. L. J. 339

——— **ss. 47, 115**—*Decree—Execution—Auction sale—Bids, nature of—Proposal—Revocation by death of bidder—Indian Contract Act (IX of 1872), s. 6—Death of highest bidder before accepted by Court—Proceeding bid accepted by Court—Order for resale, holding previous bidder liable for deficiency whether valid—Civil revision petition and appeal to High Court, competency of—Jurisdiction—Interlocutory order, revisability of.* Bids in an auction sale held in execution of a decree are merely proposals which are revoked by the death of the bidder before acceptance by the Court. A bid lapses on the making of a subsequent higher bid or on the expiry of a reasonable time after the making of the bid without acceptance by the Court. Where a Court adjourned an auction sale after certain bids had been made but the highest bidder died before the adjourned date, and the Court took up the preceding bid and accepting it called upon such bidder to pay the price, and on his refusal proceeded to put up the property to resale, holding the bidder to be a defaulter liable for any deficiency that might be caused by the resale, and the latter preferred a Civil Revision Petition as well as a Miscellaneous Appeal to the High Court against the order directing the resale. *Held*, that the lower Court acted illegally and with material irregularity in the exercise of jurisdiction in accepting the preceding bid and making the order for resale, and that the High Court was competent to interfere in revision, but that no appeal lay against the order. RAJA OF BOBBILI *v.* SURYANARAYANA RAO (1919) . . . I. L. R. 42 Mad. 776

——— **ss. 47, 115, 151 and O. XLIII, I**—*Sale set aside on appeal—Auction purchaser ordered to refund purchase money withdrawn from court—Attachment of auction-purchaser's property—Attachment set aside on appeal—whether second appeal lay.* A sale in execution of a decree was set aside at the instance of the auction-purchaser on the ground that the judgment-debtor had no saleable interest in the property as his interest had been previously sold in execution of another decree. The sale was confirmed in appeal but in the meantime the auction purchaser had withdrawn the purchase money from the court. The executing court ordered him to refund the money and, on his objecting to do so, attached his moveable property. This order was set aside by the lower appellate court. *Held*, that the order of the executing court was not a decree and, therefore, no second appeal lay. The order did not fall within s. 144 of the Code of Civil Procedure, 1908, nor was it an order adjudicating the rights of the parties in the suit, as the auction purchaser was

IVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— **s. 47**—*contd.*

not a representative of any of the parties to the suit. The question whether an auction-purchaser is entitled to a refund of the sale money does not fall within the scope of s. 47 of the Code. *Held, further*, that the order of the executing court must have been made under s. 151 of the Code and as Order XLIII, rule I, does not provide for an appeal against such an order the lower appellate court had no jurisdiction to set it aside. *Held, also*, that the High Court had power to correct a result which amounted to an abuse of the process of the court and to put the parties in the position in which they would have been if the court had not erroneously set aside the sale in the first instance, and if there had been no necessity to get that erroneous order corrected by the appellate court. *Held, further*, that the order of the executing court directing the auction-purchaser to refund the purchase-money should be executed as an ordinary money-decree. SUKHDEO DAS *v.* RITO SINGH

2 Pat. L. J. 361

——— **ss. 47, 144**—

See EXECUTION OF DECREE.

I. L. R. 42 All. 158

See PROCEDURE . **L. R. 46 I. A. 228**

——— *Decree passed* ex parte *—Application to set aside decree—Execution of decree and recovery of possession of property pending application—Setting aside of* ex parte *decree—Application for restitution of property—Court which passed the decree can hear the application.* A decree having been passed *ex parte* against the defendant in the Subordinate Judge's Court at Poona, he applied to the Court to have it set aside. Whilst the application was pending, the plaintiff recovered possession of the property in dispute in execution of the decree. Subsequently the *ex parte* decree was set aside, the suit was restored to file, and it was transferred to the Haveli Court for hearing. The defendant next applied to the Poona Court for restoration of the property to him; but the application was dismissed on the ground that it should be made to the Haveli Court. On appeal:—*Held*, that the defendant, who applied for restitution, was entitled to have the property restored to him when the decree under which the plaintiff got possession of it had been set aside; and that the Poona Court, which originally passed the decree had jurisdiction to entertain the application. SWAMIRAO *v.* VALENTINE (1919)

I. L. R. 44 Bom. 702

——— **ss. 47, 144, 151**—*Sale in execution of* ex parte *decree—Decree-holder becoming purchaser—Subsequent setting aside of the* ex parte *decree and re-trial of the case—Second decree in plaintiff's favour—Application by defendant to set aside sale under the first decree—Sale set aside on defendant paying up the amount due under the second decree—Limitation Act (IX of 1908), Arts. 166 and 181.* In 1906, an *ex parte* decree was passed against the defendant, in execution of which the defendant's house was sold and purchased by the plaintiff decree-holder in 1910. The *ex parte* decree was subsequently set aside; but at the re-trial, a decree was again passed in plaintiff's favour in 1914. In the meanwhile, the defendant applied to have the sale of the house set aside: *Held*, that the order setting aside the sale could be passed either under s. 47 or ss. 144 or 151 of the Civil Procedure Code, 1908. *Held*, also, that the application was not governed by Art. 166, but that it was within time under the provisions of Art. 181 of the Indian Limitation Act, 1908, the cause of action having accrued upon setting aside the *ex parte* decree in 1914. *Held*, further, that the previous sale of the house in execution under the previous decree which had been set aside should itself be set aside as being no longer based on any solid foundation; but subject in all the circumstances to the condition that the defendant should pay up the amount due from her under the second decree within a specified time. SHIBVAI *v.* YESOO (1918) . . . . **I. L. R. 43 Bom. 235**

——— **ss. 47 and 145**—*Third party executing surety bond for a judgment-debtor—Suit for a declaration that the bond is void for fraud and undue influence and for cancellation of the bond, maintainability of.* A person not a party to the suit, who stands surety for a judgment-debtor for the due performance of a decree, has no independent right, under s. 47 of the Civil Procedure Code, to apply to the executing Court to cancel the security bond on the ground that it was obtained by fraud and undue influence. His only remedy is by way of suit. He is a party to the suit within the meaning of s. 47, Civil Procedure Code, only for the limited purpose mentioned in s. 145 of the Code, namely, for appeal. RAMANATHAN PILLAI *v.* DORAISWAMI AIYANAGAR (1920)

I. L. R. 43 Mad. 325

——— **s. 47 O. II, r. 2**—

See SPECIFIC PERFORMANCE.

5 Pat. L. J. 314

——— **s. 47, O. XLI, r. 1**—*Execution of decree—Limitation—Appeal—Copy of decree or final order necessary to the filing of an appeal.* On an objection taken by the judgment-debtor that the Code execution of a decree was barred under s. 48 of the Civil Procedure, the Court, in disallowing the objection, wrote a judgment and also drew up a formal order, or decree, being the formal expression of the decision of the question. *Held*, that O. XLI, r. 1, of the Code applied, and no valid appeal could be filed against the decision of the Court below which was not accompanied by a copy of such formal order, or decree. *Khirode Sundari Devi* v. *Janendra Nath Pal Chaudhuri, 6 C. W. N. 283*, discussed. QASIM ALI KHAN *v.* BHAGWANTA KUNWAR (1917) . . **I. L. R. 40 All. 12**

——— **s. 47, O. XXI, r. 2**—*Decree—Execution—Court-sale—Adjustment, uncertified—Executing Court or a Court hearing suit precluded from recognizing the adjustment—Redemption—Fraud—Court-sale not to be set aside after many years on a vague plea of fraud—Transfer of Property Act (IV of 1882), s. 52.* In 1884, *M* passed an unregistered mortgage bond for Rs. 30 in favour of the plaintiff. In 1899, plaintiff obtained a decree on the bond and in execution purchased the mortgaged property himself at a Court-sale in 1901. He obtained formal possession under his purchase but the actual possession remained with defendant No. 1 under subsequent registered mortgages executed by *M* in favour of the defendant in 1892, 1897, 1898, 1899 and 1900

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— s. 47—*contd.*

In 1903, *M* sold her interest in the property to defendant No. 1. Defendant No. 2 was a purchaser from defendant No 1. In 1912 plaintiff sued to recover possession of the property or in the alternative to redeem subsequent mortgages executed by *M*. The defendants denied the claim alleging in their written statement that the Court-sale under the decree of 1899 was fraudulently obtained as the decree was satisfied prior to the sale. The plaintiff contended in reply that the question of fraud could not be investigated upon the vague plea of fraud in the written statement in a redemption suit and that the plea of satisfaction of the mortgage decree prior to the Court-sale could not be entertained, since the adjustment had not been certified in view of the provisions of O. XXI, r. 2; *Held*, (i) that under the provisions of s. 47 of the Civil Procedure Code a question relating to the satisfaction of a decree was a question arising in execution which must be tried by the executing Court under that section or at the discretion of that Court by suit, in either of which cases the Court would be a Court precluded from recognising the adjustment; (ii) that it was undesirable that the defendant should by a vague plea of fraud be permitted after the lapse of many years to call in question a title acquired at a Court-sale which was never challenged by the judgment-debtor though she was alive at the time of the trial of the suit; (iii) that the mortgages of 1899 and 1900 effected during the prosecution of the proceedings in the suit of 1899 were ineffectutal as against the plaintiff. MORU NARSU *v.* HASAN VALAD FATTEKHAN (1918)

I. L. R. 43 Bom. 240

——— s. 47 (3), O. XXI, r. 16—*Assignee's application for execution opposed by attaching creditor of decree—Matter, if appealable.* S, a purchaser of a decree, having applied for execution after substitution of his name as a decree-holder, M a creditor of the judgment-debtor who had attached the decree opposed the application alleging that S's purchase was fraudulent and *benami*. The first Court upheld the objection, but the Appellant Court found S's purchase to be good and valid. *Held*, that the order came within the purview of [illegible]

DEY (1916) . . . . . 20 C. W. N. 670

——— s. 47, O. XXI, r. 32—

See INJUNCTION . I. L. R. 46 Calc. 103

——— s. 47, O. XXI, rr. 22, 90—

See EXECUTION OF DECREE.

I. L. R. 40 Calc. 45

——— s. 47, XXI, r. 50, cls. (b), (c), O. XXX, rr. 5 and 8—*Execution of decree against firm—Admission of partnership in pleadings—Service of summons individually as partner—Absence of notice with summons as to capacity of person served, effect of—Procedure for person not a partner but served individually as such—O. V, r. 17—Service of summons on defendant's refusal to accept it: s. 47—Order by Court executing decree against firm obtained from another Court calling upon persons found to be partners to show cause against execution, if a decree and if appealable.* A decree was obtained in the High Court against a firm the names of the partners of which were not disclosed. Execution was sought against three persons who were alleged to have been partners of the firm and the Court of the District Judge to which the decree was sent [illegible]

show cause why the decree should not be executed [illegible] appellants [illegible] appeared [illegible] admitted in his written statement that he was a partner and the other appellant did not appear. The plaintiff had taken out summons against the latter for service in accordance with cl. (a) of r. 3 of O. XXX. The summons which was not accompanied by any written notice in terms of r. 5, O. XXX, was tendered to the appellant who was asked to receive it as the manager and agent of the firm and on his refusal to give a receipt, a copy of the summons was hung up on the outer door of the place of business of the firm. *Held*, that the order of the District Judge was plainly a final order made under s. 47, C. P. C., and was essentially a decree as it determined a question relating to the rights and liabilities of the parties with reference to the relief granted by the decree and the order was appealable. The fact that it was open to the judgment-debtors to avail themselves of the provision of sub-r. 1 of r. 40 of O. XXI did not alter the nature of the order. That the case of the appellant who admitted partnership in his written statement was completely covered by sub r. 1, cl. (*b*) of r. 50, O. XXI and execution was rightly [illegible]

summons and the decree-holder was entitled to proceed with execution against him. That the service of the summons by posting it on the outer door of the premises of the firm on the refusal of the appellant to grant a receipt was clearly in accordance with r. 17 of O. V. which has in this respect altered the procedure laid down in s. 80 of the Code of 1882. That under r. 5 of O. XXX in the absence of a notice in writing as to the capacity of the person on whom summons is served, the person served shall be deemed to be served as a partner and the only method by which a person so served with summons can contest his liability as a partner is by appearance under protest in accordance with r. 8 BAISNAB CHARAN SHAHA *v.* BANK OF BENGAL (1914)

19 C. W. N. 1008

——— s. 47, O. XXI, rr. 58, 60—

See EXECUTION OF DECREE—SHEBAIT.

I. L. R. 42 Calc. 440

——— s. 47, O. XXI, rr. 58, 60—*Decree for money—Execution against representative of [illegible]*

CIVIL PROCEDURE CODE (ACT V OF 1908)—*contd.*

——— s. 47—*contd.*

made an application to continue the suit: *Held*, that an order disallowing such an application is not appealable, under Order XXII, rule 10 of the Code. *Ferrall* v. *Curran, L. R. 2 Ir. R. 470*, followed. LAKSHI ACHI v. SUBBARAMA AYYAR (1915) . . . I. L. R. 39 Mad. 488

——— s. 47, O. XXXIV, r. 14—*Mortgagor retaining possession of the mortgaged property under a rent-note executed to mortgagee—Arrears of rent—Non-payment of rent—Suit by mortgagee to recover possession of property and arrears of rent—Decree—Execution of decree —Sale of equity of redemption in execution of decree for rent—Purchase of equity of redemption by a third party—Suit by mortgagor to set aside decree and sale—Decree as for a claim arising under a mortgage—Sale in execution is voidable only—Mortgagor's remedy to set aside decree and sale is application under s 47 and not a separate suit—Suit, if instituted, can be treated as an application —Limitation—Indian Limitation Act IX of 1908, Art. 166* In 1910, the plaintiffs executed a possessory mortgage of their house to defendant No. 1: and at the same time passed a rent-note to defendant No. 1 and remained in possession of the house. The plaintiffs not having paid the rent defendant No. 1 filed a suit and obtained a decree entitling him to recover possession of the house and arrears for rent. In execution of the decree for rent, the equity of redemption of plaintiffs was put up to sale and purchased by defendant No 2 in January 1916, the sale having been confirmed in March 1916. In January 1917, the plaintiffs sued to set aside the decree and the sale held in execution of it:—*Held*, that the sale of the house in execution of the decree was in contravention of Rule 14, Order XXXIV of the Civil Procedure Code, because the claim for possession as well as rent arose under the mortgage. *Ibrahim walad Goolam* v. *Nihalchand (1919) 44 Bom. 366*, followed. *Held*, further, that the sale held in contravention of Rule 14 was not void, but voidable at the instance of the mortgagor. *Sahadu Manaji* v. *Datya Jaba (1911) 14 Bom.* [illegible] referred to. *Held* also that the proper

moreover, that such a suit, if already instituted, might be treated as an application provided it was brought within time under Article 166 of the Indian Limitation Act, 1908. BHAICHAND KIRTARAM v. RANCHHODDAS MANCHHARAM (1920) I. L. R. 45 Bom. 174

——— s. 47, and O. XXXIII, rr. 10 and 13—*Suit—Plaintiff successful—Costs—Recovery of Court-fees.* Where the plaintiff in a pauper suit succeeds in obtaining a decree and the Government fail to realize the court-fees from the defendant, the amount due becomes a charge on the subject-matter of the suit and the Government is entitled to realize the amount due from the subject-matter of the suit even though such subject-matter has passed into the possession of the decree holder. In such a case the Government's claim should be dealt with under s. 47 of the Code of Civil Procedure. BABUI GIRIJA KUER v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL . 4 Pat. L. J. 160

——— s. 47 O. XLVII—

See EXECUTION OF DECREE.

3 Pat. L. J. 571

——— s. 48 (1882 Code s. 230)—

See DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879), s. 48

I. L. R. 42 Bom. 367

See EXECUTION OF DECREE.

I. L. R. 40 Calc. 704
1 Pat. L. J. 214
3 Pat. L. J. 103

See LIMITATION ACT (IX OF 1908), SCH. I ARTS. 181 and 182 I. L. R. 42 Bom. 309

ART 182 . . I. L. R. 43 All. 405

See MORTGAGE-DECREE.

I. L. R. 39 Mad. 544

——— *Decree—Execution —Limitation—Decree ripe for execution* On the 14th December 1892, the plaintiffs obtained a decree against the defendants It directed (i) that the plaintiffs should be put in possession of certain land mortgaged to them by the defendants, and that the former should enjoy the profits of the land for 20 years in satisfaction of the amount due on the mortgage, (ii) that the defendants should pay to the plaintiffs a certain amount of money annually in the nature of cash allowance; (iii) that if in any year the defendants failed to make the payment, the plaintiffs were entitled to bring to sale the mortgaged land and get the money debt satisfied out of the sale-proceeds; and (iv) that if there should be "any deficit or any just and legal obstruction of whatever nature" to the mortgaged property being sold, the plaintiffs were entitled to recover the deficiency in respect of the cash allowance from the defendants "personally and from their other property." The defendants made default in the payment of the cash allowance in 1893 with the result that the plaintiffs brought the mortgaged property to sale under an order of the Court in execution. A part of the land was sold, but as the proceeds of the sale were not sufficient to satisfy the full amount of the debt, he was about to bring to sale the rest of the mortgaged property in 1908 when the Collector intervened and had the impending sale stopped on the ground that it was *watan* property On the 19th December 1910, the plaintiffs filed the present *darkhast* to recover the balance by enforcing the personal remedy against

the twelve years' period ran only from the date when the decree became in all its parts ripe for execution. The decree became for the first time capable of execution in 1908 in respect of the personal remedy given to the plaintiffs in the fourth part; until then, in respect of that part and that remedy, the decree was merely ancillary and provisional. The decree holder could not till that point

CIVIL PROCEDURE CODE (ACT V OF 1908)
—*contd.*

——— s. 55—*contd.*

decree-holder (*i*) if the judgment-debtor did not file an insolvency petition in the proper court or (*ii*) if the insolvency petition was rejected and the surety failed to produce the judgment-debtor, *held*, (1) that on the failure of the judgment-debtor to file an insolvency petition the surety was liable to be proceeded against in the same manner as if a decree for the *amount decreed against the judgment-debtor* had been passed against himself, and that no question arose as to whether he had failed to produce the judgment-debtor upon being called upon to do so; (2) upon a construction of the bond, that the surety's liability was a general one and that the mere fact that the execution proceedings against the judgment-debtor had been dismissed did not bar the decree-holders' applica-
[illegible]
against the judgment-debtor. DEDHRAJ *v.* MAHABIR PRASAD . . . . 5 Pat. L. J. 417

——— s. 58 (1882 Code ss. 342 341)—

——— s. 59—*Document not produced with plaint and treated in trial Court as piece of evidence, it should be treated in appeal as document creating rights—Disadvantage to defendant from such procedure.* *Held*, that the High Court should not have treated a Razi petition which the plaintiff did not produce in Court when he presented his plaint or which or a copy whereof he did not deliver to be filed with the plaint as required by s. 59 of the Civil Procedure Code as creating rights and when the trial Court did not treat it otherwise than as a piece of evidence; for had it been put forward by the plaintiff as creating rights, then apart from any difficulty as to its admissibility in the absence of registration (a point on which their Lordships expressed no opinion), a line of defence requiring evidence might have been adopted which was unnecessary so long as it was used merely as a piece of evidence. SULAIMAN *v.* BIYATHTHUMMA (1916) 21 C. W. N. 553

——— s. 60 (1882 Code s. 266)—

See s. 2. . . I. L. R. 43 Bom. 718

See O. XXI, r. 53. 4 Pat. L. J. 330

See GARNISHEE I. L. R. 4 Pat. L. J. 141

See INSOLVENCY. I. L. R. 2 Lah. 78

——— **Permanent tenancy**—*With condition of forfeiture on transfer—Holding saleable in execution.* The word "saleable" in s. 60 of the Civil Procedure Code means saleable by auction at a compulsory sale under the orders of the Court and not transferable by act of parties. Where in a permanent lease there was a condition that the landlord would re-enter if the tenant made any transfer of the land demised: *Held*, that the lease forbade a sale by the tenant but did not prevent a sale by the Court. KESHAB CHANDRA PRAMANIK *v.* AJAHAR ALI BISWAS (1911) 19 C. W. N. 1182

——— **Right to future maintenance**, *including allowances, not a debt under—Non liability to attachment under s. 60 (n). Civil Procedure Code—No right to appoint receiver to collect it, under*

CIVIL PROCEDURE CODE (ACT V OF 1908)
—*contd.*

——— s. 60—*contd.*

O. XL, r. 1, Civil Procedure Code. A mere right to receive maintenance in the future, at certain rate fixed by an agreement, is not a *debt* within the meaning of s. 60 (*1*), Civil Procedure Code; it cannot be attached in execution of a decree, such a step being prohibited by s. 60 (*n*), Civil Procedure Code, and as there can be no *attachment no receiver can be appointed under* O. XL, r. 1, Civil Procedure Code, to collect the future allowances as and when they fall due for satisfying the decree. *Nanammal v. The Col-*
[illegible]
(1916) . . . I. L. R. 40 Mad. 302

——— **Defendant agriculturist consenting to sale of his non-transferable holding** *and dwelling houses in execution of decree—Decree-holder's application for attachment and sale—Judgment-debtor if may oppose.* In a suit for recovery of money, certain non-transferable occupancy holdings and other properties which were the dwelling houses of the Defendant who was an agriculturist were attached before judgment, and a decree was passed by consent under which on default by the Defendant to pay the decretal money in certain instalments, the Plaintiff would be entitled to realise the same from the properties and person of the Defendant and that the properties attached would remain charged for the decretal amount. *Held*—That upon a proper construction of the decree the properties attached before judgment were liable for the satisfaction of the amount of the decree and the Defendant could not in execution proceedings object to the *attachment and sale of the properties in execution* of the decree. UZIR BISWAS *v.* HARADEV DAS AGARWALLA . . . . 24 C. W. N. 575

——— **Insurance Policy**—*Transfer of Property Act (IV of 1882), s. 130—Trusts Act (II of 1882), s. 5—Contract Act (IX of 1872), s. 2 (i)—Married Women's Property Act (III of 1874)—Life policy expressed to be for the benefit of the wife of the assured—Attachment of the policy by the judgment-creditors of the deceased assured—Suit by the widow of the assured for a declaration that the policy was not liable to attachment—Dismissal of suit.* A policy of insurance effected by the assured upon his own life was expressed to be for the benefit of his wife. Subsequently upon the death of the assured his judgment-creditors having attached the policy, his widow applied to raise the attachment. Her application being rejected, she filed a suit for a declaration that the policy was not liable to attachment *in execution of the defendants' decree.* *Held*, dismissing the suit, that under s. 60 of the Civil Procedure Code (Act V of 1908) the policy was attachable as 'a security for money or saleable property belonging to the judgment-debtor over which he had a disposing power which he might exercise for his own benefit.' The policy was a contract between the deceased and the Insurance Company expressed to be for the benefit of the wife of the assured whereby the Company promised, on proof of the death of the assured, to pay the policy monies to the trustee or trustees who might be appointed by the assured by separate writing.

CIVIL PROCEDURE CODE (ACT V OF 1908) *—contd.*

———— s. 60—*contd.*

and in default of trustees to the beneficiary (that is, the widow of the assured) and if the beneficiary be dead, to the assured's heirs, executors, administrators or assigns. Unless and until the appointment of trustees on behalf of the wife, it was in the power of the assured at any time to put an end to the contract by ceasing to pay the premia or otherwise to defeat the expectation of his wife by assigning the policy to a creditor. He could divest himself of his beneficial interest in the policy only by assignment in writing as provided by s. 130 of the Transfer of Property Act (IV of 1882) or signed declaration of trust as provided by s. 5 of the Trusts Act (II of 1882). He had adopted neither course. The policy on his death, therefore, formed part of his estate, the right of action against the Company being in his executors or other representatives untrammelled by any trust in favour of his wife. Married Women's Property Act (III of 1874) is not applicable to Hindus. There is nothing in the Contract Act (IX of 1872) to show an intention that a person not a party to the contract can sue on it. *in re Flavell, 25 Ch. D. 89, Bhikaji v. Dottatraya, 2 Bom. L. R. 888, Samuel v. Ananthanatha, I. L. R. 6 Mad. 351, Chinnaya Rau v. Ramaya, I. L. R. 4 Mad. 137,* distinguished. SHANKAR VISHVANATH *v.* UMABAI (1913) . **I. L. R. 37 Bom. 471**

———— **s. 60 (c) agriculturists**—*Dekhan Agriculturists' Relief Act (XVII of 1879), s. 22—Decree—Execution—Agriculturist—Exemption from liability to attachment or sale—Absence of proof of exemption—Jurisdiction of the Court to order sale.* S. 60 of the Civil Procedure Code (Act V of 1908) lays down the general rule that property liable to attachment and sale in execution of a decree is lands, houses, etc., belonging to the judgment-debtor. An Agriculturist, in order to resist the application of that general rule, must prove that he belongs to the privileged class so as to render s. 22 of the Dekkhan Agriculturists' Relief Act (XVII of 1859) applicable to his case. In the absence of such proof the exemption from liability to attachment or sale does not exist for the purpose of execution-proceedings and the executing Court has, therefore, complete jurisdiction to make the order for sale. NARAYAN ANANDRAM *v.* GOWBAI (1912) . . **I. L. R. 37 Bom. 415**

———— *'Agriculturist' meaning of:* A judgment-debtor put in an application before a Subordinate Judge claiming that his house attached in execution should not be sold by reason of the provisions of s. 60 (c) of the Civil Procedure Code, 1908, as he was an agriculturist. The lower Courts dismissed the application on the ground that the judgment-debtor had ceased to be an agriculturist in the ordinary sense of the term and had become a mere agricultural labourer. On appeal to the High Court: *Held,* that the judgment-debtor should be protected from the attachment of the house as the term 'agriculturist' as used in s. 60 of the Civil Procedure Code should be held to include persons engaged in cultivating the soil for remuneration although they may have no proprietary interest in the soil. DEVARE HEGDE *v.* VAIKUNT SUBAYA (1917)

I. L. R. 41 Bom. 475

———— *Execution of decree—Mortgage—Agriculturist's house not appurtenant to*

CIVIL PROCEDURE CODE (ACT V OF 1908) *—contd.*

———— s. 60—*contd.*

his holding. Held, by RICHARDS, *C. J.,* and TUDBALL, *J.* (BANERJI, *J., dissentiente*), that s. 60 of the Code of Civil Procedure will not operate to bar the sale of a house belonging to an agriculturist in execution of a decree on mortgage of the same if such house is not an appurtenance of the mortgagor's holding which he is prohibited by law from mortgaging or transferring. *Per* BANERJI, *J.,* the Legislature clearly intended that no Court should sell a house belonging to and occupied by an agriculturist, provided that the house is of the description mentioned in clause (c) of the proviso to s. 60, Code of Civil Procedure, and it makes no difference in the powers of the Court whether that house was mortgaged by the agriculturist for his debt or was not so mortgaged. The proviso forbids both attachment and sale, that is where an attachment must precede a sale it forbids attachment, as well as sale, and where attachment is not a preliminary step, it forbids sale. *Ram Dial v. Narpat Singh, I. L. R. 33 All. 136* referred to. BHOLA NATH *v.* MUSAMMAT KISHORI (1911) . . . . **I. L. R. 34 All. 25**

———— *Execution of decree—Attachment—Objection that attached property is the house of an agriculturist—Judgment-debtor both zamindar and agriculturist—Burden of proof.* Where a judgment-debtor whose house was attached in execution of a decree took objection that the house was the house of an agriculturist to which s. 60 (c) of the Code of Civil Procedure applied and was not susceptible of attachment, and it was found that the judgment-debtor was both an agriculturist and a zamindar. *Held,* that it lay on the judgment-debtor to prove that the house was strictly of the nature contemplated by the provisions of s. 60 (c). JAMNA PRASAD RAUT *v.* RAGHUNATH PRASAD . **I. L. R. 35 All. 307**

———— *Exemption from attachment of agriculturist's house—Agriculturist, who is—Plea claiming exemption must be set up and proved by judgment-debtor.* The agriculturist whose house is protected from attachment by s. 60 (c) of the Code of Civil Procedure is one belonging to the class of common agriculturists that are known in Bengal, whose main source of livelihood is by cultivation, *i.e.,* the raiyat who tills the field. The plea that he is an agriculturist within the meaning of the section has got to be set up and proved by the judgment-debtor. ASHMATULLA SARKAR *v.* RAS MAHMUD CHOWDHURY (1915) . **20 C. W. N. 574**

———— *Execution of decree—Sale in execution—House of an agriculturist—Objection not taken at time of sale, but in answer to a suit for possession by the auction-purchaser—Estoppel. Held,* that a judgment-debtor, who could and ought to have raised objections to the sale of his property at the time of the sale, could not be permitted long after the sale had been confirmed to raise the same objections in answer to a suit by the auction-purchaser for possession of the property purchased by him. *Umed v. Jas Ram, I. L. R. 29 All. 612, Pandurang Balaji Bagare v. Krishnaji Govind Parab, I. L. R. 28 Bom. 125,* and *Dwarka Nath Pal v. Tarini Sankar Roy, I. L. R. 34 Calc. 199,* followed. LALA RAM *v.* THAKUR PRASAD (1918)

I. L. R. 40 All. 689

CIVIL PROCEDURE CODE (ACT V OF 1908)—*contd.*

——— s. 60 (f)—

——— Birt Maha Brahmani—*Execution of decree—Things not susceptible of attachment and sale in execution.* The office of a *maha brahman* or a *birt acharji*, is a right to perform personal service, and as such is exempt from attachment and sale in execution of a decree under the provisions of s. 60, cl. (*f*), of the Code of Civil Procedure. *Durga Prasad* v. *Genda, All. Weekly Notes, 1889, 169*, followed. *Rajaram* v. *Ganesh, I. L. R. 23 Bom. 131*, referred to. DURGA PRASAD *v.* SHAMBHU (1919) . . . I. L. R. 41 All. 656

——— s. 60 (g)—

See PENSION ACT, 1871, s. 11.

I. L. R. 26 All. 318

——— *Grant of jagir whether of revenue or land—Grant whether absolute or for maintenance—Political pension.* A Government sanad purported to grant the "taluka" of a certain pargana, together with the lands cultivated or uncultivated, to one K for life as revenue-free jagir ... and went on to say that

primarily points to occupancy, though it may be occur ... such as that of collector of reven ... only ... to an haka held as a permanent ...

(1917) . . . 22 C. W. N. 577

——— s. 60 (i)—

See s. 60 2 (*b*)

——— "*Public officer*"—*Execution of decree—Limitation—Limitation Act* ...

Majesty's regular forces serving in India is not a "public officer" within the meaning of *s. 60 of* the Code of Civil Procedure, 1908. The pay of ...

But see ATTACHMENT.

I. L. R. 43 Bom. 716

——— s. 60— (n)—*Annuity made* ... *but charged* ...

tion for payment of annuity in Court, if valid—Annuity charged on property distinguished from covenants to pay future maintenance. P finding himself unable to pay his debts conveyed all his properties for consideration to his son who assumed the payment of specific debts and agreed to pay to *P* a monthly sum of Rs. 4,000 payable on the ...

executed by the vendor. In the deed it was further provided that the allowance was not to be alienated by the vendor in any manner and that the sums as they fell due were in no circumstances to be payable to, or demandable by, any person other than the vendor. The respondent having obtained a decree for money against *P* applied for attachment and sale of the right, title and interest of *P* in the monthly allowance payable from and charged upon the estate in the hands of the vendee *P* objected that the right to the annuity was not saleable property within s. 60, Civil Procedure Code. The Subordinate Judge overruled the objection and issued a *prohibitory order* directing the payment of the allowance into Court *periodically as it fell due*: *Held*, that the right sought to be attached was saleable property within the meaning of s 60, Civil Procedure Code, being a ... charged upon property and ...

able only to the vendor was an illegal restraint on alienation and did not, even if considered valid as being in the nature of a spendthrift trust, necessarily imply a bar to involuntary alienation at the instance of creditors. That the direction for payment into Court of the allowance as it fell due was contrary to law, the judgment-creditor being entitled only to bring to sale the right of the judgment-debtor who would therefore be entitled to take out the sums already deposited in Court in pursuance of the erroneous order of the Subordinate Judge. PADMANUND SINGH *v.* RAMA PROSHAD MOHI (1912) . . 17 C. W. N. 662

——— *Execution of decree—"Right to future maintenance"—Younger brother put in possession of certain property by way of maintenance—Mode of taking out execution against such property.* Under a family arrangement between two brothers the younger was given certain villages "in lieu of maintenance." The grantee was to enjoy the income of the villages during his life without power of transfer, and at the elder brother's death he was to become full owner. *Held*, that such property was not exempt from process in execution of a decree against the life-tenant; but the proper mode of execution was not by sale of the life-tenant's interest in the property—whatever it might be worth—but by the appointment of a receiver, who might administer the property on behalf of the Court and apportion the income between the creditor and the life-tenant. SUNDAR BIBI *v.* RAJ INDAR NARAIN SINGH

I. L. R. 42 All. 617

——— A mere right to future maintenance is not protected from attachment. PALAKANDI MAMMAD *v.* CHINGORAN KELOTH alias V. APPA . . I. L. R. 40 Mad. 302

——— s. 60, Sub-s. 2 (b)—

See s. 60(i)

See ARMY ACT, s. 14*.

I. L. R. 43 Bom. 368

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

———— **s. 60, Sub-s. 2(b)**—*contd.*

———— *Army Act, 1881 (44 & 45 Vict., c. 58), ss. 136 and 190, sub-sec. 8, as amended by Army Annual Act, 1895 (58 & 59 Vict., c. 7), s. 4—Officer on the Indian Staff Corps—Money decree—Execution—Salary not liable to attachment.* Messrs. K. K. & Co. filed a suit and obtained a decree for a sum of money against Major D., an officer in the Indian Army. They ubsequently attached a moiety of that officer's pay under Order XXI, rule 48, of the Civil Procedure Code, and in pursuance of such attachment the Dep uty Controller of Military Accounts remitted such moiety to the Sheriff of Bombay who had paid out a portion of the moneys received by him under Messrs. K. K. & Co.'s attachment and had in his hands a further sum which in the ordinary course would have been paid out likewise, when Major D. took out a summons calling on the plaintiffs to show cause why their attachment should not be raised and the sums recovered thereunder refunded. *Held,* that Major D., under s. 190, sub-sec. 8, of the Army Act, 1881, was an officer of His Majesty's Regular Forces, and under s. 136 of the Army Act, 1881, and s. 60 of the Code of Civil Procedure he was entitled to receive his pay without any deduction and that the attachment must be raised and that the Sheriff must pay to Major D. the sum received by him under attachment and not yet paid away. *Velchand* v. *Bourchier, I. L. R. 37 Bom. 26,* applied. *Held,* however, that, as the moneys actually paid out to the execution creditors had not been paid out under coercion or under a mistake of fact, though possibly under a mistake of law, Major D. was not entitled to a refund of such moneys. KING, KING & CO. *v.* MAJOR DAVIDSON (1914) . **I. L. R. 38 Bom. 667**

———— *Army Act, 1885, (44 & 45 Vict.), s. 136—Officer in the British Army serving in India—Money decree—Execution—Salary not liable to attachment.* S. 60, cl. (2) (*b*) of the Civil Procedure Code (Act V of 1908) leaves the provisions of the Army Act, 1885 (44 & 45 Vict.) untouched. S. 136 of the Army Act, 1885, (44 & 45 Vict.), amended in 1895 provides, that the salary of the officer in the British army serving in India shall be paid to him without deduction unless the Legislature in India has directed to the contrary in that behalf. There is no law in India which expressly or by necessary implication directs that such officer's salary is liable to attachment in execution of a decree. VELCHAND *v.* BOURCHIER (1912) . **I. L. R. 37 Bom. 26**

———— *Execution of decree—Attachment—Pay of officer in the Indian Army. Held,* that the pay of an officer of the Indian Army may be attached in execution of a decree against him to the extent of one-half. *Lecky* v. *The Bank of Upper India, Limited, I. L. R. 33 All. 529,* distinguished. *Prins* v. *Murray & Co. 23 Indian Cases 935,* followed. HAY *v.* RAM CHANDAR 1917) . . . . **I. L. R. 39 All. 308**

———— **s. 63 (1882 Code s. 285)**—

See RATEABLE DISTRIBUTION.

I. L. R. 46 Calc. 64

———— *Definition of "decree"—Same property attached by both Civil and Revenue Courts—Sale in execution of Revenue Court decree—Auction purchaser entitled to retain possession*

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

———— **s. 63**—*contd.*

S. 63 of the Code of Civil Procedure only applies as between Civil Courts of different grades or as between Revenue Courts of different grades. It cannot apply where the conflict is between a Civil Court on the one hand and a Revenue Court on the other. Hence where the same property was attached in execution of a Civil Court decree and also in execution of a Revenue Court decree, but was actually sold in execution of the latter, it was *held* that the auction purchaser was entitled to retain possession *non obstante* the decree of the Civil Court and the attachment thereunder. *Raghubar Dayal* v. *Banke Lal, I. L. R. 22 All. 182,* followed. ROSHAN LAL *v.* MUHAMMAD MASHKUR ALI KHAN . **I. L. R. 43 All. 612**

———— **ss. 63 and 73**—When the same property was attached by two Courts one superior to the other, *Held* that the claimant in the inferior Court was entitled to rateable distribution in respect of one of his decrees in which there was a prior attachment by him but not in another case in which the attachment was subsequent to that affected in the superior Court. An application to a superior Court for transfer of an execution case to itself from an inferior Court cannot be treated as an application for execution to the superior Court within the meaning of s. 73. KRISHNA KUMAR GHOSH *v.* PASUPATI BANERJEE

25 C. W. N. 740

———— **s. 64 (1882 Code s. 276)**—

See O. XXI, R. 58 . **25 C. W. N. 544**

See ATTACHMENT IN EXECUTION OF MONEY DECREE.

I. L. R. 44 Mad. 232

———— *Effect of—Attachment of land by one decree-holder—Application for rateable distribution by other decree-holders—Satisfaction of attaching decree-holder's decree by subsequent private alienation of the land attached—The other decree-holders cannot impeach the alienation.* Where a decree-holder attached land in execution of his decree and the other decree-holders applied for rateable distribution without attaching the land in execution of their decrees and subsequently the judgment-debtor alienated the land and paid off the attaching decree-holder. *Held,* by the Full Bench, that the other decree-holders were not entitled to question the alienation under s. 64 of the Civil Procedure Code. *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria, I. L. R. 44 Calc. 662,* relied on. Effect of Explanation to s. 64, Civil Procedure Code, considered. ANNAMALAI CHETTIAR *v.* PALAMALAI PILLAI (1917) . **I. L. R. 41 Mad. 265**

———— *Attachment—Claim for rateable distribution—Private alienation not impeachable by application for rateable distribution unless he has himself attached the property claimed. Held* on a construction of the explanation to s. 64 of the Code of Civil Procedure, 1908, that a person claiming rateable distribution of assets cannot get the benefit of it unless he has himself got an attachment on the assets from which he seeks to benefit. The mere fact that he has filed a petition asking to share in the distribution is not sufficient. *Annamalai Chettiar* v. *Palamalai Pillai, I. L. R., 41 Mad., 265,* followed. *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria,*

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

———— s. 64—*contd.*

I. L. R., 44 Calc., 662, referred to. BHUPAL *v.* KUNDAN LAL . . . **I. L. R. 43 All. 399**

———— **s. 64 and O. XXI, r. 54**—

———— *Attachment of immovable property—Order for attachment made Alienation by judgment-debtor, subsequent to order but before proclamation of attachment, validity of—Prohibition against alienation, effective from what date.* An attachment operates as a valid prohibition against alienation of the attached property only from the date on which the necessary proclamation is made and copy of the order affixed as contemplated in O. XXI, r. 54, Civil Procedure Code. *Ramanayakudu* v. *Boya Pedda Basappa, I. L. R. 42 Mad. 565*, approved; *Venkatasubbiah* v. *Venkata Seshiah, I. L. R. 42 Mad. 1*, distinguished; *Venkatachelapatti Rao* v. *Kameswaramma, I. L. R. 41 Mad. 151*, and *Kanai Lal* v. *Ahed Bux 39 I. C. 652*, referred to. SINNAIPAN *v.* ARUNACHELLAM PILLAI (1919) . **I. L. R. 42 Mad. 644**

———— *Attachment when effective against alienation.* An attachment of land which is only ordered but not communicated to the judgment-debtor by the issue of a prohibitory order under O. XXI, r. 54, Civil Procedure Code, does not affect an alienation made before the judgment-debtor has knowledge of the prohibitory order. RAMANAYAKUDU *v.* BOYA PEDDA BASAPPA (1919) . . **I. L. R. 42 Mad. 565**

———— *Execution of decree—Purchase by decree-holder—Interest—Time when*

fied until the sale has been confirmed. If, therefore, the decree carries interest, the decree-holder is entitled to claim interest between the date of the sale and the date of its confirmation. *Ganesh* v. *Purshottam, I. L. R. 33 Bom. 311, 316*, referred to. KHALIL-UR-RAHMAN *v.* GOKUL PRASAD (1919) **I. L. R. 41 All. 526**

———— **s. 64, O. XXXVIII, r. 10**—*Attachment before judgment, scope and effect of section, if limited only to transaction subsequent to attachment—Contract to sell entered into before attachment but specifically performed thereafter and before execution sale—Purchaser at execution sale and purchaser under contract to sell, respective rights of.* The plaintiffs attached the disputed property before judgment and purchased it at an execution sale. Before the attachment by the plaintiffs the debtor had executed an agreement of sale in respect of the same property in favour of the defendant which was followed by a suit for specific performance. In pursuance of the decree in this suit the Court, before the date of the execution sale, executed a *kobala* conveying the property to the defendant who also obtained possession before the said sale. Before the plaintiff purchased at the execution sale he had notice of the agreement under which the defendant's purchase was made. *Held*, that the provision in s. 64 of the Civil Procedure Code is for the protection of a creditor only against transactions subsequent to the attachment and the defendant's purchase must prevail. There is no reason to hold that the provision in O. XXXVIII, r. 10, is limited to rights *in rem* That the defendant had a right to have the contract to sell specifically performed and under s. 489 of Act XIV of 1882, corresponding to O. XXXVIII, r. 10 of the present Code, that right was not affected by the attachment. MADAN MOHAN DE *v.* REBATI MOHAN PODDAR (1915) . . . **21 C. W. N. 189**

———— **s. 65 (1882 Code s. 316)**—

See SALE FOR ARREARS OF REVENUE. **I. L. R. 40 Calc. 81**

———— *Purchase by decree-holder—interest—time when decree is satisfied—Confirmation of sale.* A decree the satisfaction of which has resulted from the decree-holder himself bidding the full amount of the same at the execution sale is not actually satisfied until the sale has been confirmed. If therefore the decree carries interest the decree-holder is entitled to claim interest between the date of the sale and the date of its confirmation *Ganesh* v. *Purshottam I. L. R. 33 Bom. 311*, referred to. KHALIL-UR-RAHMAN *v.* GOKUL PRASAD **I. L. R. 41 All. 52**

———— **s. 66 (1881 Code 317)**—

See s. 47 . **I. L. R. 44 Bom. 351**

See BENAMI . **I. L. R. 43 Calc. 20**

See CIVIL PROCEDURE CODE, 1882, s. 317 **I. L. R. 25 Bom. 342**

See HINDU LAW JOINT FAMILY PROPERTY **I. L. R. 49 All. 189**

See SALE IN EXECUTION OF DECREE. **I. L. R. 43 Mad. 643**

See TITLE . . **23 C. W. N. 604**

———— *Auction sale in the name of defendant—Agreement to sell half share to plaintiff after sale-certificate is obtained—Sale, whether benami—Agreement subsequent to sale to convey—Suit for specific performance of latter agreement, whether barred.* Where the defendant agreed that certain immovable property should be purchased in his name in Court auction and that one half of it should be conveyed by him to the plaintiff after the sale certificate was obtained, and under an agreement subsequent to the purchase the defendant agreed to execute a registered conveyance. *Held*, by the Full Bench, in a suit being brought for specific performance of the latter agreement, that the suit was not barred under s. 66 of the Civil Procedure Code. VENKATAPPA *v.* JALAYYA (1919) **I. L. R. 42 Mad. 615**

———— *Execution of decree—Benami purchase—Claim against certified purchaser, but not by representative of the real purchaser.* The widow of one Bhola Nath purchased a house at a Civil Court auction sale in the name of her son-in-law Baldeo and incorporated it into another house left by her husband who had died sonless. On her death one of her daughters claimed the house as an heir of her deceased father. The son-in-law in whose name the house was purchased raised the plea that he was the certified auction-purchaser and the suit was barred by s. 66 of the Code of Civil Procedure. *Held*, that as the plaintiff did not claim through the widow, but through the widow's husband, her father, the

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— s. 66—*contd.*

suit did not come within the purview of s. 66 of the Code. *Ram Narain* v. *Mohanian, I. L. R. 28 All. 82*, distinguished. NARAIN DEI *v.* DURGA DEI (1913) . . . **I. L. R. 35 All. 138**

——— *Suit by beneficiary against benami certificated purchaser at Court sale when lies.* Where a Mahomedan father having bought land at a Court sale with his money in the name of one of his sons settled the same with a tenant who attorned to him and paid his heirs rent after his death : *Held,* in a suit brought by the heirs other than the certificated purchaser against the tenant for arrears of rent making the certificated purchaser a *pro formâ* Defendant, in which the tenant alleged that he was bound to pay rent to the certificated purchaser only and the latter supported him, that the suit was not barred by s. 66 of the Civil Procedure Code. MAHAMMAD EMARTULLA SIRCAR *v.* MAHAMMAD DIDAR BUX . . . . **24 C. W. N. 51**

——— *Civil Procedure Code (Act XIV of 1882), ss. 316, 317—Suit for declaration of title against recorded purchaser at execution sale —Title of auction-purchaser, when accrues—Certificate of sale, value of—Construction of statute—Amending Act—Retrospective operation—Vested rights.* An execution sale was held and confirmed when the Code of 1882 was in force but the sale certificate was issued after the new Code of 1908 came into operation. The recorded purchaser conveyed the property to another person and the plaintiff sued for a declaration of his title to the property on the ground that it was purchased by him in the name of the recorded purchaser : *Held*—That a sale-certificate does not create title but is merely evidence of title and the title of the purchaser accrued under s. 316 from the date of the confirmation of the sale. That the suit was not barred by s. 66 of the Civil Procedure Code of 1908 which is not applicable to an execution purchaser whose title was perfected when s. 317 of the Code of 1882 was in force. Both s. 317 of the Code of 1882 and s. 66 of the Code of 1908 although placed in a Code of Procedure impose in essence a serious restriction upon the title of the real purchaser at the execution sale. PROMOTHO NATH PAL CHOWDHURY *v.* SAURAVI DOSI CHOWDHURANI . . **24 C. W. N. 1011**

——— *Agreement by certified purchaser to convey property—Suit to enforce, if maintainable.* S. 66 of the Civil Procedure Code does not affect an agreement subsequent to the purchase, and a suit lies against the certified purchaser for specific performance of such an agreement. *Venkatappa* v. *Jalayya, I. L. R. 42 Mad. 615 (F. B.) (1919)*, approved. RAMATHAI VADIVELU MUDALIAR *v.* PERIA MANICKA MUDALIAR . . . . . . **24 C. W. N. 699**

——— *Certified purchaser, suit against, if barred—Real purchaser's possession —Certified purchaser's failure to assert right whether amounts to waiver or transfer.* The general language of s. 66 of the Code of Civil Procedure (Act V of 1908) is not restricted to *benami* purchases made by or on behalf of judgment-debtors. *Hanuman Prasad Thakur* v. *Jadunandan Thakur, 20 C. W. N. 147 (1915)*, followed. *Ganga Shahai* v. *Kesri, 22 C. L. J. 508 (P. C.) (1915)* and *Bodh Singh Doodhoria* v. *Gunesh Chandra Sen, 12 B. L. R. 317 (P. C.) (1873)*, referred to. The failure of the alleged *benamdar* the certified purchaser, to assert his rights against the real purchaser during the latter's possession after the auction purchase cannot be regarded as a waiver or transfer of the rights. *Monappa* v. *Surappa, I. L. R. 11 Mad. 234 (1886)*, disapproved. *Bishan Dial* v. *Ghazi-ud-din, I. L. R. 23 All. 175* (1901), followed. The title of the certified purchaser was extinguished by three years' possession of the landlord, the alleged real purchaser, under the 3rd Schedule of the Bengal Tenancy Act, and the latter acquired a title by adverse possession. HARISH CHANDRA GUHA *v.* NRIPENDRO KUMAR CHUCKERBURTY **24 C. W. N. 1024**

——— *Hindu law—Joint Hindu family—Status of females in a Joint Hindu family—Property purchased benami by father in name of his wife.* Certain property was purchased at an auction sale held in execution of a decree by the father in a joint Hindu family *benami* in the name of his wife. After the death of the father, one of the sons sued for a declaration that the property, so purchased, was joint family property having been purchased from joint family funds in the name of a member of the family. *Held*, that females in a joint Hindu family not being members of the family in the sense of having a right to a share in the family property, the purchase could not be taken to have been made for the benefit of the family, but the defendant was in the position of a pure *benamidar* and a suit for the declaration asked for by the plaintiff was prohibited by s. 66 of the Code of Civil Procedure. *Bodh Singh Doodhooria* v. *Gunesh Chunder Sen, 12 B. L. R. 317*, and *Achhaibar Dube* v. *Tapasi Dube, I. L R. 29 All. 557*, referred to. BAIJNATH DAS *v.* BISHAN DEVI. . **I. L. R. 43 All. 711**

——— *Benami auction purchase—Suit against transferee from certified purchaser—Transfer made before, but suit brought after the coming into force of the present Code—Suit governed by the present Code—Waqf—Hanafi law —Requirements of valid waqf where waqif appoints himself as muttawalli.* Prior to 1900 certain properties were purchased at auction sales, ostensibly by X and Y, who were recorded as the certified purchasers, but the purchase money was in fact provided by A. S. and A. L. In 1900 these properties were transferred or purported to be transferred to Z. In 1916 the representatives of A. S. and A. L. sued for possession of these properties upon the ground that both the original purchases and the subsequent transfers to Z were benami transactions and that the plaintiffs were the real owners of the properties. *Held* that s. 66 of the present Code of Civil Procedure, and not s. 317 of the Code of 1882, applied, and the suit was barred. *Quære* whether even under the former Code the interpretation placed upon s. 317, that it did not extend to a suit against the transferee from a certified purchaser, was correct ? *Sibta Kunwar* v. *Bhagoli, I. L. R. 21 All. 196*, referred to. According to the Hanafi law, where the owner of property has declared it to be *waqf* and has appointed himself as *mutawalli* there is no need for any further formal transfer of possession, neither will the conduct of a subsequent

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

———— s. 66—*contd.*

mutawalli accepting his appointment under the terms of the *waqfnama* invalidate the *waqf*. ABDUL JALIL KHAN *v.* OBED-ULLAH KHAN
I. L. R. 43 All. 416

———— s. 66, O. XXI, rr. 84, 94—*Agreement by purchaser at Court sale before deposit of balance to share property with others—Latter's remedy.* The person who is declared to be the purchaser after the bids are concluded is the person in whose name the certificate is to be granted under O. XXI, r. 94, C. P. C. Where the Defendant after having bid for the property and paid the earnest money on his own account entered into an agreement with the Plaintiffs to buy the property for Plaintiffs and himself jointly in certain shares and paid the balance in part out of money taken from Plaintiffs: *Held*—That the case was not covered by the second proviso to sec. 66 of the Civil Procedure Code, but that the plaintiffs were entitled to sue the defendants for specific performance of the agreement. Plaint allowed to be amended accordingly. BABURAM MANDAL *v.* DOKHINA SUNDARI NAMASUDRANI . . 24 C. W. N. 27

———— s. 68 (1881 Code s. 320)—

———— *Allahabad Civil Court—Power to order sale.* An ancestral grove with a house which has been assessed by Government cannot be sold in execution of a decree through the Court but the Court must transfer the decree to the Collector who alone has jurisdiction to execute it . I. L. R. 36 All. 33

———— ss. 68, 70, r. 14, O. XXI, 101—*Decree—Execution by Collector—Court 'functus officio' for the time being—Exhaustion of all the power conferred upon the Collector for execution—Matters requiring to be done in execution must be done by the Court which passed the decree.* After a decree has been transferred to a Collector for execution, [illegible]

(Act V of 1908), then any matters requiring to be done, and usually regarded as in execution, must be done by the Court which made the decree. *Pita* v. *Chunilal, I. L. R. 31 Bom. 207, referred* to. ARJUNA BIN RAGHU *v.* KRISHNAJI (1911)
I. L. R. 38 Bom. 673

———— ss. 68 and 70—Sch. III—*Exemption of a decree by Collector—Delegation to Assistant Collector of functions of Collector—Application to Assistant Collector to take action—Ultra Vires—Penal Code (Act XLV of 1860), s. 182.* *A* obtained a decree for money against *B*. In execution thereof certain immoveable property was ordered to be sold and the execution was transferred to the Collector of Basti under s. 68 of the Code of Civil Procedure. The property was sold and purchased by *C*. *B* applied for permission to deposit the sum decreed and 5 per cent. of the purchase money. He next presented a petition saying that he had made the required deposit. Subsequently he put in a petition to the effect that some unauthorized person had paid the money into the Treasury, and that he had been compelled to put his thumb impression on a blank paper which was used for the petition aforesaid. This petition

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

———— s. 68—*contd.*

was presented to the Assistant Collector and the officer ordered *B's* prosecution under s. 182, Indian Penal Code. *Held*, that inasmuch as the Assistant Collector had no power to deal with *B's* applications except by passing them on to the Collector, s. 182 of the Indian Penal Code did not apply and the Assistant Collector had no jurisdiction to order *B* to be prosecuted thereunder. EMPEROR *v.* BHAJAN TEWARI (1915)
I. L. R. 37 All. 334

———— s. 68, O. XXI, r. 100—*Decree—Execution proceedings transferred to Collector—Sale—Auction purchaser placed in possession of property—Application by person wrongly dispossessed to be made to Collector and not to Civil Court—Collector not ministerial officer—Jurisdiction—Civil Court.* Where execution proceedings are transferred to a Collector, and a person is wrongly ousted or dispossessed under the Collector's order, he should apply to the Collector, and not to the Court, complaining of such ouster or dispossession. O XXI, r. 100 of the Civil Procedure Code, 1908, has no application to a case where the execution of the decree has been transferred to the Collector, and he has acted under the powers conferred on him by the Local Government under s. 70 of the Code. RAGHO CHANDRARAO *v.* HANMATI CHANDRARAO (1913) . I. L. R. 37 Bom. 488

———— ss. 69 and 70—

See SCH. III. . I. L. R. 37 Bom. 32

———— s. 70 (1882 Code 320)—

See s. 68 . I. L. R. 37 All. 334

———— *Execution of decree—Ancestral property—Sale held by Collector and confirmed by Commissioner—Suit in Civil Court to set aside sale—Rules framed by Local Government.* Where a sale of ancestral property held by a Collector in accordance with rules framed by the Local Government under s. 70 of the Code of Civil Procedure, 1908, has been duly confirmed, no suit will lie in a Civil Court for the purpose of setting aside such sale. FARHAT-UN-NISSA BIBI *v.* SUNDARI PRASAD . . I. L. R. 42 All. 475

———— s. 70, O. XXI, r. 72—*Bombay Civil Circulars, Chap. II, cl. 91, sub-cl. 16—Execution proceedings transferred to the Collector—Court's power to entertain application for leave to bid at Court-sale—Set-off cannot be allowed by Court.* When the execution of a decree is transferred to the Collector, the Court has no power to entertain an application by the decree-holder for leave to bid at the auction-sale; it should be made to the Collector under sub-sec. 16 of Cl. 91 of the Manual of Bombay Civil Circulars. No set-off can be allowed either by the Collector or the Court. SHRINIWAS APPACHARYA *v.* JAGADEVAPPA (1918)
I. L. R. 42 Bom. 621

———— s. 71 (1882 Code s. 229)—

———— s. 72 (1882 Code 226)—

See EXECUTION OF DECREE.
I. L. R. 1 Lah. 192

———— s. 73 (1882 Code s. 295)—

See ss. 2 & 63 . 5 Pat. L. J. 415

See s. 47 . I. L. R. 39 Mad. 570
I. L. R. 36 Bom. 156

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— s. 73—*contd.*

See s. 63 . . **25 C. W. N. 740**

See s. 60 . **I. L. R. 2 Lah. 78**

See O. XXI, r. 52.
I. L. R. 44 Mad. 100

See Co-operative Societies Act, 1912.
I. L. R. 42 Calc. 377

See Execution of Decree.
I. L. R. 47 Calc. 515

See Limitation Act (IX of 1908), Sch. 1, Arts. 29, 36, 120.
I. L. R. 39 All. 322

See Rateable Distribution.
I. L. R. 42 Calc. 1
I. L. R. 38 Mad. 221
I. L. R. 46 Calc. 64

1. ——— *Civil Procedure Code (Act V of 1908), ss. 73, 115—Assets if held by Court until whole of purchase-money deposited—Receiver, execution against—Leave of Court taken after application, if sufficient—Refusal to exercise jurisdiction from misapprehension of statute—Revision.* Assets cannot be said to be held by the Court available for rateable distribution within the meaning of s. 73 of the Civil Procedure Code at the date of the sale, and until the whole of the purchase-money has been deposited. The Court cannot dismiss an application for rateable distribution merely on the ground that no leave had been obtained to proceed against a Receiver, who was one of the judgment-debtors, when such leave had in fact been obtained before the Court was called upon to make rateable distribution. *Banku Behari* v. *Harendra Nath, 15 C. W. N. 54*, applied. When the Court below has refused to exercise a jurisdiction vested in it by law, it is immaterial that such refusal is based upon a misapprehension of the true effect of the statutory provision on the subject, and the High Court will interfere in such a case in revision. *Amir Hassan,* v. *Sheo Baksh, L. R. 11 I. A. 237 : s. c. I. L. R. 11 Calc. 6 ; Mahammad* v. *Abdul, L. R. 16 I. A. 104 : s.c. I. L. R. 16 Calc. 749 ; Vishumbhar* v. *Vasudev, I. L. R. 16 Bom. 708 ; Ross* v. *Petambar, I. L. R. 25 All. 509*, referred to. Maharaja of Burdwan *v.* Apurba Krishna Roy (1911)
15 C. W. N. 872

2. ——— *Rateable distribution of assets, application for—Applicant whether real decree-holder, execution Court if may determine.* It is competent to the execution Court to determine whether an applicant for rateable distribution of assets under s. 73 of the Code of Civil Procedure is a real decree-holder or a benamidar for the judgment-debtor. *In re Sundar Das, I. L. R. 11 Calc. 42, Chaugan Lal* v. *Fazar Ali, I. L. R. 13 Bom. 134*, followed. *Raghu Nath Guzrati* v. *Rai Chatrapat Singh, 1 C. W. N. 633*, referred to. Puran Chand Boid *v.* Purendra Narain Singh (1912).
17 C. W. N. 326

3. ——— *Application for rateable distribution—Objection that decree obtained by applicant for rateable distribution was fraudulent —Jurisdiction of Court to hold summary inquiry—Evidence Act (1 of 1872), s. 165—Examination of judgment-debtor without notice to parties after the close of case and before delivery of judgment.* The petitioner obtained a decree for money against one H and his brothers. Previous to the petitioner's decree the opposite party had obtained a decree against the same judgment-debtors. In the execution proceedings commenced by the petitioner, there was an application for rateable distribution by the opposite party and in the proceedings for execution commenced by the opposite party, there was an application for rateable distribution by the petitioner. The opposite party, however, objected to the application for rateable distribution by the petitioner, on the allegation that the decree obtained by the latter was fraudulent. The Subordinate Judge held a summary enquiry into the matter and allowed the opposite party's objection. It appeared that in the enquiry, after evidence on both sides was adduced and arguments addressed to the Court, judgment was reserved. Thereafter the Court examined the judgment-debtor H without notice to the pleaders for the parties and relied on his statements in passing the final order : *Held, that the Subordinate Judge had jurisdiction to* hold a summary enquiry into the matter, but the examination of H should not have taken place without notice to the parties or their pleaders and without any opportunity afforded to them to cross-examine him or to rebut his statements. S. 165 of the Evidence Act does not justify the procedure adopted by the Judge. Peary Lal Das *v.* Peary Lal Dawn (1913)
19 C. W. N. 903

4. ——— *Surplus sale-proceeds, distribution amongst attaching creditors—Money standing to the credit of one suit, application for transfer to another suit, if to be made in former—Practice—Certificates of Accountant-General and Registrar, Original Side, required with application.* Where money in Court stands to the credit of one suit and the plaintiff in another suit has, by reason of being an attaching creditor or mortgagee or otherwise, an interest in such money and desires the fund to be transferred to the credit of *his* suit in order to be dealt with therein, he should in all cases make the application in the suit to whose credit the money stands for the transfer. In an application on the Original Side of the High Court for the transfer and rateable distribution of funds to which the provisions of s. 73 (*1*), cl. (*c*), of the Code of Civil Procedure (Act V of 1908) may possibly apply, the applicant should be required to produce in addition to the certificate of the Accountant-General, a certificate of the Registrar. Kumar Krishna Mitter *v.* Amulya Charan Mitter (1915) . . . **19 C. W. N. 345**

5. ——— *Rateable distribution, application for—Decree, validity of, if can be impeached—Inquiry, judicial or administrative—Objection to decree as collusive, if can be raised—Power of Court—Conditions under s. 73.* An inquiry under s. 73 of the Civil Procedure Code is of a non-judicial character and a Court charged with the distribution of assets under that section has no power to inquire into the validity or the *bonâ fides* of a decree on the strength of which rateable distribution is claimed. *Shankar Sarup* v. *Mejo Mal, I. L. R. 23 All. 313*, referred to. The only conditions to be satisfied under s. 73 are that there must have been an application *before* the assets are realized and that the decree should not have been satisfied. Saravana Pillai *v.* Arunachalam Chettiar (1916) . . **I. L. R. 40 Mad. 841**

CIVIL PROCEDURE CODE (ACT V OF 1908)
—contd.

———— **s. 73**—*contd.*

6. ———————— *Rateable distribution—Conditions to be satisfied—Fund in Court—Attachment by a decree-holder in execution—Application by him for payment—Other decree-holders, obtaining decrees in their suits subsequently—Right of latter to rateable distribution against former—Priority.* Where a decree-holder having attached in execution of his decree a fund in Court belonging to his judgment-debtor, applied for payment of the amount before other decree-holders of the same judgment-debtor had obtained decrees in their suits, but the latter claimed rateable distribution of the fund along with the former: *Held*, that the attaching decree-holder was in law entitled to be paid the amount attached by him in priority to the others. *Katum Sahiba v. Hajee Batcha Sahib, I. L. R. 38 Mad. 221*, dissented from; *K. Tiruvengadial v. Tiruvenkadiah, 26 M. L. J. 364*, followed. UMMA VENKATARATNAM & Co. *v.* ADAMJI USMAN & Co. (1919)

I. L. R. 42 Mad. 692

7. ———————— *Rateable distribution—Right of a decree-holder to impeach the decree of another before distribution—Suit for declaration whether maintainable.* One decree-holder cannot dispute the right of another decree-holder against the same judgment-debtor to share in a rateable distribution of the assets, merely on the ground that the latter's decree was not based on a real debt, unless there was collusion between him and the judgment-debtor in obtaining that decree *Per* SADASIVA AYYAR, J.—A decree-holder may file a suit for a declaration that another decree-holder is not entitled to rateable distribution under s 73, Civil Procedure Code, and for an injunction even before the distribution of the assets by the Court VENKATARAMA AIYAR *v.* THE SOUTH INDIAN BANK, LIMITED (1920)

I. L. R. 41 Mad. 381

8. ———————— *Money deposited by sureties for release of an attachment before judgment, whether can be treated as "assets held by Court"—Rateable distribution of such money among different decree-holders, if allowable—S. 115, High Court's power of revision.* In a money suit certain property belonging to the Defendant was attached before judgment and then released on two persons standing sureties for the amount of the claim. The suit was ultimately decreed and the decree-holder applied for execution, whereupon the sureties deposited the decretal amount in Court. On that very day just before the deposit was made, the petitioner who also held a money-decree against the same judgment-debtor, applied for execution of his decree and prayed for rateable distribution of the amount deposited. The application was refused by the Trial Court and the money paid out to the attaching creditor on the latter giving an undertaking to refund the amount in case the High Court reversed the order rejecting the Petitioner's application for rateable distribution: *Held*,—That the amount deposited was [illegible] Civ [illegible] of [illegible] an [illegible] the disposal of the Court for the purpose of satisfying a decree. GHISULAL AGARWALLA *v.* TODARMULL AGARWALLA . . **26 C. W. N. 109**

CIVIL PROCEDURE CODE (ACT V OF 1908)
—contd.

———— **s. 73, O. XXI, r. 52**—

See EXECUTION OF DECREE.
I. L. R. 44 Calc. 1072

———— **s. 73, O. XXI, r. 65**—

See RATEABLE DISTRIBUTION.
I. L. R. 44 Calc. 789

———— **s. 73, O. XXI, r. 89**—

See RATEABLE DISTRIBUTION
I. L. R. 40 Calc. 619

———————— *Execution sale set aside by deposit by judgment-debtor—Application for rateable distribution of money deposited, if lies.* The Court has no power to rateably distribute under s 73 of the Civil Procedure Code money deposited in Court under O XXI, r. 89, with a view to setting aside a sale of immoveable property in execution of a money decree HARAI SAHA *v.* FAIZLUR RAHAMAN (1913) . **19 C. W. N. 1155**

———— **s. 73, O. XXXVIII, rr. 5, 8, and 10, O. XXI, rr. 52 and 63**—*Effect of attachment before judgment—Property deposited in Court—Decree—Priority—Suit for a declaration that attachment before judgment did not confer any title on the attaching creditor.* A got certain property belonging to B attached before judgment. The property being of a perishable nature it was sold and the proceeds were deposited in Court. Subsequently one C obtained a decree against B and applied for the satisfaction of his decree out of the sum of money that was lying in Court. A filed an objection and it was allowed by the Court After A had obtained his decree, the sum deposited in Court was distributed rateably between A and C C brought the present suit for a declaration that he was entitled to get his decree satisfied out of the sum which had been deposited in Court: *Held*, that the effect of attachment before judgment was to prevent alienation. It did not confer any priority of title on the attaching creditor, and, therefore, the plaintiff was entitled to get his decree satisfied and the suit was maintainable *Ishwari Singh v. Sheo Ram Singh, I. L. R. 19 Calc. 286*, referred to. BISHESHAR DAS *v.* AMBICA PRASAD (1915)

I. L. R. 37 All. 575

———— **s. 75**—*Commissioner, trial of suit on merits, if can be delegated to.* Where the Subordinate Judge after framing issues and considering preliminary objections referred the case to a Commissioner for trial on the merits: *Held*, that the power of a Court to issue a commission is defined in s. 75 of the Code of Civil Procedure (Act V of 1908), and the Subordinate Judge has in this case improperly delegated his judicial functions to a Commissioner. RAM NARAIN SINGH *v.* OBINDRA NATH MUKERJEE (1911)

17 C. W. N. 2[illegible]2

———— **s. 80 (1882 Code s. 424)**—

See 2 (17).
I. L. R. 34 Bom. 595 & 581

BENGAL TENANCY ACT, 1885, s. 95.
24 C. W. N. 108

See CAUSE OF ACTION.
I. L. R. 38 Calc. 707

See CIVIL PROCEDURE CODE, 1908, s. 2
I. L. R. 34 Bom. 581 & 595

See LIMITATION . **I. L. R. 46 Calc. 199**

CIVIL PROCEDURE CODE (ACT V OF 1908)—*contd.*

——— s. 80—*contd.*

See NOTICE . **I. L. R. 40 Calc. 503**

See SUIT . . **I. L. R. 45 Calc. 934**

——— **suit against Official Assignee—**

See PRESIDENCY TOWNS INSOLVENCY ACT, 1909, ss. 38 and 52.

I. L. R. 44 Bom. 555

——— *Suit against public officer—Official Assignee—Suit for injunction—Notice.* A suit brought against a public officer (*e.g.*, the Official Assignee, Bombay) to restrain him from doing an act as such officer, can be brought without giving notice as required by s. 80 of the Civil Procedure Code. *Flower* v. *Local Board of Low Leyton, 5 Ch. D. 347,* followed. NAGINLAL CHUNILAL *v.* OFFICIAL ASSIGNEE, BOMBAY (1912) . . **I. L. R. 37 Bom. 243**

——— [*Old Code. (Act XIV of 1882), s. 424*]—*Notice of suit against Secretary of State—Notice not restricted to suits for damages for an act done.* Under s. 424 of the Civil Procedure Code (Act XIV of 1882) [corresponding to s. 80, Code of Civil Procedure (Act V of 1908)], notice is necessary in all suits of whatever description against the Secretary of State for India in Council. SECRETARY OF STATE *v.* KALEKHAN (1914)

I. L. R. 37 Mad. 113

——— *Secretary of State for India in Council, suit against—Notice to " Collector " means notice to Collector of District in which suit instituted—Suit for damages for breach of contract notice if necessary of.* The notice contemplated in s. 80 of the Civil Procedure Code must be served on the Collector or one of the Collectors of the District in which the suit is to be brought. A suit brought in the Court at Sealdah, after notice served on the Collector of Purneah, is not in compliance with s. 80, Civil Procedure Code. Such a notice is required even in a case arising out of a contract. *Manindra Chandra Nandi* v. *Secretary of State, 5 C. L. J. 148,* followed. *Secretary of State* v. *Rajlucki, I. L. R. 25 Calc. 231,* referred to. RATAN CHAND DHARAM CHAND *v.* SECRETARY OF STATE FOR INDIA (1914).

18 C. W. N. 1340

——— *Notice of suit to Government officer acting in bad faith, if necessary.* A public officer sued in respect of an act done in bad faith is not entitled to notice under s. 80, Civil Procedure Code. *Shahunshah Begum v. Ferguson, I. L. R. 7 Calc. 499, Raghubans* v. *Phool Kumari, I. L. R. 32 Calc. 1130, Muhammad* v. *Panna, Peary Mohan Das* v. *D. Weston*

16 C. W. N. 145

——— *Notice of suit—Suit against Government—Government threatening to demolish property, the subject of suit—Suit within two months of the notice.* On the 2nd May 1912, the plaintiff gave notice to Government under s. 80 of the Civil Procedure Code (Act V of 1908) of a suit which he intended to file for a declaration of ownership of certain property. Shortly afterwards, the Mamlatdar threatened to demolish the property which was the subject-matter of the notice. The plaintiff thereupon filed the present suit against Government on the 19th June 1912. The defendant contended that the suit was bad under s. 80 as having been instituted within two months of the date of the notice. *Held,* that the suit was not bad under s. 80, inasmuch as the defendant's agent had during the currency of the notice threatened to demolish the property in dispute. SECRETARY OF STATE FOR INDIA *v.* GULAM RASUL (1916) . . **I. L. R. 40 Bom. 392**

——— *Public Officer acting* mala fide—*Suit against Public Officer—Notice of suit, whether necessary—' Purporting to be done ' in s. 80, meaning of.* A Public Officer is entitled to notice of suit under s. 80 of the Civil Procedure Code even if, in the discharge of his duty, he had acted *mala fide.* Meaning of ' purporting to be done ' discussed. *Shahebzadee Shahunshah Begam* v. *Ferguson, I. L. R. 7 Calc. 499,* and *Muhammad Saddiq Ahmad* v. *Panna Lal, I. L. R. 26 All. 220,* not followed. *Jogendra Nath Roy Bahadur* v. *Price, I. L. R. 24 Calc. 584,* and *Jugol Kishore* v. *Jugal Kishore, I. L. R. 33 All. 540,* followed. KOTI REDDI *v.* SUBBIAH (1918)

I. L. R. 41 Mad. 792

——— **s. 83 (1882 Code s. 430)—**

——— *Suit for judicial separation—Right of an alien enemy to sue in British Court.* In this case the Court granted an application for an order directing the summons, together with a copy of the petition filed by the petitioner for a judicial separation, to be sent to the Probate, Divorce, and Admiralty Division of the High Court in England for transmission to the Foreign Office for service on the respondent, the petitioner being the wife of a German living in Germany, but herself residing in British India, apparently with the permission of the Government of India. REIFFSTECK *v.* REIFFSTECK (1917) . . . **I. L. R. 39 All. 377**

——— *Suit brought in British India by a firm, some of whose partners were residing and carrying on a business at Mecca while Turkey was at war with Great Britain—whether competent—" Alien enemy " defined.* The plaintiff firm consisted of 6 partners, one of whom lived at Delhi and carried on the business of the firm there, the remaining five lived in the Turkish Vilayat of the Hedjaz where they carried on a branch firm belonging to the partners. The plaintiff firm brought the present suit in the Civil Court at Delhi in April 1915, while Great Britain was at war with Turkey. It was objected that they could not maintain suit in the Courts of British India, the partners in Mecca being alien enemies. *Held,* that a person who voluntarily resides in a hostile country for a substantital period of time acquires the disability attaching to an enemy during that period even if he is a British subject, unless such residence is with the consent of the Crown, and that consequently the 5 partners residing and carrying on business at Mecca must be treated as alien enemies. *McConnell* v. *Hector (6 R. R. 724) per Lord Alvanley, C. J., Porter* v. *Freudenberg (1 K. B. 857), Daimler Company Limited* v. *Continental Tyre and Rubber Company, Limited (2 Ap. C. 328) and Janson* v. *Driefontein Consolidated Mines (1902 Ap. C. 505),* followed. *Held also,* that if one of the partners in a firm is an alien enemy as defined above neither he nor his partner, who does not bear an enemy character, can recover money owing to the firm in the Courts of British India, and that the plaintiffs where therefore rightly non-suited by the Lower Court. *McConnell* v. *Hector (6 R. R. 724),* followed.

CIVIL PROCEDURE CODE (ACT V OF 1908)
—contd.

———— s. 83—contd.

Rodriguez v. *Speyer Brothers* (1919) *Ap. C. 59*), distinguished. HAJI ALI JAN v. ABDUL JALIL KHAN . . . . . I. L. R. 1 Lah. 276

———— s. 86 (1882 Code s. 433)—

See JURISDICTION.

I. L. R. 39 Mad. 661

———— *Suit against Ruling Chief—Sanction of Governor-General in Council—Suit for declaration of title to land, sanctioned by Governor-General in Council—Amendment of plaint by addition of prayer for recovery of possession—Subsequent sanction of Governor-General in Council for suit for recovery of possession.* Where the plaintiff with the sanction of the Governor-General in Council obtained under s. 86, Civil Procedure Code, instituted a suit in the Court of the Subordinate Judge of Rungpur against His Highness the Maharaja of Cooch Behar for a declaration that the plaintiff was entitled to certain lands within the jurisdiction of that Court and that a certain map prepared by the Settlement Officer was incorrect and the Court on the application of the plaintiff, after the defendant filed his written statement pleading, *inter alia*, that the plaintiff was never in possession of the lands in dispute, and the suit was barred by limitation, amended the plaint by the addition of a prayer for recovery of possession and framed an issue as to whether the suit as amended by the addition of a prayer for recovery of possession was instituted with the consent of the Governor-General in Council within the meaning of s. 86, Civil Procedure Code, or was liable to be dismissed and decided it in favour of the plaintiff and the plaintiff subsequently obtained a fresh sanction from the Governor-General in Council for the institution of a suit for recovery of possession of the land in dispute, the High Court set aside the [illegible]

NARAYAN BHUP v. MANINDRA CHANDRA NUNDY 17 C. W. N. 1242

———— *Sovereign Prince or Ruling Chief in British India, suit against—Sovereign or private capacity—Suit against him as trustee of certain temples—Rule of international law* [illegible]

or in his private capacity such as a trustee of a temple in British India. *The Maharaja of Jaipur* v. *Lalji Sahai, I. L. R. 29 All. 379, Mighell* v. *Sultan of Johore, [1894] 1 Q. B. 149, Statham* v. *Statham and the Gaekwar of Baroda, [1912] L. R. Pr. 92*, and *Chandulal* v. *Awad bin Umar Sultan*, [illegible] *Rule of Practice* [illegible] *H. L. C. I.* THE CRETURY [illegible]

8 Mad. 635

———— The section applies when the defendant attains the rank of a Ruling Chief after the institution of the suit and necessitates the plaintiff obtaining the consent of the Governor-General in Council unless the Ruling Chief waives his privilege which he would do by making an application (even for adjournment) in the suit. MAHARAJ BAHADUR OF REWA v. SIVA SARAN LAL (1921) . . . . 6 Pat. L. J. 153

CIVIL PROCEDURE CODE (ACT V OF 1908)
—contd.

———— s. 88 (1882 Code 470)—

See INTERPLEADER.

I. L. R. 37 Calc. 532

———— s. 89 (1882 Code 310 A)—

See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXXIII, r. 3, O. VIII r. 8

I. L. R. 45 Bom. 245

———— ss. 89 and 104 (1) (f) Sch. II, 20 and 21—*Arbitration—Failure to determine one of the matters referred—Matter left undetermined not* [illegible]

they were under the formal Code of 1882. The refusal of a court to file an award in a matter referred to arbitration without the intervention of a court does not constitute a bar to the prosecution of a suit to enforce the award. *Kunji Lal* v. *Durga Prasad, I. L. R. 38 All., 350*, followed. Nor is it necessary, on pain of the award becoming void and ineffectual that application should be made within six months for the filing thereof in court. Although the neglect of an arbitrator to determine any of the matters submitted to him may be sufficient to vitiate the award, the matter left undetermined must be some definite and substantial question upon which the parties are at variance. The omission to record a formal decision upon a point as to which the parties are in fact in agreement will not be sufficient to invalidate the award. *Randall* v. *Randall, 7 E. R. 81, Ganesh Narain Singh* v. *Malida Koer, 13 C. L. J., 399*, and *Ramji Ram* v. *Salig Ram, 14 C. L. J., 158*, referred to. HARAKH RAM JANI v. LAKSHMI RAM JANI . . . . I. L. R. 43 All. 108

———— s. 89, O. XXIII, r. 3, and Sch. II—

See ARBITRATION.

———— *Arbitration—Suit referred to arbitration by the parties without the intervention of the Court—Award, recording of, in such cases—Procedure to be adopted in case an award is disputed.* Where a suit which is pending is referred by the parties to arbitration, without the intervention of the Court, and an award is made, the submission and the award may, if the Court sees fit, be recorded as an agreement adjusting or compromising the suit and a decree may be passed in terms of such award and the Court has power to inquire into a disputed compromise and to record it, if satisfied that the compromise was properly arrived at. The procedure to be followed in such cases is that laid down in Order XXIII, rule 3, and not that laid down in the Second Schedule of the Civil Procedure Code. The provisions of the Second Schedule do not apply to or contemplate a reference to arbitration by parties to a suit which is pending outside the suit and without the intervention of the Court

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— s. 89—*contd.*

and the operation of the Second Schedule is excluded by the words used in *s. 89 of the* Code, "Save in so far as is otherwise provided by .... or by any other law for the time being in force," which last words are applicable to O. XXIII, r. 3. HARAKHBAI *v.* JAMNABAI (1912).

I. L. R. 37 Bom. 639

——— **s. 89, O. XXIII, r. 3. Second Schedule,—Paras. 14, 15, 20 and 21**—*Civil Procedure Code (Act XIV of 1882), s. 375—Indian Arbitration Act (IX of 1899)—Reference to arbitration without intervention of Court, while suit pending—Procedure to enforce award—Award, not adjustment of suit under Order XXIII, rule 3.* The plaintiff sued on the 11th of June 1915, to recover a sum of Rs. 5,353-9-6 as the price of goods sold to the defendant. The defendant in his written statement pleaded *inter alia* that the goods supplied by the plaintiff were not of the quality agreed upon by the parties. On the 21st of August, 1915, the parties without the intervention of the Court agreed to refer the matters in dispute between them concerning the contract referred to in the plaint in respect of which the suit had been filed in High Court, to the arbitration of M. D. and R. M. The arbitrators made their award on the 28th of October, 1915 whereby they awarded to the plaintiff a sum of Rs. 4,001-4-0 with interest at 6 per cent. till the date of payment. The award was filed by the arbitrators on the 10th of December 1915. On the 10th of January, 1916 the plaintiff took out a notice of motion, for an order that the adjustment of the suit arrived at between the plaintiff and the defendant as stated in the plaintiff's affidavit should be recorded under Order XXIII, rule 3 of the Civil Procedure Code, and a decree in accordance therewith should be passed. The defendant disputed the legality of the award on two grounds, first, that the arbitrators exceeded their jurisdiction and decided something which was not within their power to decide and secondly, that they refused an opportunity to the defendant to call witnesses, or that after they had given him to understand they would adjourn the matter to enable him to call evidence they published the award without giving him any such opportunity. *Held*, (*i*) that the plaintiff had adopted a wrong procedure in applying for a decree on an award under Order XXIII, rule 3, (*ii*) That the defendant was entitled to be heard on the objections raised by him under paragraph 21 of the Second Schedule of the Civil Procedure Code. *Pragdas* v. *Girdhardas, I. L. R. 26 Bom. 76*, and *Ghellabhai* v. *Nandubai, I. L. R. 21 Bom. 335*, considered. *Per* MACLEOD J. —No application can be made to obtain a decree on an award except as provided for in s. 89 of the Code of Civil Procedure (Act V of 1908)......Under that section the provisions of the Second Schedule govern all arbitrations in a suit, or otherwise, except such arbitrations as are specially excluded. An arbitration between the parties to a suit without an order of the Court has not been excluded and must, therefore, come under the provisions which deal with arbitrations without the intervention of the Court. SHAVAKSHAW *v.* TYAB HAJI AYUB (1916) . . . **I. L. R. 40 Bom. 386**

——— **s. 90, (1882 Code 311)**—

See BOMBAY MUNICIPAL ACT, ss. 140, 143 . . . **I. L. R. 43 Bom. 281**

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— s. 90—*contd.*

See PRESIDENCY BANKS ACT, 1876, s. 23.

I. L. R. 45 Bom. 138

——— **s. 91 (1882 Code 313)**—*Vesting of highway in public authority, if precludes private individuals suing with leave in respect of public nuisance on street—Dedication, acceptance of, how established—User as evidence of dedication Calcutta Municipal Act (Beng. III of 1899), s. 336.* S. 336 of the Calcutta Municipal Act by vesting public steets, including the soil, in the Calcutta Municipal Corporation does not take away the right of members of the public to sue under s. 91 of the Civil Procedure Code in respect of a nuisance committed on the street. Where a highway is dedicated to the public acceptance by the public requires no formal act of adoption by any persons or authority but is to be inferred from public user of the way. SERAJMAL KHORAD *v.* ABHOY KUMAR ROY CHOWDHURY (1917) . . . . . **21 C. W. N. 595**

——— **s. 92 (1882 Code 539)**—

See S. 9 . **I. L. R. 45 Bom. 683**

See CIVIL PROCEDURE CODE, 1882, ss. 30 AND 539 . **I. L. R. 33 All. 660**

See HINDU LAW—WILL.

I. L. R. 39 Mad. 365

See JURISDICTION

I. L. R. 41 Calc. 866

See PARTIES. **I. L. R. 42 Calc. 1135**

See PUBLIC RELIGIOUS TRUST.

I. L. R. 41 Calc. 749

See RELIGIOUS ENDOWMENTS ACT, 1863, s. 3 . . **I. L. R. 39 Mad. 700**

See TRANSFER **I. L. R. 39 Calc. 146**

I. L. R. 48 Calc. 53

1. ——— *Public religious trust—Suit to recover trust property from strangers.* The provisions of s. 92 of the Civil Procedure Code (Act V of 1908) do not apply to a suit, brought by the trustees of a public religious trust, to recover property belonging to the trust which has gone wrongfully into the possession of strangers to the trust. MALHAR BHAGVANT *v.* NARASINHA KRISHNA (1912) . **I. L. R. 37 Bom. 95**

2. ——— *Waqf—Suit for declaration of plaintiff's right as mutawalli and for possession—Jurisdiction.* Where the plaintiff came into court alleging that he was the rightful *mutawalli* of a certain *waqf* and that the defendant, on the death of the last incumbent, had wrongfully taken possession of the *waqf* property, and asking to be put into possession thereof as *mutawalli*, it was *held* that this was not a suit which fell within the purview of s. 92 of the Code of Civil Procedure and was properly filed in the court of a Subordinate Judge. *Budree Das Mukim* v. *Chooni Lal Johurry, I. L. R. 33 Calc. 789*, and *Ghelabhai Gavrishankar* v. *Uderam Icharam, I. L. R. 36 Bom. 29* referred to. *Muhammad Ibrahim Khan* v. *Ahmad Saiyid Khan, I. L. R. 32 All. 503*, and *Said Ali* v. *Ali Jan, I. L. R. 35 All. 98*, distinguished. MUHAMMAD ABDUL MAZID KHAN *v.* AHMAD SAID KHAN, (1913) . . . . **I. L. R. 35 All. 459**

3. ——— *Applicability of to the suit—Religious Endowment—Temple subject to superintendence of Temple Committee—Offerings by*

CIVIL PROCEDURE CODE (ACT V OF 1908)
—*contd.*

———— **s. 92**—*contd.*

worshipper, ownership of—Permanent alienation of offerings by Committee, validity of—Suit to set aside—Limitation—Cause of action—Civil Procedure Code (Act V of 1908), O. I. r. 8—Suit by two worshippers on behalf of themselves and others under, maintainability of—Religious Endowments Act (XX of 1863), s. 18, or Civil Procedure Code (Act V of 1908), s. 92, sanction under, necessity of—Suits in which reliefs asked for against strangers to trust, no necessity for sanction for—"Vesting any property in trustees"—S. 92, clause (h), meaning of—Scope of—Respective rights and duties of trustees and Temple Committees. Two of the worshippers of a temple near Karur, purporting to sue on behalf of themselves and others, with the leave of the Court obtained under O I, r 8 of the Code of Civil Procedure, instituted a suit against the members of the Devasthanam Committee of Karur, to whose superintendence the temple was subject, and the *archakas* and *stanikas* of the temple for a decree (i) declaring the invalidity as against the temple of a perpetual lease granted by the Committee to the *archakas* and *stanikas* of the right to collect offerings made by the pilgrims; and (ii) directing that only the trustee or the manager duly appointed should retain the right of collecting the said offerings The plaint alleged that the alienation in question was highly detrimental to the interests of the temple and was beyond the power of the Committee The trustee

the hands of strangers or alienees from the temple authorities; and (ii) that the suit was, therefore, maintainable without such sanction *Obiter*: The

trustees have been appointed or other cases of a similar nature, such as those mentioned in ss. 26 to 35 of the Trustee Act of 1893 (56 & 57 Vict., cap. 53) of England Clause (*h*) of s 92 must be read along with the specified reliefs and the reliefs that can be granted under it should not be of a character different from those expressly mentioned. *Per* COUTTS TROTTER

pective rights and duties of trustees and temple committees discussed. VENKATARAMANA AYYANGAR *v.* KASTURIRANGA AYYANGAR (1916)

I. L. R. 40 Mad. 212

4. ———— *Suit under, nature*

add persons as additional parties whose presence may be necessary in order to enable the Court effectually and completely to adjudicate upon the questions involved in the suit. *Varadayya Chetty v. Munusami Chetty, 10 Mad. L. T. 514*, followed. *Chhabile Ram v. Durga Prasad, I. L. R. 37 All. 296*, dissented from. PARAMESWARAN MUNPEE *v.* NARAYANAN NAMBODRI (1916).

I. L. R. 40 Mad. 110

5. ———— *Suit by a Muktesar of a temple against superseded Muktesars—The superseded Muktesars also trustees of the endowment—Prayers for recovery of property belonging to the temple, mesne profits and for taking accounts of the management—Jurisdiction of Court to entertain suit—Religious Endowments Act (XX of 1863), s 14.* The plaintiff, who claimed to be heir of the original donor and a newly appointed Muktesar of a temple, sued the defendants who were the trustees of the endowment and the superseded Muktesars of the temple, praying for possession of immoveable and moveable properties belonging to the temple, for mesne profits and for accounts. The trial Court
...erned neither
... nor by s. 15
...decreed it on
...missed by the
District Judge on the preliminary ground that the cognizance of the suit was barred by s 92 of the Civil Procedure Code The plaintiff having appealed *Held*, that the suit clearly fell within the scope of s 92 of the Civil Procedure Code, inasmuch as taking the plaint as a whole the suit was one for the removal of the defendants from their position as trustees, for the restoration of the trust property to the plaintiff as Muktesar, for taking accounts and for damages for their wrongful acts as trustees *Held*, further, that the defendants were not in the position of strangers, for they were trustees and claimed as such to be entitled to hold the lands from generation to generation subject to the due fulfilment of the trust *Per* MARTEN, J. —"There is much which is in common between the two sections (s 92 of the Civil Procedure Code and s 14 of the Religious Endowments Act) but s 92 is substantially the wider and provides *inter alia* for settling a scheme which is a jurisdiction of a very wide and beneficial nature I think, therefore, that a plaintiff may proceed for appropriate relief under either Act, and that the opening words in s 92 (2) only mean that if he elects to proceed under the Religious Endowments Act, he is not to be prevented from so doing by s. 92 (2). HANSRAJ LADDASHET *v.* ANANT PADMANABH (1918).

I. L. R. 42 Bom. 742

6. ———— *Sanction of Advocate-General—Plaint amended—New defendant and prayers added—No sanction of Advocate-General to amendments.* Two plaintiffs as relators having previously obtained the sanction of the Advocate-General under s. 92 of the Civil Procedure Code, filed a suit against three defendants in respect of certain charitable properties. When the suit was called on for hearing two of the defendants were struck off and the plaintiffs asked for and obtained leave to add another person as defendant and they amended the plaint and prayed for certain reliefs against the added defendant. No sanction of the Advocate-General was obtained previous to the amendment of the plaint and the addition of the new defendant. *Held*, that the plaintiffs were not entitled to maintain the suit against the added

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— s. 92—*contd.*

defendant on the ground that no sanction of the Advocate-General was obtained previous to his being made a defendant in the suit and previous to the amendment of the plaint. *Attorney-General* v. *Fellows, 1 J. & W. 254,* followed. ABDUL REHMAN *v.* CASSUM EBRAHIM (1911)

I. L. R. 36 Bom. 168

7. ——— *Procedure—Mahomedan law—Waqf—Trust for a public purpose of a religious or charitable nature.* Where a trust is a trust created for a public purpose of a religious or charitable nature (in this case a *waqf* under the Mahomedan law) no suit can be maintained for the removal of a duly appointed trustee, save in conformity with the provisions of s. 92, sub-s. (*1*), of the Code of Civil Procedure. SAIYD ALI *v.* ALI JAN (1912) . . . **I. L. R. 35 All. 98**

8. ——— *Religious Endowments Act (XX of 1863), s. 18—Option to proceed under either so far as reliefs common are prayed for—Collector's sanction for removal of trustee given in 1908, good for suit for removal after coming into force of Civil Procedure Code (Act V of 1908).* A suit instituted with the consent of the Collector is a good suit for all reliefs referred to in s. 92 of Civil Procedure Code (Act V of 1908). S. 92, Civil Procedure Code, and s. 14 of Act XX of 1863, so far as the forms of relief to which they relate are the same, offer a choice to persons interested in the trust, who may proceed under either; they are not bound to proceed under both. The consent of the Collector given in November 1908, *i.e.,* before the Civil Procedure Code came into force, is a valid consent for the institution of a suit for the removal of a trustee though at the time the consent was given a suit for removal could not be instituted under the law then in force. VENKATARANGA CHARLU *v.* KRISHNAMA CHARLU (1914).

I. L. R. 37 Mad. 184

9. ——— *Suit to remove mutwalli of mosque—Compromise by which plaintiff agrees to withdraw suit for consideration, whether lawful—Compromise if may be recorded before question whether endowment public or private decided.* In a suit instituted under s. 92, Civil Procedure Code, on the allegation that the defendant (the *mutwalli* of two mosques) had misappropriated certain property dedicated for their upkeep and praying, *inter alia,* that the defendant might be removed from the *mutwalliship* and a new *mutwalli* appointed and a scheme for the proper discharge of the trust framed, the parties entered into a compromise, whereby the plaintiffs agreed to withdraw from the suit in consideration of certain advantages to be received by them, but the Court refused to record the compromise and pass a decree on its basis. On appeal, *held,* that the question whether the agreement of compromise was a lawful one depended on the further question whether the endowment in suit was a public endowment or not, and until that question was decided, it could not be said to be proved to the satisfaction of the Court that the suit had been adjusted by lawful agreement. *Gyananda* v. *Kristo Chandra, 8 C. W. N. 404,* referred to. AHMAD KHAN *v.* ABDUS SOBHAN CHOWDRY (1913).

18 C. W. N. 1264

10. ——— *Public trust—Suit instituted by two plaintiffs—Death of one plaintiff pending suit—Abatement of suit.* Where a suit concerning a public trust of a charitable or religious nature has been instituted by two persons having an interest in the trust with the consent of the Advocate-General and one of the plaintiffs dies, the suit will abate. But it is open to any other member of the public similarly interested to obtain the consent of the Advocate-General and to apply to be brought on to the record as a co-plaintiff, and it would be the duty of the Court to give a person wishing so to be made a party a reasonable opportunity of obtaining the consent of the Advocate-General. CHHABILE RAM *v.* DURGA PRASAD (1915) . . **I. L. R. 37 All. 296**

11. ——— *Suit regarding public charitable property—Consent by Collector—Conditional consent.* A suit was brought in the name of two plaintiffs for the removal of trustees for a declaration that the property in the hands of the trustees belonged to the Darga of Pir Saheb and to recover possession of the property. Before the institution of the suit one of the plaintiffs applied to the Collector of the District for permission to file the suit under s. 92 of the Civil Procedure Code of 1908. The Collector replied as follows:—"The Collector doubts whether s. 92 of the Civil Procedure Code applies to this case, but if the Court holds that it does, the Collector hereby declares his consent to the filing of a suit to claim any of the reliefs specified in s. 92 which the Court may deem fit to grant." The trying Court was of opinion that the above certificate was defective in form and therefore dismissed the suit. The plaintiffs having appealed. *Held,* dismissing the appeal, that the Collector had not acted in the manner provided by s. 92 of the Civil Procedure Code of 1908. He had not indicated on the proceedings that the suit was filed with his consent and that he had not even come to a conclusion that the suit was one which should have been filed. The Collector acting under s. 93 of the Civil Procedure Code had no right to consent to the institution of a suit by two persons claiming to have an interest in the trust unless it was such a suit as he would consider himself to be justified in filling at the relation of such two persons in his own name. The provisions of s. 92 of the Civil Procedure Code must be regarded as imperative. SULEMAN HAJI USMAN *v.* SHAIKH ISMAIL (1915) . **I. L. R. 39 Bom. 580**

12. ——— *Suit by mutawalli to remove trespasser managing trust as trustee de facto—Leave, if necessary.* S. 92 of the Civil Procedure Code does not apply where a plaintiff claiming to be the trustee of a public religious and charitable trust sues for the removal of a trespasser who has usurped the management of it. *Budree Das Mukim* v. *Chooni Lal Johurry, 10 C. W. N. 581: s. c. I. L. R. 33 Calc. 789,* followed. *Neti Rama Jogiah* v. *Venkata Charulu, I. L. R. 26 Mad. 451,* and *Sajedur Raja Chowdhuri* v. *Gour Mohun Das Baishnav, I. L. R. 24 Calc. 418,* not followed. AYATANNESSA BIBI *v.* KULFU KHALIFA (1914) . . . . **19 C. W. N. 234**

13. ——— *Waqf—Suit for removal of mutawalli—Defendant alleged to be a minor, but no allegation of mismanagement of wakf property.* *Held,* that no suit would lie under s. 92 of the Code of Civil Procedure for the removal of

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

———— s. 92—*contd.*

a *mutawalli* where no case of mismanagement of the waqf property was made out; but the sole ground was that the defendant (who was the grandson of the last *mutawalli* and most substantial benefactor of the waqf) was a minor according to the provisions of the Indian Majority Act, 1874, though apparently not so according to the Mahomedan law NIAMAT ALI *v.* ALI RAZA (1914).
I. L. R. 37 All. 86

14 ———————— *Public trust, cause of action as to—Practice of District Courts to enquire first whether subject-matter of trust is public—Public trust, if may be declared, when suit dismissed for want of cause of action—Costs, if payable out of trust estate when no cause of action—Findings in the judgment, immaterial to the decision, if appealable—S. 115 C. P. C, revision under, of decree for costs* Where the plaintiff's suit is dismissed for want of cause of action, the defendant has no right of appeal against some findings of fact which are not in his favour, *Thakur Magundeo* v *Thakur Mahadeo Singh, I. L. R. 18 Calc 647* and *Jamaitunnissa* v *Lutfunnissa I. L R. 7 All. 606*, followed. It has generally been the practice of the District Courts to enquire first into the question whether the trust is a public trust or not and this is probably a convenient course under s. 92, C P. C, no cause of action arises save in a case of alleged breach of a trust for a public purpose or where the directions of the Court are deemed necessary for the administration of such trust Where the plaintiffs after obtaining sanction from the Advocate-General instituted a suit against the defendant for his removal from the management of a trust which was alleged by the plaintiffs to be a public trust and the defence was that the trust was not a public trust and that there was no misfeasance, and the District Judge found that the trust was indeed a public trust but that the defendant had not been guilty of misfeasance and so dismissed the suit for want of cause of action with costs to be paid out of the trust estate to the plaintiffs because the defence was that the trust was not a public trust: *Held*, that when the Judge had come to the decision that there was no cause of action for the suit he could not record a decision binding on the parties that the trust was a public trust and he could not make an order for the payment of costs from the estate as a public trust. *Held*, further, that the order for costs out of the estate was without jurisdiction within the meaning of s 115, C P. C. BRIJ BEHARI LAL *v.* SHIVANATH PRASAD (1916) . . **20 C. W. N. 1354**

15. ———————— *Suit by a trustee against a co-trustee—Administration suit—Will—Charitable or religious trusts—Jurisdiction—Practice.* The plaintiff as one of the two surviving executors of the will of one Harjivandas Purshottam, dated the 15th June 1892, sued the defendant executor in the First Class Subordinate Judge's Court at Ahmedabad—(*a*) for accounts of the property of the deceased from 1899 and onwards, (*b*) for an injunction restraining the defendant from further management of the estate without plaintiff's consent, and (*c*) for an injunction restraining the defendant from interfering with the plaintiff's management of the said estate. The will showed that the property was worth Rs 89,500 out of which Rs. 19,500 were set apart for legacies and the balance of

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

———— s. 92—*contd.*

Rs 70,000 was bequeathed to purely charitable and religious purposes. The Subordinate Judge held that he had no jurisdiction to entertain the suit as it fell within the purview of s 92 of the Civil Procedure Code, 1908. The joint Judge, in appeal, was of opinion that the suit as framed by the plaintiff was to obtain the assistance of the Court for the purpose of securing co-operation with the defendant in the due administration of the estate according to the provisions and direction in the will and in so far as it sought this relief it did not come under s. 92 of the Civil Procedure Code, 1908 He, therefore, reversed the decree and remanded the case The defendant having appealed: *Held*, affirming the order of remand made by the Joint Judge, that the Subordinate Judge had jurisdiction to entertain the suit, for there was nothing in the plaint to suggest that the suit was framed in relation to any charitable or religious trusts and the plaint contained no prayer for relief of any of the kinds specified in s. 92 of the Civil Procedure Code, 1908. *Per* CURIAM: If any questions relating to charitable bequests should arise in the present case before the Subordinate Judge, his proper course would be to give notice to the Advocate-General in order that that officer might decide whether any action should be taken under s. 92 of the Civil Procedure Code in order to get any of the specific reliefs referred to in that section. It would be quite possible for the Subordinate Judge to continue the administration of the estate up to the point of separating the funds appropriated for particular charities as to which schemes would have to be framed, and holding those funds in the possession of a Receiver until the Advocate General or the Collector had obtained the directions of the Court, if such were necessary with reference to the disposal of those funds under some suitable scheme. Such directions of course would have to be taken from the District Court under s 92 BAPUJI JAGANNATH *v.* GOVINDLAL KASANDAS (1916) . . . **I. L. R. 40 Bom. 439**

16. ———————— *Suit for adminis-*

[illegible]

t of notice ross objec- d a suit 1908, for

[illegible]

institution. In providing for the appointment of new trustees, however, the Judge included defend-

[illegible]

pondent and cross-objections were filed on its behalf to the effect that the suit was bad under s. 32 of the Court of Wards Act, 1905, and that no notice having been given to the Court of Wards as required by s. 31 of the Act, the decree was not binding on defendant No. 1. The plaintiffs-appellants contended that the cross-objections

CIVIL PROCEDURE CODE (ACT V OF 1908) *—contd.*

——— **s. 92**—*contd.*

were not properly stamped. *Held*, that the cross-objections must be stamped as on an appeal relating to the sum of Rs. 6,000 decree against 1st defendant. *Held*, also, that the suit was not bad on the ground that the statutory notice provided for by s. 31 had not been given since it was a suit relating to the property of a religious institution and not to the property of the 1st defendant. *Held*, further, that the suit was not bad under s. 32 of the Court of Wards Act as the section did not say that if the Court of Wards was not named as guardian from the commencement the suit was bad. The omission might under the circumstances be treated as a mere defect or irregularity in procedure not affecting the merits of the case or the jurisdiction of the Court and be corrected under s. 152 of the Civil Procedure Code, 1908. *Rup Chand* v. *Dasodha, I. L. R. 30 All. 55* and *Bibi Walian* v. *Banke Behari Pershad Singh, L. R. 30 I. A. 182*, followed. SAYAD AMIR SAHEB *v.* SHEKH MASLEUDIN (1916).
I. L. R. 40 Bom. 541

17. ——— *Hindu temple—Worshipper—Right of suit of—Interest, meaning of—Mere right to worship, whether sufficient interest to maintain suit under s. 92—Religious Endowments Act (XX of 1863), ss. 14 and 15—Definition of interest therein, whether applicable to s. 92—Lord Romilly's Act—English decisions thereon, whether proper guidance in construction of s. 92—Interest, nature of, to maintain suit—Policy of Act and Code—Act and Code, whether in* pari materia. Where a Hindu residing in Madras and another residing in Tellicherry instituted a suit in the District Court of North Malabar under s. 92 of the Civil Procedure Code, in respect of a Hindu temple situated in Tellicherry in North Malabar, after obtaining sanction under the section, and it appeared that the former had gone to worship in the temple on one or two occasions in the past and might go there to worship in the future if business took him to Tellicherry and he relied on his right as a Hindu to worship in the temple as entitling him to institute the suit: *Held*, by OLDFIELD and COUTTS TROTTER, *JJ.* (ABDUR RAHIM, *J.*, dissenting), that, though as a Hindu he might have the right to worship in the temple he had not, on that ground alone, the interest required by s. 92 of the Code to maintain the suit. 'Interest' under s. 92 of the Code denotes an interest which is substantial and not sentimental or remote: it must be a present and substantial and not a remote and fictitious or purely illusory interest. The definition of 'interest' in s. 15 of the Religious Endowments Act (XX of 1863) cannot be used as a guide in interpreting the word as used in s. 92 of the Code. The English decisions under Lord Romilly's Act, which lay down that the petitioners under the Act must have an interest which is clear or direct, should be a guidance in interpreting the provisions of s. 92 of the Civil Procedure Code. *Per* ABDUR RAHIM, *J.*—In the case of a temple or a mosque, persons entitled to attend there for purposes of worship are beneficiaries and must as such be held to possess a sufficient interest to support a suit under s. 92 of the Civil Procedure Code. English and Indian decisions on the subject reviewed. T. R. RAMCHANDRA AIYAR *v.* PARAMESWARAN UNNI (1918) . **I. L. R. 42 Mad. 360**

CIVIL PROCEDURE CODE (ACT V OF 1908) *—contd.*

——— **s. 92**—*contd.*

18. ——— *Religious Endowments Act (XX of 1863), s. 14—Sanction for suit—Trustees of a temple—Appointment of a trustee by a Devastanam Committee in bad faith—Suit, without sanction, by two trustees for declaration as to invalidity of appointment and for injunction—Maintainability of the suit—Jurisdiction of Civil Courts to question appointment.* Two out of three trustees of a temple instituted a suit in a Subordinate Judge's Court for a declaration that the appointment by the Devastanam Committee of one of the defendants as a trustee in the place of a deceased trustee was invalid, and for an injunction to restrain him from interfering with the affairs and the property of the temple. The plaintiffs' trustees did not obtain sanction either under s. 92, Civil Procedure Code, or s. 14 of the Religious Endowments Act (XX of 1863). The defendants pleaded, *inter alia*, that the suit was not maintainable for want of sanction and that the Civil Courts could not question the appointment made by the committee. *Held*, that the suit was not maintainable for want of a sanction under s. 92, Civil Procedure Code, and that a Civil Court can question an appointment of a trustee by a Devastanam Committee if it is not made reasonably or in good faith. *Per* ABDUR RAHIM, *J.*, s. 14 of the Religious Endowments Act (XX of 1863) did not apply to the present suit, as it was not a case of misfeasance, breach of trust or neglect of duty by a trustee. SUBRAMANIA PILLAI *v.* KRISHNASWAMY SOMAYAJIAR (1919) **I. L. R. 42 Mad. 668**

19. ——— *Suit by two persons, one of whom had no interest under the section—Leave under the section obtained subsequently by two others having such interest—Latter joined as additional plaintiffs—Suit, whether maintainable.* Where a suit was instituted under s. 92, Civil Procedure Code by two plaintiffs, one of whom had no interest such as that required by that section, and two other persons having the requisite interest subsequently obtained leave under the section and were joined as additional plaintiffs in the suit. *Held*, that the suit was maintainable under s. 92 of the Code, and ought to be tried on the merits. *Ramayyangar* v. *Krishnayyangar (1887) I. L. R. 10 Mad., 185*, applied. JEKKAM REDDI *v.* SIR S. SUBRAMANIA AYYAR (1920) . . **I. L. R. 43 Mad. 720**

——— **ss. 92 and 93**—*Alienee from trustee—Declaration against—Appeal by alienee—Death of trustee, pending appeal—Abatement—Right to sue, meaning of—Alienee for consideration but not in good faith or without notice—Limitation Act (IX of 1908), s. 10, effect of.* Where in a suit brought by the Collector of a district under s. 92 of the Code against the trustee and the alienee from him, a declaration was granted to the effect that the alienation in favour of the latter was not binding on the trust, and the alienee appealed, making the Collector and the trustee parties to the appeal, but pending appeal, the trustee died and his legal representative was not brought on the record: *Held*, that the appeal did not abate as the trustee was not a necessary party to it. *Held*, also, that the cause of action against the alienee (who was an alienee for consideration) arose on the date of the alienation and as the suit was brought more than six years after that date, it was barred by limitation under Art. 20 of the

CIVIL PROCEDURE CODE (ACT V OF 1908) —*concld.*

——— s. 92—*concld.*

Limitation Act. Time will run in favour of an alienee for consideration though he may not be an alienee in good faith. Trust property in the hands of alienees for consideration and in good

COLLECTOR OF TRICHINOPOLY (1914).
I. L. R. 38 Mad. 1064

——— ss. 92, 115—

See PUBLIC CHARITY . 14 C. W. N. 932

——— s. 92, O. I, r. 3—

See PARTIES . I. L. R. 42 Calc. 1135

——— s. 92, O. I. r. 10 (2)—*Suit by plain-* ... *Advocate-General— be added as co-* ... *parties.*] In a ... edure Code, instituted by persons who had obtained the requisite consent of the Advocate-General, the Court can on the application of the Advocate-General, add him as a co-plaintiff. *Ambalavana Pandara Sannadhigal v. The Advocate-General of Madras* (1920) . . . . I. L. R. 43 Mad 737

——— s. 93 (1882 Code s. 539)—

See S. 92 . I. L. R. 38 Mad. 1064

——— *Duties imposed upon Collectors—Duties not to be discharged by subordinate.* Duties which are imposed upon Collectors by Government under s. 93 of the Civil Procedure Code (Act V of

Collector was discharging the functions of the Collector under the provisions of s. 11 of the Land Revenue Code (Bom. Act V of 1879) in revenue matters, he was, therefore, entitled to discharge his functions with reference to suits filed under s 92 of the Civil Procedure Code (Act V of 1908), is erroneous. SOMCHAND BHIKHABHAI *v.* CHHAGANLAL (1911) . . . I. L. R. 35 Bom. 243

——— s. 94 (C. & E.)—

See ATTACHMENT BEFORE JUDGMENT.
I. L. R. 46 Calc. 717

See BENGAL TENANCY ACT, s. 69.
5 Pat. L. J. 76

appointment of a Receiver will be made as a matter of course on the application of a mortgagee if the interest payable under the security is in arrear.

other hand the mortgagees had been compelled to advance money to pay the Government revenue on

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— s. 94—*contd.*

the mortgaged properties in order to save them from sale for arrears and that to recover the sums so advanced they had been compelled to bring another suit: *Held,* that it was a fit case for the

appoint a Receiver—then the Court exercises its discretion as to who shall be appointed Receiver

RAKEA KHATUN (1912). . 16 C. W. N. 997

——— s. 94 (e)—*Temporary injunction, application for—Order by Court calling upon defendant to furnish security and submit accounts—Order if made with jurisdiction—Appeal—Revision.* Where on the plaintiffs' application for the issue of a temporary injunction restraining the defendant from working mica mines on the property in suit, the Court passed order directing the defendant to furnish security to the extent of Rs. 5,000 and submit accounts of the minerals appropriated every week from the date of the application: *Held,* that the order was not one passed under r. 1 of O. XXXIX of the Civil Procedure Code and was not appealable under cl. (r) of r. 1 of O XLIII. That the order was an interlocutory order made under cl (e) of s. 94 of the Code to prevent the ends of justice from being defeated and should not be set aside in revision. SITO MAHTON *v.* F. F CHRISTIAN (1912). . 17 C. W. N. 318

——— s. 95 (1882 Code ss. 491 and 497)—

See INJUNCTION. I. L. R. 42 Calc. 550

——— s. 96 (1882 Code s. 540)—

See S. 2 . I. L. R. 42 Mad. 52

See S. 47 . . I. L. R. 32 All. 3

See LAND ACQUISITION ACT (I OF 1894) s. 54 . I. L. R. 38 Bom. 337

See SUCCESSION CERTIFICATE ACT, ss. 9 25, 26. . I. L. R. 36 Bom. 272

——— Plaintiff sued upon an alleged account stated which the Courts in India found to be a fraudulent and fabricated one. Plaintiffs being thus compelled to rely on items of claim contained in a general account, it was found that each of these items was barred by limitation, but the Defendant nevertheless consented to a decree being passed in Plaintiffs' favour for such of the items as were proved, and the trial Court passed a decree upon that basis: *Held*—That the findings on the question of limitation standing, the decree was a consent decree which could not be modified on appeal. SRI SRI SRI RAMACHANDRA DEO GARU RAJAH OF KALLIKOTTA *v.* CHAITANA SAHU. . 24 C. W. N. 1133

——— s. 96, cl. (3), O. XXIII ... O. XLIII, r. 1, cl. ...

See COMPROMISE
I. L. R. ...

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— **ss. 96 and 97**—*Partition—Appeal—Passing of final decree no bar to the hearing of an appeal against the preliminary decree.* When an appeal has once been filed and is pending against the preliminary decree in a suit for partition the passing of a final decree does not render the appeal nugatory. The final decree depends upon the preliminary decree, and if, as the result of an appeal, the latter is set aside, the former must fall with it. *Kuriya Mal* v. *Bishambhar Nath, I. L. R. 32 All. 225,* overruled. *Khirodamoyi Dasi* v. *Adhar Chandra Ghose, 18 C. L. J. 321,* dissented from. *Muhammad Akhtar Husain Khan* v. *Tassadduq Hussain, I. L. R. 34 All. 493,* and *Lukshmi* v. *Maru Devi, I. L. R. 37 Mad. 29,* followed. *Abdul Jalil* v. *Amar Chand Paul, 18 C. L. J. 223,* referred to. KANAHAIYA LAL *v.* TIRBENI SAHAI (1914) . **I. L. R. 36 All. 532**

——— **ss. 96, 100**—*Land Acquisition Act (I of 1894), ss. 53, 54—Land—Compulsory acquisition—Compensation—Award by Assistant Judge—Appeal to the District Judge—Second appeal—Practice and procedure.* Where an award is made by the Assistant Judge under the provisions of the Land Acquisition Act, 1894, and there has been an appeal to the District Judge, no second appeal can lie from the appellate decision. MATHURBHAI NARANDAS *v.* MANORDAS LALDAS (1911).

I. L. R. 36 Bom. 360

——— **s. 97**—

See s. 2 (2) . **I. L. R. 39 Bom. 422**
I. L. R. 38 Bom. 392

See APPEAL . **I. L. R. 42 Calc. 914**

See PARTITION . **I. L. R. 34 All. 493**

1. ——— *Preliminary decree—Appeal—Status of agriculturists—The question if not appealed from as preliminary decree cannot be agitated in appeal on merits—Party's duty to ask Court to draw up decree—Practice and procedure.* The plaintiff brought a suit to redeem mortgage according to the provisions of the Dekkhan Agriculturists' Relief Act, 1879. A preliminary issue was raised whether the plaintiffs were agriculturists and decided against the plaintiffs. The Court ordered the plaintiffs to pay the requisite court-fee within a week's time, which not having been done, the suit was dismissed. In the appeal which the plaintiffs preferred against the final decree they sought to question the finding on the preliminary issue: *Held,* that the preliminary decree having become extinct by reason of the final decree, and the plaintiffs not having exercised their right of presenting an appeal from that decree, it was not open to them in the present appeal to challenge finding on the preliminary issue. *Held,* further that though the statutory obligation lay on the Court to draw up a preliminary decree to entitle the plaintiffs to appeal, yet it was equally the duty of the plaintiffs to ask the Court to draw up that decree in order to enable them to present an appeal against it. GOVIND RAMCHANDRA *v.* VITHAL GOPAL (1912) . . **I. L. R. 36 Bom. 536**

2. ——— *Preliminary decree—Appeal—Finding on preliminary issue, but no decree drawn up—Appeal not necessary—Duty of raising issues—Practice and procedure.* In a suit for redemption, a preliminary issue was raised and decided that the plaintiff was an agriculturist. Accounts were next taken under the provisions of

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— **s. 97**—*contd.*

the Dekkhan Agriculturists' Relief Act (XVII of 1879) and a redemption decree was passed. On appeal from the final decree, the question as to the status of the plaintiff was raised; and the Court of Appeal decided that the plaintiff was not an agriculturist; and varied the decree by increasing the amount of redemption. On second appeal, it was contended that the lower Appellate Court was wrong in going into the preliminary point at the stage it did: *Held,* that no appeal was necessary against the preliminary finding; and that unless there was a preliminary decree no appeal could lie under the provisions of s. 97 of the Civil Procedure Code (Act V of 1908). *Bai Divali* v. *Shah Vishnav Manordas, I. L. R. 33 Bom. 182,* followed. *Govind Ramchandra* v. *Vithal Gopal I. L. R. 36 Bom. 536,* explained. SAKHARAM VISHRAM *v.* SADASHIV BALSHET (1913) . . **I. L. R. 37 Bom. 480**

3. ——— *Preliminary decree—Appeal—Findings on preliminary issues—No Appeal lies from findings—Decree, drawing up of—Duty to draw up decree is of the Court—Civil Circulars (1912), cl. 159.* In a suit for accounts, the first Court recorded findings on certain preliminary issues and ordered accounts to be taken on the basis of those findings. No preliminary decree was drawn up by the Court and none was asked for by the plaintiff's pleader. The accounts were next taken by a commissioner and a decree was passed in accordance with his report, dismissing the suit. The plaintiff appealed against the final decree and urged objections against finding on preliminary issues. *Held,* that the plaintiff was not barred of his right to urge objections against the findings on preliminary issues, for under the Civil Procedure Code (Act V of 1908), s. 97, his right to appeal arose only when there was a decree based on those findings. That the practice in the mofussil Courts was in accordance with the provisions of the Civil Procedure Code and Civil Circulars, cl. 159, *viz.,* that the Court was to draw up the decree, and that the pleaders, if any, in the case were to see that it was in accordance with the judgment. There is no provision requiring a party or his pleader to move the Court to draw up a decree, and mere omission to ask the Court to do that which it is the duty of the Court to do on its own motion cannot affect his right to appeal. KALURAM PIRCHAND *v.* GANGARAM SAKHARAM (1913) . . **I. L. R. 38 Bom. 331**

4. ——— *Preliminary decree—Appeal—Decisions that suit not barred as caste question.* A decision in favour of the plaintiff upon a preliminary defence that the matters in dispute are caste questions outside the jurisdiction of Civil Courts does not amount to a preliminary decree attracting the provisions of s. 97 of the Civil Procedure Code (Act V of 1908). *Siddhanath Dhonddev* v. *Ganesh Govind, I. L. R. 37 Bom. 60,* overruled. *Narayan Balkrishna* v. *Gopal Jiv Ghadi, I. L. R. 38 Bom. 392,* dissented from. CHANMALSWAMI *v.* GANGADHARAPPA (1914).

I. L. R. 39 Bom. 339

5. ——— *Preliminary decree—Appeal—Decision as to res judicata.* A decision that a matter is not *res judicata* is not a preliminary decree. *Chanmalswami* v. *Gandharappa, I. L. R. 39 Bom. 339,* followed. BHARMA BIN SHIDDAPPA *v.* BHAMAGAVDA (1915) **I. L. R. 39 Bom. 421**

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

———— s. 97—*concld.*

6. ———— *Partnership accounts, suit for—Preliminary decree declaring partnership dissolved and directing inquiries and accounts—Part ordering inquiries if to be separated from decree and treated as order—Validity of order if may be questioned on appeal from final decree.* In a suit to have partnership accounts taken, the Trial Judge by a formal adjudication, dated 30th June 1908, (*i*) declared that the partnership was dissolved as from 1st July 1907, and ordered and decreed, (ii) that inquiry be made by the referee as to who were the partners, and (*iii*) that the referee should take an account of the dealings of the parties with the assets of the partnership business. No appeal was preferred from this adjudication, and inquiry was made and accounts taken. The decision of the referee upon the inquiry which was adverse to the appellant was confirmed by the Judge. In an appeal against the final decree,

preliminary decree, and not having been appealed against could not under s 97 of the Civil Procedure Code be questioned on the final appeal The adjudication did not cease to be a decree, because a subordinate part of it, if correctly made, might have been made separately as an order. The Code makes no provision for something which is neither a decree nor an order, nor anything which is both, neither does it provide that one adjudication by the Court can be resolved into diverse elements, some of which are decrees and some orders. AHMED MUSAJI SALEJI *v.* HASHIM EBRAHIM SALEJI (1915) . **19 C. W. N. 449**

———— ss. 97 and 2—*Preliminary decree—Preliminary issue, whether a party is an agriculturist—Finding on the issue not an adjudication which can be embodied in a decree—Practice—Procedure.* A finding on a preliminary issue whether a party is an agriculturist is not by itself an adjudication which can be embodied in a preliminary decree within the meaning of s. 97 of the Civil Procedure Code, 1908. *Per* MACLEOD, C. J.—It is only when the finding on an issue is sufficient for the decision of a suit or a part of the suit that the Court may pronounce judgment. When the finding is not sufficient for the decision the suit must be postponed for further hearing. Accordingly the stage of the case at which judgment is pronounced will determine whether the decree is preliminary or final. *Per* FAWCETT J.—It is an abuse of the procedure intended by the Code for a Court to draw up a preliminary decree directing accounts to be taken under s. 13 of the Dekkhan Agriculturists' Relief Act, before it had even decided whether the mortgage sued upon was proved. *Municipal Committee of Nasik City v. The Collector of Nasik (1915) 39 Bom. 422*, considered. DATTATRAYA PURSHOTTAM *v.* RADHABAI (1920) . . . **I. L. R. 45 Bom. 627**

———— s. 97, O. XXXIV, rr. 1, 5—

See TRANSFER OF PROPERTY ACT (IV OF *1882*), *ss. 88, 89*
I. L. R. 40 Bom. 221

———— s. 98 (1882 Code s. 575)—

See INCUMBRANCE **I. L. R. 43 Calc. 558**

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

————s. 98—*contd.*

See LETTERS PATENT CL. 15.
I. L. R. 41 Mad. 943

See MINOR . **I. L. R. 35 All. 487**

See SALE FOR ARREARS OF REVENUE
I. L. R. 39 Calc. 353

1.———— *High Court Judges, difference between—Practice as to reference to third judge, change of—Case to be conditionally decided and point only to be referred.* JENKINS, C. J. The intention of s. 98 of the Civil Procedure Code is that the Judges hearing the appeal should come to a complete decision with the reservation on the point of law on which they differ, and they should by their judgments make it clear that if the point of law is decided in one way it will have a certain final result, and if it is decided in another way it will have another and a different final result. GAUHAR ALI *v.* SAMIRUDDIN SHEIKH (1913)
18 C. W. N. 33

2.———— *Second appeal from the mofussil—Difference of opinion—Procedure—Letters Patent, 1865, cl. 36.* In second appeals from the mofussil on the Appellate Side of the High Court where Judges differ the procedure is governed by s. 98 of the Civil Procedure Code, 1908, and not by cl 36 of the Letters Patent, 1865. BHUTA *v.* LAKADU DHANSING (1918).
I. L. R. 43 Bom. 433

which provides a different procedure in these circumstances. BHAIDAS SHIVDAS *v.* BAI GULAB
I. L. R. 45 Bom. 718

———— s. 99 (1882 Code 578)—

See HINDU LAW—RELIGIOUS ENDOWMENT . . **I. L. R. 42 Calc. 536**

———— *Misjoinder includes non-joinder—What parties necessary in suit against karnavan of tarwad to enforce contract of previous karnavan—When act of karnavan impeachable.* In a suit to enforce against the karnavan of a tarwad in his capacity as such karnavan a contract made by a previous karnavan on behalf of the tarwad, it is not necessary to add the other members of the tarwad as parties. 'Misjoinder' in s. 99 of the [illegible] ...oinder" [illegible] ...rwad, if [illegible] binding [illegible]

———— In a rent [illegible] minor tenant's mother refuses to act as [illegible] proper course is to get an officer [illegible] appointed to represent him. The [illegible] be cured under s. 99 for each [illegible] for the entire rent and [illegible] BAIKUNTHA NATH BOSE *v.* [illegible]

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— **ss. 99, 100, 108**—

See JURISDICTION **I. L. R. 45 Calc. 926.**

——— **ss. 99, 107 (1) (b), O. XLI, r. 23**—

See REMAND . **I. L. R. 41 Calc. 108**

——— **ss. 99, 107, Sch. II**—*Arbitration—Appellate Court, powers of—Reference once made unaffected by death of party.* An application for a reference to arbitration under Sch. II to the Code of Civil Procedure, 1908, may be made to an Appellate Court as well as to a Court of original jurisdiction, and the Court is bound to accept and act upon such application if made by all the parties interested in the appeal. When an application for arbitration has been made, it will not lapse by reason of the death of one of the parties: but if the right to sue survives, the arbitration must be proceeded with after substitution of the representatives of the deceased party. *Perumalla Setyanarayana* v. *Perumalla Venkata Rangayya, I. L. R. 27 Mad. 112,* referred to. DUTTA *v.* KHEDU (1911).

I. L. R. 33 All. 645

——— **s. 99 and O. I, r. 3**—*Suit by reversioners for the usual declaration in respect of a sale and previous mortgages of land—Misjoinder of parties—remand by Lower Appellate Court for a fresh decision.* The plaintiffs, minor sons of G, through their maternal uncle, brought the present suit for the usual declaration in respect of a sale and previous mortgages of land effected by their father and his two brothers, defendants 1-3, in favour of the vendee, defendant 4, and the previous mortgagees, defendants 5-10. The first Court held that the suit was bad for misjoinder of parties and returned the plaint to the plaintiffs for amendment. The plaint was accordingly amended by striking out the mortgages and the suit was thereafter dismissed, it being found that necessity had been proved for the bulk of the sale price. On appeal the District Judge held that the suit was not bad for misjoinder of parties and remanded the case for a fresh decision after impleading the previous mortgagees. From this order the vendee appealed to this Court. *Held,* that as common questions both of law and fact arose in the case, there was no misjoinder of parties—*vide* Order I, rule 3 of the Code of Civil Procedure. Mussammat *Gopal Devi* v. *Jai Narain (1 P. R. 1905),* not followed. *Rup Narain* v. *Mussammat Gopal Devi (93 P. R. 1909 P. C.) Provabati Debi* v. *Rameswar Mandal, (6 Indian Cases 248),* and *Rameswar Mandal* v. *Provabati Debi (25 Indian Cases 84),* followed. *Held also,* that the order of remand by the District Judge was not opposed to the provisions of s. 99 of the Code, as the order of the first Court vitally affected the merits of the case. RALLIA RAM *v.* MULK RAJ . . . **I. L. R. 1 Lah. 295**

——— **s. 100 (1881 Code s. 584)**—

See S. 4. . **I. L. R. 38 Bom. 340**

See S. 96 . **I. L. R. 36 Bom. 360**

See CHOTA NAGPUR TENANCY ACT 1908.
5 Pat. L. J. 697

See CONSTRUCTION OF DOCUMENTS.
5 Pat. L. J. 251

See CONTRACT . **I. L. R. 42 Bom. 344**

See JURISDICTION **I. L. R. 46 I. A. 140**
I. L. R. 45 Calc. 926

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— **s. 100**—*contd.*

See MAHOMMEDAN LAW PRE-EMPTION.
I. L. R. 44 Calc. 47

See SECOND APPEAL.
I. L. R. 39 Calc. 241

——— *Second appeal—Finding of fact—Land tenures in Kumaun—Custom—Pasture land—Grant of pasture land disputed.* According to the special law relating to land tenures in Kumaun, land which was not allotted to villagers for purposes of cultivation was held to belong to the Government and might be granted to individual villagers for cultivation or the planting of trees. But if such land were *gauchar*, or pasture land, a grant could only be made if it was not inconsistent with the general wishes and well-being of the village community: and it was open to any villager to bring a suit to dispute the validity of such grant. *Held,* on such a suit being filed, that the finding of the Appellate Court that the grant in question was inconsistent with the general wishes and well-being of the community was a finding of fact and could not be disturbed in second appeal. GITA RAM *v.* KIRPA RAM (1914).

I. L. R. 36 All. 256

——— *Fact, finding of, based upon evidence assumed to exist, if contrary to law—Second appeal.* Where the lower Appellate Court not merely misunderstood the effect of a witness's deposition but referred to evidence which did not exist at all and based its decision principally, if not entirely, upon it, the decision, though on a question of fact, would be contrary to law and liable to be set aside on second appeal. *Bibee Ameerun* v. *Shaik Cherag Ali, 24 W. R. 343,* relied on. *Durga Chaudhurani* v. *Jewahir Singh Chaudhury, L. R. 17 I. A. 122: I. L. R. 18 Calc. 23, Ram Rattan Sukul* v. *Nandu, L. R. 19 I. A. 1: I. L. R. 19 Calc. 249,* referred to. BHUPENDRA KUMAR CHUCKERBUTTY *v.* PEARY MOHAN RAY (1912) . . . . **17 C. W. N. 37**

——— *Finding of fraud without any evidence—Power in second appeal to decide case on issue not expressly framed on the evidence as it stood and reverse decision of lower Appellate Court.* The Plaintiff had executed a sale deed in respect of immovable property in favour of the Defendant on the 26th June 1909 which was a Saturday, and the deed contained a stipulation that the consideration money was to be paid in the presence of the registration officer. Under a prior agreement the last day for payment of the purchase money was the 27th June 1909. The deed was presented by the vendor for registration and though Defendant's agent was present at the registration office with the money, it was not paid immediately as Defendant had not yet come, and when the latter came, the registration officer had left earlier than usual owing to indisposition and the Plaintiff also had left the office. The Defendant offered to pay the money at the registration office on Monday the 28th June 1909, the 27th being Sunday, but the Plaintiff refused to accept it. In a suit by Plaintiff for cancellation of the sale deed, no issue was framed as to whether the Defendant was ready and willing on the 26th June to pay the purchase money and was prevented from doing so by the action of the Plaintiff, but both the trial Court and the first Court of Appeal held that no new agreement had been come to

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— **s. 100**—*concld.*

between the parties substituting the 28th June for the 27th as the date of completion of the sale, and they also held that the Defendant had deliberately and fraudulently acted as he did on the

[illegible]

in second appeal was competent upon the evidence, and in the absence of an express issue, to find that the Defendant was ready and willing to pay the purchase money on the 26th June but was prevented from doing so by the action of the Plaintiff and to reverse the decisions of the lower Appellate Court on that ground. DAM USA *v.* ABDUL SAMAD . . . **24 C. W. N. 81**

——— *Custom or usage having the force of law—Extent of jurisdiction of High Court in second appeal in deciding custom or usage—Mirasidar in Chingleput district, right to thunduvaram by custom from Government ryots—Onus of*

[illegible]

custom or 'usage having the force of law' is a mixed question of fact and law. S 100, Civil Procedure Code, precludes the High Court from interfering in second appeal with the findings arrived at by the lower Court of actual facts from which the existence of the custom has been inferred; the inference as to the existence and the decision as to the validity of the custom being matters of law, revisable by the High Court in second appeal. *Kakarla Abbayya* v. *Raja Venkata Papayya Rao, I. L. R. 29 Mad 24*, overruled. *Kailas* v. *Padmalisor, 25 C. L. J. 613*, and *Pankajammal* v *The Secretary of State for India, I. L. R. 40 Mad. 1108*, followed. *Palaniappa Chetty* v. *Sreemath Devasikamony Pandarasannadhi, I. L. R. 40 Mad. 709*, referred to. *Held*, further: (a) that in a suit by an *ekoboga mirasidar* in a village in the Chingleput district, for certain customary dues called *thunduvaram* from the non-mirasidar Government ryots in the village, the onus of proving the custom was on the mirasidar, (b) that on the facts found he

[illegible]

Court can, under s. 103, Civil Procedure Code,

[illegible]

therein. The *thunduvaram* payable to the mirasidar by a ryot according to custom is not in the nature of 'rent' but falls under 'dues' within art 13 of

[illegible]

I. L. R. 44 Mad. ... [illegible]

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— **s. 100, O. VI, r. 6**—

See SPECIFIC RELIEF ACT (I OF 1877), s. 39 . . **I. L. R. 39 Bom. 149**

——— **s. 100, O. XLV, r. 27**—*Refusal to admit additional evidence in appeal—Discretion of Court—Appeal.* A refusal in the exercise of discretion to admit additional evidence under O. XLI, r. 27, of the Code of Civil Procedure, will not afford a ground for second appeal. *Ram Piari* v. *Kallu, I. L. R. 23 All 121*, followed. DURGA PRASAD *v.* JAI NARAIN (1911).

I. L. R. 33 All. 379

——— **s. 101 (1882 Code s. 585)**—

——— **s. 102 (1882 Code s. 586)**—

See HOMESTEAD LAND. **I. L. R. 42 Calc. 638**

See POSSESSORY SUIT. **I. L. R. 45 Calc. 519**

See PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887), SCH II, ART. 8 **I. L. R. 41 Bom. 367**

——— *Second Appeal—Suit of a nature cognizable by a Small Cause Court, meaning of—Suit by a landholder for rent under the Madras Estates Land Act (I of 1908), ss. 77 and 189—Second Appeal in such suits whether competent—Provincial Small Causes Courts Act (IX of 1887), s. 15.* A suit by a landholder for rent under the Madras Estates Land Act is cognizable only by a Revenue, and not by a Civil Court; and such a suit is therefore not of a *nature* cognizable by a Court of Small Causes within the terms of s 102, Civil Procedure Code, and consequently a Second Appeal in such a suit is not barred by that section. *Soundaram Ayyar* v. *Senna Naicken, (1900) I. L. R, 23 Mad., 547 (F. B.)*, applied. ZAMINDAR OF TARLA *v* KANDA BARIKIVADU (1921).

I. L. R. 44 Mad. 697

——— **s. 103**—

See ONUS OF PROOF **I. L. R. 43 Mad. 567**

See SECOND APPEAL. **I. L. R. 47 Calc. 107**

——— **s. 104 (1882 Code s. 588)**—

See APPEAL . **I. L. R. 38 Calc. 339**

See EXECUTION OF DECREE. **I. L. R. 42 Calc. 440**

See S. 2 (2) **I. L. R. 35 All. 582**

See S. 42 . . **19 C. W. N. 1085**

See S. 47 . **I. L. R. 29 Mad. 570**
I. L. R. 32 All. 3
I. L. R. 1 Lah. 77
I. L. R. 44 Bom. 472

See S. 89 . **I. L. R. 43 All. 108**

——— **sub-s. 1 (c)**—*Arbitration award, order modifying—Appeal against, how far lies.* Cl. (c) of sub-s. (1) of s. 104 of the Civil Procedure Code *does* not confer an unrestricted right of appeal; in other words, when an order has been made by which an award has been modified or corrected in an appeal preferred against that order, the validity of the whole award cannot be called in question, the true effect of the clause being to allow an appeal against the order only in so [illegible]

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— s. 104—*contd.*

modifies or corrects the award. RAJBUNS SAHAY *v.* SOORJEE LAL (1911) . . 17 C. W. N. 617

——— Sub-s. 1 (d)—

See SCH. II, PAR. 17

I. L. R. 36 Mad. 353

——— sub-s. 1 (f)—

See APPEAL . I. L. R. 45 Calc. 502

See ARBITRATION ACT, 1899, SS. 11 AND 20 . . . I. L. R. 43 All. 248

s. 4. I. L. R. 43 All. 348

——— *Arbitration without intervention of Court—Award—Order filing award, if appealable after decree in accordance with award.* An appeal lies against an order filing an award made upon an arbitration without the intervention of the Court even after a decree is passed upon the award. The decree based upon the award is no doubt final if it is in accordance with the award, but the validity of the decree depends upon the validity of the order directing the award to be filed and if the latter is set aside, the decree must be declared inoperative. KHETTRA NATH GANGOPADHYAY *v.* USHABALA DASI (1914)

18 C. W. N. 381

——— *Arbitration—Application to file an award in an arbitration made without the intervention of the Court—Appeal—Duties of arbitrator. Held,* that an appeal lies from an order directing the filing of an award in an arbitration made without the intervention of the Court. *Held,* further, that in an arbitration proceeding if the parties come to terms on a certain point it does not absolve the arbitrator from passing judgment on that point incorporating the terms of the compromise in the award. HARI KUNWAR *v.* LAKHMI RAM JAIN (1916) . . I. L. R. 38 All. 380

——— ss. 104, 117, O. IX, rr. 8, 9—

See APPEAL . I. L. R. 43 Calc. 857

——— *Arbitration—Order directing award to be filed—Appeal—Misconduct of arbitrator.* An appeal lies against an order filing or refusing to file an award in an arbitration made without the intervention of court, and the bare fact that a decree has been drawn up after the passing of the order does not take away the right of appeal against the order. *Saudamini Ghosh* v. *Gopal Chandra Ghosh, 19 C. W. N., 949,* and *Hari Kunwar* v. *Lakhmi Ram Jaini, I. L. R. 38 All. 380,* referred to. An arbitrator cannot decide the case submitted to him on his own knowledge and without taking evidence unless the terms of the reference especially permit him to do so. LACHMI NARAIN *v.* SHEO-NATH PANDE

I. L. R. 42 All. 185

——— ss. 104 and 141, O. IX, rr. 4 and 9 and O. XLII, r. 1 (c)—

See RESTORATION OF SUIT.

2 Pat. L. J. 720

——— s. 104 ; O. XXI, rr. 90, 92, O. XLIII, r. 1 (j)—*Execution of decree—Sale in execution—Application to set aside sale, rejected—Appeal.* Under O. XXI, r. 90, of the Code of Civil Procedure, 1908, an application may be made to set aside a sale held in execution of a decree, upon the ground, amongst others, of fraud in the publication or conduct of the sale, and, if this application is refused under r. 92, an appeal lies under O. XLIII, r. 1, cl. (j) ; but no second appeal is allowed from the order of the Appellate Court. SHEO PRASAD SINGH *v.* PREMNA KUNWAR (1917)

I. L. R. 40 All. 122

——— s. 104, cl. (2) ; O. XLIII, r. 1 (a)—

——— *Order returning a plaint for presentation to proper Court—Appeal—Case remanded to Court of first instance—Appeal from order of remand inadmissible.* A Munsif returned for presentation to the proper Court a plaint filed before him. Then plaintiff appealed against this order to the District judge, who transferred the appeal to a Subordinate Judge, who in turn remanded the case to the Munsif for trial on the merits. *Held,* that no appeal would lie from the appellate order of remand. NAUBAT SINGH *v.* BALDEO SINGH (1911) . I. L. R. 33 All. 479

——— *Held,* that no appeal will be under s. 10 of the Letters Patent from an order of a Single Judge of the High Court dismissing an appeal from an order of an execution Court under O. XXI, r. 90 refusing to set aside a sale. PIARI LAL *v.* MADAN LAL

I. L. R. 39 All. 191

——— *Order of returning a plaint for presentation in the proper court—Appeal. Held,* that an appeal will lie from the order of an appellate court returning a plaint to be presented in the proper court. *Dalip Singh* v. *Kundan Singh, I. L. R. 36 All. 58,* followed. NAND KISHORE *v.* ABDUR RAHMAN

I. L. R. 42 All. 74

——— s. 104, O. XLIII, r. 1 ; O. XXI, r. 90 —*Letters Patent, s. 10—Appeal from an order of a single Judge dismissing an appeal from an order refusing to set aside a sale. Held,* that no appeal will lie under s. 10 of the Letters Patent from an order of a single Judge of the High Court dismissing an appeal from an order of an execution Court under O. XXI, r. 90 of the Civil Procedure Code, refusing to set aside a sale. *Naim-ullah Khan* v. *Ishan-ullah Khan, I. L. R. 14 All. 226,* followed. PIARI LAL *v.* MADAN LAL (1916)

I. L. R. 39 All. 191

——— s. 104 ; O. XLIII, r. 10 (a)—*Order of Appellate Court returning plaint for presentation to proper Court—Appeal—Suits Valuation Act (VII of 1887), s. 11. Held,* that an appeal lies, under the Code of Civil Procedure, 1908, as it did under the former Code, from an order returning a plaint to be presented to the Court. *Wahidullah* v. *Kanhaya Lal, I. L. R. 25 All. 174,* followed. Where, however, such an order is to be made by an Appellate Court, it is the duty of such Court first to consider whether the over-valuation or under-valuation of the suit has prejudicially affected its disposal on the merits and thereafter to take action in the manner prescribed by s. 11 of the Suits Valuation Act, 1887. DALIP SINGH *v.* KUNDAN SINGH (1913) . I. L. R. 36 All. 58

——— s. 104, and Sch. II, r. 11—*Arbitration —Statement of special case for opinion of Court—Appeal from order of Court—Indian Arbitration Act*

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

———— 104—*concld.*

(IX of 1899), s. 10. In a suit filed for partition of joint family property, the parties agreed to refer the matter to arbitration, and a consent order of reference was taken. A similar agreement referred to the same arbitrators questions as to the partition of such immoveable property as was outside the jurisdiction of the Court in the suit. The arbitrators disagreed on certain points, but, instead of referring their differences (as the agreement of reference authorised them to do) to an umpire, they submitted their own opinions in the form of a special case for the opinion of the Court. In doing so they purported to act under the provisions of the Civil Procedure Code (Act V of 1908), Sch. II, r. 11, and of the Indian Arbitration Act (IX of 1899), s. 10 (*b*). The matter was decided by the Chamber Judge and an appeal was preferred against the decision. *Held,* that no appeal lay. Inasmuch as the special case was in no sense an award, it did not come within the Civil Procedure Code (Act V of 1908), Sch. II, r. 11; but, in so far as it related to the agreement which was not the subject of the Court's order, it fell under the Indian Arbitration Act (IX of 1899), s. 10 (*b*) PURSHOTUMDAS RAMGOPAL *v.* RAMGOPAL HIRALAL (1910) . . . I. L. R. 35 Bom. 130

———— s. 105 (1882 Code s. 591)—

See APPEAL . . 15 C. W. N 830

See APPEAL TO PRIVY COUNCIL.
I. L. R. 38 Mad. 509

1. ———— *Arbitration —Appeal. Held,* that an order of a court setting aside the award of an arbitrator, and deciding that the case shall be tried by the Court is an order affecting the decision of the case within the meaning of s. 105 of the Code of Civil Procedure, and is therefore liable to be challenged in appeal against the decree. *Ganga Prasad* v. *Kura, I. L. R. 28 All. 408, Kalyan Das* v. *Pyare Lal, 4 All. L. J. R. 256,* dissented from *Shyama Charan Pramanik* v. *Prohlad Daruan, 8 C. W. N. 390,* referred to. *Nanak Chand* v. *Ram Narain, I. L. R. 2 All. 18, Ram Jiwan* v. *Nawal Singh, 5 All L. J. R. 644, Damodar Trimbak Dharap* v. *Raghu Nath Hari, I. L. R. 26 Bom. 551, Achuthayya* v. *Thimmayya, I. L. R. 31 Mad. 345, Mathooranath Tewaree* v. *Brindaban Tewaree, 14 W. R. 327,* followed. RAM AUTAR TEWARI *v.* DEOKI TEWARI (1915)
I. L. R. 37 All. 458

2. ———— *Order by Court returning plaint for amendment—not appealable under present Code—whether it may be challenged in appeal from the decree notwithstanding that it has been complied with.* Plaintiff sued ¼th share by partition of certain portions of premises The

plaint accordingly. He subsequently appealed

Held, that under s. 105 of the Code of Civil Pro-

———— s. 105—*contd.*

suit to be rejected and appealed from the rejection. SHAH JAHAN *v.* INAYAT SHAH
I. L. R. 1 Lah. 54

———— ss. 105, 108, 109; O. XLI, s. 23—*Remand—Appeal—Privy Council. Held,* that an order remanding a case to the lower Appellate Court passed by the High Court under O. XLI, r. 23 of the Code of Civil Procedure, 1908, is not appealable to His Majesty in Council. *Forbes* v. *Ameeroon-nissa Begum, 10 Moo. I. A. 315; Mahant*

NARAIN (1911) . . I. L. R. 33 All. 391

———— ss. 105, 115, Sch. II, Art. 15—*Arbitration in a suit—Award—Objection as to validity of order of reference—Absence of fresh written statement by defendant, who alleged minority but was found to be of full age—Award set aside—Revision.* The defendant to a suit on a contract pleaded infancy and filed a written statement through a person who professed to act as his guardian. Issues were framed, amongst them one as to the age of the defendant. This was tried first, and it was found that the defendant was not an infant. The de-

took exception, *inter alia,* to the absence of a written statement filed by the defendant after he had been found to be of full age. The court accepted this plea and on this ground alone set aside the order of reference and the award. *Held,* on application in revision by the defendant, that the application would lie. The court below had in this case no jurisdiction to reverse the order of reference, which in substance it had done, and, in setting aside the award on the sole ground of some supposed defect in the order of reference, which was irrelevant, it had acted with material irregularity. *Ghulam Khan* v. *Muhammad Hassan, I. L. R. 29 Calc. 167,* and *Lutawan* v. *Lalchya, I. L. R. 36 All. 69,* referred to. PIGGOTT, J., while agreeing that the order complained of was unsustainable, expressed a doubt as to whether the proper course for the defendant was not to wait for the final decree of the trial court and to challenge the order setting
of appeal, in
decree against
PRASAD, HAN

———— s. 105 (2); O. XLI, rr. 23 and 25—*Procedure—Appeal—Distinction between an order under r. 23 and an order under r. 25.* Where in the course of an appeal a Judge or a Bench has made an order under O. XLI, r. 25, of the Code of Civil Procedure, 1908 referring issues for trial to the lower court, it is open to the Judge

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd.

———— s. 105—concld.

before whom the appeal ultimately comes for disposal to consider whether such an order was necessary, and, if it is found that it was not necessary, the order and the subsequent findings may be ignored. But it is otherwise with an order of remand made under O. XLI, r. 23. Such an order is appealable under s. 10 of the Letters Patent and if no appeal is filed against it, it cannot subsequently be challenged. MASIH-UN-NISSA BIBI v. KANIZ SUGHRA BIBI . I. L. R. 43 All. 377

———— s. 105 (2) and O. XLIII, r. 1 (u) *Appellate Court dismissing part of plaintiff's claim and accepting appeal as to the rest and remanding case for redecision—whether plaintiff can appeal to High Court under O. XLIII—Suit for injunction against person wrongfully collecting rent from tenants—whether competent* Plaintiff sued for an injunction to restrain the defendants from realising rent from his tenants and also for a decree for Rs. 385 on account of the rent realised. The first court dismissed the whole claim as it considered that the plaintiff should have sued for possession. On appeal the Lower Appellate Court agreed with the first Court that an injunction could not legally be granted but accepted plaintiff's appeal regarding his right to sue for rent and remanded the case under O. XLI, r. 23 of the Code for a decision as to the amount due. Against this decision the plaintiff preferred an appeal to the High Court under O. XLIII, r. 1 (u). It was contended that no such appeal was competent. *Held*, that an appeal was competent, as the plaintiff, who had lost a portion of his claim in the Lower Appellate Court, was an aggrieved person within the meaning of O. XLIII, r. 1 (u) of the Code of Civil Procedure and was by s. 105 (2) of the Code precluded from questioning the decision in any way other than by an appeal against the order of remand. *Held also*, that the plaintiff was entitled to relief by way of injunction as he had no desire to dispossess the tenants who were in possession of the shops. *Kanakasabai* v. *Muthu, I. L. R. 13 Mad. 445*, distinguished. KARAM SINGH v. VIR SINGH I. L. R. 2 Lah. 252

———— s. 107—

See s. 99. . I. L. R. 33 All. 645

See REMAND . I. L. R. 41 Calc. 708

———— ss. 107, 149 ; O. VII, r. 11, cl. (c)— *Memorandum of appeal insufficiently stamped—Presenting the memorandum of appeal on the last day for filing—Court must give time for paying up deficiency.* A memorandum of appeal which required a court-fee stamp of Rs. 205 was stamped with an eight annas stamp and was filed in Court, on the last day allowed by the law of limitation. The pleader on being questioned stated that he had no funds with which to pay the requisite stamp and requested the Court to give him time for making the necessary payment. The Court refused to grant the time applied for and rejected the memorandum of appeal. The plaintiff having appealed. *Held*, reversing the order, that the lower Court was in error in rejecting the memorandum of appeal, and that it ought to have granted time within which to supply the requisite stamp. ACHUT RAMCHANDRA v. NAGAPPA BAB BALGYA (1913) . . I. L. R. 38 Bom. 41

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd.

———— s. 107—concld.

———— ss. 107 and 151—*Addition of respondent, power of appellate court to allow Probate proceedings, who may intervene in.* Both under s. 107 of the Code of Civil Procedure, 1908, and under its inherent powers, an appellate Court has power to add as parties to the suit persons who were not parties in the first Court. The mere possibility of an interest is sufficient to entitle a person to become a party to probate proceedings. A person who is entitled to prove a Will is entitled to intervene as a respondent in the appellate Court to support the Will. The head of an endowment entitled to a legacy under the Will is so entitled. SRI MATI HEMANGINI DEBI v. HARIDAS BANERJEE 3 Pat. L. J. 409

———— ss. 107, 151, O. XLI, r. 23—
See REMAND . I. L. R. 44 Calc. 929

———— s. 107, O. XXIII, r. 1—*Withdrawal of suit—Leave to plaintiff to withdraw from a suit with permission to bring a fresh suit—Court of Appeal.* A Court of appeal can, in an appeal pending before it, give leave to the plaintiff to withdraw from a suit with permission to bring a fresh suit in respect of the same subject-matter. *Eknath* v. *Ranoji (1911) 35 Bom. 261*, distinguished; *Chhanubhai Mansukh* v. *Dahyabhai Govind (1919) 44 Bom. 598*, and *Kamayya* v. *Papayya (1916) 40 Mad. 259*, followed; *Kali Prasanna Sil* v. *Panchanan Nandi (1916), 44 Calc. 367*, doubted. SHEKH HASSAN v. MAHOMED ALI (1920) . I. L. R. 45 Bom. 266

———— s. 107, O. XLI. r. 27—*Appellate Court—Power of to examine or re-examine parties to the suit.* An appellate court is competent to examine (or re-examine) any of the parties if it considers it necessary for the ends of justice to do so. JANG BAHADUR RAI v. RAJ KUMAR RAI. I. L. R. 42 All. 48

———— s. 107, O. XLI, r. 4—
See COSTS . I. L. R. 42 Calc. 451

———— s. 107 ; O. XLI, rr. 23, 25—
See REMAND
I. L. R. 43 Calc. 148, 938

———— s. 109 (1882 Code s. 595)—

See APPEAL TO PRIVY COUNCIL.
I. L. R. 38 Mad. 509

See s. 2 . . 4 Pat. L. J. 461
See s. 47 . . 3 Pat. L. J. 339

See PROVIDENT FUND ACT.
24 C. W. N. 288

1. ———— "Final order,"— "*passed in appeal,*" *order refusing application to sue in forma pauperis, if—Letters Patent, s. 39.* An order passed by the High Court in the exercise of its revisional jurisdiction under s. 115, Civil Procedure Code, or its power of superintendence under s. 15 of the Charter Act is an order made or passed on appeal within the meaning of s. 109, Civil Procedure Code, or s. 39 of the Letters Patent. The term "final order" in s. 109 denotes an order which finally decides any matter which is directly at issue in the case in respect of the rights of the parties. If the order in effect finally decides the cardinal point in the suit, if it decides an issue which goes to the foundation of the suit and therefore is an order which could never, while the decision stood, be questioned again in the suit, it is final within the

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— s. 109—*contd.*

section, notwithstanding that there may be subordinate enquiries to be made. The question has to be decided with reference to the precise relation in which the order stands to the proceeding before the Court. Whenever an application to sue in *forma pauperis* is refused, the decision is not necessarily a final order within s. 109, Civil Procedure Code. The order is "final" when leave is refused on the ground that the allegations of the petitioner in the plaint does not disclose a cause of action against the defendant. HARISH CHANDRA ACHARJA *v.* THE NAWAB BAHADUR OF MURSHIDABAD (1911) **15 C. W. N. 879**

2. ——— *Privy Council appeal to—Decree or final order, an order remanding a suit for taking accounts if.* An order setting aside the decision of the Court of first instance as to the respective shares of parties in a partnership and directing fresh accounts to be taken is such a final decision on the points in issue between the parties as to amount to decree in the suit within the meaning of s. 109, cl. (*a*), Civil Procedure Code. DWARKA NATH SARKAR *v.* HAZI MAHOMED AKBAR (1910) . . . . . *15 C. W. N. 60*

3. ——— *Appeal to His Majesty in Council—"Final order"—Order of remand which decided finally only one issue out of several. Held,* that an order of remand made by the High Court which decided finally only one issue out of several which were raised by the proceedings before the Court of first instance, which were proceedings under r. 17 of the second schedule to the Code of Civil Procedure, was not a "final order" within the meaning of s. 109, cl. (*a*) of the Code. NURI MIAH *v.* THE GANGES SUGAR WORKS, LIMITED (1915) . . . . **I. L. R. 38 All. 150**

4. ——— *Decree or final order within the meaning of the section—Leave to appeal to Privy Council.* Where the High Court in appeal remanded a case and directed that defendants who had been sued in their individual capacity should be sued as executor as well and that one of the defendants should be sued as residuary legatee and heir, and on such amendment of the suit being made the questions between the parties should be adjudicated upon. *Held, per* SANDERSON, *C.J.*, that this was not a final order within the meaning of s. 109, Civil Procedure Code. *Per* WOODROFFE, *J.* That this was neither a final decree nor order within the meaning of the section. BIRENDRO NATH ROY *v.* NRIPENDRA NATH ROY (1917) . . . . **22 C. W. N. 640**

5. ——— *"Final order,"*

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— s. 109—*contd.*

is final if it finally disposes of the rights of the parties. *Sala Man* v. *Warner, L. R. (1891) 1 Q. B. 734*, and *Bozson* v. *The Altrincham Urban District Council, L. R. [1903] 1 K. B. 547*, followed. The order in these cases was not a final order as it did not finally dispose of the rights of the parties but *left them to be determined by the Court in the* ordinary way RAMCHAND MANOMAL *v.* GOVERDHANDAS VISHINDAS RATANCHAND **24 C. W. N. 721**

6. ——— Certificate of fitness—*Practice—Grounds for granting certificate in case of connected appeals.* It is a good ground for granting a certificate of fitness for appeal to His Majesty in Council under s. 109 (*c*) of the Code of Civil Procedure that the case in which leave to appeal is

7. ——— *Appeal to His Majesty in Council—"Final order"—Order of remand—Interlocutory order.* Appeals on matters interlocutory in their nature should be allowed to be preferred

Narain, I. L. R. 33 All. 391, Nuri Miah v. The Ganges Sugar Works, Ld., Cawnpore, I. L. R. 38 All., 150, and *Danby* v. *Tafazul Husain, 45 Indian Cases, 200*, referred to. SAJJAD ALI KHAN *v.* ISHAQ KHAN . . **I. L. R. 42 All. 174**

8. ——— *Application for leave to appeal to His Majesty in Council—"Final order"—Order of remand— Substantial question of law"—Registration—Fraud regarding registration committed by the Mortgagor but not participated in by*

not belong to him and was only entered for the purpose of having the deeds registered in a particular district. It was found, however, that the mort-

the meaning of s. 109 of the Code of Civil Procedure, and no appeal lay as of right. *Sajjad Ali Khan* v. *Isha Khan, I. L. R. 42 All. 174*, referred to. But the question whether or not the fraud of the mortgagor alone would vitiate the registration

DIRGPAL SINGH *v.* PAHLADI LAL **I. L. R. 42 All. 176**

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— s. 109—*contd.*

9. ——— An order setting aside dismissal of suit for want of prosecution is appealable under this section. LACHMI NARAIN MARWARI *v.* BALMAKUND MARWARI

6 Pat. L. J. 116

9 (*a*). ——— *Scope of—"Order" in cl. (c), meaning of, as distinguished from "final order"—Jurisdiction of High Court to grant leave to appeal to King in Council against interlocutory order—Fit case for the exercise of such jurisdiction.* The term "order" in cl. (*c*) of s. 109 is intended to cover not merely a "final order" but is wide enough to include an interlocutory order. It has a different meaning to the expression "final order" in cl. (*a*). In a fit case the High Court has jurisdiction to grant leave to His Majesty in Council under cl. (*c*) of s. 109 from an interlocutory order. SHIVA PRASAD SINGH *v.* RANI PRAYAG . . . **26 C. W. N. 819**

10.——— A decision on the construction of a statute is not appealable merely because it may affect others not party to the suit.

6 Pat. L. J. 125

11. ——— Leave to appeal to Privy Council—decree or final order defined. The first Court dismissed a suit on the ground that it was barred by *res judicata* and the High Court in appeal held that it was not so barred and remanded the case for trial on the merits. *Held,* that the decision of the High Court was in respect of a cardinal issue on the suit and was a final decree for the purposes of appeal to the Privy Council. KHAGENDRA NANDAN ASRAM *v.* SAHAYRAM CHUCKERBUTTY . . . **25. C W. N. 896**

12.——— *Application for leave to appeal to His Majesty in Council from an order of remand.* Plaintiff sued for a declaration that he was the sole owner of the property in suit. Defendant objected that he being in possession of the property a suit for declaration was not maintainable. The trial Court decided that this objection must prevail and dismissed the suit. On appeal to the Chief Court it was decided that as plaintiff was in possession of part of the property and was a co-sharer with one N in the portions of the property in N's possession, the suit as framed was competent. The case was accordingly remanded to the trial Court for decision on the merits. The defendant then applied for leave to appeal to His Majesty in Council against this order of remand. *Held,* that an order of remand is not ordinarily capable of being the subject of an appeal to His Majesty in Council and as the order in the present case decided nothing which could be regarded as a cardinal point in the suit it was not a *final* order within the meaning of cl. (*a*) of s. 109 of the Code of Civil Procedure. *Radha Kishan* v. *Collector of Jaunpur (I. L. R. 23 All. 220 P. C.)*, followed. *Saiyid Muzhar* v. *Mt. Bodha Bibi (I. L. R. 17 All. 112 P. C.)*, *Drigpal Singh* v. *Pahladi Lal (I. L. R. 42, All. 176)*, and *Hyder Mehdi* v. *Mt. Badshah Khanam (49, Indian Cases 520)*, distinguished and followed in part. *Held also,* that there is no ground for granting a certificate under cl. (*c*) of the section. MEHR CHAND *v.* LABU RAM

I. L. R. 2 Lah. 106

13. ——— *An order is final* when it finally disposes of the rights of the parties. RAMCHAND MANJIMAL *v* GOVERDHANDAS VISHINDAS RATANCHAND . . **24 C. W. N. 721**

14. ——— *Held,* that the nature of the legal position of a person who has collected the debts of a deceased person by virtue of a succession certificate is a substantial question of law such as would support the granting of leave to appeal to the Privy Council. NAJIN-UN-NISSA BIBI *v.* AMINA BIBI

I. L. R. 38 All. 189

——— s. 109 and 110—

——— S. 109 contemplates cases in which it is impossible to define in money value the exact character of the dispute (*e.g.*), questions relating to religious Rites or caste. S. 110 does not cover the whole grounds of appeal to the Privy Council. RADHAKRISHNA AYYAR AND OTHERS *v.* SWAMINNATHA AYYAR (1920).

25 C. W. N. 630

——— *Leave to appeal to Privy Council—Final order—Interlocutory order—Order rejecting an application for bringing on record the legal representatives of a deceased party to a pending appeal—Amended Letters Patent, cl. 39.* The applicant, claiming to be the legal representative of a deceased party to a pending appeal, applied to have his name brought on the record. The High Court disallowed the application and ordered the names of the heirs of the deceased to be substituted. The applicant applied for leave to appeal to His Majesty in Council from the order rejecting the application. *Held,* that the order having been passed on an application in a pending appeal was not a final, but an interlocutory order; and that no appeal lay from it to His Majesty in Council under the provisions of cl. 39 of the Amended Letters Patent. GANGAPOA REVANSHIDAPPA *v.* GANGAPPA MALLESHAPPA (1914)

I. L. R. 38 Bom. 421

——— *Consent decree, whether appeal lies from.* An appeal does not lie to His Majesty in Council from a consent decree even where such decree reverses the decree of the first court and where the value of the subject-matter of the appeal is above Rs. 10,000. LACHMI NARAYAN MARWARI *v.* BALMAKUND MARWARI.

5 Pat. L. J. 383

——— ss. 109 and 110; O. XLI, r. 10—*Dismissal of appeal for default in furnishing security for costs—Application for leave to appeal to His Majesty in Council—"Substantial question of law."* *Held,* that an order dismissing an appeal for default in furnishing security for costs under Order XLI, r. 10, of the Code of Civil Procedure, 1908, is not a fit subject for the grant of a certificate under s. 109 (*c*) of the Code. MUHAMMAD ABDUL GHAFUR KHAN *v.* THE SECRETARY OF STATE FOR INDIA (1914) . . **I. L. R. 36 All. 325**

——— ss. 109, 110, O. XLV, r. 3—

See APPEAL TO PRIVY COUNCIL.

I. L. R. 40 Calc. 685

See PROCEDURE.

I. L. R. 44 Mad. 293

——— ss. 109, 110, 111 and 112—AND OS. XXXIII AND XLIV, R. 1—*Appeal to His Majesty in Council—application for leave to appeal* in forma

CIVIL PROCEDURE CODE (ACT V OF 1908) *—contd.*

——— **s. 109**—*concld*

pauperis, *jurisdiction of High Court to grant.* The High Court has no jurisdiction to grant a party leave to appeal *in forma pauperis* to His Majesty in Council. O. XLIV, r. 1, of the Code of Civil Procedure, 1908, does not apply to appeals to His Majesty in Council. That rule contemplates an appellate Court perusing the judgment of a Subordinate Court, and not the Court whose judgment is appealed from perusing its own judgment. RAMKISHEN LALL *v.* MANNA KURMI

3 Pat. L. J. 179

——— **s. 110 (1882 Code 596)**—

See APPEAL TO PRIVY COUNCIL **I. L. R. 44 Calc. 119**

See LEAVE TO APPEAL TO PRIVY COUNCIL. **I. L. R. 42 Calc. 35**

See RECORD OF RIGHTS **5 Pat. L. J. 383**

1. ——— *Appeal to His Majesty in Council—Requirements to be fulfilled before grant of a certificate—Decree involving some question respecting property of the value of ten thousand rupees or upwards;* The value of the subject matter of the suit in the Court of first instance was over Rs 10,000, but the value of the subject matter in dispute on appeal to His Majesty in Council was less than Rs 10,000. On the other hand, the proposed appeal to His Majesty in Council necessarily involved a decision as to the validity of an award which dealt with property of far greater value and which had been declared by the High Court to be invalid *Held,* that the provisions of s. 110

Rs. 10,000. *Macfarlane* v. *Leclaire, 15 Moo. P. C. 181, Musammat Aliman* v. *Musammat Hasiba, 1 C. W. N. 93 (Notes) xciii,* and *Anand Chandra Bose* v. *Broughton, 9 B. L. R. 423,* referred to. SRI KISHAN LAL *v.* KASHMIRO (1913)

I. L. R. 35 All. 445

2. ——— **"Substantial question of law"** *—Position of holder of certificate under the Succes-*

1889, is a substantial question of law such as would support the granting of special leave to appeal to His Majesty in Council. NAJM-UN-NISSA BIBI *v.* AMINA BIBI (1916)

I. L. R. 38 All. 188

3 ——— *Appeal to Privy Council—Valuation of appeal—Appealable amount subject-matter of appeal—Suit to enforce mortgage—Person made defendant as having adverse claim on the mortgaged property—Appeal on rejection of her claim by High Court.* In a suit to enforce a mortgage for Rs 2,000, the amount due upon which was Rs. 38,000, the mortgagee (respondent) asked for payment or for a sale of the mortgaged property. Besides the parties who claimed under the mortgagor, the appellant, who set up an adverse claim to a portion of the mortgaged property, and

CIVIL PROCEDURE CODE (ACT V OF 1908) *—contd.*

——— **s. 110**—*contd.*

the person through whom she claimed were made defendants and they alone defended the suit. The Subordinate Judge allowed a moiety of her claim, but on appeal the High Court held that she had no title to any of the property. The High Court granted her leave to appeal to His Majesty in Council under s. 110 of the Civil Procedure Code,

not maintainable as the subject-matter of it was below the appealable value), that as between the respondent seeking to enforce his mortgage and the appellant it was quite immaterial what the amount of the mortgage was, and that the subject-matter in dispute was not Rs 38,000 but simply the value of the property the appellant claimed, which was not shown to be of the amount prescribed by s. 110 of the Civil Procedure Code, 1908. RADHA KUNWAR *v.* REOTI SINGH (1916)

I. L. R. 38 All. 488

4. ——— *Privy Council—Leave to appeal—Suit for declaration and injunction tried by the Second Class Subordinate Judge—Value of the subject-matter can be shown by evidence for the purposes of the leave* A suit for declaration and injunction, in which the claim was valued at Rs. 135, was tried by a Subordinate Judge of the Second Class. The decree was confirmed by the District Judge, but reversed by the High Court on second appeal. The plaintiff having applied for leave to appeal to the Privy Council, the defendant contended that as the plaintiff himself had elected to value his suit at only Rs. 135 and conducted it in the Court of the Subordinate Judge, the limit of whose pecuniary jurisdiction was Rs. 5,000, he could not contend that the subject-matter of the suit was worth Rs. 10,000 *Held,* overruling the contention, that the suit being one for declaration and injunction, the plaintiff by suing in the Second Class Subordinate Judge's Court seemed to have made neither directly nor indirectly any sort of representation to the defendant as to the real or market value of the property to be affected, as distinguished from the fiscal value which, as the law allowed him to do, he placed upon the relief which he was seeking. *Hirjibhai* v. *Jamshedji, 15 Bom. L. R. 1020,* distinguished. MOHANLAL NAGJI *v.* BAI KASHI (1916) **I. L. R. 40 Bom. 477**

5. ——— *Right of appeal to His Majesty in Council—Amount or value of the subject-matter of the suit, less than ten thousand rupees—Valuation for appeal, mode of—Mesne profits from date of suit, to date of petition for certificate to appeal, if can be added—Value with Mesne profits, more than ten thousand rupees—"Involve directly" in s 110, Civil Procedure Code, Meaning of—Privy Council Appeals Act (VI of 1874)* Where the amount or value of the subject matter of the suit in the Court of first instance was less than ten thousand rupees, but the amount or value of the subject-matter in dispute in the appeal to His Majesty in Council exceeded that sum owing to the addition of the claim for mesne profits for the period between the institution of the suit and the filing of the petition for a certificate [illegible] *Held*, that the case did not [illegible]

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— s. 110—*contd.*

of either the first or the second paragraph of s. 110 of the Civil Procedure, and that leave to appeal to His Majesty in Council could not be granted. *Per* WALLIS, *C.J.* The words "involve directly," contained in the second paragraph of s. 110 of the Code, cannot be read as including cases which involve nothing but the actual subject matter in dispute in the appeal. *Moti Chand* v. *Ganga Prasad Singh, I. L. R. 24 All. 174; 29 I. A. 40* followed. *Dalgleish* v. *Damodar Narain Chowdhry, I. L. R. 33, Calc. 1286*, and *Basanta Kumar Roy* v. *Secretary of State for India, 6 Ind. C. 792*, dissented from. *Mohideen Hadjiar* v. *Pitchey, [1893] A. C. 193*, explained. *Per* SRINIVASA AYYANGAR *J.* If the operation of the decision is confined only to the particular object matter. cl. (*2*) of s. 110 does not apply, and unless the case satisfies the conditions in cl. (*1*), there is no right of appeal. If the decision, beyond awarding relief in respect of the particular object matter of the suit, affects rights in other properties, cl. (*2*) would apply: also if the matter in dispute is one which is incapable of valuation, as in the case of easements, cl. (*2*) may apply. SUBRAMANIA AYYAR *v.* SELLAMMAL (1915)

I. L. R. 39 Mad. 843

6. ——— *Leave to appeal to Privy Council—Suit by reversioner to recover several items of land—Joinder of several alienees from widow and others claiming on independent title as defendants —Separate appeals by defendants to High Court—Single decree by High Court—Petition in each appeal for leave to appeal to Privy Council—Value of subject-matter of some appeals, less than ten thousand rupees—Leave to appeal, whether can be granted in such appeals—R. 105 of the Civil Rules of Practice, 1905, effect of.* Where the plaintiff sued, as the nearest reversioners under the Hindu Law on the death of the widow of the last male holder, to recover his estate and joined various defendants, who were in possession of separate items either as alienees from the widow or as owners claiming by independent title and, on a decree being passed in the Original Court in favour of the plaintiffs, the defendants preferred separate appeals to the High Court which were disposed of by one decree drawn up under r. 105 of the Civil Rules of Practice, and where several petitions were filed in the several appeals for leave to appeal to His Majesty in Council and the respondents to some of the petitions objected that leave could not be granted in their appeals as the value of their subject-matter was less than ten thousand rupees. *Held,* that the claims against the several alienees were based on really different causes of action against the several defendants, though they were allowed, according to a well-established practice, to be joined in the same suit; that the fact, that only one appellate decree was drawn up in all the appeals under r. 105 of the Civil Rules of Practice, could not affect the requirements of s. 110 of the Civil Procedure Code as to granting leave in each of the appeals; and that, consequently, in such of the appeals in which the value of the subject-matter was below ten thousand rupees, the High Court could not grant leave to appeal to His Majesty in Council. NAITHILINGA MUDALIAR *v.* SOMASUNDARAM CHETTIAR (1918) . . . I. L. R. 42 Mad. 228

7. ——— *Appeal to His Majesty in Council—value of subject-matter.* Where the plaintiff claimed a sum of Rs. 5,445 due to him by way of pension from October, 1911, to July 1912, and interest on unpaid arrears, and any other relief to which he might be entitled, and he was awarded the sum claimed with interest at 6 *per centum per annum* until realization, and it was ordered that the decree should be executed against a certain estate, the existence of which the defendant denied, *held,* in an application by the defendant for leave to appeal to His Majesty in Council; that as the plaintiff had not claimed a declaration that he was entitled to future pension or to a charge on the estate, the case did not fall within the first paragraph of s. 110 of the Code of Civil Procedure, 1908, and as it had not been found, whether the defendant had in his hands any property of the value of Rs. 10,000 of which attachment could be made in execution of the decree, the case did not fall within the second paragraph of that section. *Per* MULLICK, *J.*—The question as to what properties can be attached in execution of a decree cannot be said to have even an indirect connection with the decree itself. MAHARAJA KESHO PRASAD SINGH *v.* SHIVA SARAN LAL

3 Pat. L. J. 317

8. ——— *Appeal to His Majesty in Council—valuation—Mesne profits.* In calculating the value of a decree for the purposes of s. 110 of the Code of Civil Procedure, 1908, it is not the gross income of the property in dispute but the net income after deducting Government revenue and other outgoings, which should be taken into consideration. The Patna High Court, following the practice of the Calcutta High Court, will permit an applicant for leave to appeal to His Majesty in Council to add to the actual value of the property in suit the amount of mesne profits accrued up to the date of the Appellate Court's decree. MAHABIR PRASAD SINGH *v.* ANUP NARAIN SINGH. . . . . 3 Pat. L. J. 377

8 (*a*). ——— *Petitioner if has to show that any substantial question of law is involved, where though the High Court's decree purported to dismiss the appeal, it yet substantially overruled the decision of the lower Court.* In a certain suit the lower Court held amongst other things that in view of the frame of the suit it was not open to it to direct a conveyance to the plaintiffs of the mortgaged properties. On appeal, the High Court dismissed the plaintiffs' appeal with costs and affirmed the decree of the lower Court with one variation, namely—"that the decree as also the mortgaged properties will be included in the conveyance to the plaintiffs." *Held*—That though the decree of the High Court purported to dismiss the appeal with costs, it was impossible to hold that it affirmed the decision of the Court below. Therefore it was not necessary for the petitioner to show that any substantial question of law was involved in the appeal to His Majesty. NAGENDRABALA DASI *v.* DINANATH MAHISH

26 C. W. N. 652

9. ——— *"Value of subject-matter in dispute"—Appeal to His Majesty in Council.* Where in a suit on a mortgage the value of the property sold in execution was over Rs. 10,000 and a puisne mortgagee who was interested in a share of the property—the value of the said share being Rs. 4,000—applied for leave to appeal

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

———— s. 110—*contd.*

to His Majesty in Council from an order refusing to set aside the sale. *Held*, that the value of the subject-matter in dispute was Rs. 4,000 and not the value of the whole property sold, and hence the appeal fell short of the requirements of s. 110 of the Code of Civil Procedure, 1908. In order to determine the value of the subject-matter of an appeal under s. 110 of the Code of Civil Procedure, 1908, the decree has to be looked at as it affects the interests of the party prejudiced by it, and if the detriment of the party seeking relief is less than Rs. 10,000 then the value of the matter in dispute in appeal is not of the prescribed value and the decree itself does not involve any claim of question to, or respecting property of, that value and the case does not fulfil the requirements of the Code. GOSAIN BHAUNATH GIR *v.* BIHARI LAL

14 Pat. L. J. 415

9 (*a*). ———————— In computing the value of the subject matter in dispute in a suit for the purpose of s 110 the appellant is not entitled to take into consideration the amount of interest accruing subsequent to the decree of the trial Court. RAMYAD SINGH *v.* RAMBILAS SINGH

6 Pat. L. J. 596

10. ———————— *Privy Council—Leave to appeal—Valuation of claim—Value as at the date of the decree under appeal.* In a suit for partition of joint family property, the amount or value of the subject matter, for the purposes of s. 101 of the Civil Procedure Code of 1908, is the value of the share which the appellant claims and not the value of the entire family property. Such value ought to be ascertained as at the date of the High Court decree under appeal. RAOJI BHIKAJI *v.* LAXMIBAI (1919). **I. L. R. 44 Bom. 104**

11. ———————— A plaintiff claimed a sum which with interest exceeded Rs. 10,000. In the Court of first instance the decree was for less—defendants appealed and Plaintiff's suit was dismissed. Plaintiff applied for leave to appeal to His Majesty in Council. *Held*, that the plaintiff could not bring his appeal above the statutory limit by adding to the amount decreed interest at the amount allowed by the Court. RAM KUMAR *v.* MUHAMMAD YAKUB **I. L. R. 42 All. 445**

12. ———————— *Appeal to His Majesty in Council—Decree which modifies the decree of the lower court not a decree affirming the decision of that court.* *Held* on a construction of [illegible]

[illegible] *nath Roy Bahadur v. The Secretary of State for* [illegible] dissented from. [illegible] *Indian Cases,* [illegible] *Thakur Lali* [illegible]d. BHAGWAN [illegible]

I. L. R. 43 All. [illegible]

13. ———————— It is of the utmost importance that certificates of leave [illegible] appeal to the Privy Council when made [illegible] exercise of a discretion should make [illegible] the discretion has been exercised [illegible] BAHADUR SINGH *v.* BALCHAND [illegible]

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

———— s. 110—*contd.*

14. ———————— *Held* that where [illegible]

deemed to have made it with the consent of his clients the decree being one of affirmance except in so far as it was varied by appellants' consent the latter had to show there was some substantial question of law involved before they could get leave to appeal to the Privy Council. UMA CHURN SETT *v.* KANAI LAL SETT

25 C. W. N. 775

———— ss. 110, 115—

15. ———————— *Leave to appeal to His Majesty in Council—suit for a declaration valued by plaintiff at Rs. 11,000—decree not involving a question to property to which special value can be attached.* The plaintiff *G R* sued for a declaration that he was a Rajput by caste He valued his suit for purposes of jurisdiction at Rs. 11,000 His suit was decreed by the Subordinate Judge, but dismissed by the High Court. Plaintiff then claimed an appeal as of right to His Majesty in Council on the ground that the decree involved a question respecting property over Rs 10,000 in value. *Held* that such a suit was not one to which any special money value could be attached, and it could not be said that the value of the subject matter of the suit amounted to Rs. 10,000 or upwards or that the decree involved directly or indirectly any claim or question to or respecting property of like amount or value. *Moula Newas* v. *Sajidunnissa Bibi I. L. R. 18 Calc. 378,* followed. *Karam Singh* v. *Khem Singh (60 P. R. 1905),* and *Pichayee* v. *Sivegami (I. L. R. 15 Mad. 237, F. B.),* referred to. *Charan Das* v. *Amir Khan 25 Calc. W. N. 289, P. C.*), distinguished. GHULAM RASUL KHAN *v.* THE SECRETARY OF STATE

I. L. R. 2 Lah. 297

See LETTERS PATENT APPEAL.

I. L. R. 48 Calc. 00

———— ss. 110 and 149—*Leave to appeal to His Majesty in Council from decree of High Court rejecting an appeal by reason of it not bearing the full Court-fee and refusing to allow appellant to make up the deficiency—Substantial* [illegible] There were three appeals before the [illegible] and at the hearing it was objected [illegible] ants that the stamps on these appeals [illegible] Rs. 45-12-0 and Rs. [illegible] Rs. 1,015, Rs. [illegible] and Rs. [illegible] that the appeals should [illegible] In the first [illegible] stamped [illegible] were [illegible]

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

———— s. 110—*contd.*

Court agreeing with this contention declined to exercise its discretion under s. 149 and dismissed the appeals. The appellant then presented the petition for leave to appeal against the judgment and decree of the High Court aforesaid to His Majesty in Council. *Held*, that the judgment of the High Court dismissing the appeals must be considered as one affirming the decision of the Court below. *Krishnasami* v. *Ramasami (23 Mad. L. J. 219*, and *Ram Karan* v. *Madhukar Prasad, 29 Indian Cases 469*, followed. *Held also*, that the petition did not involve any substantial question of law. *Krishnasami* v. *Ramasami, 23 Mad. L. J. 219, Muhammad Abdul Ghafur Khan* v. *Secretary of State, I. L. R. 36 All. 325*, and *Bhagat Singh* v. *Jai Ram, 22 P. R. 1915*, followed. MUSSAMMAT SATTO *v.* AMAR SINGH

I. L. R. 1 Lah. 220

———— **s. 110 ; O. XLI, r. 5**—"*Substantial question of law*"—*Stay of execution*—*Appellate Court*—*Jurisdiction*. *Held* (1) that an appellate court cannot order a stay of sale unless it has seisin of the case in which the sale was ordered to take place, and (2) that the question whether or not an appellate court could order a stay of sale without having seisin of the case in which the sale was ordered to take place, was not "*a substantial* question of law" within the meaning of s 110 of the Code of Civil Procedure. *Purshottam Saran* v. *Hargu Lal, I. L. R. 43 All. 128*, followed. PURSHOTTAM SARAN *v.* HARGU LAL

I. L. R. 43 All. 513

———— **s. 110 ; O. XLV, r. 4**—*Appeal to His Majesty in Council*—*Valuation*—*Two suits between same parties*—*Consolidation*—*Separate judgment in original court, but appeals decided together by High Court on the evidence in both suits*—*Certificate granted*. Two suits between the same parties in which the same question was raised were decided by separate judgments in the original court. There were two appeals in the High Court, which were heard together and by consent of both parties the evidence in the two suits was considered as a whole. In the result the decree of the lower court was set aside. Leave to appeal to the Privy Council was granted in one of the suits. As to the other suit it was held that although the valuation of that suit and of the appeal to the Privy Council therefrom was below Rs. 10,000 and there was no question of law involved, *it was a proper case to which* the procedure sanctioned by O. XLV, r. 4, should be applied and leave granted. BHAGWAN SINGH *v.* BHAWANI DAS, BHAGWAN DAS

I. L. R. 43 All. 223

———— **s. 110 and O. XLV, rr. 4, 7 and 8**—*Appeal to His Majesty in Council*—*Consolidation of appeals*—*failure of one appellant to furnish security, effect of*. The applicant referred to in R. 7 of O. XLV of the Code of Civil Procedure, 1908, is the appellant. Where there are two or more persons whose appeals must be consolidated before the conditions necessary for granting the application for leave to appeal are fulfilled, the security, required by R. 7 is the whole security and not a portion only of that which the appellants together have to furnish. Where two appeals to His Majesty in Council were allowed to be consolidated under R. 4 of O. XLV and *a certificate* was granted that the consolidated appeal complied with the provision of s. 110, and subsequently the appeal of one of the appellants was stayed for failure to furnish security. *Held, that since the remaining appeal* did not fulfil the requirements of s. 110, the appeal could not proceed. MUSSAMAT BIBI NABI ZOHRA *v.* BAIJNATH GOENKA BAHADUR **4 Pat. L. J. 198**

———— **s. 110 ; O. XLV, r. 5**—*Leave to appeal to the Privy Council*—*Certificate*—*Second appeal*—*Substantial point of law*—*Dispute as to the value of property involved*—*Finding of the trial Judge acquiesced in*—*Finding cannot be re-opened for the purposes of a certificate*. In an application for leave to appeal to the Judicial Committee of the Privy Council in a second appeal, the applicant contended that the appeal involved a substantial point of law and asked for a remand to the lower Court for enquiry as to the amount or value of the subject-matter under O. XLV, r. 5 of the Civil Procedure Code, 1908, on the ground that a dispute between the parties had arisen on the point. The trial Judge had, on enquiry, found that the value of the property was Rs. 4,000 and this finding was acquiesced in by the applicant till the disposal of the second appeal. *Held*, that the applicant was concluded by the result of the enquiry already made and he could not be allowed to re-open a finding as to the value of the property in order to provide him with the means of taking the litigation to the Privy Council. ANANT NARAYAN *v.* RAMCHANDRA GANGADHAR (1918)

I. L. R. 42 Bom. 609

———— **s. 111 (1882 Code, s. 597)**—

See UNDER SS. 109—112.

3 Pat. L. J. 179

———— **ss. 112 (1883 Code, s. 616)**—

See HIGH COURT, JURISDICTION OF.

I. L. R. 40 Calc. 955

———— **s. 113 ; (1882 Code, s. 617)**—

See REFERENCE .

See SPECIFIC PERFORMANCE.

I. L. R. 43 Calc. 59

———— **s. 114 (1882 Code, s. 623)**—

See DECREE . **I. L. R. 40 All. 579**

See REVIEW .

———— *Review*—*New evidence, what is*—*Review granted on inadmissible judgments*—*O. XLI, r. 27*—*Additional evidence in the Appellate Court*—*No discretion where no jurisdiction*. The plaintiff was a co-sharer landlord of a mauza contiguous to which a *chur* was thrown up. The principal defendants claimed that the *chur* was a reformation *in situ* of their estate and the other defendants were the tenants of the *chur*. One *S* also claimed a portion of the *chur*. The plaintiff brought a suit for rent against the tenant defendants. The principal defendants also sued them for rent and the tenants deposited the amount claimed under s. 149, Bengal Tenancy Act. The plaintiff then brought a suit against the principal defendants under cl. (3) of the section. The plaintiff's suit for rent was decreed by the Court of first instance. Judgment was next delivered in the suit brought by the principal defendants as also in the suit under s. 149. The decree in the *plaintiff's suit for rent* was then affirmed in appeal by the District Judge. After this, judgment was

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

—— s. 114—*contd.*

delivered in a suit for rent brought by *S* as also

lords a party. The District Judge subsequently reviewed his judgment in appeal in plaintiff's suit for rent, relying on the judgments in the suits of the principal defendants and *S* and in the s. 149 case *Held*, that none of the judgments was admissible for the purpose of the review and the order made thereon must be vacated. The District Judge had no jurisdiction to review his original judgment in the light of a judgment turning on facts, subsequently delivered in another Court, in a suit which was not *inter partes.* That the judgment in the suit of *S* which was not in existence at the time when the case was tried in the Primary and Appellate Courts was not "new evidence" in the sense in which the expression is generally used, nor was the judgment in the suit of the principal defendants which came into existence at the original hearing of the appeal but was not tendered on that occasion. That they merely added a debateable item to the evidence on the record and the District Judge had no power to admit them as additional evidence under O XLI, r. 27, of the Code. That the objection that the lower Appellate Court admitted in review evidence which he had no authority so to admit may be taken on an appeal from the decree as made on review. SARAT KUMAR ROY *v.* SRIPATI CHATTERJI (1918) . **23 C. W. N. 242**

—— **ss. 114, 115, 121 ; O. XLVII (1)—**

See ARBITRATION **I. L. R. 43 Calc. 290**

—— **ss. 114, 151—**

See PROBATE AND ADMINISTRATION ACT (V OF 1881), s. 50.
I. L. R. 37 All. 380

—— **s. 114 ; O. XLVII, r. 1—**

See REVIEW . **I. L. R. 44 Calc. 1011**

—— **s. 114, O'O. XLIII, r. 1 (v) XLVII—**

See REVIEW . **I. L. R. 39 Calc. 1037**

—— **s. 115 (1882 Code, s. 622)—**

See APPEAL . **I. L. R. 41 Calc. 323**

See APPEAL, RIGHT OF
I. L. R. 44 Calc. 804

See ARBITRATION . **4 P. L. J. 265**
I. L. R. 43 Calc. 290

See ARBITRATION BY COURT.
I. L. R. 38 Calc. 421

See AWARD . **I. L. R. 38 Mad. 256**
4 Pat. L. J. 20, 642

See CHOTA NAGPUR TENANCY ACT.
3 Pat. L. J. 143

See CIVIL PROCEDURE CODE.
S. 3 . . **I. L. R. 37 Bom. 114**
S. 10 . . **I. L. R. 42 All. 409**
S. 47 . . . . . **I. L. R. 42 Mad. 776**

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

—— **s. 115—*contd.***

See CIVIL PROCEDURE CODE
S. 148 . . **4 Pat. L. J. 428**
O. XXI, R. 89 . **4 Pat. L. J. 340**
I. L. R. 38 Mad. 775
O. XXIII . **I. L. R. 41 Mad. 701**
O. XXXIV, RR. 3, 8
I. L. R. 33 Mad. 882
O. XLI, R. 27 . **5 Pat. L. J. 263**

See CRIMINAL JURISDICTION.
14 C. W. N. 806
I. L. R. 37 Calc. 714

See CRIMINAL PROCEDURE CODE, s. 476.
I. L. R. 34 All. 393
I. L. R. 38 All. 695
I. L. R. 39 All. 367

See DISMISSAL FOR DEFAULT.
4 Pat. L. J. 277

See EXECUTION OF DECREE.
I. L. R. 46 Calc. 962

See HIGH COURT, JURISDICTION OF.
I. L. R. 39 Calc. 473
I. L. R. 40 Calc. 477

See HIGH COURT, JURISDICTION OF.
I. L. R. 37 Calc. 714

See JURISDICTION.
I. L. R. 34 Bom. 267

See LAND ACQUISITION ACT (I OF 1894), SS. 3 AND 18. **I. L. R. 42 Mad. 231**

See LETTERS PATENT APPEAL.

See MADRAS ESTATES LAND ACT.
I. L. R. 42 Mad. 310

See MAMLATDARS' COURTS ACT, SS. 19, 23
. **I. L. R. 35 Bom. 487**

See PRACTICE . **I. L. R. 41 Calc. 632**

See PRESIDENCY SMALL CAUSE COURT.
I. L. R. 38 Calc. 425

See PROVINCIAL SMALL CAUSE ACT.
1 Pat. L. J. 465

See PUBLIC CHARITIES.
14 C. W. N. 932

See RELIGIOUS ENDOWMENTS ACT (XX OF 1863), s. 10.
I. L. R. 40 Mad. 793

See REVISION .

See SALE . **I. L. R. 48 Calc. 119**

See SANCTION FOR PROSECUTION.
I. L. R. 37 Calc. 13
I. L. R. 39 Calc. 774
I. L. R. 43 Calc. 597
I. L. R. 44 Calc. 816

See SONTHAL PARGANAS.
I. L. R. 41 Calc. 876

1. —— **Order granting leave to sue in forma pauperis**——*Revision. Held*, that no application in revision will lie to the High Court from an order granting an application for leave to sue *in forma pauperis. Harsaran Singh* v. *Muhammad Raza, I. L. R. 4 All. 91*, and *Bulneshri Dat* v. *Bidiadis, All. Weekly Notes (1882), 69*, followed. *Faiz Musammat Muhammad Khan* v. *Aziz-un-nissa*,

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

————s. 115—*contd.*

All. Weekly Notes (1893) 218 ; Musammat Changia v. *Joti Prasad, Civil Revision No. 24 of 1910, dated May 24th, 1910, Ghulam Shabbir* v. *Dwarka Prasad, I. L. R. 18 All. 163*, and *Debi Das* v. *Ejaz Husain, I. L. R. 28 All. 72*, referred to. MUHAMMAD AYAB *v.* MUHAMMAD MAHMUD

I. L. R. 32 All. 623

2. ———— **Wrong decision of the lower Appellate Court that the first Court had or had not jurisdiction**—*to entertain a suit—Revision —Power of High Court to interfere in. Held*, by the FULL BENCH (SADASIVA AYYAR, *J.* dessenting), that the High Court has jurisdiction to interfere under s. 115, Civil Procedure Code (Act V of 1908) where an Appellate Court erroneously decides in the exercise of its admitted jurisdiction as an Appellate Court, that the Court of first instance had or had not jurisdiction to entertain a suit. Case-law on the subject reviewed. *Per* WALLIS, *C. J.* The power of the High Court to interfere in such matters is under the third part of s. 115. *Per* SUNDARA AYYAR, *J.* The power of the High Court to interfere in such matters is under the first part of s. 115. The function of an Appellate Court is to do that which the first Court ought to have done. *Per* SADASIVA AYYAR, *J.* Under none of the three parts of s. 115 has the High Court power to interfere in such matters. Cls. (*a*) and (*b*) of s. 115 apply only to jurisdiction of the Court whose decree or order is sought to be revised, to pass such order or decree and not to its decision on the jurisdiction of some other Court. The words "acted illegally" in s. 115, Civil Procedure Code, mean "giving a wilfully perverse, but not a mere erroneous, decision on a question of law." ATCHAYYA *v.* SRI SEETHARMACHANDRA RAO (1912) . . . . I. L. R. 39 Mad. 195

3. ———— **Case in which no appeal lies**—*High Court—Extraordinary civil jurisdiction—Temporary injunction restraining a Hindu widow from adopting—Application against the order—'Case' meaning of—Jurisdiction under s. 5 of Bombay Regulation II of 1827—High Courts Act (24 & 25 Vic., Ch. 104), s. 9—General Repealing Act (XII of 1873).* In the course of a pending suit, the first Court granted a temporary injunction restraining defendant No. 1 from making an adoption; but afterwards dissolved it, on appeal, the District Judge granted the temporary injunction. The defendant No. 1 having applied to the High Court against the order, a preliminary objection was taken that the application was not competent under s. 115 of the Civil Procedure Code. *Held*, overruling the objection, that the application was competent under s. 115 of the Civil Procedure Code Act (V of 1908), as the order was a "case decided in which no appeal lies" within the meaning of the section. *Held*, further, that the order was open to consideration under the wider provisions of s. 5 of Regulation II of 1827, continued in force by virtue of s. 9 of the High Courts Act, 1861, and saved from repeal by the operative sections of the General Repealing Act (XII of 1873). *Per* BATCHELOR, *J.* "The word 'case' which occurs in s. 115 of the Civil Procedure Code (Act V of 1908), is a word of wide or comprehensive import and clearly covers a far larger area than would be covered by such a word as 'suit' or 'appeal.'" "Inasmuch as s. 115 is merely an empowering section granting certain jurisdiction to the High Court, and as the use of exercise of that jurisdiction will, within the prescribed limits, be regulated by the discretion of the High Court, the section ought to receive rather a liberal than a narrow interpretation." BAI ATRANI *v.* DEEPSING BARIA THAKOR (1915)

I. L. R. 40 Bom. 86

4. ———— **Bombay District Municipalities Act**—*(Bom. Act III of 1901), s. 160.* No application can be made under the revisional jurisdiction of the High Court from the decision of a District Court under cl. (3) of s. 160 of the Bombay District Municipalities Act (Bombay Act III of 1901). MUNICIPALITY OF BELGAUM *v.* RUDRAPPA (1916)

I. L. R. 40 Bom. 509

5. ———— **Agra Tenancy Act**—*(II of 1901) —Suit relating to an agricultural holding—Order adjourning suit indefinitely—Revision—Powers of High Court—Statutes 5 and 6 Geo. V, Cap. LXI, s. 107.* Plaintiff brought a suit in a Civil Court alleging that the defendant's father had been a lessee of certain property for 7 years, that after the expiry of the lease he became manager of the property and, after his death, the defendant also became manager. He pleaded that the defendant had been dismissed from his position as manager and asked for possession of the property which comprised shares in 26 villages, a market and some collection houses. The defendant pleaded that he was a "thekadar" within the meaning of the Tenancy Act, and filed an application praying the Court to exercise its jurisdiction under s. 202 of that Act. The Court acceded to this prayer and adjourned the suit to an indefinite period till the question was decided by the Revenue Court. The plaintiff applied in revision against the order. *Held* (*Per* PIGGOT, *J.*), that the revision was incompetent as it was directed against an interlocutory order and a remedy by way of appeal was open to the plaintiff wherein all matters could be decided; (*Per* WALSH, *J.*) that a revision lay to the High Court. DHANDEI KUNWAR *v.* CHOTU LAL (1916) . . . I. L. R. 39 All. 254

6. ———— **Small Cause Court**—*Suit tried as a regular suit—Jurisdiction—Appeal—Revision.* Where a Small Cause suit is tried by a Munsif on the original side, and his decision is reversed on appeal, the High Court is bound to set aside the appellate decree as being passed without jurisdiction. *Kollipara Seetapathy* v. *Kankipati Subbayya, I. L. R. 33 Mad. 323*, followed. ABDUL MAJID *v.* BEDYADHAR SARAN DAS (1916)

I. L. R. 39 All. 101

7. ———— **Suit intentionally undervalued**—*Powers of Court as regards amendment of valuation—Court-fee.* When a Court is of opinion that a suit has been insufficiently valued, and that the plaintiff has done so intentionally, it may require the plaintiff to make a fresh valuation and pay the proper Court-fee, but it has no power to amend the valuation itself. ASHIQ ALI *v.* IMTIAZ BEGAM (1917) . . . I. L. R. 39 All. 723

8. ———— **Bombay Act XII of 1850**—*Nazir's embezzlement—District Judge ordering recovery by attachment under Bom. Act of 1850, s. 4—Jurisdiction of the High Court to revise the order.* Under s. 115 of the Civil Procedure Code, 1908,

CIVIL PROCEDURE CODE (ACT V OF 1908) *—contd.*

——— s. 115—*contd.*

the High Court has no jurisdiction to revise an order made by a District Judge acting under s. 4 of the Bom. Act XII of 1850 as it is an order made by him as a person at the head of an office and not an order made by a Court in any way subordinate to the High Court. COOPER, *In re* (1917) I. L. R. 42 Bom. 119

which bears on such question. *Balakrishna Udayar v. Vasudeva Ayyar, I. L. R. 40 Mad. 793,* explained. BIHARI LAL *v.* BALDEO NARAIN (1918) I. L. R. 40 All. 674

within the meaning of s. 115 of the Code of Civil Procedure, 1908, the decision of a "case" from ... is therefore open to the

JAGANNATH, BHAGWAN DAS (1919) I. L. R. 41 All. 602

11. ——— Onus Misplaced—Trial of wrong issue—*Onus wrongly placed—Decision*

tried, (ii) that the onus was misplaced, (iii) that there was no evidence to support the decision. *Held,* that the trial of the issue in the form it was ... amounted to an error in law and not to an

to interfere under s. 115. *Held,* also, that inasmuch as there was some evidence on which the Court acted, there could not be any interference under the section. HARAN CHANDRA CHATTERJI *v.* CORPORATION OF ROYAL EXCHANGE ASSURANCE (1919) . . . . . 23 C. W. N. 759

12. ——— Criminal Procedure Code, s. 195 (6)—*Sanction to prosecute—Sanction granted by Munsif—Revisional powers of District Judge.* One of the parties to a civil suit applied for sanction to prosecute the plaintiff on the ground that ... Munsif dis... ands. The ... under s. 195 ... The Judge ... al of the ... revision

CIVIL PROCEDURE CODE (ACT V OF 1908) *—contd.*

——— s. 115—*contd.*

exercisable by the District Judge were confined to those conferred by s. 195, Criminal Procedure Code, and he had no jurisdiction to make the order of remand. BENI PRASAD *v.* SARJU PRASAD THAKURIA (1911) . . I. L. R. 33 All. 512

...—*High* ... *Vict.* ... *remedy exists.* ... l Procedure Code or s. 15 of the Charter Act gives power to the High Court to interfere with interlocutory orders. *Held,* that there is one common principle which governs its interference under both sections, *viz.,* that it will not have recourse, ...

rected upon appeal from the decree to be passed in the suit. Such an order not being likely to cause irreparable injury should not be interfered with under the Charter Act. CHANDI RAY *v.* KRIPAL RAY (1911) . . 15 C. W. N. 682

14. ——— The High Court will interfere with an interlocutory order, if irreparable injury would be caused to one of the litigants if matters were not set right. AMJAD ALI *v.* ALI HUSSAIN JOHAN (1910) . . . 15 C. W. N. 353

15. ——— Final order—*Letters Patent, s. 39—Privy Council, leave to appeal to—"Final order" passed on appeal—Order passed by High* ...

or passed on appeal within the meaning ... of the Letters Patent. Whether a particular order is a final order within the meaning of s. 109 of the Civil Procedure Code, for the purpose of granting leave to appeal to His Majesty in Council, must depend upon its nature and contents and ... to the proceedings in which it has been made ... a general rule an order cannot rightly ... final which settles a point only ... of law or fact, in other words, ...

order. ... with the question of the ... *Land Acquisition Judge* ... "*final order*" within the meaning ... *Letters Patent* or s. 109 ... *Code. An order of the* ... *the Land Acquisition Judge* ... *the instance of the* ... *the Collector* ... *the claimants* ... *the award* ... *Judge* ... of s. 39 of the Letters Patent and ... Civil Procedure Code ... ould ... t ob... ght the ... opponent ... o got out ... n rateable ... missed the ... High

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

———— s. 115—*contd.*

16. ———— Award—*Decree framed upon award—Appeal—Application under revisional jurisdiction—Decree set aside—Grounds—Jurisdiction.* The plaintiff, as Mutawali of a Musjid at Zanzibar, brought a suit against the defendant for the recovery of certain pots and pans. Three other persons, who alleged themselves to be Mutawalis, were joined as parties apparently without any amendment of the plaint. After some progress of the suit, the presiding Judge was asked by all concerned in the Jamat (community) to arbitrate upon all matters in difference between them. The Judge framed an award on the 30th June 1904 and the award was read out in Court after notice to the parties. In the year 1909 a pleader for the plaintiff applied to have a decree framed in the terms of the award and the Judge accordingly passed a decree on the 7th April 1909. One of the defendants having appealed against the decree which was not appealable, the appeal was allowed to be converted into an application under the revisional jurisdiction s. 115 of the Civil Procedure Code (Act V of 1908) and the decree was set aside as being passed by the Judge without any sort of jurisdiction whatever. The grounds being: (i) There was no written reference to arbitration as required by law. (ii) The reference was made by a great number of persons who were not parties to the suit. (iii) The matters in difference submitted to arbitration were matters not in suit at all. (iv) The result of the said irregular proceedings was to expand the claim for the possession of a few cooking utensils into a suit for framing a scheme for the administration of a large religious endowment and no suit of the kind could have been properly launched without the previous sanction of the Advocate-General or such officer as is clothed with his functions. (v) The award was made on the 30th June 1904 and the application to have it filed was not made till 1909. The application was, therefore, manifestly time-barred. (vi) The plaintiff died early in the year 1905, and no application was ever made to bring his heirs or legal representatives on record. The suit had therefore abated by July of that year. MERALI VISRAM *v.* SHERIFF DEWJI (1911) . **I. L. R. 36 Bom. 105**

17. ———— Interlocutory order—*Scope of section. Held* by KARAMAT HUSAIN, *J.*, that an application under s. 115 of the Code of Civil Procedure cannot be entertained in the case of those interlocutory orders against which, though no immediately appeal lies, a remedy is supplied by s. 105, which provides that they may be made a ground of objection in appeal against the final decree. *Moti Lal Kashibhai* v. *Nana, I. L. R. 18 Bom. 35*, followed. Inasmuch as an order under O. IX, r. 13, setting aside an *ex parte* decree can be attacked in appeal from the final decree, no application will lie for revision of such an order. *Gopal Chetti* v. *Subbier, I. L. R. 26 Mad. 604*, followed. NAND RAM *v.* BHOPAL SINGH (1912) **I. L. R. 34 All. 592**

18. ———— High Courts jurisdiction—*Prejudice, it must be proved—Valuation of suits—Agreement to grant mourasi lease—Suits to enforce, how valued.* Where the District Judge set aside the decision of the Subordinate Judge as to the proper valuation of a suit and simply accepted the valuation given by the plaintiff without giving any reasons for arriving at that decision and without attempting to ascertain the materials on which that valuation was based and in fact without arriving at a judicial decision at all. *Held*, that the High Court should interfere in such a case under s. 115, Civil Procedure Code, if satisfied that the decision of the District Judge was wrong. *Amir Hassan* v. *Sheo Baksh, I. L. R. 11 Calc. 6*, distinguished. Where the Subordinate Judge in his view of the value of the suit returned the plaint for presentation to the Munsif and the District Judge set aside that decision and it was contended that the High Court should not interfere as there was no prejudice. *Held*, that as the law requires that suits of a particular value should be brought in particular Courts, where an order was against that law, no question of prejudice arises in setting aside that order. Where a land was taken for clearing and bringing under cultivation, under an agreement that after a certain number of years the defendant would grant a *mokurari mourasi* lease, and a suit was subsequently brought by the lessee for a declaration of his *mourasi mokurari* title and for the execution of the lease. *Held*, that the suit was in effect one to enforce the agreement to lease. The *mourasi mokurari* title would only accrue after the lease was granted and the suit could therefore be valued on the footing of that title. PORT CANNING AND LAND IMPROVEMENT COMPANY, LD. *v.* ROSON ALI MOLLAH (1912) **17 C. W. N. 160**

19. ———— Jurisdiction, failure to exercise—*Limitation Act (XV of 1877), s. 7—Revision on the ground of limitation. Semble.* A Court decreeing or allowing a time barred suit or application, without considering whether it is so or not, may be said to have failed to exercise jurisdiction vested in it by law so as to bring the matter within the scope of s. 115 of the Civil Procedure Code. *Held*, that a Court cannot be said to have failed to exercise jurisdiction merely because it omitted to consider *ex proprio motu* the question whether a person was entitled to proceed out of time by reason of some special provision of law, *e.g.*, s. 7 of the Limitation Act, such question not having been raised by him or on his behalf. The mere fact that in the headings to certain applications made in the case the person was described as a minor represented by a guardian was not sufficient to entitle him to the benefit of s. 7 of the Limitation Act or to throw upon the Court the duty of raising the point on his behalf. *Benod Behari Bhadra* v. *Ram Sarup Chamar, 16 C. W. N. 1015*, followed. PANCHU MONDAL *v.* SHEIKH ISAF (1913) **17 C. W. N. 667**

20. ———— Error of law—*committed by lower court—Contribution, meaning of—Suit for contribution, what is—Suit of the value of less than Rs. 500 cognisable by a Court of Small Causes, appeal in—Decree for rent obtained by co-sharer landlord against tenants—Deposit of decretal amount by purchaser from one of the tenants to prevent sale—Right of such depositor to be reimbursed—Provincial Small Cause Courts Act (XV of 1882), Art. 41, Sch. II—Indian Contract Act (IX of 1872), ss. 69, 70.* The plaintiffs purchased the interest of one of the defendants in a tenancy held by them all. Some out of the entire body of landlords who claimed a half share in the superior tenancy obtained a decree for rent and in execution thereof were about to bring the

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— **s. 115**—*contd.*

property to sale when the plaintiffs deposited in Court the necessary amount in satisfaction of the decree. The plaintiffs brought an action for declaration that the defendants were liable to pay the judgment-debt and they themselves had paid the money under circumstances which entitled them in equity to recover the same from the defendants. The suit was described as one for contributions. The lower Courts dismissed the plaintiffs' claim on the ground that as the decree had been obtained by co-sharer landlords, the interest of the plaintiffs in the tenancy was not in jeopardy and the payment made by them must consequently be deemed voluntary. The plaintiffs appealed to the High Court. *Held,* that contribution signifies payment by each of the parties interested of his share in any common liability. Consequently an action for contribution is a suit brought by one of such parties who has discharged the liability common to them all to compel the others to make good their shares. That the suit as framed could not be deemed a suit for contribution: it was really a suit by the plaintiffs for recovery of money paid by them for the benefit of the defendants. That Art. 41 of the Second Schedule to the Provincial Small Cause Courts Act does not cover the present case. The suit was clearly one of a nature cognizable by a Court of Small Causes and as the sum claimed was less than Rs 500, the appeal was incompetent under s. 102, Civil Procedure Code, and must be dismissed. That the view taken by the lower Courts that the payment made by the plaintiffs was voluntary, as the decree for rent was obtained by co-sharer landlords who could not have executed it so as to prejudice the interest of the plaintiffs, was erroneous. The question of the precise effect of a sale in these circumstances would at any rate be a matter for controversy and the party liable to be affected would consequently be entitled to satisfy the decree to protect himself from the apprehended injury to his right; he would also be entitled if he made the payment to be reimbursed under s. 69 or s. 70 of the Indian Contract Act. *Held,* however, as to the application of the plaintiffs for the memorandum of appeal being treated as an application for revision, that the error committed by the lower Court being one of law and not affecting the jurisdiction of the Court, the High Court could not interfere in the exercise of its revisional powers. SATYA BHUSAN BANNERJEE *v.* KRISHNA KALI BANNERJEE (1914) . . . . . **18 C. W. N. 1308**

21. ——— **Pleader appearing for each party**—A pleader who had appeared for a party in proceedings under s. 145 of the Code of Criminal Procedure, must, before appearing for the opposite party in a subsequent civil suit flowing out of such proceedings, satisfy the court that in acting in those proceedings he did not as a fact obtain from his then client any knowledge which would be of use to his present clients, or that if he did obtain any such knowledge, then such knowledge is now, so to speak, public property available to any pleader who can obtain inspection of the record of the proceedings in the Magistrate's Court. If he fails to do so, he brings himself within r. 277 of the Rules of Practice framed by the High Court and it cannot be said that the Court has wrongly exercised its discretion in refusing him audience. *Little* v. *Kingswood Collieries Company, 20 Ch. D. 733,* referred to. SRINIVASA RAU *v.* PICHAI PILLAI (1913) **I. L. R. 38 Mad. 650**

22. ——— **Jurisdiction**—*Error in the exercise of, whether wrong decision on question of limitation is* An erroneous decision that a petition for restoration is not barred by limitation when in fact it is so barred, is not an error in the exercise of jurisdiction under s. 115 of the Code of Civil Procedure, 1908 JHOTU LALL GHOSE *v* GANOURI SAHU . . . . . **3 Pat. L. J. 376**

23. ——— **Interlocutory orders**—*whether High Court will interfere with—Court-fees whether High Court will revise preliminary order on question of.* The High Court will not interfere in revision with an interlocutory order where there is another course open to the applicant, and no irremediable harm can be suffered by the interlocutory order. MUSSAMMAT LACHMIBATI KUMARI *v.* NAND KUMAR SINGH . **5 Pat. L. J. 400**

24. ——— **Order returning plaint for want of jurisdiction**—*Order reversed on appeal—Revision.* The court to which a plaint in a suit based on contract was presented returned the plaint for presentation to the proper court upon the ground that no part of the cause of action had arisen within the jurisdiction. The plaintiff appealed against this order, and the appellate court reversed the order and remanded the suit for trial on the merits. *Held* on application in revision by the defendants that no revision would lie, even if the conclusions of the appellate court were wrong either in fact or law. *Mathura Nath Sarkar* v. *Umes Chandra Sarkar, 1 C. W. N., 626,* and *Jwala Prasad* v. *East Indian Railway Company, 16 A. L. J., 535,* followed. *Badami Kaur* v. *Dinu Rai, I. L. R. 8 All. 111, Zamiran* v. *Fateh Ali, I. L. R. 32 Calc. 146, Sri Narain* v. *Jagannath, 15 A. L. J. 653,* and *Vuppuluri Atchayya* v. *Sri Kanchumurti Venkata Seetaramachandra Rao, 24 M. L. J. 112,* referred to. CHANDU LAL *v.* KOKA MAL . . . . . **I. L. R. 43 All. 334**

25. ——— **Attachment before judgment**—*at the instance of petitioner—Sale proceeds* [illegible]

the sale proceeds were paid into Court to the credit of the suit. Eventually a decree was passed in the suit on the 10th April 1916. On the 7th April [illegible]

application was heard and the money in Court was paid to him on the 19th April 1916 without any notice to the petitioner. The petitioner who could not then apply for execution as he had not ob- [illegible]

distribution. Both the lower Courts dismissed the suit. The petitioner having applied to the High Court under its extraordinary jurisdiction, *Held,*

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— s. 115—*contd.*

that there was no material irregularity which would entitle the Court to interfere under s. 115, Civil Procedure Code, 1908, although the attaching Court, before it paid out the proceeds of the petitioner's atachment to the opponent, ought to have given the petitioner notice as a matter of equity. VISHNU *v.* RAMPRATAP (1920) . **I. L. R. 45 Bom. 360**

26. ——— **Contempt of Court.**—*Order passed by Munsif to show cause why proceedings in relation to an alleged contempt should not be taken. Held*, that an order passed by a Munsif calling upon parties to a civil suit to show cause, why they should not be proceeded against in respect of an alleged contempt of court is an order which is amenable to the revisional jurisdiction of the High Court, either under s. 115 of the Code of Civil Procedure or under s. 107 of the Government of India Act. *In the* MATTER OF THE PETITION OF KADHORI **I. L. R. 42 All. 26**

26. (*a*) ——— An erroneous decision that a petition for restoration is not barred by limitation when in fact it is so barred is not an error in the exercise of jurisdiction under s. 115. JHOTU LAL GHOSE *v.* GANOURI SAHU **3 Pat. L. J. 376**

27. ———**Jurisdiction**—A Munsif, having before him a suit on a promissory note, first passed an order (illegal in the circumstances of the case) dismissing the suit for want of prosecution. On this a decree followed, which was signed by the Munsif. Subsequently, the Munsif cancelled his first order and decree, and, having re-instated the suit, fixed a day for its hearing. On that date the plaintiff appeared and tendered some evidence, but the defendant did not appear. The Munsif thereupon passed a decree in favour of the plaintiff *ex parte*. *Held*, on application by the defendant for revision of the Munsif's second order re instating the suit, that the High Court had the power and ought to set aside, not only the order complained of, but all the proceedings of the Munsif and restore the suit to its original position. *Hingu Singh* v. *Jhuri Singh, I. L. R. 40 All. 590*, and *Govind Singh* v. *Kalyan Dass, 15 A. L. J. 24*, referred to. ABDUL AZIZ *v.* SHEKHAR CHAND . **I. L. R. 42 All. 18**

28. ——— **Interlocutory order**— Under s. 115, the High Court might call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto; but it has no power to call for the record of any case which is under trial by a Court subordinate to the High Court. BAI RAMI *v.* JAGA DULLABH (1919) **I. L. R. 44 Bom. 619**

29. ——— **When other remedy available**—*Injunction issued by Mamlatdar—Order set aside by Collector—Summary Proceedings—High Court not to exercise powers of revision unless the party has no other remedy.* The petitioner sued the opponents in Mamlatdar's Court for an injunction to restrain the opponents from disturbing the petitioner in the possession of his land. The Mamlatdar issued the injunction. The opponents then applied to the Collector who set aside the Mamlatdar's order under s. 23 of the Mamlatdars' Courts Act (Bom. Act II of 1906). The petitioner having applied to the High Court under s. 115, Civil Procedure Code, 1908. *Held*, discharging the rule, that the High Court would not exercise its powers of revision under s. 115, Civil Procedure Code 1908, unless the party applying to the Court had no other remedy. In a case where the proceedings which are sought to be revised are purely summary proceedings and which do not finally decide the dispute between the parties, the High Court should not exercise its powers of revision. IRBASAPPA *v.* BASANGOWDA (1919) . **I. L. R. 44 Bom. 595**

30. ———**Executing Court**—*Decree under execution cannot be questioned.* It is not competent to an executing Court to go behind a decree and question its propriety. *Ramchandra Govind* v. *Jayanta (1920) 45 Bom. 503*, followed. RAMNATH *v.* GAJANAN (1920) . **I. L. R. 45 Bom. 946**

31. ———**Probate Proceedings**—Revision of order of the District Judge in probate proceedings declaring that caveator has no *locus standi*. RADHA-RAMAN CHOWDHURY *v.* GOPAL CHANDRA CHUCKERBUTTY . . . . **24 C. W. N. 316**

——— *Revision—Jurisdiction of High Court—Order deciding issue of jurisdiction in favour of the plaintiff—"Case."* In a suit for damages for breach of contract filed in the court of Munsif the defendants pleaded, *inter alia*, that the court had no jurisdiction to try the case. The Munsif, by consent of parties, tried this plea on the evidence separately from the other issues in the suit and passed a formal order to the effect that the suit was cognizable by his court. Against this order the defendants preferred an application in revision to the High Court under s. 115 of the Code of Civil Procedure, and a preliminary objection was taken by the plaintiff that no revision lay. *Held* by PIGGOTT, RYVES and GOKUL PRASAD, JJ. (MUHAMMAD RAFIQ and WALSH, JJ., dissenting) that no revision lay, inasmuch as no "case" had been decided by the court below within the meaning of s. 115 of the Code of Civil Procedure. All that had been decided was one out of several issues in the suit, and the defendants had their remedy by way of appeal from the decree in the suit, if it should be decided against them. *Bhargava and Co.* v. *Jagannath, Bhagwan Das, I. L. R. 41 All. 602*, overruled. *Per* MUHAMMAD RAFIQ and WALSH, JJ., *contra*. In the circumstances the decision of the question of jurisdiction was the decision of a "case" within the meaning of s. 115 of the Code of Civil Procedure, and therefore the High Court had jurisdiction to entertain an application for revision. *Chhattarpal Singh* v. *Raja Ram, I. L. R. 7 All. 661*, referred to by MUHAMMAD RAFIQ, J. *Dhapi* v. *Ram Pershad I. L. R. 14 Calc. 768*, referred to by WALSH, J. BUDDHU LAL *v.* MEWA RAM **I. L. R. 43 All. 564**

——— **ss. 115 and 151**—

——— **Arbitrators' award decree**—*without inquiry into the nature of the award —Manual of High Court's Circulars, Chapter VI, para. 2—Inquiry—Real point of difference—Decree set aside—Abuse of judicial process.* The plaintiff a money-lender, filed in Court an arbitrator's award passed against the defendant-debtor and prayed for a decree in the terms of the award. The Court having presumed that there was a real point of difference between the parties, passed a decree in

CIVIL PROCEDURE CODE (ACT V OF 1908) *—contd.*

——— **ss. 115 and 151**—*contd.*

the terms of the award without instituting inquiry directed by a circular of the High Court (Manual of High Court's Circulars, Chapter VI, para. 2, page 181) *Held*, setting aside the decree under [illegible]

I. L. R. [illegible] Bom. [illegible]

——— **ss. 115, 151 and 152, O. VII, r. 11, O. XLIII—r. 1** (*w*)—*Incorrect valuation of relief claimed—Plaint returned—Review of order returning plaint—Appeal—Court-fees Act* (*VII of 1870*), *s. 12* [illegible]

[illegible] even though it incidentally decides a question [illegible] valuation, the order is appealable. (3) In cases [illegible] where the other involves a question [illegible] erfere either [illegible] edure, 1908, [illegible] of India Act "by virtue of the residue of jurisdiction which the Court will always exercise wherever it appears that [illegible] order of rejection, the Court [illegible] ay, [illegible] der [illegible] ise [illegible] ANI [illegible] 57 [illegible] O. XV [illegible] which has been [illegible] the nature of a summary [illegible]

——— **ss. 115, 151; O. XLI,** [illegible] *Appellate Court—Refund of Court-fees* [illegible] *order*— [illegible] Appellate [illegible] 23 of the [illegible] to order [illegible] ndum of [illegible] the High [illegible] applica- [illegible] of s. 151 [illegible], *further*, [illegible] der s. 115 [illegible] Court, in refusing to pass the order had acted with illegality or with material irregularity. *Per* BEAMAN, *J.* "I think it is very clear that that s. (151) is intended to empower Courts to deal with their own decrees and orders and was not intended to give authority to superior Courts by way of conferring supplemental jurisdiction to that conferred by s. 115." BHAUSING *v.* CHAGANIRAM HUTCHAND (1918) . . . **I. L. R. 42 Bom. 363**

CIVIL PROCEDURE CODE (ACT V OF 1908) *—contd.*

——— **s. 115, O. XL, r. 12**—

See LAND ACQUISITION.

I. L. R. 38 Calc. 230

——— **s. 115, O. XXI, r. 66**—

——— The Act of a Court in settling the terms of a sale proclamation under O. XXI, r. 66, is a Judicial Act. MUNSHI RAGHUNATH SINGH *v.* HAZARI SAHU

2 Pat. L. J. 131

——— **s. 115, O. XXI, r. 89**—

——— *Private sale by judgment-debtor after Court auction—Application to set aside Court sale—Whether purchaser in private sale or judgment-debtor entitled to apply—Dismissal of petition as of person not entitled to apply—Powers of High Court—Revision.* A judgment-debtor who, after the Court sale, transfers his interest in the properties sold in execution of a decree retains [illegible] meaning of O. XXI, [illegible] *Sub.* [illegible] *L. R.* [illegible] *man v.* [illegible] *7*, and [illegible] *(1919)* [illegible] *Patra*), followed; *Ishar Das* v. *Asaf Ali Khan* (*1912*) *I. L. R. 34 All. 186*, dissented from. The purchaser of such properties after Court sale is precluded from applying under the rule. *Lakshmi* [illegible] (*1913*), *24 M. L. J.*, *205*, [illegible] vision [illegible] been dismissed on the ground [illegible] by a person who was not entitled to apply. SUNDARAM *v.* MAUSA MAVUTHAR (1921)

I. L. R. 44 Mad. (F.B.), 554

——— *Decree—Execution—* [illegible] applicant deposited in Court the amount of the decree together with interest on the purchase money for the property sold. The applicant, however, having made no application to set aside the [illegible] aside sales, and the [illegible] may be taken as indicative of the policy of the Legislature that titles arising from judicial sales should be settled as soon as possible. RAOJI *v.* BANSILAL NARAYAN (1919)

I. L. R. 43 Bom. 735

——— **s. 115, O. XXII, r. 5**—*Suit for rent in a Revenue Court—Death of plaintiff—Conflicting*

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— **s. 115, O. XXII, r. 5**—*contd.*

claims to represent plaintiff by widow and father—Necessity for inquiry—Order of District Collector recognizing widow as land-holder, effect of—Order of Revenue Court recognizing widow as legal representative—Revision to High Court, competency of—Madras Estates Land Act (I of 1908), ss. 3 (5), 192 and 205, construction of. In a suit for rent instituted in a Revenue Court the plaintiff died; the widow of the deceased plaintiff claimed to be his legal representative to continue the suit, as against the father who claimed to be such representative as the legatee under an alleged will of the deceased plaintiff. Subsequent to the institution of the suit, the District Collector had passed an order, under s. 3 (5) of the Madras Estates Land Act, recognizing the widow as 'land-holder' in succession to the deceased plaintiff. The Revenue Court held that the widow should be held to be the legal representative to continue the suit, and dismissed the claim of the father without inquiring into the genuineness and validity of the will. The latter preferred a Civil Revision Petition to the High Court under s. 115 of the Civil Procedure Code. The respondent raised a preliminary objection that no revision petition lay to the High Court and also contended that the point was concluded by the order of the District Collector. *Held*, (i) that the High Court was competent to revise the order of the Revenue Court under s. 115 of the Civil Procedure Code, which is made applicable to proceedings in Revenue Courts by s. 192 of the Madras Estates Land Act, and s. 205 of the Act does not relate to interlocutory orders in rent suits, the final decrees in which are appealable under Part A of the schedule; (ii) that the Revenue Court is bound under O. XXII, r. 5 of the Civil Procedure Code, to hold an inquiry into the claims of the several claimants and determine who was entitled to be brought on the record as legal representative in the place of the deceased plaintiff; and (iii) that the order of the District Collector recognizing the widow as 'land-holder' under s. 3 (5) of the Madras Estates Land Act, was not only not conclusive on the point but has no bearing on it and could not be the basis of an order of the Court under O. XXII, r. 5 of the Code, or obviate the necessity for an enquiry thereunder. PARAMASWAMY AYYANGAR *v.* ALAMELU NATCHIAR AMMAL (1918) . . . . **I. L. R. 42 Mad. 76**

——— **s. 115; O. XXIII, r. 1**—

See JURISDICTION OF HIGH COURT. **I. L. R. 44 Calc. 454**

See WITHDRAWAL OF SUIT. **3 Pat. L. J. 460**

——— **s. 115, O. XXIII, r. 1.**—*Withdrawal of suit—Order of Appellate Court granting withdrawal—Revision, power of High Court to interfere in.* The High Court has power in its revisional jurisdiction to interfere with an order passed by a subordinate Appellate Court granting the plaintiff leave to withdraw his suit with permission to bring a fresh suit upon the same cause of action. Where, in an appeal by the plaintiff from an order dismissing his suit, the one party defendant filed cross-appeals in which they alleged that the suit must fail owing to a formal defect in the pleadings; *Held*, that it could not be urged by that party defendant that the Court had no jurisdiction to allow the plaintiff to withdraw the suit with permission to bring a fresh suit on the same cause of action. BISHESHAR AHIR *v.* BRIJRA MISSIR **3 Pat. L. J. 630**

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— **s. 115, O. XXIII, r. 1**—*contd.*

——— **s. 115; O. XXXVIII, rr. 9, 11**—

See ATTACHMENT BEFORE JUDGMENT. **I. L. R. 45 Calc. 780**

——— **s. 115, O. XL, r. 1**—

See RECEIVER. . . **3 Pat. L. J. 573**

——— **s. 115, O. XL, rr. 1 and 4**—

See RECEIVER . . **5 Pat. L. J. 94**

——— **s. 115, Sch. II, para. 15**—

See ARBITRATION **I. L. R. 36 All. 354**

——— **s. 115, Sch. II, para. 16**—*Arbitration Award—Award filed in Court—Court should give time to the parties to file objections to the award—Procedure and practice.* In a pending suit, the parties referred their disputes to an arbitrator, who heard the parties, made the award, and filed it in Court. On the day the award was filed the Court examined the parties who happened to be in Court, overruled the objections which one of the parties made to the award, and passed a decree in terms of the award. The party aggrieved having applied to the High Court. *Held*, that though no appeal lay from the decree so made on the ground that there was any defect in the award itself, yet the High Court could, under s. 115 of the Civil Procedure Code, set aside the decree and remit the award to the lower Court to enable the applicant to file his objections to it within the time prescribed by law. *Walji Mathuradas* v. *Ebji Umersey (1904) 29 Bom. 285*, followed. RAVJIBHAI *v.* DAHYABHAI (1920) . . . **I. L. R. 45 Bom. 832**

——— **ss. 117 (1882 Code, s. 632)**—

See INSOLVENCY **I. L. R. 43 Calc. 243**

——— **ss. 117 to 130**—

See LETTERS PATENT. **25 C. W. N. 557**

——— **ss. 119 (1882 Code, s. 635)**—

See PRACTICE . **I. L. R. 37 Calc. 853**

——— **s. 632 121**—

See ARBITRATION. **I. L. R. 43 Calc. 290**

——— **s. 122 (1882 Code, ss. 633, 652)**—

See POWER-OF-ATTORNEY. **I. L. R. 41 Bom. 40**

——— *Power of High Court to make rules—Rules of Court of the 18th January, 1898, Chap. III, r. 2—Appeal—Limitation—Limitation Act (IX of 1908), s. 12.* The High Court framed a rule, with reference to the presentation of the appeals from appellate decrees, that "No memorandum of appeal from an appellate decree or from any order shall be presented, unless accompanied, by a copy of the decree or order appealed against, and, *where it exists, a copy of the judgment of the Court of first instance.*" *Held*, on construction of this rule, that it did not connote that the appellant had a right to exclude from the period of limitation for filing his appeal the time requisite for obtaining a copy of the judgment of

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— **s. 122**—*contd.*

the Court of first instance. *Held*, also, that having regard to s. 122 of the Code of Civil Procedure, 1908, the rule in question was not *ultra vires*. NARSINGH SAHAI *v.* SHEO PRASAD (1917)
I. L. R. 40 All. 1

——— **ss. 122, 123, 124 and 125**—

See RULES OF THE PATNA HIGH COURT, 1916 . . . **5 Pat. L. J. 719**

——— **s. 128 (1882 Code, s. 637)**—

See CONTRACT ACT, ss. 39, 73, 120.
I. L. R. 34 Bom. 192

——— **s. 128 (2) (e) & O. I, r. 10 (2)**—

See PARTIES . **I. L. R. 46 Calc. 48**

——— **s. 129 (1882 Code, s. 652)**—

See O. XLI, r. 10.
I. L. R. 37 Bom. 572
16 C. W. N. 119

See PRACTICE . **I. L. R. 37 Calc. 853**

——— **s. 132 (1882 Code, s. 640)**—

See EXAMINATION ON COMMISSION.
I. L. R. 45 Calc. 697

——— **ss. 132, 133**—

See EXAMINATION ON COMMISSION
I. L. R. 45 Calc. 492

——— **s. 133 (1882 Code, s. 641)**—

——— **s. 135 (1882 Code, s. 642)**—

See s. 47 . . **I. L. R. 32 All. 3**

——— **s. 135, O. XXXVIII, r. 3**—*Surety for appearance of defendant—Defendant present in Court to conduct his case—Application by surety to be released from obligation—Voluntary surrender.* A surety, who had entitled to under O. appears in appearance is not a voluntary surrender with in the meaning of the rule, nor is he entitled to such discharge because the defendant submitted to a consent decree without his assent. S. 135 of the Indian Contract Act does not apply. APPUNNI NAIR *v.* ISACK MACKDAN (1920).
I. L. R. 43 Mad. 272.

——— **s. 141 (1882 Code, s. 647)**—

See LEGAL PRACTITIONERS ACT, 1879

See s. 2 (2) . **I. L. R. 1 Lah. 187**

s. 14. . . . **1 Pat. L. J. 576**

See RESTORATION OF SUIT.
2 Pat. L. J. 720

——— **141,144 and O. II, r. 2**—

See RESTITUTION . **3 Pat. L. J. 367**

——— **ss. 141 and 151**—*Procedure relating to* ... *for execu*... *sed for de*... *rent power* ... *de of Civil* Procedure, 1908, does not apply to a proceeding for execution. *Thakur Prasad* v. *Fakir-Ullah* (*I. L. R. 17 All. 106, P. C.*); *Hari Charan* v. *Manmatha Nath Sen* (*I. L. R. 41 Ghose Cal. 1*) and *A. Balasubramania* v. *Swarnammal* (*I. L. R.*

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— **ss. 141 and 151**—*contd.*

38 Mad. 199), followed. *Held, however*, that in the exercise of its inherent power, expressly recognised by s. 151 of the Code, a Court can restore an application for execution after it has dismissed it for default, and should do so, notwithstanding that the applicant has an alternative remedy by making a second application for execution, if he satisfies the Court that it should exercise its inherent jurisdiction *ex debito justitiæ*. *Debi Bakhsh Singh* v. *Habib Shah* (*I. L. R. 35 All. 331, P. C.*), referred to. *Babui Ritu Kuer* v. *Alakhdeo Narain Singh* (4 Patna L. J. 330) explained. BHOLU *v.* RAM LAL . . . **I. L. R. 2 Lah. 66**

——— **ss. 141, 151 and O. IX, r. 9**—*Applica*...

suit was dismissed in default on 9th October 1918 by *Lala* Hari Chand, Senior Sub-Judge, under O. IX, r. 8, Civil Procedure Code. An application for restoration of the suit was put in by their Pleader on the same date. On 22nd November this application was consigned to the Record room in default of appearance of plaintiffs. On 19th December 1918 the plaintiffs made an application, described as a review of the order of the 22nd November, but which in substance was one for a restoration of the suit. M. Zafar Ali, the then Senior Sub-Judge decided that he had no jurisdiction to entertain the application for review as his predecessor, *Lala* Hari Chand, had not issued notice. *Held*, that

further, that it is not necessary in every case to have the support of a section of the Code to empower a Court to pass an order not expressly or impliedly forbidden and which is essential in the interests of justice. *Hukum Chand Boid* v. *Kamalanand Singh* (*I. L. R. 33 Calc. 927, 918*), approved. ABDUL RAHMAN SHAH *v.* SHAHANA
I. L. R. 1 Lah. 339

——— **s. 141, O. II, r. 2**—

See EXECUTION **I. L. R. 38 Mad. 199**

——— **s. 141 ; O. IX, r. 13**—

See EXECUTION PROCEEDINGS.
I. L. R. 41 Calc. 1

——— **s. 141 ; O. XVI, r. 12**—*Proceeding against a pleader under the Legal Practitioners Act (XVIII of 1879), before a District Judge—Court's*...

Code. NANDA LAL ROY *v.* RASER ALI (1919)
23 C. W. N. 560

——— **s. 141, O. XXI, r. 90 O. IX**—*Application for setting aside sale—Dismissed for default*—

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— s. 141, O. XXI, r. 90—*contd.*

Restoration. An application for setting aside an execution-sale is not an application for execution, but in the nature of an original proceeding which is not excluded from the purview of s. 141 of the Civil Procedure Code. Such application if dismissed for default can be restored under O. IX, r. 9, of the Civil Procedure Code. *Aism Mandal* v. *Raj Mohan Das, 13 C. L. J. 532,* and *Hari Charan Ghose* v. *Manmatha Nath Sen, I. L. R. 41 Calc. 1,* distinguished. *Subbiah Naicker* v. *Ramanathan Chettiar, I. L. R. 37 Mad. 462, 475,* and *Safdar Ali* v. *Kishun Lal, 12 C. L. J. 6,* followed. NICHHA BIBEE *v.* HEMANTA KUMAR RAY (1915)
19 C. W. N. 758

——— s. 141, O. XXXIX, r. 10, O. XL, r. 1—

See GUARDIANS AND WARDS ACT, s. 12, CL. (3) (*b*) . **I. L. R. 36 Bom. 20**

——— s. 141 O. XL, r. 1—

See COMMON MANAGER.
I. L. R. 43 Calc. 986

——— s. 141, O. XLVI, r. 1—*Reference in proceeding neither a suit nor appeal—Jurisdiction of High Court.* O. XLVI, r. 1, read with s. 141 Civil Procedure Code, does not authorize a reference to the High Court in a matter which is neither a suit nor an appeal. S. 141 does not authorize a Court to invoke the jurisdiction of another Court any more than it authorizes a party to do so by way of appeal. Such right must be expressly conferred by statute. DAMODARA MENON *v.* KITTAPA MENON (1913) . . **I. L. R. 36 Mad. 16**

——— s. 144 (1882 Code, s. 583)—

See s. 151 . **I. L. R. 41 Mad. 316**

See ACCOUNT . **I. L. R. 44 Mad. 570**

See DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879), s. 22.
I. L. R. 40 Bom. 194

See EX PARTE DECREE.
14 C. W. N. 182

See EXECUTION OF DECREE.
I. L. R. 42 All. 156

See PROCEDURE . **L. R. 46 I. A. 228**

1. ——— *Decree—Interest, award of—Discretion of Court—Land Acquisition Act (I of 1894)—Court determining the amount of Compensation—Payment of the amount to claimant—Subsequent reduction in amount on appeal—Interest over the excess—Inherent powers of the Court.* A sum of money by way of compensation awarded under the Land Acquisition Act (I of 1894) and paid into Court was taken out by the claimant. Subsequently on appeal, the High Court reduced the amount of compensation payable to him, but made no order as to interest. Government then applied to recover from the claimant interest over the excess drawn by the claimant from the Court. *Held,* that the interest claimed should be awarded, inasmuch as the claimant had had the benefit of the money belonging to Government in excess of that to which the High Court held him to be entitled, and the benefit was represented not only by the excess wrongly taken by the claimant from the District Court but also the amount of interest which the excess carried. *Mookoond Lal Pal* v. *Mahomed Sami Meah, I. L. R. 14 Calc. 484, 486,* and *Gobind Vaman* v. *Sakharam Ramchandra, I. L. R. 3 Bom. 42,* referred to. COLLECTOR OF AHMEDABAD *v.* LAVJI MULJI (1911)
I. L. R. 35 Bom. 255

CIVIL PROCEDDRE CODE (ACT V OF 1908) —*contd.*

——— s. 144—*contd.*

2. ——— *Execution-sale set aside on ground of decree-holder and auction-purchaser's fraud—Auction-purchaser if may be directed to make over profits realised without suit—Restitution.* Where a sale in execution of a decree is set aside at the instance of the judgment-debtor on the ground of fraud on the part of the decree-holder as well as of the auction-purchaser. *Held,* that the Court in setting aside the sale can, in the exercise of its powers under s. 151 of the Civil Procedure Code, direct the auction-purchaser to make over to the judgment-debtor the profits he realised from the property, having got hold of the property by an abuse of the Court's process. *Quære.* Whether the case falls within s. 144 of the Code. *Beni Madho Singh* v. *Pran Singh, 15 C. L. J. 187,* followed. *Safaraddi* v. *Durga Prosad Sen, 16 C. L. J. 83,* referred to. AMIRANNESSA CHOWDHURANI *v.* KURIMANNESSA CHOWDHURANI (1914)
18 C. W. N. 1299

3. ——— *Decree-holder as auction-purchaser in possession of property sold for more than three years—Subsequent setting aside of sale—Mesne profits, application for, by purchaser from judgment-debtor—S. 144, Civil Procedure Code, applicability of—Inherent jurisdiction of Court—Mesne profits for more than three years if can be allowed—Limitation Act, Art. 109.* A sale held in execution of a decree at which the decree-holder was the auction-purchaser was set aside. He had been in possession of the property for more than three years. The respondent purchased the property from the judgment-debtor together with the right to sue the decree holder for mesne profits in respect of the period during which he was in possession. The respondent applied to the Court for and obtained such mesne profits. *Held,* that the Court below had no jurisdiction under s. 144, Civil Procedure Code, to entertain the application but inasmuch as the respondent obtained an order in his favour in the Court below purporting to be made under s. 144 Civil Procedure Code, and inasmuch as a determination of a question arising under s. 144, is a decree by force of the definition clause in s. 2, the respondent could not be heard to say that the appeal was incompetent. That even assuming that the Court had inherent jurisdiction to award mesne profits upon the application presented by the respondent it either had no power or it was an improper and unsound exercise of judicial discretion to award mesne profits for any period beyond three years before the application for which only mesne profits could have been obtained by suit under Art. 109 of the Limitation Act. DINO NATH DAS *v.* JOGENDRA NATH BHOUMIK (1914) . **19 C. W. N. 1167**

4. ——— *Decree for plaintiff—Reversal of the decree in appeal—Restoration of the trial Court's decree in second appeal—Claim for restitution—Plaintiff's right to claim restitution.* A question being referred whether a plaintiff, who obtained a decree in his favour in the trial Court and went into possession under it, and was put out of possession under the decree of the first

CIVIL PROCEDURE CODE (ACT V OF 1908) *—contd.*

——— **s. 144**—*contd.*

Court of Appeal reversing the trial Court's decree;

between the decrees of the first and second appeal Courts. *Held,* that the plaintiff could claim such benefit under s. 144 of the Civil Procedure Code, 1908. BHUTA *v.* LAKADU DHANSING (1918)

I. L. R. 43 Bom. 492

5. ——— *Execution of decree—Decree reversed on appeal—Bond fide auction purchaser under original decree.* Restitution cannot be obtained under s. 144 of the Code of Civil Procedure as against a *bond fide* purchaser for value at an auction sale held by a Court which had jurisdiction to hold the same. *Rewa Mahton* v. *Ram Kishen Singh, I. L. R. 14 Calc. 18, Zain-ul-abdin Khan* v. *Muhammad Asghar Ali Khan, I. L. R. 10 All. 160,* and *Abbas Husain Khan* v. *Dilband Begam, 16 Oudh Cases 225,* referred to. PIARI LAL *v.* HANIF-UN-NISSA BIBI (1916)

I. L. R. 38 All. 240

6. ——— *Decree—Execution*

favour of the plaintiff. In execution of that decree the lands were delivered to the plaintiff. On an appeal preferred by the defendant, who was then a minor, the High Court amended the decree on August 17th 1903, by excepting from the decree for delivery two survey numbers. The de-

not save limitation under s. 6 of the Indian Limitation Act, 1908, unless the application be treated

the transfer, and restraining the latter from receiving the decree-amount, the judgment-debtor is entitled, under s. 144, Civil Procedure Code (1908),

CIVIL PROCEDURE CODE (ACT V OF 1908) *—contd.*

——— **s. 144**—*contd.*

to recover from the transferor the amount paid, with interest. SUBBARAYUDU *v.* YERRAM SETTI SESHASANI (1916) **I. L. R. 40 Mad. 299**

8. ——— *Restitution—power of court to award interest—whether interest is payable when not mentioned in security bond.* Under s. 144 of the Code of Civil Procedure, 1908, the court may in its discretion award such interest as it chooses, and the fact that the principal only is secured by a bond executed under the order of the court at the time of the withdrawal of the sum originally decreed does not affect the liability of the person ordered to make restitution to pay interest in accordance with the section. INDRA CHAND BOTHRA *v.* MR. A. H. FORBES

2 Pat. L. J. 149

9. ——— *"Court of first instance"—execution of decree—property purchased by decree-holder—crops reaped by decree-holder—decree set aside—suit for value of crops reaped—plaint treated as an application under s. 47.* A obtained

the sale must, as a matter of course, be set aside at the instance of the judgment-debtor, and that the proper course for *B* to pursue was to present an

in that section show that the section is intended to be confined to cases in which the decree has been varied or reversed by some superior Court or by reason of some order passed by a superior Court. CHINTAMAN SINGH *v.* CHUNI SAHU **1 Pat. L. J. 43**

10. ——— *Procedure—Partition—Possession obtained under colour of decree but not in execution—Decree reversed—Application by defendant for restitution of possession.* The plaintiff in a suit for partition of a house obtained a decree and under colour of that decree, although not by a proceeding in execution thereof, took possession of part of the house. The decree was reversed on appeal, the finding being that the plaintiff had no interest at all in the house. *Held,*

11. ——— *Application for restitution of money paid to mortgagee auction-pur-ch*

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decree and in the sale in execution thereof purchased the mortgaged property "for whatever

CIVIL PROCEDDRE CODE (ACT V OF 1908) —*contd.*

——— s. 144—*concld.*

was due to him on the decree at the time of the sale," without offering any specific bid. In subsequent proceedings by the judgment-debtor to set aside the sale, the mortgagee auction-purchaser and the judgment-debtor came to a settlement to the effect that if a specific sum was paid off before a certain date, the sale would stand cancelled, but on default the sale would stand confirmed. The judgment-debtor, however, did not pay the entire sum but made part payments on two occasions and the auction-purchaser, with the sanction of the Court from time to time extended the time on the above conditions. Finally, default having been made, the sale was confirmed under s. 65, Civil Procedure Code, and the judgment-debtor was satisfied in full by the purchase of the mortgaged property The judgment-debtor subsequently made an application, in the execution proceedings, for restitution of the sums paid by him to the decree-holder purchaser. The lower Appellate Court held that the remedy of the judgment-debtor was by way of a regular suit: *Held*—That it is competent to the execution Court, in the exercise of its inherent power, to make an order for restitution with a view to secure complete justice between the parties concerned, even in cases not comprised within the terms of s. 144, Civil Procedure Code. RAI CHARAN BHUIYA *v.* DEBI PRASAD BHAKAT . **26 C. W. N. 408**

12. ——— *Restitution of property—Application for execution—Indian Limitation Act (IX of 1908), Art. 182.* An application for restitution, under s. 144 of the Civil Procedure Code, 1908, is an application for execution of a decree, and is governed by Art. 182 of the Indian Limitation Act, 1908. *Kurgodigouda* v. *Ningangauda (1917), 41 Bom. 625,* followed. *Krupasindhu Roy* v. *Mahanta Balbhadra Das (1917), 3 P. L. J. 367* and *Ram Singh* v. *Sham Parshad (1918), P. R. No. 67 of 1918,* dissented from. HAMIDALLI *v.* AHMEDALLI (1920)
I. L. R. 45 Bom. 1137

——— **ss. 144 and 11, expl. IV, and 47, O. II, r. 2**—*Restitution, applications for—Execution applications—Successive applications—Res judicata—Rule of constructive res judicata, applicability of—Previous applications for principal—Subsequent application or interest, whether barred.* Where a judgment-debtor who had applied for and obtained restitution of a sum of money recovered from him in execution of a decree which was subsequently reversed on appeal, filed a subsequent application for recovery of interest on the amount for the period during which the decree-holder had the use of the money. *Held,* that the subsequent application was not barred by the rule of constructive *res judicata* under s. 11, explanation IV, or by O. II, r. 2 of the Civil Procedure Code. Unless the decision of the question subsequently raised was either expressly given, or must be deemed to have been necessarily implied in the previous decision, the principle of *res judicata* should not be applied to execution proceedings. *Lakshminarayana* v. *Pallamaraju, 4 M. L. W. 101,* referred to. *Balasubramania Chetty* v. *Swarnammal, I. L. R. 38 Mad. 199,* followed. An application for restitution is an application in execution under the new Code of Civil Procedure (Act V of 1908) as under the old Code (Act XIV of 1882), *Prag Narain* v. *Kamakhia Singh, I. L. R. 31 All. 551,* referred to. SOMASUNDARAM *v.* CHOKKALINGAM (1916)
I. L. R. 40 Mad. 780

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— **ss. 144, 151 and O. XXI, r. 90**—*Restitution—Order refusing to set aside sale—Order reversed on appeal—Auction-purchaser, not a party to proceedings or appeal—Application by judgment-debtor for restitution against auction-purchaser, whether maintainable—Auction-purchaser, whether a representative of decree-holder.* Where an order passed under O. XXI, r. 90 of the Civil Procedure Code refusing to set aside a sale held in execution of a decree, was reversed on appeal but the auction-purchaser was not made a party to the proceedings for setting aside the sale or to the appeal therefrom and the judgment-debtor subsequently applied for restitution against the auction-purchaser. *Held (i)* that s. 144 of the Civil Procedure Code did not in terms apply, as no decree was varied or reversed but only an order under O. XXI, r. 90, was reversed on appeal; *(ii)* that, assuming that s. 151 allowed an order for restitution in appropriate cases not falling under s. 144, such an order could not be made unless the auction-purchaser was a party before the Appellate Court which set aside the sale; and *(iii)* that a Court auction-purchaser was not a representative of the decree-holder. *Manicka Udayan* v. *Rajagopala Pillai, I. L. R. 30 Mad. 507* and *Nadamuni Narayana Iyengar* v. *Veerabhadra Pillai, I. L. R. 34 Mad. 417,* referred to. SUBBAMMA *v.* CHENNAYYA (1917)
I. L. R. 41 Mad. 467

——— **ss. 144 and 151 and O. XXI, r. 92**—*Sale in execution of decree set aside—application by judgment—debtors for compensation—Limitation—appeal.* On a sale held in execution of a decree being set aside the judgment-debtors and persons who had purchased the rights of the judgment-debtors, applied to the court for compensation for the period during which they had been kept out of possession. *Held,* that the application was governed by art. 181 of Sch. I to the Limitation Act, 1908 and did not come within s. 144 of the code. JAGDIP NARAIN SINGH *v.* F. H. HOLLOWAY
2 Pat. L. J. 206

——— **s. 145 (1882 Code, s. 253)**—

See s. 42 . . **19 C. W. N. 1085**

See s. 47 . **I. L. R. 43 Bom. 235**
I. L. R. 43 Mad. 325

See s. 55 . . **5 Pat. L. J. 417**

See EXECUTION OF DECREE.
2 Pat. L. J. 197
3 Pat. L. J. 176

See FORFEITURE **I. L. R. 39 Calc. 1048**

1. ——— *Surety for costs of Privy Council Appeal—Decree for costs in Privy Council if may be executed against properties charged by surety—Personal execution.* Under s. 145 of the Civil Procedure Code, a party who has obtained a decree for costs in Privy Council can proceed by application to realise the amount of costs decreed against the surety (for the judgment-debtor) personally, but not against the property which he had charged under s. 602 of the old Civil Procedure Code. Even under O. XXXIV, r. 14, of the Civil

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd.

——— **s. 145**—*contd.*

Procedure Code, which has replaced s. 99 of the Transfer of Property Act, the properties charged cannot be sold except by instituting a mortgage suit. CHANDRABATI v. MADHO PROSAD (1914) **19 C. W. N. 178**

2. ——— *Surety, execution of decree against—Person depositing chattels to secure fulfilment of decree, if such surety—Personal liability, if essential* S. 145 of the Civil Procedure Code applies only where the surety has rendered himself personally liable for the decretal amount. Where *A* having been brought under arrest in

not come under s. 145, Civil Procedure Code ... only created an equitable charge upon the notes ... depositing them ... be enforced ... v. LAKHMI NARAIN KHANNA (1916) ... **C. W. N. 961**

3. ——— *Execution of decree—Security for performance of decree hypothecating immoveable property—Mode of enforcing security.* While a security bond given to a Court under s. 145 of the Code of Civil Procedure can be enforced so far as the personal liability of the surety is concerned by means of executing the original decree against him, *if the surety takes upon himself more than a personal liability and hypothecates immovable property, such hypothecation can only be enforced against the property by means of a regular suit. Janki Kuar* v. *Sarup Rani, I. L. R. 17 All. 99,* not followed. *Multa Prasad* v. *Mahadeo Prasad, I. L. R. 38 All. 327,* distinguished. AMIR v. MAHADEO PRASAD (1916) . . . . **I. L. R. 39 All. 225**

4. ——— *Surety bond executed in execution proceeding—Liability of surety, if continues after the termination of the particular execution proceeding, or ceases with the dismissal of the particular execution case.* In a certain execution proceeding, the decree-holder had attached

ultimately disallowed. ... was dismissed and the execution case was also

became inoperative as soon as the execution ... in the course which it was furnished, was dismissed and they could not be made liable *Held,* the mere fact that the execution case against the judgment-debtor was dismissed after the claim was dismissed, does not affect the question of the liability under the bond. Had there been a suit under the bond, there is no doubt that the sureties could have been made liable. The present Code, however, provides for realization of the amount due under the bond by execution. AJITULLA SARKAR v. NANDOOR MAHAMMAD (1917) . **22 C. W. N. 919**

5. ——— *Execution of decree—Sureties of judgment-debtors—Application to*

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd.

——— **s. 145**—*concld.*

enforce liability against sureties—Application made within three years of the date of final appellate decree is in time —Indian Limitation Act (IX of 1908), Article 182. When an *ex-parte* decree was set aside against the defendant, the appellants became sureties for him. The suit was re-tried and a decree was passed against the defendant on the 22nd March 1907. On appeal, the decree was ...

execution, when the sureties (appellants) contended that the execution as against them was time-barred as no application for execution was made within three years from the date of the trial Court's decree which alone they had undertaken to satisfy. *Held,* that the execution was not time-barred and that the sureties were liable to be proceeded against in execution under cl. 2 of Art. 182 of the Indian Limitation Act, 1908. CHOLAPPA v. RAMCHANDRA (1919) **I. L. R. 44 Bom. 34**

6. ——— *Whether applicable to a joint holding, separate portion of which is held by each co-owner—necessity for enquiry into possession —revision by High Court.* Mussammat M., complainant-petitioner, filed an application under s 145, Criminal Procedure Code, *alleging that she* had been in possession of her husband's land, since his death, and that certain reversioners of her husband's property had forcibly taken possession of it, and that she feared for her life The Magistrate, *after a summary enquiry, issued notice* to the opposite party calling upon them to file

further alleging that the khata was joint. Mussammat M. was examined and stated that she had been in possession of the land for many years; that she did not know whether there had been *any partition, but that the various joint owners* had held separate portions of the joint holding for themselves, each one being in actual possession of a definite portion. The Magistrate thereon, without any further inquiry, dismissed the application, *holding that s. 145, Criminal Procedure Code,* was not applicable to disputes for possession of joint land. *Held,* that s. 145, Criminal Procedure Code, was applicable to a case where the dispute is between co-sharers, each claiming to be in possession of the disputed land to the exclusion

in a case where such irregularity has been committed. MUSSAMMAT MALAN v. MAKHAN SINGH **I. L. R. 2 Lah. 372**

——— **s. 145 and O. XXXII, r. 6**—*Security enabling next friend to receive monies due to minor under decree—Attachment of surety's property for sums not accounted for, legality of.* Security being furnished, the next friend of a minor and the surety were permitted *to draw from the court monies due* to a minor under a decree. On default in accounting, the amount due to the estate of the minor was

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— s. 145, O. XXXII, r, 6—*contd.*

directed to be realized by attachment of the property of the surety. *Held*, that the order for attachment was made without jurisdiction as neither s. 145 nor any other provision of the Code of Civil Procedure empowers the Court to attach the property of the surety. KURUGODAPPA *v.* SOOGAMMA (1917) . . I. L. R. 41 Mad. 40

——— s. 145, and O. XXXIV, r. 14—

See EXECUTION OF DECREE.

2 Pat. L. J. 197

——— *Execution of decree—Security for default of judgment-debtor—Mode of enforcement of security.* On attachment of certain property under a decree by a decree-holder, a third party came forward claiming the attached property as his own but subsequently entered into a compromise with the decree-holder whereby he made himself responsible for payment of the decretal amount and executed a security bond in which, in addition to undertaking a personal liability for the judgment-debtor's default, he also hypothecated certain property. *Held,* that default having been made by the judgment-debtor, the decree-holder was at liberty to enforce the security in the manner provided for by s. 145 of the Code of Civil Procedure, and that O. XXXIV, r. 14, was no bar to his enforcing it against the hypothecated property as well as any other property of the surety. *Janki Kuar* v. *Sarup Rani, I. L. R. 17 All. 99,* referred to. MUKTA PRASAD *v.* MAHADEO PRASAD (1916) . . . . I. L. R. 38 All. 327

——— s. 145, O. XLI, r. 5—

See EXECUTION OF DECREE.

I. L. R. 38 Cal. 754

——— s. 146 (of 1882 Code, s. 158-A)—*Suit originally filed in a District Munsif's Court—Plaint returned and filed in a Subordinate Judge's Court—Suit property mortgaged to another during pendency of suit in the former Court—Decree for plaintiff by Subordinate Court—Petition to District Court by mortgager for permission to appeal, if competent—Appeal by mortgagee against decree of Subordinate Judge's Court, whether, maintainable.* A plaint filed in a District Court was, on objection taken by the defendant to the valuation of the suit, ordered to be returned and was presented in the Subordinate Judge's Court. While the suit was pending in the District Munsif's Court, the suit property was mortgaged by the defendant to the appellant. On the suit being decreed by the Subordinate Judge in favour of the plaintiff, the defendant did not prefer an appeal; the *appellant,* as the mortgagee of the suit property pending suit alleging collusion between the plaintiff and the defendant, filed an application in the District Court under O. XXII, r. 10, for an order allowing him to prefer an appeal, and also preferred an appeal against the decree. The District Judge dismissed both the petition and the appeal as incompetent. The appellant preferred to the High Court a Civil Miscellaneous Appeal and a second appeal against the decisions respectively. *Held,* that O. XXII, r. 10, only governs applications made to continue a suit and that an application presented after the termination of the suit was not within the rule; *Subba Pillai v. Rungasami, (1917) Mad. W. N. 306* and *The Collector of Muzaffernagar* v. *Husaine Begam,*

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— s. 146—*contd.*

I. L. R. 18 All. 85, followed. *Held,* also, that under s. 146 of the Civil Procedure Code, it was competent to the mortgagee to prefer an appeal to the District Court against the decree of the Subordinate Judge, and that the District Judge was bound to dispose of the appeal on the merits, notwithstanding the dismissal of the petition under O. XXII, r. 10. Where a plaint is returned for presentation to the proper Court, any devolution of interest during the pendency of proceedings in the first Court must be taken to be a devolution of interest during the pendency of the suit in the second Court. *Seshagiri Row* v. *Vapa Velayudam Pillai, I. L. R. 36 Mad. 492,* distinguished. SITARAMASWAMI *v.* LAKSHMI NARASIMHA (1917)

I. L. R. 41 Mad. 510

——— s. 148—

See CIVIL PROCEDURE CODE, 1908

ss. 104, AND 148, I. L. R. 35 All. 532

O. XXXIV, R. 8, PROVISO

I. L. R. 39 Mad. 876

See S. 2 (2) . I. L. R. 35 All. 582

See PRACTICE . I. L. R. 37 Calc. 548

——— *Pre-emption, decree for—extension of time for deposit of purchase money, power of Court to grant.* When a decree for pre-emption has been made, O. XX, r. 14 of the Civil Procedure Code, 1908, does not deprive the Court making the decree of the power vested in it under s. 148 of the Code to extend the time fixed in the decree for the deposit of the purchase money. ABU MUHAMMAD MIAN *v.* MUKUT PERTAP NARAIN

1 Pat. L. J. 92

——— ss. 148 and 149—

See S. 27 . . 26 C. W. N. 391

——— ss. 148 and 115 and O. IX, rr. 8, 9 and 13—*Dismissal for default—application for re-instatement—Limitation Act (IX of 1908), ss. 5 and 18—arbitrary exercise of discretion to extend time.* The discretion conferred by s. 148 of the Code of Civil Procedure, 1908, cannot be arbitrarily exercised in matters to which the rules of limitation apply, and in which, by those rules the Court can only extend the time after a proper judicial consideration of the cause shewn under s. 5, or the fraud established under s. 18 of the Limitation Act, 1908. A Court cannot keep alive a cause of action for an indefinite period by granting without cause shewn and without consideration indulgence under s. 148, to litigants who are guilty of the grossest *laches,* and who fail to comply with the order of the Court. MUSAMMAT DUKHNO *v.* MUNSHI SAHU . . . 4 Pat. L. J. 428

——— ss. 148 and 151; O. XXXIV, r. 8; O. XLVII—*Decree conditioned upon payment of money within a fixed period—Court not competent to extend time for payment otherwise than in the case of mortgage decrees.* Except in the case of a decree in a mortgage suit to which O. XXXIV, r. 8, of the Code of Civil Procedure applies, a court has no power to extend the time limited for payment of money ordered by a decree to be paid as a condition precedent to its operation. *Suranjan Singh* v. *Ram Bahal Lal, I. L. R. 35 All. 582,* followed

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— ss. 148 and 151—*contd.*

Idumba Parayan v. *Pethi Reddi, I. L. R. 43 Mad.* 357, dissented from. KANDHAIYA SINGH MUSAMMAT *v.* KUNDAN . . I. L. R. 42 All. 639

———s. 148 ; O. IX, r. 13—*Decree, ex-parte—Conditional order setting aside decree—Condition not fulfilled—Court competent either to extend time for compliance with condition or to pass a fresh conditional order.* On an application to set aside an *ex parte* decree the Court passed an order in favour of the applicants, but conditional on their paying to the plaintiff by a certain date a sum of money as damages This condition was not fulfilled, and the Court, holding that it had no jursidiction to receive the prescribed payment after the date fixed, disallowed the defendants' application to set aside the decree. *Held,* (i) that an appeal lay from this order, and (ii) that the Court below had jurisdiction to extend the time for payment of the damages or to pass a fresh conditional order setting aside the decree upon terms, the

——————Pre-emption—decree for—where a decree for pre-emption has been made O. XX, r. 14 of the Code does not deprive the Court making the decree of the power vested in it under s. 148 to extend the time fixed in the decree for the deposit of the purchase money. ABU MUHAMMAD MIAN *v.* MUKUL PERTAP NARAIN 1 Pat. L. J. 92

——— s. 148 and O. XXI, r. 89—*Sale application to set aside—Limitation, whether court may extend period of.* An application to set aside a sale under r. 89 or O. XXI of the Code of Civil Procedure, 1908 must be made within 30 days of the date of the sale unless the parties agree to an extension of this period, and the court has no

WAR MISSER . . . . 2 Pat. L. J. 16·

——— s. 148, O. XXXIV, r. 8—*Mortgage—Redemption—Mortgage money not paid within time limited by decree—Power of Court to extend time.* S. 148 of the Code of Civil Procedure applies to cases in which the time fixed by the Code of Civil Procedure for the doing of some act is extended and not to the extending of the time fixed by a mortgage decree for the payment of a prior mortgage. The plaintiff, in a suit for redemption of a mortgage, obtained a decree which provided in the event of non-payment, not that he should be debarred from all right to redeem the mortgaged property, but that his suit should be dismissed. Owing to a *bona fide* mistake, the plaintiff paid into Court within the time limited less than the sum actually due. *Held,* that the Court had power under O. XXXIV, r. 8, of the Code of Civil Procedure to extend the time limited for payment of the full decretal amount. HET SINGH *v.* TIKA RAM (1912) I. L. R. 34 All. 388

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— s. 148, Sch. II, s. 15 (c)—

See ARBITRATION I. L. R. 38 Calc. 522

——— s. 149—

See s. 110 . . I. L. R. 1 Lab. 220

See COURT FEE. . I. L. R. 1 Lah. 234

See LIMITATION . 1 Pat. L. J. 420

——— s. 150—

See s. 37 . I. L. R. 37 Mad. 462

——————" *Assignment* " *of busi-*

whereof arose within certain local limits. Subse-

MALI *v.* MUNSHI NIAMUDDIN AHMED 26 C. W. N. 216 I. L. R. 42 Mad. 821

——— s. 151—

See S. 14 . I. L. R. 32 All. 71

See APPEAL . I. L. R. 41 Calc. 418

See S. 47 . . 2 Pat. L. J. 361

See S. 115 . I. L. R. 38 Bom. 638
4 Pat. L. J. 57
3 Pat. L. J. 250
I. L. R. 42 Bom. 363

See CASTE I. L. R. 34 Bom. 467

See CIVIL PROCEDURE CODE, 1908, s. 144 18 C. W. N. 1299

See COURT FEES . 3 Pat. L. J. 452

See EXECUTION OF DECREE.
3 Pat. L. J. 435
4 Pat. L. J. 330

See HIGH COURT, JURISDICTION OF. I. L. R. 40 Calc. 955

See INSOLVENCY. I. L. R. 43 Calc. 243

See LIMITATION ACT, 1908, ART. 168. I. L. R. 1 Lah. 363

See PROBATE AND ADMINISTRATION ACT (V OF 1881), s. 50. I. L. R. 37 All. 380

See STAMP ACT, 1899, s. 52. 14 C. W. N. 1101

See TRUSTS ACT I. L. R. 34 Bom. 437

1. ——— Decree of Small Cause Court—*Money lying in deposit in the Court of the First Class Subordinate Judge—Attachment and recovery of money in execution of the Small Cause Court decree—Suit in the Court of the First Class Subordinate Judge for a declaration that the attachment was invalid and for refund of money—Decree accord-*

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— s. 151—*contd.*

ingly—Proceedings in the Small Cause Court and order for refund by that Court—Order not sustainable. The plaintiff brought a suit in the Court of the First Class Subordinate Judge and finally obtained a decree declaring that an attachment on certain money, already lying in deposit in that Court, levied by the defendant in execution of his Small Cause Court decree was invalid and decreeing that the defendant should repay the same to the plaintiff. In execution of the said decree in the suit of the Court of the First Class Subordinate Judge, the plaintiff applied to the Small Cause for the refund of the money and that Court passed an order for the refund. The defendant, thereupon, preferred an application to the High Court under the extraordinary jurisdiction. *Held,* setting aside the order, that such an order could only be made if it was necessary for two purposes, namely, for the ends of justice or to prevent the abuse of the process of the Court. The plaintiff had already a decree which he was entitled to execute in the First Class Subordinate Judge's Court. GANESH NARAYAN *v.* PURUSHOTTAM GANGADHAR (1919)
I. L. R. 34 Bom. 135

2. ——— **Caste questions**—*Trustees of caste funds—Extent of right to inspect documents—Demand and refusal—Jurisdiction of Civil Courts in caste questions—Application of Indian Trusts Act (II of 1882), ss. 5 and 6, to creation of trusts to caste funds—Civil Procedure Code (Act V of 1908), s. 151. Held,* that when according to well-established principles certain questions have been removed from the jurisdiction of the Court, they cannot be brought within the jurisdiction under s. 151 of the Civil Procedure Code (Act V of 1908). JETHABHAI NARSEY *v.* CHAPSEY COOVERJI (1909)
I. L. R. 34 Bom. 467

3. ——— **Costs against persons behind benamidar creditor obtaining adjudication**—*order in insolvency proceedings.* Certain persons were adjudicated insolvents on the application of a lady who professed to be a creditor. The insolvents questioned the right of the lady to claim as a creditor in the insolvency before the Official Assignee who held that the lady was not a creditor but a *benamidar* for certain other persons. Against this decision of the Official Assignee the lady preferred an appeal which was ultimately dismissed by the court of Appeal. The adjudication order was also cancelled. On the application of those who had been adjudicated insolvents: *Held,* that they are entitled to costs in respect of the proceedings connected with the *benamidar's* claim as a creditor in insolvency against the real persons behind the *benamidar* when it appeared that the person put forward was of no means, and was put forward by them with a view to abusing the process of the Court. KETOKY CHARAN BANERJI *v.* SARAT KUMARI DEBI (1917). . . . **21 C. W. N. 826**

——— **ss. 151 and 154**—*Money deposited in Court—Withdrawal by one party—Undertaking by party to repay amount—No provision in undertaking to pay interest—Application by party entitled to recover amount with interest—Power of Court to enforce undertaking—Liability for interest.* The plaintiffs having sued to establish their right to certain money which had been paid into Court by a third party, the defendant was allowed to draw the money on an undertaking to repay it if the plaintiffs succeeded. The plaintiffs having obtained a decree, *held,* that the Court had inherent power to order the defendant to repay the money, and that he could be made liable for interest as he had had the wrongful use of the money. *Rodger* v. *The Comptoir D'Escompte DeParis, I. L. R. 3 P. C. A. C. 465, Subbarayudu* v. *Yerram Setti Seshasani, I. L. R. 40 Mad. 299,* and *Indra Chund Bothra* v. *Mr. A. H. Forbes, 2 Pat., L. J. 149,* referred to. ALAGAPPA CHETTIAR *v.* MUTHUKUMARA CHETTIAR (1917) . . . . **I. L. R. 41 Mad. 316**

——— **ss. 151, 47, O. XLVII, r. 2**—*Court inherent power, if to be exercised in contravention of prohibition of statute, and if to be exercised when not tending towards substantial justice—statute, application of.* In exercise of its inherent powers under s. 151 of the Civil Procedure Code, the Court cannot assume jurisdiction to grant a review where it has been expressly forbidden by the Legislature to entertain such application. On any point specifically dealt with by the Code, the Court cannot disregard the letter of the enactment according to its true construction, though, as the Legislature cannot anticipate and make express provisions to cover all possible contingencies, it is the duty of a Judge to apply the provisions of the law not only to what appears to be regulated expressly thereby, but also to all cases to which just application of them may be made and which appears to be comprehended either within the express sense of the law or within the consequences that may be gathered from it. The inherent power of a Court can be invoked only for the attainment of the ends of substantial justice for the administration of which alone Courts exist. A sale certificate is merely evidence of title and does not create title, so that if the Court should refuse to grant such a certificate to the auction-purchaser, possession should not be delivered to him as required by the Code. This will not preclude him from suing for a declaration of title and for recovery of possession within 12 years of the date when the sale was confirmed. Where purporting to act under s. 151, Civil Procedure Code, a Munsif cancelled an order for delivery of possession passed by his predecessor on the ground that the application for delivery of possession having been made more than 3 years after the date of confirmation of the sale was manifestly barred by limitation. *Held,* that as the Munsif was expressly forbidden by statute to entertain an application for review, he could not entertain the application in exercise of his inherent powers. That the order should not have been made, as its only effect would be to drive the auction-purchaser to institute a suit. SASI BHUSAN MOOKERJEE *v.* RADHA NATH BOSE (1914) . . . . **19 C. W. N. 835**

——— **ss. 151 and 152**—

See AMENDMENT OF DECREE.
4 Pat. L. J. 330

1. ——— *Decree in apparent conformity with judgment—True intention of Court as to costs awarded to successful party, whether against one or more defendant, as gathered from whole judgment, if may be given effect to, by way of amendment—Review application, if only remedy.* Where one only of several defendants contested the suit which was decreed in favour of the plaintiffs,

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— *s.* 151—*contd.*

and from the judgment, as a whole, it appeared that the Court intended to make defendant No. 1 alone liable for the costs and not the other defendants, but in concluding its judgment it said : " the suit be decreed with costs." *Held*, that this portion of the judgment was elliptical and ambiguous, and the true intention of the Court was to be gathered from the judgment as a whole, and the decree of the Court which following the concluding portion of the judgment awarded costs against all the defendants was not really in accord with the true intention of the Court. That the defect in the decree could be amended under either *s.* 151 or s 152 of the Civil Procedure Code, and an application for review of judgment was not the only remedy of the other defendants. *Brij Ratan* v. *Jay Narain, I. L. R. 37 Calc. 649, 659, In re Swire, 30 Ch. D. 239,* referred to. Such an amendment could be made even after an appeal had been lodged from the decree. *E.* v. *E.* [*1903*]. *P. 88,* followed. BARHAMDEO SINGH *v.* HARMANOOE SINGH (1913) . . . **18 C. W. N. 772**

——— ss. 151, 152—*Inherent jurisdiction of Court—Scope of s. 151—Amendment of decree.* S. 152 does not in any way affect the inherent jurisdiction of the Court under s. 151 and in exercise of this jurisdiction the Court can amend a decree even when s. 152 has no application. MOHABIR PROSHAD CHOUDHURY *v.* CHANDRA SEKHAR SAHI (1914) . . **19 C. W. N. 1021**

——— If a decree embodying a compromise is inaccurate or does not embody true terms the only remedy is, by an independent suit, to set aside the decree for mistake and fraud or other such ground. RAM LAGAN SAHU *v.* RAM BIRICH KOERI . . . **4 Pat. L. J. 205**

——— **s. 151 O. IX, r. 13**—*Procedure—Minor—Decree against minor set aside on ground of*

appoint a proper guardian *ad litem.* The institution of the suit is complete and saves limitation,

and a decree passed against a minor has been set aside because the minor was not properly represented in the suit, the Court whose duty it ultimately is to appoint a guardian has inherent power, under s. 151 of the Code of Civil Procedure, to revive the suit under O. IX, r. 13 of the Code. *Raj Kumar Roy* v. *Hara Krishna Chakrabarti, 10 Indian Cases, 355.* BHAGWAN DAYAL *v.* PARAM SUKH DAS (1916) . . **I. L. R. 39 All. 8**

——— **s. 151, Os. IX and XLVII**—

See EXECUTION OF DECREE. **4 Pat. L. J. 330**

——— **s. 151, O. XXXIX, r. 1**—

See INSOLVENCY PROCEEDINGS. **3 Pat. L. J. 456**

——— **s. 151, O. XLI, rr. 1, 11**—

See APPEAL . **I. L. R. 42 Calc. 433**

——— **s. 151 and O. XLI, r. 19**—*Indian Limitation Act (IX of 1905), s. 6 and Art. 168*—

cation to re-admit an appeal under O. XLI, r. 19 of the Civil Procedure Code, 1908, is outside the scope of s. 6 of the Indian Limitation Act, 1908 and is governed by Art. 168 of that Act. O. XLI, R. 19, does not exhaust the powers of the Court in a proper case to re-admit an appeal or an application *dismissed for default and it is open to the* Court in exercise of its inherent powers to deal with those applications under s. 51 of the Code of Civil Procedure and to make an order to that effect

Dobey (*1894*) *22 Calc. 8* and *Raja Debi Bakhsh Singh* v. *Habib Shah* (*1913*) *L. R. 40 I. A. 151,* referred to SONUBAI *v.* SHIVAJIRAO (1920) **I. L. R. 45 Bom. 648**

——— **s. 151, O. XLIII, r. 23**—

See REMAND. . . **3 Pat. L. J. 253**

——— **s. 152, 1882 Code 206 (3)**—

See S. 151 . . . **19 C. W. N. 1021**

See PRACTICE . **I. L. R. 37 Calc. 649**

——— *Refusal of Court to correct an accidental mistake in the drawing up of a decree—Revision—Jurisdiction.* In a suit for sale on foot of a mortgage one of the defendants

judgment directed that a decree for sale should be prepared in accordance with the provisions of O. XXXIV, r. 4, of the Code of Civil Procedure ; but the decree which was drawn up was one for sale of the property in suit, without any reference to the prior mortgage. The prior mortgagee presented an application under s. 152 of the Code of Civil Procedure to the Court which passed the decree to have it amended *Held,* that the prior mortgagee, whether or not he had preferred an appeal from the decree, was entitled, with reference to s. 152, to have it amended, and the Court in refusing to amend had failed to exercise a jurisdiction vested in it by law. SAHADEO GIR *v.* DEO DUTT MISIR (1915). . . **I. L. R. 37 All. 323**

——— **s. 152 ; O. XLVII, r. 1**—

See PRACTICE . **I. L. R. 44 Calc. 28**

——— **s. 153**—

See DECREE-HOLDER. **I. L. R. 38 Mad. 677**

See HINDU LAW—PARTITION. **1 Pat. L. J. 393**

See PROCEDURE **I. L. R. 48 Calc. 832**

——— *Partition suit—Omis-*

also by the Appellate Court. Per JWALA PRASAD, J.

CIVIL PROCEDURE CODE (ACT V OF 1908)
—*contd.*

——— **s. 153**—*contd.*

In a suit for partition of joint family property by a Hindu, all the properties must be included in the action, and the reason for this proposition is to save the parties from multiplicity of proceedings. If by inadvertence, mistake, or fraud of any of the parties, some of the joint properties are not partitioned in the original suit, there will be no bar after the partition to have the properties, excluded at the first partition, divided when the mistake or fraud is discovered. *Jogendra Nath Mukherji* v. *Jugobundhu Mukherji, I. L. R. 14 Calc. 122,* and *Jogendra Nath* v. *Baladeo Das, I. L. R. 35 Calc. 961 ; s. c. 12 C. W. N. 127,* referred to. O. VI, r. 17, enables the Court to allow either party to alter or amend his pleadings at any stage on such terms as may be just. S. 153, C. P. C., empowers the Court to make itself all necessary amendments for the purpose of determining the real questions or issues raised in the action. This power is vested both in the original as well as in the Appellate Court. *Srimohan Thakur* v. *MacGregor, I. L. R. 28 Calc. 769,* approved. *Per* ATKINSON, *J.* To avoid multiplicity of suits, the law has endowed all Courts in all countries with just and most ample powers of amendment. The widest power of amendment is given not only to the primary Court but to the High Court, which enables the Court to try all matters properly in dispute between the parties. MUKUNDA LAL CHAKRAVARTI *v.* JOGESH CHANDRA CHAKRAVARTI (1916) . . **20 C. W. N. 1276**

——— **O. I, r. 1 (1882 Code s. 26)**—

See APPEAL TO PRIVY COUNCIL.
I. L. R. 38 Mad. 406

See MISJOINDER OF PARTIES.
1 Pat. L. J. 437

See NUISANCE . **I. L. R. 40 Bom. 401**

——— *Co-mortgagees*—Where property is mortgaged to two persons as tenants in common and there is no separate covenant for repayment and one mortgagee wants to realise and the other does not, the former should sue in respect of the whole amount joining his co-mortgagee as defendant. SUNITABALA *v.* DHARASUNDARI . . . **24 C. W. N. 297**

——— **O. I, rr. 1, 3**—*Apply to questions of joinder of parties, as well as causes of action.* Questions of joinder of parties and causes of action are governed by the same principle whether the claim is founded on breach of contract or on tort. RAMENDRO NATH RAY *v.* BROJENDRO NATH DAS (1917) . . . . **21 C. W. N. 794**

——— **O. I, rr. 1, 3 ; O. II, r. 3**—
See MISJOINDER OF PARTIES.
I. L. R. 45 Calc. 111

——— **O. I, r. 3, (1882 Code s. 28)**—

See PARTIES . **I. L. R. 42 Calc. 1135**

See PROVINCIAL INSOLVENCY ACT, 1907.
I. L. R. 45 Bom. 810

——— **Suit by reversioner for possession**—*Other reversioners and transferees from widow joined as defendants.* *Held,* that it was competent to a reversioner suing for possession of immoveable property after the death of a Hindu widow to join as defendants both other reversioners in possession of the property claimed and also transferees of such property from the widow, and the suit was not bad for multifariousness. *Parbati Kunwar* v. *Mahmud Fatima, I. L. R. 29 All. 267, Kubra Jan* v. *Ram Bali, I. L. R. 30 All. 560,* and *Ganeshi Lal* v. *Khairati Singh, I. L. R. 16 All. 279,* referred to. BAL KRISHNA DAS *v.* HIRA LAL BAGLA (1914)
I. L. R. 36 All. 406

——— *Misjoinder—Agreement to sell his share by one member of a joint Hindu family—Suit by vendee for specific performance, partition and possession against vendor and the vendor's coparceners—Specific Relief Act (I of 1877), s. 27 (b) and (c).* Where a plaintiff sued a member of a joint Hindu family for specific performance of a contract to sell his share, and included in the same suit a claim for partition and possession against all the members of the family, based on an allegation that a subsequent partition made between all the members of the family by which the items contracted to be sold to the plaintiff were allotted to the other members, was made with a view to defraud the plaintiff of his rights under the contract. *Held,* by the Full Bench (ABDUR RAHIM, *J., contra*)—(i) that the claim for partition was wrongly joined with the claim for specific performance, as at the date of suit the plaintiff had no right to sue for partition not having completed his title by a sale-deed; and (ii) that by reason of the subsequent partition the other members of the joint family were properly made parties to the suit for specific performance as subsequent transferees with notice. *Tasker* v. *Small, 3 My. & Cr. 63,* applied. *Per* ABDUR RAHIM, *J.*—The suit as framed for specific performance, as well as for partition and possession, against all the members of the family is maintainable under O. I, r. 3, Civil Procedure Code, and s. 27 (c) of the Specific Relief Act. A right to ask both for specific performance, as well as for partition and possession, arises at the time the vendor refuses to carry out the bargain and give possession of the property. The right to possession *arises out of* the contract to sell within the meaning of O. I, r. 3, Civil Procedure Code. RANGAYYA REDDY *v.* SUBRAMANIA AYYAR (1917)
I. L. R. 40 Mad. 365

——— **O. I, r. 3, O. II, r. 3**—*Grades of several defendants in one suit—" Same act or transaction "—" Series of acts or transactions "—Practice.* In reading O. I, r. 3, of the Civil Procedure Code (Act V of 1908) it seems quite obvious that the word "same" which precedes the words "acts or transaction" governs also the words "series of acts or transactions" and must be read before those words also. The first condition to be fulfilled before joining several persons as co-defendants in the same suit is that the right to relief sought in the suit must arise against all the defendants from the *same* act or transaction or from the *same* series of acts or transactions. The second condition to be fulfilled under the rule is that some common question either of fact or law should arise against the defendants if separate suits were brought against such persons. Before a plaintiff can join several defendants in the same suit *both* the conditions laid down in the rule must be fulfilled, *first,* the relief sought against the defendants whether jointly, severally or in the alternative must arise from the same act or transac-

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

———— **O. I, r. 3 ; O. II, r. 3**—*contd.*

tion or the same series of acts or transactions. And, *secondly*, there must rise between the plaintiff and all the defendants some common question of law or fact. The plaintiff may in one action unite several causes of action against several defendants provided that all such defendants are "jointly liable in respect of each and all of such causes of action" and that the condition precedent to the plaintiff being allowed to join several causes of action against several defendants, is that such defendants must all "have a joint interest in the main question raised by the litigation" and that causes of action joined in one suit against several defendants must be causes of action in which "the defendants are all jointly interested." It is not necessary, that every defendant should be interested as to all the reliefs claimed in the suit but it is necessary that there must be a cause of action in which all the defendants are more or less interested although the relief asked against them may vary. UMABAI *v.* BHAU BALWANT (1908) **I. L. R. 34 Bom. 358**

———— **O. I, r. 3 ; O. XXIII, r. 1**—*Procedure—Suit dismissed for misjoinder of parties and of causes of action—Plaintiff permitted to withdraw suit with liberty to bring fresh suits* Where it was found on second appeal to the High Court that the suit out of which the appeal had arisen was bad for misjoinder of parties and of causes of action, in that there was no community of interest between the various defendants, whose sole connection with each other was that they were purchasers of different portions of property, the whole of which was claimed by the plaintiff, the High Court permitted the suit to be withdrawn on terms as to costs, with liberty to the plaintiff to bring separate suits against each of the defendants. AFZAL SHAH *v.* LACHMI NARAIN (1917) **I. L. R. 40 All. 7**

———— **O. I, r. 8 (1882 Code ss. 30 and 32)**—

See CHOTA NAGPUR ENCUMBERED ESTATE ACT. ss. 17, 18. . **4 Pat. L. J. 580**

See HINDU LAW . **24 C. W. N. 206**

See MAHOMEDAN LAW—WAQF. **I. L. R. 35 All. 197**

See MOSQUE PROPERTY, SUIT FOR. **I. L. R. 44 Calc. 258**

See MUTT . **I. L. R. 41 Mad. 124**

See RELIGIOUS ENDOWMENT. **I. L. R. 40 Mad. 212**

———— **Suit filed by Representing body of creditors**—*Application to be made party—Administration suit* Where a suit has been filed on behalf of a body of persons and an individual member of that body applies to be made a party, he must show that his interests will be seriously prejudiced if he is not allowed to come in He must show that the conduct of the suit is not in proper hands, or that action prejudicial to his interest is being taken by those who purport to represent him. In an administration suit it is extremely undesirable that individual creditors should be added as parties unless they show some very strong reason. The willingness of the applicants to bear their own costs does not counterbalance the delay caused by the addition of a party and the consequent increase in the cost of other parties.

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

———— **O. I, r. 8 (1882 Code ss. 30 and 32)** —*contd*

VASSONJI TRICUMJI & Co *v.* ESMAILBHAI SHIVJI (1909) . . . **I. L. R. 34 Bom. 420**

———— *Suit for declaration of public right of way, if can succeed without proof of special damage—Advocate-General's permission under s. 92, C. P. Code, if necessary, where permission of Court is taken under O. I, r 8—Limitation Act (IX of 1908), s. 23, Arts. 120 and 144, applicability of, in such suit.* Plaintiff sued for a declaration that a village path was a public way and sought relief for himself and his fellow villagers. The permission of the Court was taken under O. I, r. 8, of the C. P Code. The suit was decreed

Plaintiff suffered special damage or not did not arise, because a suit for a declaration that a pathway is a village pathway can succeed without proof of special damage. *Harihar Das* v. *Chandra Kumar Guha, 23 C. W. N. 91* followed. The suit was one to which O. I, r 8, C. P. Code, was appropriate and the Court's permission having been obtained under that rule, recourse to the Advocate-General was not necessary. Art. 144 ... to the

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26 C. W. N. 587

———— **Representing the section of a caste**—*to take account and to recover moneys belonging to the section—Meeting not properly convened—Suit opposed by numerous members of the section—Suit as representing the plaintiffs supported by a large number of the*

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and the funds of each section were separately kept by defendant No 1, who was the headman

were authorised

meeting at the

8th April 1909.

It appeared ... was irregularly convened. The plaintiffs brought the present suit, under O. I, r. 8 of the Civil Procedure Code, to take accounts of the funds belonging to the Mojumpuria section from defendant No. 1, and to recover from him the amount that might ...en. Out

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must fail, for the plaintiffs could not ... sent nor sue on behalf of those numerous members of the Mojumpuria section who admittedly were in diametrical opposition to them in the present controversy: *Held, also,* that the plaintiffs could not call in aid the private expressions of consent obtained after suit filed so as to supply that authority which was admittedly lacking at the time when the suit was in fact filed. HARKISHANDAS SHIVLAL *v.* CHHAGANLAL NARSIDAS (1915) **I. L. R. 40 Bom. 158**

CIVIL PROCEDURE CODE (ACT V OF 1908) *—contd.*

———— O. I, r. 8 (1882 Code ss. 30 and 32) *—concld.*

———— **Death of some of the persons on whose behalf a suit was brought**—*impleaded as respondents in the Appellate Court—abatement of appeal—order that appeal has abated—whether a decree and open to appeal.* The *Jat* proprietors, 393 in number, claimed to be alone entitled to the income of the *shamilat* land of the village as against the *Brahman* proprietors, 53 in number. The plaint was signed by 6 persons and was accompanied by a petition by the same persons under O. I, r. 8, Civil Procedure Code, praying that they be allowed to sue on behalf of all the *Jat* proprietors and that two of the defendants be permitted to defend the suit on behalf of all the *Brahman* proprietors. This was sanctioned by the Court and a decree was eventually passed in favour of the plaintiffs for a declaration of their rights as prayed. The defendants appealed and in the list of parties in their memorandum of appeal set out the names of 52 defendants as appellants and the 393 plaintiffs as respondents. On the date of hearing it was discovered that three of those respondents had died and applications to bring their legal representatives on the record had not been presented within the period of limitation. Thereupon the Lower Appellate Court decided that the appeal had abated *in toto* relying on *Hadu* v. *Lala* (*41 P. R. 1915*). On appeal to this Court, it was contended that no appeal was competent as the order of the Lower Appellate Court was not a decree. *Held,* that the order of the Lower Appellate Court was in effect that inasmuch as the interest of all the plaintiffs was common and the legal representatives of the deceased plaintiffs had not been brought on the record within time the whole appeal had abated and that such an order falls within the definition of the term "decree" and is appealable as such. *Niranjan Nath* v. *Afzal Hussain* (*128 P. R. 1916 F. B.*), followed. *Held also,* as the plaintiff's respondents who died were not among the six plaintiffs who had instituted the suit in accordance with the order of the Court under O. I, r. 8 of the Code Civil of Procedure but among the persons on behalf of whom the 6 plaintiffs had sued, they were not parties to the suit and were unnecessarily made respondents in the appeal. It was therefore not necessary to bring their legal representatives on the record and the appeal had not abated. *Ram Diyal* v. *Mohammad Raju Shah* (*46 P. R. 1919*), followed.
UDMI *v.* HIRA . . **I. L. R. 1 Lah. 582**

———— O. I, r. 8 ; O. XXI, r. 89 and s. 35—

See CONTRACT ACT (IX OF 1872), s. 70
I. L. R. 42 Bom. 556

———— O. I, r. 9 (1882 Code s. 31)—

See O. XXXIV, R. 1.
6 Pat. L. J. 640

See LIMITATION ACT, 1877, ss. 22, 28.
I. L. R. 34 Bom. 91

See MALABAR LAW.
I. L. R. 44 Mad. 344

See RIGHT OF WAY **25 C. W. N. 249**

———— *Parties, non-joinder, dismissal of suit for if proper—Amendment—O. II, r. 5, joining claims against executors personally and as executors—O. I, r. 1—Joinder of claim in the alternative as* shebait *and as owner—Inconsistent positions.* Plaintiff alleged that one *J* was in possession of shares of coparcenary properties belonging to himself and others, including one *N*, from whose widow (it was averred) *J* had improperly obtained an *ekrar* under which he retained possession of *N's* share till his death. After his death defendants Nos. 2 to 6 (who, it transpired, were executors to the will of *J*) remained in possession of that share. After *J's* death *N's* widow adopted plaintiff as *N's* son, and plaintiff brought this suit to recover possession of *N's* share, with mesne profits as from the date of adoption, making defendant No. 1, who was heir and residuary legatee of *J*, and defendants Nos. 2 to 6 in their personal capacity, defendants, the allegation being that these defendants were keeping the plaintiff out of possession. The plaintiff stated that, so far as he had come to know on inquiry, the properties in suit were *debutter* properties and that he and others of the family had *shebaits* interest therein, but that, in case the properties were found not to be *debutter*, he might be allowed to recover as owner. The defendants, *inter alia,* objected that defendants Nos. 2 to 6 having been in possession as executors the suit could not proceed against them in their personal capacity, and that the plaintiff could not maintain the suit as a *shebait* and at the same time in his own right as owner. The first Court dismissed the suit on the first of these grounds, and was also of opinion that the suit was not maintainable by plaintiff alternatively as *shebait* and owner, his interest as *shebait* being in conflict with his interest as owner. *Held,* that though, under O. I, r. 9, the Court could not dismiss the suit on the ground that defendants Nos. 2 to 6 were not sued as executors, in order effectually and completely to adjudicate all the questions involved in the case, defendants Nos. 2 to 6 should be sued personally, as well as executors and defendant No. 1 (who was found not to be in possession) should be sued as residuary legatee and heir of *J* and the plaint should be amended accordingly. That O. II, r. 5, was no bar to the amendment as defendants Nos. 2 to 6 claimed to be in possession of the properties as part of *J's* estate and prevented the plaintiff from taking possession professedly in their character as executors. The word "estate" as used in O. II, r. 5, means both the "estate" rightly and properly held as executors and the "estate" in its physical sense. That the claim of the plaintiff in the alternative as *shebait* and as owner was not open to objection, having arisen out of the same transaction and there being really no conflict, the plaintiff claiming as owner only in the event of the properties being found to be not *debutter.* NIRPENDRO NATH RAY *v.* BIRENDRO NATH RAY (1917) . . **21 C. W. N. 939**

CIVIL PROCEDURE CODE (ACT V OF 1908) *—contd.*

———— O. I, r. 9 (1882 Code s. 31)— *concld.*

———— O. I, r. 9—

See O. XXXIV, R. 1.
I. L. R. 35 All. 441

See MALABAR LAW.
I. L. R. 44 Mad. 344

———— O. I, r. 9 and O. XXXIV, r. 1—
Mortgage suit—non-joinder of parties—joinder of parties after expiration of period of limitation. R. 9 of O. I of the Code of Civil Procedure, 1908,

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— **O. I, r. 9 and O. XXXIV, r. 1**—*concld.*

is subordinate to r. 1 of O. XXXIV. A mortgage is indivisible and if all the parties entitled to a share in the money due on the mortgage are not upon the record the suit must be dismissed in its entirety. When a necessary party has not been impleaded at the time of the institution of the suit but has been *brought on the record after* the period of limitation has expired the whole suit must be dismissed. When it is intended to sue in the name of a managing member of a joint Hindu family governed by the *Mitakshara*, *on account of a breach of contract made by a* former managing member of the family, it must be clearly stated in the plaint that the suit is by that managing member. It is not sufficient that he should be accidentally on the record as one out *of many members of the family* of whom several have been omitted GIRWAR NARAIN MAHTON *v.* MUSSAMAT MAKBUNESSA . **I Pat. L. J. 468**

——— **O. I, r. 10, (1882 Code ss. 27, 32 and 33)**—

See ACCOUNTS . **24 C. W. N. 110**

See INSOLVENCY . **I. L. R. 42 Calc. 72**

See MADRAS ESTATE LANDS ACT 1908, s. 55 . . **I. L. R. 44 Mad. 43**

See PARTIES . **I. L. R. 46 Calc. 48**

See SPECIFIC RELIEF ACT (I OF 1877), s. 42 . . **I. L. R. 42 Mad. 219**

1. ——— *Suit instituted by administratrix after power as such had terminated—*Bonâ fide *mistake—Due care and attention if must be established.* For a *bonâ fide* mistake as contemplated by O. 1, r. 10 of the Civil Procedure Code, *it is not necessary* that the party who committed it should have exercised due care and attention Where it is not deliberately but honestly made, the mistake is *bonâ fide.* NISTARINI DASYA *v.* SARAT CHANDRA MAZUMDAR (1915) **20 C. W. N. 49**

2. ——— *Scope and effect of, as to powers of Courts in striking off and adding parties—Dismissing suit for non-prosecution, when plaintiffs compromise with only some of the defendants—Court if bound to pass a decree embodying the terms of the compromise under O. XXIII, r. 3—Appeal, if lies when no decree passed—Alternative remedy by way of revision under s. 115, C. P. C., if lies—Erroneous application of section of law if open to revision under s. 115, C. P. C.* In a suit, for dissolution of partnership and for accounts the plaintiffs having received a large sum of money from some of the defendants, filed a compromise petition and asked for dismissal of the suit. The other defendants objected to the dismissal of the suit, praying that they might be made, plaintiffs and allowed to continue the suit, and the plaintiffs, if necessary, might be made defendants The Court held that it had no power under *the new Civil Procedure Code to* make the transposition of parties asked for, and hence dismissed the suit for non-prosecution. The objecting defendants then asked the Court to draw up a decree, so that they might appeal, but the Court did not draw up any decree: *Held,* that the Court had ample powers under the new Civil Procedure Code to make transposition of parties and it ought to have done that. That

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— **O. I, r. 10, (1882 Code ss. 27, 32 and 33)**—*contd.*

it was not bound to pass a decree under O. XXIII, r. 3, and no appeal lies against the order of dismissal That the lower Court, having failed to exercise the discretion vested in it under O. I, r. 10, failed to exercise a jurisdiction vested in it in refusing to make the transposition prayed for, and hence that order is liable to be set aside on revision by the High Court. *Krishnabai* v. *Sonubai, 2 Bom H. C. R 310, Eduljee v. Vulleebhoy, I. L. R. 7 Bom. 167,* and *Saiyad Abdul Hak* v. *Gulam Jilani, I. L. R 20 Bom 677,* followed. BROJENDRA KUMAR DAS *v* GOBINDA MOHAN DAS 1916) . . . . **20 C. W. N. 752**

3. ——— *Plaintiff described as a minor, really a major—*Bonâ fide *mistake of next friend—Dismissal of suit, if proper—Procedure to be adopted* Where a plaintiff was described in the plaint as a minor but had really attained majority some four days before the plaint was filed by his next friend who was under a *bonâ fide* belief that he was still a minor when she filed the suit on his behalf as his next friend: *Held,* that the suit ought not to be dismissed but that the proper procedure to be adopted in the case was to [illegible] after makin[illegible] striking off t[illegible] minor suing [illegible] other consec[illegible] *Taqui Jan* v [illegible] followed *Sh*[illegible] *20 All. 90,* referred to. SHANMUGA CHETTY *v.* NARAYANA AYYAR (1916) **I. L. R. 40 Mad. 743**

4. ——— *Limitation Act (IX of 1908), Art. 171—Partition suit—Death of a party—Abatement—Application to set aside the* [illegible] *the suit for the ends of justice.* On the 8th April 1892 the plaintiff obtained a decree for partition and died in October 1893, leaving him surviving a minor son, who attained majority in February 1907. At a very late stage of the execution-proceedings, the son made an application on the 16th April 1910 for the issue of a commission to effect partition according to the rights declared in the partition decree: *Held,* that as soon as the Civil Procedure Code (Act V of 1908) came into force the suit abated so far as regarded the applicant's father who was a party, and the application to set aside the abatement by adding the applicant as the legal representative of the deceased not having been made within sixty days under Art. 171 of the Limitation Act (IX of 1908), the application was time-barred: *Held,* further, that [illegible] should be before [illegible] such orders as might be necessary for the ends of justice. LAKHMICHAND REWACHAND *v.* KACHUBHAI (1911) . . . **I. L. R. 35 Bom. 393**

5. ——— *Parties—Competence of Court to add parties in second appeal. Held,* that the High Court cannot in second appeal add a person as a party unless such person was a party to the appeal before the lower Appellate Court, notwithstanding that he

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— **O. I, r. 10, (1882 Code ss. 27, 32 and 33)**—*concld.*

the suit in the Court of first instance. *Chunni Lal* v. *Lala Ram, I. L. R. 16 All. 5*, followed. PACHKAURI RAUT *v.* RAM KHILAWAN (1914)
I. L. R. 37 All. 57

——— **O. I, r. 10 (2) and O. XXXIV, r. 1**——*Mortgage—Suit for redemption—Suit by some of the heirs of mortgagor—Application to add remaining heirs as defendants, after cause of action had become time-barred—Indian Limitation Act (IX of 1908), s. 22.* Some of the heirs of a mortgagor sued to redeem the mortgage a few days before the expiry of the period of limitation. To meet an objection raised for non-joinder of parties, the plaintiffs subsequently applied to make the remaining heirs party-defendants to the suit. The lower Courts declined to make them parties on the ground that the claim as regards them was barred by s. 22 of the Indian Limitation Act, 1908. The plaintiffs having appealed: *Held*, that the plaintiffs' right to redeem which they had when they filed the suit was not lost by their omission to make the remaining heirs parties. They were only necessary parties to save multiplicity of suits and to prevent the mortgagee being subjected to suits being filed against him in succession by various parties entitled to the equity of redemption. *Held*, also, that it was within the discretion of the Court under O. I, r. 10, sub-r. (2) of the Civil Procedure Code, to make the remaining heirs co-defendants, and then to consider what would be the legal result of such addition. *Per* FAWCETT, *J.*:—" There is no provision in either the Civil Procedure Code or the Indian Limitation Act which says that a party cannot be added after his right of suit or liability to be sued (as the case may be) is barred by the provisions of the Indian Limitation Act. Accordingly I think it is absurd to hold that the plaintiffs' right of redemption is entirely lost because he has not complied with the provisions of O. XXXIV, r. 1. That, in my opinion, would be subordinating justice to a technicality of procedure." SHIVUBAI *v.* SHIDDHESHWAR MARTAND (1920) . . . **I. L. R. 45 Bom. 1009**

——— **O. I, r. 10 and O. XXII, r. 10**—A trespasser cannot be said to have brought to suit on behalf of the rightful owner and the latter is consequently not entitled to have himself substituted for the trespasser. When a person has obtained a decree for possession of an estate it is not necessary for him to take out execution of the decree in order to sue an agent of his predecessor in possession for an account. MAHARAJA KESHO PRASAD SINGH *v.* LAL BRIJ MOHAN LAL
2 Pat. L. J. 199

——— **O. I, rr. 10 and 11**—*Defendant, if may be joined as plaintiff*—Bonâ fide *mistake.* Where a plaintiff had brought a suit for the recovery of possession of property falsely denying the title of persons whom he had joined as defendants and asserting that an exchange by which he had transferred this property to these defendants had never been acted upon and it was found that the exchange had in fact terminated the plaintiff's title and had been acted on and that he had therefore no *locus standi* to sue the principal defendant: *Held,* on an application for liberty to join his transferee defendants as plaintiffs, that it could not be said that the plaintiff

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— **O. I, rr. 10 and 11**—*concld.*

had made a *bonâ fide* mistake within the meaning of O. I, r. 10, Civil Procedure Code. GANENDRA NATH RAY CHOWDHURY *v.* SURYA KANTA RAY CHOWDHURY (1912) . . **17 C. W. N. 462**

——— **O. I, r. 13 (1882 Code s. 34)**—Where parties without objection join issue and go to trial defendant cannot later raise irregularities in unitial procedure to defeat jurisdiction. JOY CHANDRA DUTTA *v.* SARAWBALA DEBI
23 C. W. N. 876

——— **O. II, rr. 1, 2 and 3—(1882 Code ss. 42, 43 and 45)**—*Previous suit for declaration, dismissal of, for want of prayer for possession—Later suit for declaration and possession, maintainability of.* The dismissal of a previous suit for a declaration of title to certain properties on the ground that the plaintiff was found entitled to possession is no bar to a suit for possession based on the same title as the causes of action, for which the allegations in the plaints must be looked to, are different in the two cases. O. II, rr. 1, 2 and 3 are no bar to the later suit. *Chand Kour* v. *Partab Singh, I. L. R. 16 Calc. 98, Thrikaikat Madathil Raman* v. *Thiruthiyil Krishnan Nair, I. L. R. 29 Mad. 153, Ramaswami Ayyar* v. *Vythinatha Ayyar, I. L. R. 26 Mad. 760, Nonoo Singh Monda* v. *Anand Singh Monda, I. L. R. 12 Calc. 291, Jibunti Nath Khan* v. *Shib Nath Chuckerbutty, I. L. R. 8 Calc. 819,* and *Mohan Lal* v. *Bilaso, I. L. R. 14 All. 512,* followed. *Muthu Narayana Reddi* v. *Rayalu Reddi, 6 Mad. L. J. 51,* and *Rangasami Pillai* v. *Krishna Pillai, I. L. R. 22 Mad. 259,* not followed. SILIMAN SAIB *v.* HASSON (1913) . . **I. L. R. 38 Mad. 247**

——— **O. II, r. 2 (1882 Code s. 43)**—

See O. VII, R. 6.
I. L. R. 2 Lah. 13

See AGRA TENANCY ACT (II OF 1901), s. 34 . . **I. L. R. 35 All. 512**

See AMENDMENT OF PLAINT.
I. L. R. 45 Calc. 305

See CAUSE OF ACTION.
I. L. R. 41 Calc. 825
I. L. R. 46 Calc. 640

See CIVIL PROCEDURE CODE (1882), s. 43.
I. L. R. 32 All. 625
I. L. R. 33 All. 244

See EXECUTION . **I. L. R. 38 Mad. 199**

See LIMITATION ACT (IX OF 1908), SCH. I, ARTS. 62 AND 120.
I. L. R. 40 Mad. 291

See MAHOMEDAN LAW—DOWER.
I. L. R. 33 All. 291

See MORTGAGE . . **25 C. W. N. 129**

See RES JUDICATA.
I. L. R. 45 Bom. 805

See SANTAL PARGANAS SETTLEMENT REGULATION, 1872 . **6 Pat. L. J. 373**

See SPECIFIC PERFORMANCE.
5 Pat. L. J. 314

1. ——— **Landlord and tenant**—*Lease—Landlord to recover possession on tenants' failure to pay rent—Suit by landlord to recover possession on tenants' failure—Decree directing plaintiff to*

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

—————— **O. II, r. 2 (1882 Code s. 43)**—*contd.*

recover possession on tenants' failure to pay rent within three months—Defendants' failure and recovery of possessions by plaintiff—Prayer in the plaint for reservation of leave to bring a suit for rent not granted—Subsequent suit by the plaintiff to recover rent—Subsequent suit barred. A lease provided that on the tenants' failure to pay rent, the landlord should be entitled to take possession of the lands. The tenants having failed to pay the rent of two years, the landlord sued them and obtained a decree which directed that on the defendants' default to pay all the arrears of rent and costs within three months, the plaintiff should take possession of the lands. In the said suit the plaintiff had asked for permission to bring a separate suit for the rent in arrears for two years, but none was given. Subsequently the plaintiff having brought a suit for the said rent of two years: *Held*, that the suit was barred under O. II, r. 2, of the Civil Procedure Code (Act V of 1908) as the claim in the suit for rent up to the date of forfeiture arose upon the same contract as did the landlord's right of forfeiture for non-payment of rent; that no necessity or reason existed for a separate suit for rent where there had been a forfeiture or non-payment and that the claim for possession and the claim for rent ought to be enforced in one suit, provided the cause of action was the same, unless the Court should give leave for the reservation of one of the remedies. KASHINATH RAMCHANDRA *v.* NATHOO KESHAV (1914) . **I. L. R. 38 Bom. 444**

2. —————— **Hundi**—*given in discharge of debt on accounts—Failure of suit on* hundi—*Subsequent suit based on the accounts.* A debtor gave his creditor a *hundi* for the amount of his debt. The creditor accepted the *hundi*, but the debtor failed to pay it at maturity. The creditor then sued the debtor on his *hundi*, but failed to recover: *Held*, that this was no bar to his suing on the accounts to recover the debt. The cause of action on the *hundi* was totally distinct from the cause of action in respect of the original debt. *Preonath Mukerji* v. *Bisnath Prasad, I. L. R. 29 All. 256*, doubted. *Payana Reena Layana Saminathan Chetty* v. *Pana Lana Palaniappa Chetty, 18 C. W. N. 617*, referred to. BENI RAM *v.* RAM CHANDAR (1914) . . . . **I. L. R. 36 All. 560**

3. —————— **Causes of action different, though claim same**—*Agreement admitting liability and prescribing payment by promissory notes—Promissory notes, materially altered—Suit on promissory notes dismissed—Suit upon agreement, if* [illegible]

grounds—No objection by defendant—Amendment. [illegible]

thereby admitted to be due from *B* to *A*, amounting in all to Rs. 28,224 odd and prescribed the mode in which it was to be paid, namely, by a cash payment of Rs 224 odd (which was immediately paid) and by passing two promissory notes for Rs. 14,000 each "payable with interest" on two dates. The amount of interest was (probably by oversight) not specified, but there was no doubt that the parties intended that it would be at a certain customary rate which worked out to between 6 and 7 per cent. per annum. *A*, however, subsequently, and without communication with *B*, went to one of the arbitrators and (without bad faith either on his part or the arbitrator's persuaded him to alter both promissory notes by inserting therein 9 per cent as the rate of interest. *A*'s action on the two promissory notes having been dismissed on the ground of material alteration, he sued *B* for two items of moneys amounting to Rs. 12,297 odd which he had claimed before the arbitrators and which were included in their award: *Held*, that the "receipt" constituted the award of the arbitrators. That whether it did or did not amount to an award it was clearly an "accord and satisfaction by a substituted agreement" whereby the respective rights of the parties *inter se* were abandoned in consideration of the acceptance by all of a new agreement. That the arrangement for the discharge of the unpaid balance of the amount found due by means of the promissory notes only expressed the mode of payment, which was essentially a matter of form only, the substance of the award being that the specified amount was actually due; the plaintiff could, therefore, sue for the balance due upon the agreement when his action on the promissory notes failed That the form of the plaintiff's action which was based on rights already extinguished by the agreement was faulty But the present action should be treated as one based on the new agreement, the defendant not having taken exception to plaintiff's statement of the grounds of his claim, so as to give him an opportunity to amend them at an earlier stage. That a claim on the promissory notes and a claim for the amount found due under the award were not the same cause of action, but were really inconsistent and mutually exclusive causes of action, and the plaintiff was not required in his suit on the promissory notes to ask for relief on the cause of action arising out of the agreement, by s. 34 of the Ceylon Civil Procedure Act. That the plaintiff's suit which was for a part only of the unpaid balance should be decreed. But he would be precluded by s. 34 of the *Ceylon Civil Procedure Act* from bringing a fresh action for the remainder. The object and meaning of *s. 34 of* the Ceylon Civil Procedure Act (which is very [illegible]

different causes of action, even though they arise from the same transactions. The first part of the clause makes it incumbent on the plaint[illegible] to include the whole of his claim in the [illegible] The second portion makes it incumbent [illegible] to ask for the whole of his remedies. [illegible] paragraph (*Explanation* in the In[illegible] not intended to be an illustration of [illegible] provisions, but a substantive enac[illegible] what otherwise would be ind[illegible] action, one cause of action for [illegible]

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— **O. I, r. 2 (1882 Code s. 43)**—*contd.*

section. SAMINATHAN CHETTY *v.* PALANIAPPA CHETTY (1913) . . . **18 C. W. N. 617**

4. ——— **Omission to sue for right relief** —*Maintainability of subsequent suit.* Where plaintiff knew what relief he was entitled to and deliberately omitted to claim the right relief, his subsequent suit in respect to the same cause of action for the right relief was held to be barred by the provisions of O. II, r. 2, of the Code of Civil Procedure. ABDUL HAKIM *v.* KARAN SINGH (1915) . . . . **I. L. R. 37 All. 646**

5. ——— **Specific performance**—*of an agreement to sell previous suit for—Decree for specific performance—Deed of conveyance obtained in execution—Subsequent suit for recovery of possession against the vendors—Suit not barred.* Where the plaintiff, who had obtained in a previous suit a decree against the defendants for specific performance of an agreement to sell certain immoveable property to the plaintiff and had got a sale deed in his favour in execution of the decree, instituted the present suit for the recovery of possession of the lands from the defendants: *Held,* that the suit was not barred by O. II, r. 2, of the Civil Procedure Code (Act V of 1908). At the time the plaintiff brought the previous suit, the right to possession of the lands was not vested in him, as he acquired that right only on the execution of the deed of conveyance. *Narayana Kavirayan* v. *Kandasami Goundan, I. L. R. 22 Mad. 24,* disapproved. *Rangayya Goundan* v. *Nanjappa Rao, I. L. R. 24 Mad. 491,* explained. *Nathu valad Pandu* v. *Budhu valad Bhika, I. L. R. 18 Bom. 537,* followed. KRISHNAMMAL *v.* SOUNDARARAJA AIYAR (1913) . **I. L. R. 38 Mad. 698**

6. ——— *Specific Relief Act (I of 1877), s. 42—Suit for declaration—Previous decree between third parties—Plaintiffs not parties—Suit to declare that the decree is collusive and not binding on plaintiffs, if maintainable.* The plaintiffs sued for a declaration (*i*) that they were the owners of the suit properties as the reversioners of one *N* who was the last male owner; and (*ii*) that a decree obtained by the first defendant against the second in respect of the properties in another suit to which the plaintiffs were not parties, was collusive and was not binding on the plaintiffs. The plaintiffs had already brought a suit in the same Court against the present defendants to recover possession of some other properties as the reversionary heirs of *N*, but did not include therein the properties claimed in the present suit, though the defendants were in possession of them at the time of their previous suit. The plaintiffs alleged that they came into possession of the properties subsequently to the previous suit. The defendants contended that the suit was barred under O. II, r. 2 of the Civil Procedure Code, and that the suit for a declaration that the decree passed in the suit between the first and the second defendants was collusive and not binding in the plaintiffs, was not maintainable: *Held,* that the present suit was not barred under O. II, r. 2 of the Civil Procdure Code: *Held,* further, that a suit for a declaration that a decree obtained by the first defendant against the second defendant was collusive and not binding on the plaintiffs was maintainable under s. 42 of the Specific Relief Act. NAGANNA *v.* SIVANAPPA (1914) . **I. L. R. 38 Mad. 1162**

7. ——— **Mesne profits**—*Subsequent suit for the same, not barred—Cause of action for mesne profits different from that for possession of land.* Claim for possession and claim for *mesne* profits are separate causes of action and have been always so treated under the Code of Civil Procedure. Where a plaintiff sued for possession of lands only when he might have joined in the same action claims for *mesne* profits and damages, it is open to him to bring a subsequent suit against the same defendants for the profits which became payable before the institution of the former suit and which might have been included in such suit. *Monohur Lall* v. *Gouri Sunkur, I. L. R. 9 Calc. 283, Tirupati* v. *Narasimha, I. L. R. 11 Mad. 210, Lalessor Babui* v. *Janki Bibi, I. L. R. 19 Calc. 615,* and *Gutta Saramma* v. *Maganti Raminedu, I. L. R. 31 Mad. 405,* followed. PONNAMMAL, *v.* RAAMIRDA AIYAR (1914) **I. L. R. 38 Mad. 829**

8. ——— **Causes of action different**—On *T's* death, his widow sold two of his survey numbers (403 and 404) to *D*, and shortly afterwards sold survey No. 324 to *Z*, who was a brother of *D*, joint in estate. After the widow's death, *B*, a daughter of *T*, sued *D* and *T* (another daughter of *T*) to recover possession of survey No. 324; but the suit was at her request dismissed. *B* then having sold the three survey numbers to the plaintiff, the present suit was brought against the two daughters, and *D* and *Z*, to recover possession of the three survey numbers. The lower Courts dismissed the suit on the preliminary ground that since *B* omitted to sue in respect of survey numbers 403 and 404 in the first suit, the plaintiff was debarred from preferring his claim to those numbers in the present suit. The plaintiff having appealed: *Held,* that the suit was not barred by the provisions of O. II, r. 2 of the Civil Procedure Code inasmuch as the two sets of facts which required to be proved in both suits in order to enable the plaintiff to succeed were different sets of facts, and the causes of action accordingly were different. SONU VALAD KHUSHAL *v.* BAHINIBAI (1915) . **I. L. R. 40 Bom. 351**

9. ——— **Partition**—*Separate suits for property in different districts—Cause of action.* The plaintiff as member of a joint Hindu family brought a suit for partition of certain property in the district of Sultanpur. He admitted that he was not in possession of this property, and paid an *ad valorem* court-fee on his plaint. This suit was settled by a compromise. Subsequently the plaintiff brought a separate suit in Allahabad for partition of some of the joint-family property situated in that district; but in this suit he alleged that he was in joint and undivided posssion and paid a court-fee of Rs. 10 as on ordinary partition suit: *Held,* that the omission of the Allahabad property from his suit in Sultanpur was not a bar to the plaintiff's second suit and that the case did not fall within O. II, r. 2, of the Code of Civil Procedure. *Mansa Ram Chakravarty* v. *Ganesh Chakravarty, 16 Indian Cases, 383, Ukha* v. *Daga, I. L. R. 7 Bom. 182,* and *Subba Rau* v. *Rama Rau, 8 Mad. H. C. R. 376,* referred to. RAM HARAKH *v.* RAM LAL (1916) **I. L. R. 38 All. 217**

CIVIL PROCEDURE CODE (ACT V OF 1908) *—contd.*

——— **O. II, r. 2 (1882 Code s. 43)**—*contd.*

10. ——— **Mortgage-deed**—*conferring option upon the mortgagee to sue for interest or for possession on the mortgagor's failure to pay interest at the stipulated time—first suit for interest for earlier default—second suit for possession on subsequent default—whether barred.* *Held*, that a mort- [illegible] r. 2, Civil Proce- [illegible] sion of the mort- [illegible] of a stipulation [illegible] to sue for interest [illegible] the mortgagor's failure to pay interest at the stipulated time, because on the occurrence of a previous default the mortgagee sued only for interest and not for possession. O. II, r. 2, requires the plaintiff to include in his suit the whole of the claim which he is entitled to make in respect of the cause of action upon which the suit is brought and if he omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he cannot afterwards sue in respect of the portion omitted or relinquished The object of the rule is to avoid the splitting of claims, and to prevent further litigation. Under the terms of the mortgage-deed in the present case the mortgagee could, when he brought the earlier suit, have sued either for interest or for possession, he could not have claimed both the reliefs at one and the same time. Consequently in suing for interest only he did not omit to sue in respect of, or intentionally relinquish, any portion of the claim which he was then entitled to make. The law of procedure should not be interpreted so as to run counter to an express stipulation entered into by the parties. *Ram Bhaj* v. *Devia (123 P. R. 1881)* and *Badi Bibi Sahibal* v. *Sami Pillai (I. L. R. 18 Mad. 257)*, followed *Ganga Ram* v. *Abdul Rahman (28 P. R. 1907)*, distinguished. PARMASHERI DAS *v.* FAKIRIA **I. L. R. 1 Lah. 457**

11. ——— **Omission to sue for a portion** [illegible]

as it appeared from the evidence in this case that plaintiff had been dispossessed of the arable land at the same time as the homestead, the whole suit was barred. The plaintiff having in the previous suit omitted to sue for a portion of his claim, namely, for the arable lands could not under O. II, r. 2 of the Code of Civil Procedure be permitted to sue for them subsequntly. *Jiubti Nath Khan* v. *Shib Nath Chakraburty, I. L. R. 8 Calc. 819*, and *Pitapur Raja* v. *Suriya Roy, L. R 12 I. A. 116 : s. c I. L. R. 8 Mad 520.* distinguished. KALI KUMAR CHUCKERBUTTY *v.* ASLAM (1914) . . . . **20 C. W. N. 163**

12. ——— **Property different**—*in the two suits, also titles of defendants—One defendant only common to both.* The plaintiff claimed possession of a considerable amount of property as having been the property of her father, to which she became entitled on the death of her mother. She brought two suits. The first was for possession of a specific house and grove, the defendants [illegible] in the house by the leave and licence of the the plaintiff's mother. The second suit was for *possession of various other items of property*, and, with the exception of Ram Chandra, the defendants also were different persons: *Held*, that the second suit was not barred by O. II, r. 2, of the Code of Civil Procedure. *Murti* v. *Bhola Ram, I. L. R. 16 All 165*, distinguished by RICHARDS, *C. J. Balmakund* v *Sangari, I. L. R. 19 All. 379*, and *Govind Krishna Narain* v. *Sirajunnissa, 7 A. L. J. 627*, referred to by BANERJI, *J.* BINDO BIBI *v.* RAM CHANDRA (1919)

I. L. R. 41 All. 583

13. ——— **Mahal**—*alleged to be in part in possession of trespassers—Separate suits against the lambardar for profits of one part and against the alleged trespassers for mesne profits of the other part maintainable* The plaintiff having purchased at an auction sale the whole 20 biswas of a mahal was resisted in his attempts to obtain possession of a portion of it by certain persons who set up a right of possession in themselves. In respect of such portion the plaintiff filed a suit against the persons in possession, and ultimately obtained a decree against them, but in that suit he made no claim for mesne profits He also filed a suit against the lambardar of the mahal for profits in respect of the remaining portion of the mahal. The plaintiff subsequently filed a suit for mesne profits for a certain period against the three defendants in his former suit in ejectment: *Held*, that the suit was not barred by reason of the omission of the present claim from his former suit against the lambardar for profits. SHEOBARAN SINGH *v.* BHAGWAN SAHAI (1918)

I. L. R. 41 All. 286

14. ——— **Dekkhan Agriculturists' Relief Act (XVII of 1879), ss. 12 and 13**—*Cause of action—Splitting up of—Two mortgages—Suit* [illegible]

balance of sale proceeds. The defendant [illegible] three mortgages as part of the same [illegible] over the same property. The [illegible] to recover money due on one of the [illegible] only, under the provisions of the [illegible] culturists' Relief Act, [illegible] decree in execution of which [illegible] perty was sold free from any [illegible] sale proceeds were [illegible] amount and there [illegible] mortgagee brought a second suit [illegible] remaining mortgages and [illegible] two [illegible] the balance [illegible] [illegible] and 13 of [illegible] Act, 1879 [illegible] [illegible]

CIVIL PROCEDURE CODE (ACT V OF 1908) *—contd.*

——— **O. II, r. 2 (1882 Code s. 43)**—*concld.*

of the property which was sold in execution of the first decree. DALUCHAND *v.* APPI (1920)
I. L. R. 45 Bom. 55

15. ——— SUIT FOR INTEREST ON BOND—*Decree satisfied—Subsequent suit for principal barred.* A hypothecation bond contained a clause stipulating that if interest was not paid for six months the creditor might sue either for interest alone or for both principal and interest without waiting for the expiration of the period fixed for repayment (which was three years) and the debtor was "to have no objection whatever." More than three years after, no interest having been paid, the creditor brought a suit for interest alone and obtained a decree for sale of the mortgaged property. The decreted amount was deposited in Court and satisfaction entered. On a subsequent suit by the creditor for the principal sum and arrears of interest: *Held*, that the provisions of O. II, r. 2 of the Civil Procedure Code were applicable and the subsequent suit was not maintainable. The cause of action referred to in the rule is the cause of action which gives occasion for and forms the foundations of the suit, and if that cause enables a man to seek for larger and wider relief than that to which he limits his claim, he cannot afterwards seek to recover the balance by independent proceedings. MUHAMMAD HAFIZ *v.* MIRZA MUHAMMAD ZAKARIYA
26 C. W. N. 299

——— **O. II, r. 2 and 3**—

See O. II, R. 1 **I. L. R. 33 Mad. 247**

——— **O. II, r. 2; O. XXXIV, rr. 2 and 4**—*Mortgage—Suit for sale—Construction of document—Possiblity of separate suits for interest and principal.* A mortgage bond executed on the 14th of September, 1910, provided that the mortgage debt should be repayable after the expiry of three years. It also provided that, if interest remained unpaid for more than a specified time, the mortgagee might, without waiting for the expiry of the term of the mortgage, sue for either the unpaid interest or the whole amount of principal and interest then due. It further provided that, if the mortgage debt was not paid at due date, the whole amount, principal and interest, might be recovered by suit. After the expiry of the term of the bond, the mortgagee sued to recover arrears of interest only and obtained a decree, the defendant not entering an appearance. In that suit the plaintiff did not allege that he had a right to sue for the principal separately at a subsequent date: *Held*, on a construction of the bond in suit, and with reference to the former pleadings, that the subsequent suit was barred by O. II, r. 2 of the Code of Civil Procedure. *Read* v. *Brown, 22 Q. B. D. 128*, and *Murti* v. *Bhola Ram, I. L. R. 16 All. 165*, referred to. *Yashvant Narayan Kamat* v. *Vithal Divakar Parulekar, I. L. R. 21 Bom. 267*, and *Rambhaj* v. *Devia, Punj. Rec. 1881, p. 296*, distinguished. *Per* PIGGOTT, J. Rr. 2, 4 of O. XXXIV of the Code of Civil Procedure do not contemplate that there should be more than one suit for sale on a mortgage. Whether or not it might be possible so to draft a mortgage as to evade this statutory obligation this had not been done in the present case. MUHAMMAD ZAKARIYA *v.* MUHAMMAD HAFIZ (1917) . . . . **I. L. R. 39 All. 506**

CIVIL PROCEDURE CODE (ACT V OF 1908) *—concld.*

——— **O. II, r. 2; O. XXXIV, r. 14**—*Procedure—Suit by mortgagee for simple money decree—Subsequent suit for sale on mortgage not barred—*Res judicata—*Limitation—Acknowledgment.* Certain mortgagees sued for a simple money decree in respect of their mortgage debt, stating that they had relinquished their claim under their mortgage and obtained a decree as prayed. The decree in this suit stated that "the paintiff would not be entitled to bring to sale the property mortgaged in the bond sued on." As, however, this decree was not satisfied, the plaintiffs-mortgagees proceeded to put their mortgage into Court and prayed for a decree for sale on it: *Held*, that the former proceedings were no bar to the present suit. INDARPAL SINGH *v.* MEWA LAL (1914) . **I. L. R. 36 All. 264**

——— **O. II, r. 3 (1882 Code, s. 45)**—

See UNDER O. I, R. 1, O. I. R. 2

——— **O. II, r. 4 (1882 Code s. 44)**—

See ADMINISTRATOR. **2 Pat. L. J. 642.**

——— **O. II, r. 5 (1882 Code s. 44)**—*Misjoinder of causes of action—Hindu family, position of surviving members of joint and undivided, not heirs of deceased member—Joinder of claim by widow of deceased member of joint and undivided Hindu family for maintenance against the property in which the deceased member was a co-parcener at the date of his death with claims against the surviving co-parceners for her* stridhan *ornaments.* Members of a joint and undivided Hindu family hold the family estate jointly and and are seized of it "*per my et per tout.*" On the death of a co-parcener of a joint Hindu family his share and interest in the family property is automatically absorbed and the surviving co-parceners become the full owners of the whole estate. Such co-parceners are not the heirs of the deceased but inherit by survivorship and become the owners of the interest of the deceased in the family estate as co-owners in their own right and by the legal extinction of the interest of the deceased co-parcener by reason of his death. The claim of the widow of such a deceased co-parcener for maintenance is clearly not against "the estate of the deceased" husband, but is against the property of which he was a co-parcener at the time of his death. Accordingly there is no misjoinder of causes of action if the widow in one suit sues the co-parceners of her deceased husband to recover her *stridhan* property improperly or illegally detained by them and also to enforce her right of maintenance of the estate of the joint family of which during his lifetime her husband was a member. JANKIBAI *v.* SHRINIVAS GANESH (1913) . **I. L. R. 38 Bom. 120**

——— **O. III, r. 1 (1882 Code s. 36)**—

——— *Recognised agent, if has right of audience.* A recognised agent as such has no right of audience. HURCHAND RAY *v.* BENGAL-NAGPUR RAILWAY CO. (1914) **19 C. W. N. 64**

——— **O. III, r. 1, O. IX, rr. 4, 8, 10 and 12**—*Dismissal for default—Appeal to District Judge—Revision.* The defendant in a suit asserted that he wished to examine one of the three plaintiffs as a witness, and the Court ordered such plaintiff to appear. The plaintiff failed to appear and the suit was dismissed. In appeal the District

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

———— **O. III, r. 1, O. IX, rr. 4, 8, 10 and 12**—*concld*

Judge held that the order to the plaintiff to appear was not a good order, and that in any case the suit should only have been dismissed as against the defaulter and not as against the remaining two plaintiffs. *Held,* (1) that the first Court had power, under O. III, r. 1, of the Code of Civil Procedure, 1908, to order the plaintiff to appear *in person and to dismiss his suit on failure to* comply with the order; (2) that the order dismissing the suit against the defaulting plaintiff was not appealable to the District Judge, and (3) that the order dismissing the suit against the remaining plaintiffs was in contravention of O. IX, r. 10 SRI PROBHU *v.* DWARKA PRASAD

4 Pat. L. J. 152

———— **O. III, r. 1 and O. IX, r. 12**—*Order of Court directing a party to appear in person —Refusal of the party to comply with the order— Order of Court declaring him* ex parte, *legality of.* A Court is empowered, under O. III, r. 1, of the Civil Procedure Code, to direct the appearance in Court of a party in person and if the party so directed refuses to appear, the Court may declare him *ex parte* even though he had engaged a pleader who is prepared to appear for him in the case. *Satu* v. *Hanmantrao, I. L. R. 23 Bom. 318,* dissented from. VAIGUNTAHAMMAL *v.* VALLAMMAN (1917)

I. L. R. 41 Mad. 256

———— **O. III, r. 2 (a) (1882 Code, s. 37)**—

See POWER-OF-ATTORNEY.

I. L. R. 41 Bom. 40

———— **O. III, r. 4 (1882 Code, s. 39)**—

See VAKALATNAMA .

I. L. R. 43 Calc. 884

———— Vakalatnamah, *necessity of written acceptance of—withdrawal from suit, whether verbal permission of court or consent of party is sufficient.* A pleader should not be allowed to act upon a *vakalatnamah* which does not contain his written acceptance as required by the High Court rules. When a pleader has been appointed by a party his employment cannot be determined except in the manner provided by O. III, r 2, of the Code of Civil Procedure, 1908. He cannot retire from a case on the mere verbal permission of the court, nor upon the consent of the party appointing him without any reference to the court. *Pleaders* (IN THE MATTER OF TWO)

2 Pat. L. J. 259

———— **O. V, rr. 1, 2; (1882 Code, ss. 64 and 65)**—Ex parte *decree—Appearance of defendant in answer to a preliminary application not equivalent to appearance in answer to the plaint: Held,* that the fact that before the admission of a suit one of the proposed defendants had appeared by pleader on a miscellaneous application for his appointment as guardian *ad litem to a minor* defendant, did not absolve the Court from the necessity of serving such defendant, when the suit was admitted, with a copy of the plaint and notice of the date fixed for hearing GULAB CHAND *v.* SHANKAR LAL (1913)

I. L. R. 35 All. 163

———— **O. V, r. 3 (1882 Code, s. 66)**—*Order for personal attendance of plaintiff—Non-attendance of plaintiff on adjourned date—Dismissal*

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

———— **O. V, r. 3 (1882 Code, s. 66)**—*concld.*

of suit. An order made by a Court for the personal appearance of a party to a suit on a particular date does not imply that the party to whom it is issued is bound to appear on any subsequent date to which the suit may be adjourned. SUNDAR NATH *v.* MALLU (1917)

I. L. R. 39 All. 476

———— **O. V, r. 5 (1882 Code, s. 68)**—*Suit on mortgage—First summons to be for settlement of issues and not for final disposal—Practice and Procedure.* In 1910 a mortgage suit was filed The plaintiff having died, the name of his son was substituted in place of his name on the 13th April 1912. On the same day, the Court issued summons for the first time to the defendants, for final disposal On the day fixed for hearing, the Court raised issues, and as neither party had witnesses ready, the Court found the claim not proved in absence of evidence. The plaintiff having appealed *Held,* reversing the decree, that there was a miscarriage of justice in the way the case had been disposed of The scheme of the Civil Procedure Code required, in cases like the present, that the parties should have the opportunity to produce evidence relevant *to issues framed after ascertaining matters as* to which the parties were in dispute *Held,* further, that the summons to the defendants

I. L. R. 38 Bom. 377

———— **O. V. r. 12 (1882 Code, s. 75)**—

See SUMMONS, SERVICE OF.

I. L. R. 43 Calc. 447

———— **O. V, rr. 12, 17; O. IX, r. 13**—

See SUMMONS, SERVICE OF

I. L. R. 43 Calc. 447

———— **O. V, r. 15 (1882 Code, s. 78)**—*Summons—Question of sufficiency of service of summons.* The summons in a suit was served on the paternal uncle of the defendant, who was a member of the same joint family and lived in the same house with the defendant. *Held,* that such service was insufficient in the absence of evidence that the defendant himself could not be found. MAKHAN DAS *v.* MANNU LAL (1913)

I. L. R. 35 All. 556

———— **O. V, rr. 15 to 23**—*Practice—Issue of summons—Summons transmitted for service to Court having*
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service on the defendant, it is the serving Court and not the issuing Court with which, ordinarily speaking, rests the decision whether such summons has been properly served or not, though possibly there may be cases in which the issuing
question
Romanath
22 Calc.
of O. V.
RASAD *v.*
649

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— **O. V, rr. 15, 17, 27—**

See SUMMONS . **I. L. R. 42 Calc. 67**

——— **O. V, r. 17 (1882 Code, s. 80)—**

See SUBSTITUTED SERVICE

I. L. R. 38 Calc. 394

See SUMMONS (SERVICE OF)

I. L. R. 43 Calc. 447

—*Held,* that a summons affixed to the ancestral house owned by the Defendant when the owner actually lived elsewhere and had no person at the ancestral house authorised to receive it was not duly served. KUMUD NATH ROY CHOWDHURI *v.* RAI JATINDRA NATH CHOWDHURI

15 C. W. N. 399

—*Service of summons—Proper service.* Where a serving peon was informed when he went to the house where the defendant ordinarily resided that the latter had gone to Vizagapatam in the Madras Presidency, and he thereupon affixed a copy of the notice on the outter door of the house, and it appeared that the defendant did not return from Vizagapatam till 3 months after the date of service: *Held,* that the service was properly effected under r. 17, O. V of the Civil Procedure Code, as it was impossible for the peon in the circumstances to effect personal service on the Defendant. SITARAM SIVAMI *v.* KALANDI PATRA (1911)

17 C. W. N. 999

——— **O. V, rr. 17, 19**—*Service of summons on purdanashin ladies who cannot be approached by serving peon—Powers and duties of the Court under—Service of summons on purdanashin ladies by registered post—O. IX, r. 13—Purdanashin lady,* ex parte *decree against, setting aside of—Unrebutted statement on oath as to absence of knowledge of suit.* The plaintiff-respondent instituted a suit against several persons to recover a sum of money alleged to be due from them as members of a partnership concern. The suit was decreed *ex parte.* Two of the defendants, the appellants, who were *purdanashin* ladies and the widows of an alleged member of the firm, made an application to set aside the decree on the ground that the summons had not been duly served on them and they had no knowledge of the suit and they were at any rate prevented by sufficient cause from appearing, when the suit was called on for hearing. It appeared that the peon could not obtain access to the appellants and there was no authorised agent to receive summonses on their behalf and that there were no adult members of the family of the ladies upon whom the service could be made. The copies of the summons and plaint were in consequence affixed by the serving peon on the main gate of the dwelling house. It further appeared that there was on the record a *vakalatnama* purporting to be signed by one of the appellants and an officer of the other appellant on her behalf which authorised a pleader to oppose the plaintiff's application for attachment before judgment. The appellants on being examined stated on oath that they had no knowledge of the suit and the *vakalatnama* was not put to them and the plaintiff did not take any steps to prove what purported to be the signature of one of the appellants on the *vakalatnama* nor did he establish that the other appellant had

CIVIL PROCEDURE CODE (ACT V OF 1908) —*concld.*

——— **O. V, rr. 17, 19**—*contd.*

authorised her officer to sign the *vakalatnama* on her behalf: *Held,* that r. 17, O. V of the Civil Procedure Code is applicable to a case of the present description where the serving officer is not able to obtain access to a *purdanashin* lady who has to be served and cannot deliver or tender a copy of the summons to her. Where it is impossible for the serving officer to obtain access to the person to be served either by reason of the custom of the country or for any other reason the case may be held to be covered by the description in r. 17 "where the defendant cannot be found by the serving officer" and the requirements of that Rule having been fulfilled the appellants could not succeed on the ground that the summonses were not duly served on them within the meaning of r. 13 of O. IX of the Code. R. 19 of O. V imposes upon the Court the duty to satisfy itself that service has been properly effected and it is open to the Court even when there has been a technical compliance with the provisions of r. 17 to order service in another mode if the Court thinks fit to do so in the interest of justice. The Court may in a case of this description direct the issue of summons to *purdanashin* ladies by means of notice sent by registered post so that the cover may in due course reach the lady herself. In the present case the plaintiff-respondent having failed to rebut the allegation on oath made by the appellants, the High Court held on a consideration of the circumstances of this case that it was established that the appellants had no knowledge of the suit and they were prevented by sufficient cause from appearing when it was called on for hearing and the *ex parte* decree was set aside as against them. KSHIRODE SUNDARI DASI *v.* NABIN CHANDRA SAHA (1915)

19 C. W. N. 1231

——— **O. V, rr. 19 and 20 (1882 Code, ss. 82, 83, 84)]**

See SUMMONS, SERVICE OF.

I. L. R. 43 Calc. 447

——— **O. V, r. 23 (cf. 1882 Code s. 85)—**

See O. V, R. 15 **I. L. R. 33 All. 649**

——— **O. V, r. 25 (1882 Code s. 89)—**

See PRACTICE **I. L. R. 35 Bom. 213**

——— *Practice—Procedure—Service of summons by registered post on defendant residing out of British India—Summons returned marked "Refused to take"—General Clauses Act (X of 1897), s. 27.* A summons was sent by registered post addressed to the first defendant at Navalgarh in the State of Jaipur and purported to be sent in accordance with the provisions of O. V, r. 25 of the Civil Procedure Code (Act V of 1908). The cover was returned with an endorsement in the vernacular which was translated as follows:—"Refused to take. The handwriting of Chunilal, postman:" *Held,* that as it appeared that the cover was properly addressed to the first defendant and had been registered, duly stamped and posted, the Court was entitled to draw the inference indicated in s. 27 of the General Clauses Act and to hold that there was sufficient service. *Per Curiam:* The only rule, if it can be called a rule, to be laid down, is that the Court must

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— O. V. r. 25 (1882 Code s. 89)—*concld.*

be guided in each case by its special circumstances as to how far it will give effect to a return of a cover endorsed "refused" or words to the like effect. *Jagannath Brakhbhau* v. *J. E. Sasoon, I. L. R. 18 Bom. 606,* distinguished. BALURAM RAMKISSEN v. BAI PANNABAI (1910)
I. L. R. 35 Bom. 213

——— O. V, r. 27—

See SUMMONS . **I. L. R. 42 Calc. 67**

——— O. VI, r. 4—

See SANTAL PARGANAS, SETTLEMENT RYS. 1872 . . . **6 Pat. L. J. 373**

See SPECIFIC RELIEF ACT, 1877, s. 39.
I. L. R. 39 Bom. 149

——— O. VI, r. 14—*Procedure—Plaint—Distinction between signature of plaint and authorization of suit—Suit filed on behalf of a person in jail.* O VI, r. 14, of the Code of Civil Procedure, which requires a pleading to be signed by a party, is merely a matter of procedure. It is the business of the Court to see that this provision is carried out. It is also the business of the Court to see that a suit is authorized by the plaintiff. The authority for the bringing of a suit is a question of principle. But where a suit is duly authorized, the proper signing of the plaint is a matter of practice only, and if a mistake or omission has been made, it may be amended at any time. *Basdeo* v. *John Smidt, I. L. R 22 All. 55, Rajit Ram* v. *Katesar Nath, I. L. R. 18 All 396,* and *Cropper* v. *Smith, 26 Ch. D. 700,* referred to. The mere fact that the signing of a plaint by or on behalf of a plaintiff who was in jail at the time might have involved a breach of jail regulations has nothing to do with the question of the validity or invalidity of the plaint. *In the matter of the petition of* BISHESHAR NATH (1917)
I. L. R. 40 All. 147

——— O. VI, r. 15 (1882 Code, s. 51)—

See EX PARTE DECREE.
I. L. R. 46 Calc. 1001

See PROFESSIONAL MISCONDUCT.
I. L. R. 41 Calc. 113

——— O. VI, r. 17 (1882 Code, s. 53)—

See LIMITATION **I. L. R. 46 Calc. 16**

See HINDU LAW—JOINT FAMILY.
1 Pat. L. J. 393

See PLAINT . **I. L. R. 48 Calc. 110**

——— *Amendment of plaint, when allowed—New relief prayed, barred by limitation—Just prayer, no injustice to defendant, and no new facts.* Under O. VI, r. 17, Civil Procedure Code, a petition for an amendment of a plaint based on no new facts and asking for a further relief, *viz.*, recovery of money, may be allowed even though it be barred by limitation between ... *21 Mad. L. J. 475,* followed. *Weldon* v. *Neal, 9 Q. B. D. 394,* distinguished. Plaintiff alleged that the defendants were his servants on a monthly pay and had charge of his shop and he claimed that the accounts kept by them in regard to the business were his property and he sued to recover these accounts: *Held,* that these facts disclosed a cause of action. Plaintiff stated even in his original petition that he will file a separate suit afterwards for such amount as the accounts, whose recovery was sought for in the plaint, might disclose as due from the defendants. He afterwards thought it desirable to claim, by an amendment, the recovery of Rs 800, which approximately estimated would be the amount due to him, stating that he would pay additional court-fee if more was actually found due on looking into the accounts: *Held,* that the amendment prayed for ought to have been allowed. SEVUGAN CHETTY v KRISHNA AYYANGAR (1913)
I. L. R. 36 Mad. 378

——— A suit, was instituted as a suit for partition but the Court held that the Court-fee of Rs. 10 paid was insufficient as the Plaintiffs were out of possession at the date of the suit. *Ad valorem* Court-fees were thereupon paid ... all the elements necessary to convert the suit into a suit for recovery of possession: *Held*—that O. VI, r. 17, *C P. C.,* gives ample power to the Court to give leave to the parties to amend the pleadings but such leave should not be given where the amendment would prejudice the opposite party. *Cropper* v. *Smith, 26 Ch. D. 700 (1884),* and *Kali Das Chaudhuri* v. *Draupadi Sundari, 22 C. W. N. 104 (1917),* referred to REBATI RAMAN BASAK v. HARISH CHANDRA BASAK . . . . **24 C. W. N. 749**

——— The Court has full power to exercise of its discretion to make amendments to a plaint and although such a power should not be exercised as a rule if its effect would be to take away a right accrued to the defendant by lapse of time and yet these are cases when such considerations are outweighed by special circumstances. CHARAN DAS AND OTHERS v AMIR KHAN AND OTHERS. . . . **25 C. W. N. 283**

——— O. VI, r. 17 and O. XXI, r. 103—*Amendment of plaint—Suit for possession—Conversion of the suit to one for redemption of mortgage—Practice and procedure.* The plaintiff, a decree-holder, was, when seeking to recover possession of the property under the decree, obstructed by defendants who claimed to be mortgages in possession. The plaintiff then filed a suit, as provided by O. XXI, r. 103 of the Civil Procedure Code, to establish his right to possession of the property and alleged that the mortgage relied on by defendants was a sham. The Court coming to the conclusion that the mortgage was not a sham, the plaintiff applied to be allowed to convert his suit into one for redemption:—*Held,* that the plaintiff should not be permitted to alter the nature of the suit from a suit for possession into one for redemption, as it would entirely alter the character of the suit. LAXMISHANKAR DEVSHANKAR v. HAMJADHAI USUFALLY (1919)
I. L. R. 44 Bom. 515

CIVIL PROCEDURE CODE (ACT V OF 1908) *—contd.*

—————— **O. VI, r. 17 and O. XXI, r. 103**—*concld.*

———————————— *Amendment of plaint when permissible—Limitation Act (IX of 1908), Arts. 39 and 120.* Courts will allow amendment of pleadings subject to three general conditions, *viz.*, (1) when there is *bona fides* on the part of the applicant, (2) where the amendment does not cause such prejudice to the other party as cannot be compensated by costs, (3) where it does not convert a suit of one character to a suit of another character. Where the Plaintiffs originally sued for damages and injunction against the defendant and then by an amendment prayed for declaration of title and then further by another amendment prayed for recovery of possession if in the opinion of the Court he was out of possession, and it was found that the dispossession of the Plaintiffs was more than six years before the institution of the suit: *Held*—That the limitation applicable to the claim for damages being three years and that for declaration of title six years the second amendment ought not to have been allowed as its effect was to enlarge the period of limitation to 12 years from the date of the dispossession and to take away from the Defendant his right to defeat the suit as originally framed on the ground of limitation. That the amendment altered the nature of the suit, and upon the evidence it appeared that there was no *bona fides* on the part of the Plaintiffs. GYANANDRA NATH CHAKRAVARTI *v.* PARESH NATH PAL

26 C. W. N. 70

—————— **O. VII, r. 1 (1882 Code, s. 50)**—

See APPEAL JOBUM OF· **I. L. R. 40 Mad. 1**

—————— **O. VII, r. 2 (1882 Code, s. 50)**—

See BENGAL ASSAM, CIVIL COURTS ACT, 1887 . . . **4 P. L. J. 447**

—————— **O. VII, rr. 4, 5 (1882 Code, s. 50)**—

See PARTIES . **I. L. R. 46 Calc. 877**

—————— **O. VII, r. 6 (1882 Code, s. 50)**—

Suit by mortgagee for possession—Limitation—plaint setting out one ground for extension of period of—whether plaintiff can rely upon another ground as well—acknowledgment—Indian Limitation Act, IX of 1908, s. 19 and Art. 135. On 17th December 1898 a mortgage for Rs. 600 was executed by defendant's father in favour of the father of plaintiffs. Under its terms the mortgagor had to pay Rs. 40 per annum as interest and in case of default the mortgagee was to be entitled to realise interest by a separate suit or to claim possession of the mortgaged land in lieu of principal and interest. In 1906 the mortgagee brought a suit for arrears of interest for 3 years and obtained a decree on 18th August 1906. Since then further default in payment of interest was made, and on 6th June 1918 the plaintiffs instituted the present suit for possession of the mortgaged land. The suit was resisted on two grounds, *viz.*—(1) that it was barred under O. II, r. 2, Civil Procedure Code, and (2) that it was barred by limitation under Art. 135, Indian Limitation Act. The Lower Courts dismissed the suit on both these grounds, and on appeal to the High Court, ABDUL RAOOF, *J.*, upheld the decree on the first plea.

CIVIL PROCEDURE CODE (ACT V OF 1908) *—contd.*

—————— **O. VII, r. 6 (1882 Code, s. 50)**—*concld.*

The plaintiffs appealed against this decision under s. 10 of the Letters Patent, and a Full Bench of the Court decided that the suit was not barred under O. II, r. 2. The case then went to a Division Bench for decision of the point of limitation. The plaintiffs *in their plaint stated* that their suit was in time on account of certain payments alleged to have been made by defendants. The Lower Courts held that these payments were not proved and that the plaintiffs could not be allowed to rely on an acknowledgment as they had not specified this in their plaint. In their written statement in the previous case, dated 25th June 1906, defendants admitted their liability under the mortgage: *Held* that the plaintiffs having mentioned one ground of exemption in their plaint was not debarred by the provisions of O. VII, r. 6, of the Code of Civil Procedure from taking another and an inconsistent *ground to get over the bar of limitation* and could consequently rely upon the acknowledgment made in the pleas of the previous case *Hingu Mian* v. *Heramba Chandra (13 Calc. L. J. 139) and Yakub Ebrahim Sayani* v. *Bai Rahimat Bai (10 Bom. L. R. 346)*, followed. *Ram Suk Das* v. *Ghulam Muhammad (102 P. R. 1918)*, approved. *Jogeshwar Roy* v. *Raj Narain (I. L. R. 31 Calc. 195) and Golinda Mal* v. *Santa (83 P. R. 1914)*, distinguished. PARMESHRI DAS *v.* FAKIRIA **I. L. R. 2 Lah. 13**

—————— **O. VII, r. 7**—*"Other relief"—Suit for possession by partition—Property incapable of being partitioned—Relief by declaratory decree or by decree for joint possession.* In a suit for partition of a defined share in certain immovable property the plaintiffs established their title to share in the poperty, but it was at the same time found that the property was *impartible*: *Held* that this was not a reason for dismissing the suit, but the plaintiffs should have been given a decree for joint possession according to their share. *Sri Mahant Govind Rao* v. *Sita Ram Kesho, I. L. R. 21 All. 53*, referred to. RAJJAB SHAH *v.* TAHIR SHAH . . . . **I. L. R. 43 All. 318**

—————— **O. VII, r. 9 (2)**—

See PARTIES . **I. L. R. 46 Calc. 877**

—————— **O. VII, rr. 9 and 14**—There is a distinction between documents sued upon and documents relied upon. GHAND MULL GONESH MULL *v.* DHANRAJ GANAPATROY

24 C. W. N. 392

—————— **O. VII, r. 9 and O. XLVII r. 1**—*Restoration of suit, application for, time-barred whether application for review can be made.* An application under r. 9 of O. IX of the Code of Civil Procedure, 1908, for restoration of a suit, must be made within 30 days from the order of dismissal, and this rule of limitation cannot be evaded by making an application for review under r. 1 of O. XLVII. *Per* SHARFUDDIN, *J.* R. 9 of O. IX applies only to original cases and not to cases in appeal. DEODIP SINGH *v.* GOPAL SINGH . . . . **1 Pat. L. J. 547**

—————— **O. VII, r. 10 (1882 Code, s. 57)**—

See MESNE PROFITS **2 Pat. L. J. 394**

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

———— **O. VII, r. 10 (1882 Code, s. 57)**—*concld.*

See O. XXIII, R. 1(2)
I. L. R. 41 Mad. 701

———— *Jurisdiction—can be considered by Court* suo motu *and plaint returned for presentation to proper Court—Contract made by telegram—place where contract completed.* Plaintiffs carry on business at Khanna and they sent an order by telegram from Khanna to defendants at Khamgaun in the United Provinces to purchase cotton-seeds on their behalf. Defendants replied by telegram that the seeds would be purchased and sent to plaintiffs at Khanna. Defendants failed to supply the whole quantity and plaintiffs sued them for return of *part* of the purchase money and damages and instituted their suit in the Senior Subordinate Judge's Court at Ludhiana. The Judge took up the question of jurisdiction *suo motu* and decided that his Court had not jurisdiction and returned the plaint for presentation to the proper Court This order was upheld by the Lower Appellate Court: *Held,* that the Subordinate Judge was competent to take up the question of jurisdiction *suo motu*: *Held, further,* that the contract must be taken to have been made at Khamgaun where the defendants carried on business and where they received the telegram from the plaintiffs and where in the ordinary course of things the money for the cotton-seeds would be paid and that consequently the Lower Courts were right in holding that the Ludhiana Court had no jurisdiction. *Muhammad Shafi* v. *Karamat Ali (76 P. R. 1896),* followed. *Premji Khetsey* v. *Ghulam Sarwar Khan (36 P. R. 1908)* and *Boseck & Co.* v. *Mandlestan (70 P. R. 1906),* distinguished. ASA RAM-KALU RAM *v.* BAKHSHI RAM-KANHYA RAM . . . . **I. L. R. 1 Lah. 203**

———— *Plaint returned for presentation to proper Court—Court to which such plaint is represented bound to give credit for the fee*

is nothing in the new Code of the Civil Procedure in the Presidency Small Cause Courts Act or in the City Civil Courts Act to indicate that the Legislature intended to interfere with such practice *Prabhakarbhat* v *Vishwambhar Pandit, I. L. R. 8 Bom. 313,* followed. VISWESWARA SARMA *v.* NAIR (1912) . . **I. L. R. 35 Mad. 567**

———— **O. VII, r. 11 (1882 Code, ss. 53 and 54)**—

See CIVIL PROCEDURE CODE, 1908.
See ss. 115, 152 . **4 Pat. L. J. 57**

See COURT-FEE . **I. L. R. 40 Calc. 615**
I. L. R. 44 Calc. 352

See COURT-FEES ACT **4 Pat. L. J. 703**

———— *Objection by defendant that notice not duly served under s 80—Plaint, if to be rejected or dismissed.* Where it was stated in the plaint that notice under s 80, Civil Procedure Code, had been duly served, but after defendant had entered appearance it was discovered that the notice had not been duly served: *Held,* that it was too late to reject the plaint under O. VII, r. 11; and that there was also no statement in the plaint which suggested that the suit was barred. RATAN CHAND DHARAM CHAND *v.* SECRETARY OF STATE FOR INDIA (1914)
18 C. W. N. 1340

———— **O. VII, r. 14 (1882 Code, s. 59)**—

See EVIDENCE . **I. L. R. 41 All. 63**

———— *What documents should be mentioned in the list—Document, upon which witness relies for refreshing memory, if to be rejected because not specified in the list* Where in order to support the case of the plaintiff that he was born on a particular date, a witness produced an almanack and horoscope, and it was rejected on the ground that it had not been entered in the list of documents as required by O VII, r. 14, of the Civil Procedure Code: *Held,* that the order rejecting the document was erroneous It was not one to be relied upon as a probative document in itself, but it was a record made by the witness at the time, to which he was entitled to refer for the purpose of refreshing his memory. BANWARI LAL *v* MAHESH (1918)
23 C. W. N. 577

———— **O. VII, rr. 14 and 18**—*Documents relied on by plaintiff should be produced in Court along with the plaint—Practice and procedure* It is desirable that a party who sues upon a certain document should produce it at the time he files the plaint, and not spring it upon the opposite party a considerable time after when the suit comes on for hearing. GANGADHAR MAHADEV *v.* KRISHNAJI VISHRAM (1919) .
I. L. R. 44 Bom. 625

———— **O. VII, r. 22**—*(Added by High Court under s. 122)—Appeal—Notice—Duty of court as regards service of notice of appeal on the respondent.* Under O. VII, r. 22, of the Code of Civil Procedure, 1908, if service has been effected on a party by means of affixing a copy to the outer door of the house named as the "address for service" of such party, and he nevertheless does not appear at the date fixed for the hearing, it is the duty of the court to fix a fresh date and direct additional service by registered post. MATHURA PRASAD *v.* BHUP NARAIN **I. L. R. 43 All. 411**

———— **O. VIII, rr. 3, 4, 5**—*Pleadings—Averment in the plaint not denied specifically or by necessary implication in written statement—Fact not necessary to be proved—Practice—Limitation* The plaintiffs sued to recover a sum of money on an account stated. For the purpose of saving limitation they relied in their plaint upon a letter sent by the defendants' firm. The defendants in their written statement stated —"The plaintiff's suit is not in time The suit is not saved by the letter put in from the bar of limitation." The question being raised whether in this state of the pleadings the letter could be taken as having been admitted: *Held,* that under rr 3, 4, 5 of O. VIII of the Civil Procedure Code, 1908, the letter must be accepted as admitted between the

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— **O. VI, r. 17 and O. XXI, r. 103**—*contd.*

——— *Amendment of plaint when permissible—Limitation Act (IX of 1908), Arts. 39 and 120.* Courts will allow amendment of pleadings subject to three general conditions, *viz.*, (1) when there is *bona fides* on the part of the applicant, (2) where the amendment does not cause such prejudice to the other party as cannot be compensated by costs, (3) where it does not convert a suit of one character to a suit of another character. Where the Plaintiffs originally sued for damages and injunction against the defendant and then by an amendment prayed for declaration of title and then further by another amendment prayed for recovery of possession if in the opinion of the Court he was out of possession, and it was found that the dispossession of the Plaintiffs was more than six years before the institution of the suit: *Held*—That the limitation applicable to the claim for damages being three years and that for declaration of title six years the second amendment ought not to have been allowed as its effect was to enlarge the period of limitation to 12 years from the date of the dispossession and to take away from the Defendant his right to defeat the suit as originally framed on the ground of limitation. That the amendment altered the nature of the suit, and upon the evidence it appeared that there was no *bona fides* on the part of the Plaintiffs. GYANANDRA NATH CHAKRAVARTI *v.* PARESH NATH PAL.

26 C. W. N. 70

——— **O. VII, r. 1 (1882 Code, s. 50)**—

See APPEAL. JOBCH OF.

I. L. R. 40 Mad. 1

——— **O. VII, r. 2 (1882 Code, s. 50)**—

See BENGAL, ASSAM, CIVIL COURTS ACT, 1887 . . . . **4 P. L. J. 447**

——— **O. VII, rr. 4, 5 (1882 Code, s. 50)**—

See PARTIES . **I. L. R. 46 Calc. 877**

——— **O. VII, r. 6 (1882 Code, s. 50)**—

Suit by mortgagee for possession—Limitation—plaint setting out one ground for extension of period of—whether plaintiff can rely upon another ground as well—acknowledgment—Indian Limitation Act, IX of 1908, s. 19 and Art. 135. On 17th December 1898 a mortgage for Rs. 600 was executed by defendant's father in favour of the father of plaintiffs. Under its terms the mortgagor had to pay Rs. 40 per annum as interest and in case of default the mortgagee was to be entitled to realise interest by a separate suit or to claim possession of the mortgaged land in lieu of principal and interest. In 1906 the mortgagee brought a suit for arrears of interest for 3 years and obtained a decree on 18th August 1906. Since then further default in payment of interest was made, and on 6th June 1918 the plaintiffs instituted the present suit for possession of the mortgaged land. The suit was resisted on two grounds, *viz.*—(1) that it was barred under O. II, r. 2, Civil Procedure Code, and (2) that it was barred by limitation under Art. 135, Indian Limitation Act. The Lower Courts dismissed the suit on both these grounds, and on appeal to the High Court, ABDUL RAOOF, *J.*, upheld the decree on the first plea.

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— **O. VII, r. 6 (1882 Code, s. 50)**—*contd.*

The plaintiffs appealed against this decision under s. 10 of the Letters Patent, and a Full Bench of the Court decided that the suit was not barred under O. II, r. 2. The case then went to a Division Bench for decision of the point of limitation. The plaintiffs in their plaint stated that their suit was in time on account of certain payments alleged to have been made by defendants. The Lower Courts held that these payments were not proved and that the plaintiffs could not be allowed to rely on an acknowledgment as they had not specified this in their plaint. In their written statement in the previous case, dated 25th June 1903, defendants admitted their liability under the mortgage: *Held* that the plaintiffs having mentioned one ground of exemption in their plaint was not debarred by the provisions of O. VII, r. 6, of the Code of Civil Procedure from taking another and an inconsistent ground to get over the bar of limitation and could consequently rely upon the acknowledgment made in the pleas of the previous case *Hinga Mian* v. *Heramba Chandra (13 Calc. L. J. 139)* and *Yakub Ebrahim Sayani* v. *Bai Rahimat Bai (10 Bom. L. R. 346)*, followed. *Ram Suk Das* v. *Ghulam Muhammad (102 P. R. 1918)*, approved. *Jogeshwar Roy* v. *Raj Narain (I. L. R. 31 Calc. 195)* and *Gobinda Mal* v. *Santa (83 P. R. 1914)*, distinguished. PARMESHRI DAS *v.* FAKIRIA

I. L. R. 2 Lah. 13

——— **O. VII, r. 7**—*"Other relief"—Suit for possession by partition—Property incapable of being partitioned—Relief by declaratory decree or by decree for joint possession.* In a suit for partition of a defined share in certain immovable property the plaintiffs established their title to share in the poperty, but it was at the same time found that the property was impartible: *Held* that this was not a reason for dismissing the suit, but the plaintiffs should have been given a decree for joint possession according to their share. *Sri Mahant Govind Rao* v. *Sita Ram Kesho, I. L. R. 21 All. 53,* referred to. RAJJAB SHAH *v.* TAHIR SHAH . . . . . **I. L. R. 43 All. 318**

——— **O. VII, r. 9 (2)**—

See PARTIES . **I. L. R. 46 Calc. 877**

——— **O. VII, rr. 9 and 14**—There is a distinction between documents sued upon and documents relied upon. GHAND MULL GONESH MULL *v.* DHANRAJ GANAPATROY

24 C. W. N. 302

——— **O. VII, r. 9 and O. XLVII r. 1**—*Restoration of suit, application for, time-barred—whether application for review can be made.* An application under r. 9 of O. IX of the Code of Civil Procedure, 1908, for restoration of a suit, must be made within 30 days from the order of dismissal, and this rule of limitation cannot be evaded by making an application for review under r. 1 of O. XLVII. *Per* SHARFUDDIN, *J.* R. 9 of O. IX applies only to original cases and not to cases in appeal. DEODIP SINGH *v.* GOPAL SINGH . . . . . **1 Pat. L. J. 547**

——— **O. VII, r. 10 (1882 Code, s. 57)**—

See MESNE PROFITS **2 Pat. L. J. 394**

CIVIL PROCEDURE CODE (ACT V OF 1908)
—contd.

———— **O. VII, r. 10 (1882 Code, s. 57)**—*concld.*

See O. XXIII, r. 1(2)
I. L. R. 41 Mad. 701

———— *Jurisdiction—can be considered by Court* suo motu *and plaint returned for presentation to proper Court—Contract made by telegram—place where contract completed.* Plaintiffs carry on business at Khanna and they sent an order by telegram from Khanna to defendants at Khamgaun in the United Provinces to purchase cotton-seeds on their behalf. Defendants replied by telegram that the seeds would be purchased and sent to plaintiffs at Khanna. Defendants failed to supply the whole quantity and plaintiffs sued them for return of *part* of the purchase money and damages and instituted their suit in the Senior Subordinate Judge's Court at Ludhiana. The Judge took up the question of jurisdiction *suo motu* and decided that his Court had not jurisdiction and returned the plaint for presentation to the proper Court. This order was upheld by the Lower Appellate Court: *Held,* that the Subordinate Judge was competent to take up the question of jurisdiction *suo motu*: *Held, further,* that the contract must be taken to have been made at Khamgaun where the defendants carried on business and where they received the telegram from the plaintiffs and where in the ordinary course of things the money for the cotton-seeds would be paid and that consequently the Lower Courts were right in holding that the Ludhiana Court had no juris-[illegible]tion. *Muhammad Shafi* v *Karamat Ali (76* [illegible] *1896),* followed. *Premji Khetsey* v. *Ghulam* [illegible] *Khan (36 P. R. 1908)* and *Boseck & Co.* [illegible] [illegible]*estan (70 P. R. 1906),* distinguished. [illegible] [illegible]LU RAM *v.* BAKHSHI RAM-KANHI[illegible]
I. L. R. 1 Lab. [illegible]

———— *Plaint returned* [illegible] *proper Court—Court to* [illegible] **J. 720**

[illegible]

of 1908. The latter Court [illegible] is represented is bound to gi[illegible] already levied by the for[illegible] Co[illegible] existing practice in thi[illegible] Presiden[illegible] is nothing in the new C[illegible] of the Civil Proc[illegible] in the Presidency S[illegible] Cause Courts Act or in the City Civil C[illegible]rts Act to indicate that the Legislature inten[illegible]d to interfere with such practice. *Prabhakarbhat* v. *Vishwambhar Pandit, I. L. R. 8 Bom. 313,* followed. VISWESWARA SARMA *v.* NAIR (1912) . . **I. L. R. 35 Mad. 567**

———— **O. VII, r. 11 (1882 Code, ss. 53 and 54)**—

See CIVIL PROCEDURE CODE, 1908.
See ss. 115, 152 . **4 Pat. L. J. 57**

See COURT-FEE . **I. L. R. 40 Calc. 615**
I. L. R. 44 Calc. 352

See COURT-FEES ACT **4 Pat. L. J. 703**

———— *Objection by defendant that notice not duly served under s. 80—Plaint, if to be rejected or dismissed.* Where it was stated in the plaint that notice under s. 80, Civil Procedure Code, had been duly served, but after defendant had entered appearance it was discovered that the notice had not been duly served: *Held,* that it was too late to reject the plaint under O. VII, r. 11; and that there was also no statement in the plaint which suggested that the suit was barred. RATAN CHAND DHARAM CHAND *v.* SECRETARY OF STATE FOR INDIA (1914)
18 C. W. N. 1340

———— **O. VII, r. 14 (1882 Code, s. 59)**—

See EVIDENCE . **I. L. R. 41 All. 63**

———— *What documents should be mentioned in the list—Document, upon which witness relies for refreshing memory, if to be rejected because not specified in the list.* Where in order to support the case of the plaintiff that he was born on a particular date, a witness produced an almanack and horoscope, and it was rejected on the ground that [illegible] had not been entered in the list of docum[illegible] as required by O. VII, r. 14, of the Ci[illegible] Procedure Code: *Held,* that the order reje[illegible] the document was erroneous. It was not pu[illegible] to be relied upon as a probative docume[illegible] but it was a record made by the wi[illegible] time, to which he was entitled to ref[illegible] purpose of refreshing his memory. BA[illegible] MAHESH (1918)
23 C. W. N. 577

———— **O. VII, rr. 14 and 18**—*Documents* [illegible] *plaintiff should be produced in Court* [illegible] *—Practice and procedure.* It is no non[illegible] a party who sues upon a certain [illegible] should produce it at the time he files the [illegible] not spring it upon the opposite party [illegible] time after when the suit comes [illegible] hearing. [illegible] MAHADEV *v.* [illegible] (1919).
I. L. R. 44 Bom. 625

———— **O. VII, r. 22**—(*Added by High Court* [illegible]) *Appeal—Notice—Duty of court as* [illegible] *of notice of appeal on the respondent.* [illegible] O. VII, r. 22, of the Code of Civil Procedure, [illegible] has been effected on a party by [illegible] a copy to the outer [illegible] as the address [illegible] fixed for the [illegible] **Pat. L. J. 712**

[illegible] **590**

BHUP [illegible]

———— **O.** [illegible]
Averment in the plaint [illegible] *necessary* [illegible] *not necessary to be* [illegible] The plaintiffs sued [illegible] on an account stated. [illegible] limitation they relied in their [illegible] sent by the defendants [illegible] in their written statement [illegible] tiff's suit is not in time. The [illegible] by the letter put in from the bar of limitation." The question being raised whether in this state of the pleadings the letter could be taken as having been admitted: *Held,* that under rr. 3, 4, 5 of O. VIII of the Civil Procedure Code, 1908, the letter must be accepted as admitted between the

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— **O. IX, r. 8 (1882 Code, s. 102)**—*contd.*

hearing of an appeal, one of the two appellants the other being a woman) appeared before the Court and applied for an adjournment to enable him to procure the attendance of his pleaders. He was called on to argue his appeal, but he said he had nothing to say and thereupon the appeal was dismissed on the ground that it had not been supported: *Held*, that in these circumstances the Court was not justified in dismissing the appeal for want of prosecution, but was bound to consider the grounds of appeal and to decide the case on the merits. BALDEO PRASAD *v.* KUNWAR BAHADUR (1912) **I. L. R. 35 All. 105**

——— **O. IX, r. 8 (1882 Code, s. 102)**—
See O. XVII, R. 3 **6 Pat. L. J 650**

——— When plaintiff dies before the trial a Court has no right to dismiss for want of appearance. BAKHSH SINGH *v.* HABIB SHAH . . . **I. L. R. 35 All. 331**

——— **O. IX, rr. 8 and 9**—
See DISMISSAL FOR DEFAULT. **3 Pat. L. J. 355**
See APPEAL . **I. L. R. 43 Calc. 859**

——— When the plaintiff and his pleader are both absent on the day fixed for the hearing of a case and the Court does not intend to give them another opportunity of appearing it ought not to decide the suit on the merits but should dismiss it for default of appearance. PHUL KUAR *v.* HASHMATULLAH KHAN (1915) . . . **I. L. R. 37 All. 460**

——— *Dismissal of suit for plaintiff's non-appearance—Inherent jurisdiction of Court to restore a suit for ends of justice—Defendant protected in the matter of costs on restoration of plaintiff's suit.* On the 7th January 1919, a suit was called on for hearing when counsel for the plaintiff finding that his client was not in Court to give evidence asked for an adjournment. The defendants appeared and opposed the application which was refused and the suit was dismissed under O. IX, r. 8. Subsequently the plaintiff applied for the restoration of the suit, stating in his affidavit that at about 11 A.M. of the day of hearing he had gone to the premises of his principal witness to bring him to the Court, that as the latter was away from the premises he waited for his return till about 12-30 noon, and that soon after he came to the Court with the witness and found that the suit was called on and dismissed. The plaintiff submitted that as the suit was fourteenth on the Board List for the day he did not expect it to be called before 1 P.M., but that he was ready and willing to pay the defendant's costs of the day on which the suit appeared on board for hearing. The trial Judge dismissed the application on 23rd January 1919, holding that no "sufficient cause" under O. IX, r. 9 of the Civil Procedure Code was shown by the plaintiff. The plaintiff appealed: *Held*, (reversing the order of the trial Judge), that the case was one in which, whether there was sufficient cause or not, the Court should exercise its inherent jurisdiction to restore the suit for the ends of justice, provided the defendant was amply protected in the matter of costs *Lalta Prasad* v. *Ram Karan* (*1912*), *34 All. 426*, followed. BILAS-

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— **O. IX, rr. 8 and 9**—*contd.*

RAI LAXMINARAYAN *v.* CURSONDAS DAMODARDAS (1919) . . . **I. L. R. 44 Bom. 82**

——— **O. IX, rr. 8, 9 and 13**—
See CIVIL PROCEDURE CODE, ss. 148, 115. **4 Pat. L. J. 428**

——— **O. IX, rr. 8 and 9, s. 151**—*Dismissal of suit for default—Restoration—Sufficient cause—Court's inherent power to restore.* O. IX, r. 9, of the Code of Civil Procedure, 1908, makes it compulsory on a Court to set aside a dismissal under r. 8 where the plaintiff satisfies the Court that there was sufficient cause for non-appearance. It, however, cannot take away the Court's power to restore the case for any other valid reasons. LALTA PRASAD *v.* RAM KARAN (1912) **I. L. R. 34 All. 426**

——— **O. IX, rr. 8 and 9, O. XXII, rr. 3 and 9**—*Non-appearance of plaintiff—Dismissal of suit—Order setting aside dismissal when plaintiff was found to have been dead at the time suit was dismissed—Orders and rules applicable only to defaulters wrongly applied in case of dead party.* On the non-appearance of the plaintiff in a suit against the respondent, an order was made on the 4th of July, 1911, dismissing the suit for default. The plaintiff was in fact dead at the time order was made, and his son the appellant was engaged in performing his father's funeral ceremonies and was unable to attend Court. These facts were brought to the notice of the Deputy Commissioner in an pplication made under O. XXII, rr. 3 and 9, of the Civil Procedure Code (Act V of 1908) by the appellant as the heir and legal representative of the plaintiff, which was filed and accepted by the Deputy Commissioner within the time allowed by law and an order was made on the 11th of September setting aside the dismissal of the suit, and substituting the name of the appellant on the record in place of the deceased plaintiff. On an application for revision of the Deputy Commissioner's order of the 11th of September made by the respondent under s. 115 of the Code to the Court of the Judicial Commissioner, that Court reversed the order and confirmed that decision on review, mainly on the grounds that the order of the 4th of July dismissing the suit was a proper order under O. IX, r. 8, of the Code; that the appellant's application to set aside that order was not within time, and was therefore barred, and that O. XXII, r. 3, of the Code applied only to a still pending suit, and not to one that had been dismissed: *Held* (reversing the decisions of the Court of the Judicial Commissioner), that these decisions were vitiated by applying to a dead man orders and rules applicable only to mere defaulter. An "abuse of the process of the Court" within the meaning of s. 151 of the Code had occurred by the course adopted in the Judicial Commissioner's Court. Quite apart from that section any Court might rightly have considered itself to possess inherent power to rectify the mistake inadvertently made in dismissing the suit. The order of the Deputy Commissioner setting aside the dismissal was manifestly sensible and correct, and their Lordships restored it, and remitted the case to India to be disposed of on the merits. DEBI BAKSH SINGH *v.* HABIB SHAH (1913) **I. L. R. 35 All. 331**

CIVIL PROCEDURE CODE (ACT V OF 1908)
—*contd.*

———— **O. IX, rr. 8, 10 and 12—**

See NON-APPEARANCE.

I. L. R. 48 Calc. 57

———— **O. IX, r. 9 (1882 Code, s. 103)—**

See s. 141 . **I. L. R. 1 Lah. 339**

See s. 148 . **4 Pat. L. J. 428**

See O. XVII, R. 3 **6 Pat. L. J. 650**

See APPEAL . **I. L. R. 43 Calc. 857**

————*Dismissal for default, application to set aside order of—dismissal of application, whether application lies to set aside.* No application lies under O. IX to set aside and order made under O. IX. RAMGULAM SINGH *v.* SHEO DEONARAIN SINGH . **4 Pat. L. J. 287**

———— An application under

1 Pat. L. J. 547

———— **O. IX, r. 9, s. 115**—*Application to set aside order dismissing suit for default of appearance should be disposed of on evidence—Revision.* Where an application by the plaintiff for postponement of a case fixed for peremptory disposal on the ground that the plaintiff was ill and unable to attend Court having been refused, the suit

the evidence after it has been properly recorded, whether the procedure of the Court be to take the evidence *viva voce* or by affidavit It could not be disposed of on the view of the Judge merely as to whether the application was *bonâ fide* or not. DURGA KANTA SARMA *v.* ANTO KOCH (1917)

22 C. W. N. 671

———— **O. IX, r. 9, and O. XXI, r. 90—** *Application to set aside sale, dismissal for default*

4 Pat. L. J. 135

———— **O. IX, r. 9; O. XLIII, r. 1 (c)—** *Application by judgment-debtor under O. XXI, r. 90 to set aside sale—Dismissal for default—Application for restoration, rejection of—Order if appealable—Application to set aside, sale, if "suit."*

such as is referred to in s. 2 of the Civil Procedure Code, and if the question had been *res integra*, the Court would have held that it was a suit

CIVIL PROCEDURE CODE (ACT V OF 1908)
—*contd.*

———— **O. IX, r. 9; O. XLIII, r. 1 (c)—** *contd.*

within the meaning of O. XLIII, r. 1, cl (c). *Charu Chandra Ghose* v. *Chandi Charan Ray Chowdhury, 19 C. W. N. 25,* referred to. BHUBAN BEHARY NAG MAZUMDAR *v.* DHIRENDRA NATH BANERJI (1916) . . . **20 C. W. N. 1203**

———— **O. IX, r. 10 (1882 Code, s. 105)—**

See O. III, R. 1 **4 Pat. L. J. 152**

———— **O. IX, rr. 10 and 12—**

See NON-APPEARANCE.

I. L. R. 48 Calc. 57

———— **O. IX, r. 12 (1852 Code, s. 107)—**

See O. III, R. 1 **I. L. R. 41 Mad. 256**

See O V, R. 3 **I. L. R. 39 All. 476**

———— **O. IX, r. 13 (1882 Code, s. 108)—**

See O. IX, R. 6 . **18 C. W. N. 775**

See s. 148 . . **I. L. R. 36 All. 776**

See s. 151 . . **I. L. R. 398 All. 8**

See O. V, r. 102. **I. L. R. 35 All. 163**

See O. V, RR. 12, 17.

I. L. R. 43 Calc. 447

See EX-PARTE DECREE.

I. L. R. 48 Calc. 153

See EXECUTION PROCEEDINGS.

I. L. R. 41 Calc. 1

See SUMMONS, SERVICE OF.

I. L. R. 43 Calc. 447

———— *Decree* ex parte *as against one of several defendants—Such defendant not a party to appeal—Appeal dismissed as against contesting defendants—Application by non-appearing defendant to set aside* ex parte *decree against her—Merger.* Where a person who was originally a party to a suit is not made a party to the appeal preferred against the decree passed in the suit,

passed the decree for an order to set it aside as against him. The following cases were referred to in the judgment of SUNDAR LAL, J. *Ramanadhan Chetti* v. *Narayanan Chetty, I. L. R. 27 Mad. 602, Sankara Bhatta* v. *Subraya Bhatta, I. L. R. 30 Mad. 535, Damodar Manna* v. *Sarat Chandra Dhal, 13 C. W. N. 846; 3 Indian Cases 468, Kumud Nath Roy Choudhury* v. *Jotindra Nath Chowdhury, I. L. R. 38 Calc. 394, Shajan Bibi* v. *Saffr-ud-din, 26 Indian Cases 412, Dhonai Sardar* v. *Tarak Nath Chowdhury, 12 C. L. J.*

Prasad v. *Ram Charan Lal, I. L. R. 37 All. 293.* GAJRAJ MATI TIWARIN *v.* SWAMI NATH RAI (1916)

I. L. R. 39 All. 13

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— O. IX, r. 13 (1882 Code, s. 108)—*contd.*

——— *Ex-parte decree—applications for re-hearing, terms on which may be granted.* In restoring a case for re-hearing under O. IX, r. 13, of the Code of Civil Procedure, 1908, the court may make it a condition that the decretal amount or some portion thereof be paid into court. In cases where there has been no default on the part of the party asking for re-hearing, *e. g.*, where he has not been duly served, it is inequitable for the court to impose conditions. SHAM LAL SAHAI *v.* RAM NARAYIN LAL SETH **5 Pat. L. J. 420**

——— *Compromise decree application to set aside by one not a party to it—Appeal. Held, per* CURIAM (RICHARDSON, *J. dubitante*). An application by a party to a suit to set aside a compromise decree on the ground that as against him the decree was *ex parte*, comes under O. 9, r. 13, of the Civil Procedure Code, and an appeal lies against the order refusing the application. BASIRDUDDIN *v.* SHEIKH SADHU (1918) **22 C. W. N. 571**

——— *O. XVII, rr. 2 and 3, scope of—Decree* ex parte—*Defendant absent at adjourned hearing after taking adjournment for letting evidence.* Where, at the close of the plaintiff's case, an adjournment was granted to the defendant to enable him to produce his evidence and he failed to appear at the adjourned hearing, and the Court proceeded to pass a decree against him: *Held*, by the Full Bench, that the case came within O. XVII, r. 2, and the decree could be set aside under O. IX, r. 13. *Per* SADASIVA AYYAR and KUMARASWAMI SASTRIYAR, *JJ.* Rr. 2 and 3 of O. XVII, Civil Procedure Code, are mutually exclusive: r. 2 applies to all cases of absence of parties whether time was granted or not to do any of the acts mentioned in r. 3 of the Order, while r. 3 applies only to cases where parties are present and commit default of the kind mentioned in the rule. *Per* WALLIS, *C. J.* Rr. 2 and 3 of O. XVII are not mutually exclusive. R. 3 *may* be applied even in the absence of the defendant, but the decree will, none the less, be *ex parte* and liable to be set aside. *Chandramathi Ammal* v. *Narayanasami Aiyar, I. L. R. 33 Mad. 241,* followed. *Naganada Aiyar* v. *Krishnamurti Aiyar, I. L. R. 34 Mad. 97*, overruled. PICHAMMA *v.* SREERAMULU (1917) **I. L. R. 41 Mad. 286**

——— *Decree* ex parte—*Application to set aside decree—Appeal—Decree confirmed in appeal before hearing of application to set it aside.* When the High Court has once confirmed a decree on appeal, it is not open to the Court which passed the decree to entertain an application to set the decree aside, and it makes no difference that the application to set the decree aside was filed before the appeal was disposed of. MATHURA PRASAD *v.* RAM CHARAN LAL (1915) **I. L. R. 37 All. 208**

——— *Compromise petition purporting to be by all the defendants filed by those actually present in Court—Decree passed on such compromise petition—Subsequent repudiation by defendants not present at filing of petition—Jurisdiction of Court to set aside decree as* ex parte *decree under O. IX, r. 13.* The petitioners instituted a suit for declaration of their title to, and for possession of, certain lands. Two of the defendants (Nos. 4 and 5) filed a petition of compromise and asked for a decree, so far as they were concerned, on that compromise and an *ex parte* decree against the other defendants. The Court however, ordered fresh service on the other defendants, and subsequent thereto defendants Nos. 4 and 5 appeared in Court with a petition of compromise purporting to be executed by defendants Nos. 1 to 3 as well as by themselves. On this petition a decree was made in terms of the compromise. Afterwards defendants Nos. 1 to 3 put in a petition to the Court stating that defendants Nos. 4 and 5 had no authority to present the petition of compromise on their behalf, that no summons had been served on them, and that the petition was fraudulently represented as being made by them. The Court acting under O. IX, r. 13, Civil Procedure Code, set aside the decree and ordered a re-trial of the case: *Held*, that the Judge when he made his order was under the impression that all the parties in the case were before him and that the petition was the petition of all the parties; consequently in granting the petition he did not intend to make it *ex parte* and the decree could not be treated as an *ex parte* one, and consequently O. IX, r. 13, Civil Procedure Code, did not apply. DAMODAR MISRA *v.* HRISHI NAIK (1914) **19 C. W. N. 118**

——— Ex parte *decree, application to set aside, to Original Court, after appeal determined by Appellate Court, if and when lies.* Where the plaintiff sued D, his four sons and two nephews on a mortgage executed by D and D's father (now dead) and the suit having been contested by D's nephews only, a decree was made in plaintiff's favour in the presence of D's nephews but *ex parte* against D and his sons directing the sale of a two-thirds of the mortgaged property (being the share of D and his father) and making all the 7 defendants personally liable for the unsatisfied balance, if any, of the mortgage-debt; and against the decree an appeal was preferred by plaintiff wherein he sought to have a decree for the sale of the share of D's nephews as well, and the latter also preferred cross-objection against the portion of the decree which made them personally liable; and both appeal and cross-objections were allowed by the High Court: *Held*, that though D and his sons had been joined as respondents in the appeal and a self-contained decree was made therein, as no relief was claimed in the appeal against them, there was still as against D and his sons a subsisting *ex parte* decree over which the Subordinate Judge had control, and he had jurisdiction to entertain an application by D and his sons to set aside the decree. BRIJALALL SINGH *v.* MAHADEO PROSAD (1911) **17 C. W. N. 133**

——— *Decree in favour of contesting defendants and against non-appearing defendants if may be wholly set aside at the instance of latter—Refusal of Court to set aside—Plaintiff, if may ask for the setting aside of whole decree in revision. Semble*: The proviso to r. 13, O. IX of the Civil Procedure Code (Act V of 1908) does

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

———— **O. IX, r. 13 (1882 Code, s. 108)**—*contd.*

not authorise the Court, in setting aside a decree at the instance of defendants against whom it had been obtained *ex parte*, to set it aside in so far as it is in favour of the contesting defendants. ALI AHMED KHAN *v.* C. R. BROWN (1912) **17 C. W. N. 142**

———— *Ex parte decree, power of court to set aside.* A Court has no power, apart from the provisions of O. IX, r. 13, Civil Procedure Code, to set aside, an *ex parte* decree passed by itself. *Somayya* v. *Subbamma (1903) I. L. R. 26 Mad. 599,* overruled. NEELAVENI *v.* NARAYANA REDDI (1920) . . **I. L. R. 43 Mad. 94**

———— *Ex parte decree against one of the defendants—Appeal by another defendant against the decree of Original Court—*Ex parte *defendant, a party respondent in the appeal—Application to set aside* ex parte *decree made to the Appellate Court pending appeal, whether competent.* Where a decree was passed *ex parte* against [illegible]

former defendant to set aside the *ex parte* decree [illegible]

CHETTY *v.* SUBRAMANIA CHETTY (19[illegible]) **I. L. R. 44 Mad. 731**

———— In restoring a case for rehearing under O. IX, r. 13 the Court may make it a condition that the decretal amount be paid into Court but if the party applying has not made default it is inequitable to impose any conditions. SHYAM LAL SAHAI *v.* RAM NARAIN LAL SETH. . . . . **5 Pat. L. J. 421**

———— **O. IX, r. 13; O. V. r. 17**—

See SUBSTITUTED SERVICE. **I. L. R. 38 Calc. 394**

———— **O. IX, r. 13; O. XVII, r. 3**—

See s 148 . . **4 Pat. L. J. 428**

———— *Procedure—Non-appearance of defendant—Decree passed on merits in absence of defendant—Appeal—Application for rehearing.* On a date to which the hearing of a suit before a Munsif had been adjourned the plaintiff and his witnesses were present, but the defendants were not. The Munsif heard the plaintiff's witnesses and decreed his claim. The defendants filed an application for a rehearing before the Munsif who, however, rejected it. They then appealed against the decree to the District Judge, who dismissed the appeal: *Held*, on second appeal by the defendants against the District Judge's decree, that the defendants might and should have appealed against the rejection by the Munsif of their application for a rehearing; but they had no right in their appeal from the decree to raise any question as to their non-appearance in the Court of first instance. HUMMI *v.* AZIZ-UD-DIN (1916) **I. L. R. 39 All. 143**

CIVIL PROCEDURE CODE (ACT V OF 1908) —*Contd.*

———— **O. IX, r. 13; O. XXXII, r. 3**—*Guardian* ad litem—*Illusory appointment of guardian—Competence minors to have a decree passed without their being represented, set aside.* A suit was brought against certain minor defendants naming as guardian *ad litem* their uncle, who was also a defendant. The uncle refused to act as guardian *ad litem* and stated that the minors lived with their mother. No notice was served upon the mother, but upon the application of the plaintiffs the Court Amin was appointed guardian *ad litem* of the minors. The plaintiffs did not deposit any amount for the expenses of the guardian, who did not take any steps to defend the suit or to inquire whether there was a defence. A decree was passed *ex parte* against the minors, and an application on their behalf, through their mother, to have the case restored was rejected. The Courts below found that the decree was not void and dismissed the suit. *Held*, that in the circumstances above set forth the minors were entitled to a declaration that the decree was null and void as against them. *Walian* v. *Banke Behari Pershad Singh, I. L. R. 30 Calc. 1021,* and *Munnu Lal* v. *Ghulam Abbas, I. L. R. 32 All. 287,* distinguished: *Held*, also, that the minors were not debarred from bringing this suit by reason of their not having applied to have the *ex parte* decree set aside under O. IX, r. 13, of the Code of Civil Procedure BHAGWAN DAYAL *v.* TARAM SUKH (1915) [illegible] **I. L. R. 37 All. 179**

———— **O. X, r. 4 ; (1882 Code s. 120)**—*Order striking out defence for failure of defendants to appear—Appeal.* Whether an order passed by a Court which is purporting to deal with one of the parties before it under the provisions of O. X, r. 4 of the Code of Civil Procedure does or does not amount to "pronouncing judgment" against that party depends upon the particular facts of each case. Where a Court struck off the defence of one defendant out of three but ultimately decided the case on the merits and passed a decree against all three defendants—their defences being similar, it was *held* that no appeal lay from the order of the Court under O. X, r. 4. MADHURI SURENDRA SAHI *v.* BITHAL DAS (1917) **I. L. R. 39 All. 450**

———— **O. XI—(1882 Code ss. 121 to 136)**

See DISCOVERY. **I. L. R. 41 Calc. 6**
25 C. W. N. 99

———— **O. XI, r. 2**—

See INTERROGATORIES. **I. L. R. 43 Calc. 300**

———— **O. XI, rr. 12 to 15**—

See s. 32 . . **5 Pat. L. J. 550**

———— **O. XI, r. 13**—*Affidavit of documents—Inspection—Discovery.* When an affidavit of documents has been filed by one party under O XI, r. 13 of the Code, the other party is not necessarily precluded from subsequently applying under r. 18, paragraph 2 of the same Order for further inspection and discovery. 5 BASANTA COOMAR GOSWAMI *v.* KUMUDINI DASSI (1911) **16 C. W. N. [illegible]**

———— **O. XI, rr. 13, 18 (2)**—

See DISCOVERY **I. L. R. 38 Calc. [illegible]**

CIVIL PROCEDURE CODE (ACT V OF 1908) *—contd.*

——— **O. XI, r. 14 (1882 Code, s. 130)—Discovery**—*High Court—Power to interfere with interlocutory order under the Charter Act (24 and 25 Vict., c. 104), s. 15—Order for discovery—Power of Court how to be exercised—Order before issues framed or written statement filed—Right of inspecting party to take copies and notes.* Order for production of documents can be made under r. 14 of O. XI before the issues have been framed. The order must no doubt be limited to such documents alone as relate to matters in question in the suit and the Court must consequently, before it makes the order determine for the purpose thereof what are the matters in question in the suit, and this may well be done even before the issues have been framed. Provided this is done, an order for production of the defendant's documents may be made at the instance of the plaintiff even before the written statements have been filed. *Union Bank of London* v. *Manby, 13 Ch. D. 239, Augustinus* v. *Nernicks, 16 Ch. D. 13,* referred to. A party cannot obtain a commission for the inspection or production of books or papers in order that he may ransack them for evidence to make out his case. A party cannot ask for discovery with a view to ascertain the evidence on which his opponent's action or defence rests. But if the documents are material to the applicant's case, it is no objection to their production or inspection that they relate to the case of his adversary. The Court in ordering production should by its order specify the time and place of inspection and give direction as to the manner of inspection. The Court cannot delegate the exercise of its power of requiring the production of any document under the rule to a Commissioner. The party who has obtained an order to inspect documents may take notes of their content. He has also the right to take copies, but on application to the Court. "There is no possible ground for controversy that if the High Court is satisfied that an interlocutory order of the description now before us has been made without jurisdiction or under such circumstances as are likely to cause irreparable injury to one of the litigants, the High Court has ample power to set matters right under s. 15 of the Charter Act." *Dhape* v. *Ram Pershad, I. L. R. 1 Calc. 687,* referred to. GOBINDA MOHAN DAS *v.* KUNJA BEHARY DASS (1909)
14 C. W. N. 147

——— **O. XI, r. 15 (1882 Code, s. 131)**—*Inspection of Plaintiffs' documents before filing written statement when allowed—Civil Procedure Code (Act V of 1908), O. VII, rr. 9, 14; O. XI, r. 15—Documents issued upon and documents relied on—Rules of English High Court, O. XXXI, r. 14.* There is a distinction between documents sued upon and documents relied upon by the Plaintiffs. Under O. XI, r. 15 of the Civil Procedure Code, 1908, the Defendant is not entitled as of right to have inspection of the documents relied upon by the Plaintiff before filing his written statement. *Ram Dyal Saligram* v. *Nurhurry Balkrishna, I. L. R. 18 Bom. 368 (1894),* not followed. CHANDMULL GONESHMULL *v.* DHANRAJ GANAPATROY **24 C. W. N. 302**

——— **O. XI, r. 18 (2) (1882 Code, s. 134)**—
See O. XI, R. 13.
I. L. R. 38 Calc. 428

CIVIL PROCEDURE CODE (ACT V OF 1908) *—contd.*

——— **O. XI, r. 21**—
See s. 32 . . **5 Pat. L. J. 550**

——— *Procedure—Plaintiff under suspicion of suppressing documents relating to the matter at issue—Dismissal of suit.* Where a plaintiff had given the Court strong grounds for believing that he was keeping out of the way documents which would throw light on the subject matter of the suit, but there had been no order made for discovery or inspection of documents, it was *held* that the Court was not justified in dismissing the suit, purporting to act under O. XI, r. 21, of the Code of Civil Procedure. KISHAN LALL *v.* SULTAN SINGH (1915) **I. L. R. 38 All. 5**

——— **O. XII, r. 6 (1882 Code, ss. 138 and 140)**—
See COMMISSION AGENCY
I. L. R. 45 Calc. 138

——— *Held,* in a case where the written statement taken as a whole could not be regarded as an unambiguous and unconditional admission that Rs. 9,535 was due to the plaintiff, that the same could not be recovered by the plaintiff by an application under O. XII, r. 6, of the Code of Civil Procedure. *Held,* also, that there must be a clear admission that the money is due and recoverable in the action in which the admission is made, *Landergan* v. *Feast, 34 W. R. (Eng.) 691,* followed. KORAMALL RAMBALLAV *v.* MONGILAL DALIMCHAND (1919)
23 C. W. N. 1017

——— **O. XIII, r. 1—1882 Code, ss. 138 & 140.**
See MAHOMEDAN LAW—MARRIAGE.
I. L. R. 45 Calc. 878

——— **O. XIII, r. 4 (1882 Code, s. 141)**—
See MAHOMEDAN LAW—GIFT.
I. L. R. 38 All. 627

———, **O. XIV, r. 2 (1882 Code, s. 146)**—*Scope and application of rule—Issues of law, determination of, in the beginning—R. 4, O. VII—Suit by plaint in representative capacity, character of plaintiff if should be stated in cause title—Amendment of plaintiff by leave of Court, effect of.* On the 30th July 1886, the plaintiff was declared to be a disqualified proprietor and the Court of Wards took charge of her estate. On the 7th June 1890, by a *kobala* the Court of Wards sold to the father of the defendant all the properties in suit except two mauzas. By a further *kobala,* dated 11th February 1901, the two mauzas were similarly conveyed. On the 1st August 1911, the Court of Wards released the property of the plaintiff from its charge. The plaintiff on 31st May 1912 sued for a declaration that the two *kobalas* were invalid and for restoration of possession of the properties concerned. As regards the two mauzas sold in 1901, the plaint originally did not show in the cause title the character in which the plaintiff sued, although the body of the plaint and the prayers made it clear that she sued as the *shebait* of certain idols. Subsequently with the leave of the Court the cause title was amended so as to show that the plaintiff sued on behalf of herself and as *shebait* and the necessary amendments in the body of the plaint were made. On the application of the defendant the Trial Judge tried the issues of law first and

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— **O. XIV, r. 2 (1882 Code, s. 146)**—*contd*

dismissed the suit. *Held*, that the application of r. 2, O. XIV, Civil Procedure Code, is not confined only to cases in which the issues of fact had not been settled. The rule also applies to cases where the Court has not postponed the settlement of the issues of fact, and the course adopted by the Trial Judge in disposing of the issues of law was not illegal. That O. VII, r 4, does not require that when the plaintiff sues in a representative capacity that fact should be stated in the cause title of the plaint although that is a convenient place to state it The amendments made in the plaint by the leave of the Court could not in any view amount to an addition or substitution of a new plaintiff within the meaning of s. 22 of the Limitation Act. That Art. 91 of the Limitation Act had no application to the suit in so far as it was instituted by the plaintiff as *shebait* of the idols. KUARMONI SINGH *v.* WASIF ALI MEERZA (1915) **19 C. W. N. 1193**

——— **O. XIV, r. 5 (1882 Code, s. 149)**—

——— *Amendment—extent of court's power to alter frame of suit—suit for eviction on ground of wrongful possession—decree awarding rent, legality of.* The court's power to alter the frame of a suit is co-extensive with the power that it has to make amendments under r 3 of O. XIV of the Code of Civil Procedure, 1908. The court cannot convert one cause of action into a different cause of action Where the plaintiff sued for a declaration of his title to the land in dispute and prayed (1) that he might be put into possession thereof by ousting the defendants, and (2) that he might be awarded mesne profits by way of damages for use and occupation for the period during which the defendants had been in wrongful possession of the land, *held*, that the court was not competent to give a decree against the defendants on the basis that they were tenants of the plaintiff and liable to pay rent to him. JHARI SINGH *v.* PIRTHI NATH SAHU **2 Pat. L. J. 69**

——— **O. XIV, r. 6**—

See ADMINISTRATOR PENDENTE LITE. **I. L. R. 39 Calc. 587**

——— The Court cannot, where there is no agreement as is indicated in O. XIV, r. 6, of the Civil Procedure Code, go outside the allegations in the plaint in order to decide an issue as to whether the plaint discloses a cause of action. KSHITISH CHANDRA ACHARYA CHOUDHURI *v.* OSMOND BEEBEE (1912) **16 C. W. N. 516**

——— **O. XVI (1882 Code, ss. 59-78)**—

——— **O. XVI, r. 4**—*Sale of immoveable property in execution of an order for payment of expenses of witness, legality of—S. 36, scope and effect of.* In a certain suit the plaintiff was ordered to pay a certain sum as expenses for one of his witnesses. The order was executed and certain immoveable property of the plaintiff sold in execu-

[illegible]

treated as a short and summary procedure for realisation of the expenses of a witness in addi-

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— **O. XVI (1882 Code, ss. 59-78)**—*contd.*

tion to other modes of execution of orders under the provisions of s. 36 of the Code That section does not make any order capable of execution which was not so before. The section only means that the procedure prescribed for execution of decrees shall apply to execution of such orders as can be executed under the Code. There being a specific provision in that behalf in O. 16, r 4,

[illegible]

ALI MEATH . . . **26 C. W. N. 877**

——— **O. XVI, rr. 10, 12**—*Fine for non production of documents, conditions to be fulfilled before imposing fine—Duty of Courts and Settlement Officers to strictly follow the law relating to issue and service of summons.* O. XVI, r. 10, of the Civil Procedure Code does not apply where there has been no summons upon any body to produce the documents, and no order under r. 12 can be made until the procedure laid down in r. 10 has been followed where that rule applies. The Civil Courts, and particularly the peripatetic Settlement Courts, which cause a large amount of disturbance to local interests, cannot be too careful to follow the provisions of law strictly as regards summoning persons and documents before them. NABADIP CHANDRA NANDI *v.* THE SECRETARY OF STATE FOR INDIA (1916) . **20 C. W. N. 511**

——— **O. XVI, r. 12 (1882 Code, s. 170)**—

See s. 141 . **23 C. W. N. 560**

——— **O. XVII (1882 Code, s. 156)**—

See O. XXI, R. 16. **5 Pat. L. J. 390**

——— **O. XVII, r. 2 (1882 Code, s. 157)**—

See DISMISSAL FOR DEFAULT. **4 Pat. L. J. 712**

——— **O. XVII, rr. 2, 3**—

See CIVIL PROCEDURE CODE (1908), O. IX, R. 13 . **I. L. R. 41 Mad. 286**

See DISMISSAL FOR DEFAULT. **4 Pat. L. J. 277**

See EX-PARTE DECREE. **I. L. R. 41 Calc. 956**

——— **O. XVII, r. 2, O. IX, r. 3 and O. XXXII, r. 3**—*Adjourned hearing—Plaintiffs' default—Non-appearance of defendant—Dismissal of suit—Fresh suit on the same cause of action.* The plaintiffs filed a suit against several defendants, one

in

At

for

again sued the minor defendant alone on the same cause of action :—*Held*, that the dismissal of the first suit did not operate as a bar to the maintainability of the second suit, since the order passed in the first suit was a nullity as between the plaintiffs and the minor defendant. DAMU *v.* VAKRYA (1919) . **I. L. R. 44 Bom. 767**

——— **O. XVII, r. 3 (1882 Code, s. 158)**—

See DISMISSAL FOR DEFAULT **4 Pat. L. J. 481**

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— O. XVII, r. 3 (1882 Code, s. 158)—*contd.*

1. ——— *Procedure—Order for parties to appear with witnesses at adjourned hearing—Default of plaintiff's witnesses—Dismissal of suit.* On the date fixed for the hearing of a suit the parties and their witnesses were present but, as there was some prospect of a compromise, the hearing was adjourned. On the adjourned date the plaintiffs were present, but their witnesses, though summoned, did not appear. The plaintiffs did not apply for an adjournment, nor did they ask the Court to enforce the attendance of their witnesses under O. XVI, r. 10, of the Code of Civil Procedure, 1908, and the Court, acting apparently under O. XVII, r. 3, of the Code, dismissed the suit. The plaintiffs appealed, and the District Judge, dealing with the case as if the plaintiffs had made default in appearing remitted the case to the first Court to be disposed of according to law. *Held*, that the procedure of the District Judge was erroneous: he should have proceeded under O. XLI, r. 27, to direct the admission of fresh evidence, and under O. XLI, r. 25, to refer the issues for trial, to the Court of first instance. Per Curiam—"As we read the present Code we think it leaves the Court a discretion to proceed at once when witnesses have failed to attend if from any circumstances before it has reason to believe that the evidence of such defaulting witnesses is material and that the witnesses are defaulting. It would be for the witnesses to show that their absence rested on lawful excuse." RAM NARAIN DUBE *v.* JAGDEO (1911) . . . . I. L. R. 33 All. 690

2. ——— *Adjourned hearing—Suit dismissed on merits—Remedy of plaintiff—Procedure.* At an adjourned hearing of a suit in the Court of a Munsif the plaintiffs were not present and their pleader intimated to the Court that he had no instructions to go on with the case. This suit was thereupon dismissed under O. XVII, r. 3, of the Code of Civil Procedure, 1908, on the ground that the claim was not proved. The plaintiffs then made an application for restoration under O. IX, r. 4. The Munsif dismissed the application and his order was affirmed by the District Judge. *Held*, on application in revision by the plaintiffs, that no revision lay. The suit having been dismissed under O. XVII, r. 3, of the Code on the merits, the plaintiffs' remedy was by way of appeal against the Munsif's decree. *Lalta Prasad* v. *Nand Kishore, I. L. R. 22 All. 66*, followed. GAURA BIBI *v.* GHASITA (1911)

I. L. R. 34 All. 123

3. ——— *Procedure—Suit partially heard, but dismissed as for default because plaintiff was not in a position to continue it—Appeal—Inherent powers of High Court.* A plaintiff whose case had been partly heard failed to continue the prosecution of it, not because he wished to do so, but because, owing to various difficulties connected with the absence of his pleader and of some of his witnesses, he thought that he was unable to proceed further with it. Thereupon the Court passed an order dismissing the suit "for default." *Held*, that the Court should not have dismissed the suit "for default," but should have decided it as best it could on the merits and on the materials then before it. *Badam* v. *Nathu Singh, I. L. R. 25 All. 194*, referred to. The circumstances of the case constituted a *casus omissus* so far as the Code of Civil Procedure was concerned, but the High Court had inherent power to entertain an appeal against the decision of the Court below though none was specifically provided for. SUKKHU KOERI *v.* RAM LOTAN KOERI (1919)

I. L. R. 41 All. 663

——— O. XVII, r. 3, O. IX, r. 3—After issues had been framed the 4th May was fixed for hearing. Subsequently plaintiff applied to add certain minor defendants, 6th June was fixed for appointment of guardian *ad litem*. Plaintiff having failed to file process for service on guardian suit was dismissed. *Held*, that the court should have dealt with the suit under O. XVII, r. 3 and therefore there was no *res judicata*. In a suit on a mortgage against the executants and members of joint family who had purchased the equity of redemption except the grandson. *Held*, suit was bad for non joinder. A point of law not agreed in the Lower Court can be raised in 2nd appeal if it does not require consideration of the evidence and is based on the finding of the Lower Court. SHAIKH ABDUL RAHMAN *v.* SHIB LAL SAHA

5 Pat. L. J. 650

——— O. XVII, r. 3, Sch. II, Cls. 18 and 22—*Reference to arbitration—Stay of suit—Arbitrator unwilling to act—Suit not barred by agreement to refer.—Power of Court to proceed with the suit.* The plaintiff and defendant who were partners dissolved the partnership by an agreement, one of the terms of which was that certain matters of account should be referred to the decision of two named persons. Thereafter, in spite of this agreement, the plaintiff filed a suit which was subsequently stayed under para. 18 of the second schedule of the Civil Procedure Code, 1908, to enable the parties to refer their dispute to the arbitration of the two agreed persons. One of these persons, however, having been found unwilling to act and the arbitration appearing impracticable the plaintiff eventually applied for removal of stay. The Court however, without removing the stay, proceeded to decide the suit upon the materials before it, purporting to act under O. XVII, r. 3, of the Civil Procedure Code, 1908, and held that the suit was barred by the agreement to refer. The plaintiff having appealed to the High Court. *Held*, that the suit was not barred by the agreement to refer to arbitration by reason of the provisions of para. 22 of the second schedule of the Civil Procedure Code; and that the Court should have removed the stay and decided the suit on its merits. LAXMAN *v.* MANJUNATH (1921) . I. L. R. 45 Bom. 1181

——— O. XVIII, r. 2 (1882 Code, ss. 179 and 180)—

See HIGH COURT RULES.

I. L. R. 42 All. 542

——— O. XVIII, r. 5 (1882 Code s. 182)—

See DEPOSITION . I. L. R. 46 Calc. 895

See PENAL CODE, 1860, s. 193.

I. L. R. 1 Lah. 361

CIVIL PROCEDURE CODE (ACT V OF 1908) *—contd.*

——— **O. XVIII, rr. 5, 6—**

See Deposition **I. L. R. 45 Calc. 825**

See Criminal Procedure Code (Act V of 1898), ss. 239, 435, 436, 439. **I. L. R. 42 Mad. 561**

——— **O. XVIII, r. 18—**

See Co-owners **I. L. R. 39 Mad. 501**

——— **O. XIX, r. 3 (1882 Code, s 916)—**

See Affidavit . **I. L. R. 37 Calc. 259**
14 C. W. N. 153

——— **O. XX, rr. 1, 2, 3 (1882 Code s. 198)—**

See Judgment . **I. L. R. 46 Calc. 97**

——— *Judgment written, signed and dated by trial Judge, pronounced in his absence by Judge in charge—Act, whether a nullity or irregularity—Waiver of irregularity—Prejudice, proof of, if necessary—Civil Procedure Code (Act V of 1908), s. 99—Object of provisions relating to delivery of judgment.* The provisions of the law relating to the delivery of judgments have been framed for the benefit of the parties litigant, and their contravention is an irregularity curable by consent or waiver. The first Subordinate Judge having heard a case reserved judgment on 6th May 1915. On 29th May 1915 he wrote, signed and dated his judgment and on 31st May 1915, during his absence from headquarters, the second Subordinate Judge, who was in charge of the first Court, delivered that judgment: *Held* —That the judgment was not pronounced, dated and signed in conformity with the requirements of the Code. But the error did not constitute an illegality which nullified the proceedings It was an irregularity which could be waived and was waived, no objection having been taken at the time the judgment was pronounced. If an act of the Court was without jurisdiction or infringed a rule prescribed on grounds of public policy, the proceeding became a nullity; if it was, on the other hand, only an irregular exercise of jurisdiction, a contravention of rules framed by the legislature with a view to afford protection to the individual litigant, he might waive the benefit thereof and would not be entitled to obtain a reversal of the decree except on proof that the merits had been affected The purpose of the rule which has been infringed has to be examined in order to determine whether the infringement is an irregularity only or an illegality nullifying the proceeding. Fort Gloster Jute Manufacturing Co. v. Chandra Kumar Das **24 C. W. N. 791**

——— **O. XX, r. 2 (1882 Code, s. 199)—** *Judgment—Judgment written by the Judge who* [illegible] *a Judge of* [illegible] *pronounced* [illegible] y pronounce [illegible] iced by the [illegible] withstanding that at the time the judgment was written the judge who wrote it had ceased to be the Judge of the court in which the case was tried. *Basant Bihari Ghoshal* v. *The Secretary of State for India in Council, I. L. R. 35 All. 368*, and *Satyendra Nath Roy Chaudhri* v. *Kastura Kumari Ghatwalin, I. L. R. 35 Calc. 756*, followed. Lilawati Kunwar v. Chote Singh . **I. L. R. 42 All. 362**

CIVIL PROCEDURE CODE (ACT V OF 1908) *—contd.*

——— **O. XX, r. 2 (1882 Code, s. 199)—** *contd.*

——— *Judgment written but not delivered before transfer of Judge—Successor in office competent to pronounce his own judgment.* Where a judge fixed a date for delivering judgment, wrote it out and placed it upon the record, but was transferred before the date fixed, and his successor took a different view and delivered his own judgment: *Held*, that his successor in office was not obliged to deliver the judgment but was competent to pronounce a judgment of his own in the case. *In the goods of Prem Chand, Moonshi, 44 Ch. D. 262*, followed *Re Baker; Nicholas v. Baker, I. L. R. 21 Calc. 32*, referred to. Lachman Prasad v Ram Kishan (1910) **I. L. R. 33 All. 236**

——— *Judgment—Judgment writen by the judge who heard the case after his transfer from the division and pronounced by his successor in office.* A judge may pronounce a judgment written but not pronounced by his predecessor in office, and this notwithstanding that at the time the judgment was written the Judge who wrote it had ceased to be the Judge of the Court in which the case was tried *Satyendra Nath Roy Chaudhuri* v. *Kastura Kumari Ghatwalint. I. L. R 35 Calc 756*, followed. Basant Bihari Ghoshal v. Secretary of State for India (1913) **I. L. R. 35 All. 368**

——— **O. XX, r. 3 (1882 Code, s. 202)—**

See Judgment . . **5 Pat. L. J. 147**

——— **O. XX, r. 7—(1882 Code s. 205)**

See Execution of Decree. **5 Pat. L. J. 490**

See Limitation . **I. L. R. 37 All. 527**

——— **O. XX, r. 11 (1882 Code, s. 210)—** *Civil Procedure Code (Act V of 1908). O. XX, r. 11, and O. XXXIV, r. 6—Personal decree against mortgagor—Court's discretion to direct payment by instalment—Judicial discretion—Second appeal.* In making a decree under O. 34, r. 6 of the Civil Procedure Code, against a mortgagor personally, the Court may direct the payment of the decretal amount in instalments under O. 20, r. 11 of the Code. Whether or not the Court exercised a sound judicial discretion in making the order cannot be reviewed in second appeal. *Balgobindram Bhakat* v. *Chhedilal Saha, 11 C. L. J. 431*, distinguished. Bidhu Sekar Bandapadhya v. Sudhury Mahatabuddin (1911) . . **15 C. W. N. 1083**

——— **O. XX, r. 12 (1882 Code, ss. 211, 212)—**

See Partition . **I. L. R. 42 Mad. 296**

See Res-Judicata. **I. L. R. 41 Mad. 188**

——— The Court that passes a decree for possession can award mesne profits notwithstanding the amount thereof and s. 19 of the Bengal, Agra and Assam Civil Courts Act does not limit the power conferred by this order on a Munsif Dinanath Sahai v Mussammat Mayawati Kuer . . . **6 Pat. L. J. 55**

——— Notice directly sent by judgment debtor's attorney to decree holder held sufficient in circumstances and no [illegible]

CIVIL PROCEDURE CODE (ACT V OF 1908)
—*contd.*

——— **O. XX, r. 12 (1882 Code, ss. 211, 212)**—*contd.*

profits decreed. SHAMBHU NATH KHETTRI AND OTHERS *v.* SATISH CHANDRA MITTRA
25 C. W. N. 386

——— **O. XX, r. 12 (2); XXI, r. 102 and XXII, r. 10; and s. 2 (11)**—

See MESNE PROFITS.
I. L. R. 39 Calc. 220

——— **O. XX, r. 14 (1882 Code, s. 214)**—

See s. 148 . . **1 Pat. L. J. 92**

See PRESUMPTION **I. L. R. 44 Calc. 675**

——— **O. XX, r. 16 (1882 Code, s. 215A)**—

——— **O. XX, r. 18**—

See PARTITION . **I. L. R. 41 All. 207**
I. L. R. 42 Mad. 296

——— *Partition—Appeal—Preliminary decree—Subsequent interlocutory order giving directions for preparation of final decree.* In a suit for partition, a preliminary decree was passed and confirmed on appeal. When the case went back to the Court of first instance for the passing of a final decree that Court passed an order directing that actual partition should be made in accordance with certain directions then given by it: *Held,* that no appeal would lie against such an order, but its property could be questioned in appeal from the final decree. The Code of Civil Procedure contemplated the preparation of only one preliminary decree, and the order in question could not be regarded as more than an interlocutory order containing directions as to the preparation of the final decree. BHARAT INDU *v.* YAKUB HASAN (1913) . .
I. L. R. 35 All. 159

——— *Agra Tenancy Act (II of 1901), s. 32—Joint Hindu family—Partition—Occupancy holding—Existence of occupancy holding no bar to partition. Held,* that the presence of an occupancy holding as an item of joint family property is no reason for not effecting a partition of the property as a whole. The Court can either give the occupancy holding to one party, taking from that party an equivalent in value, or if it be found impossible to do this, the Court can leave the occupancy holding undivided, merely making a declaration that the parties are entitled jointly to the holding. DWARKA *v.* RAM PAT (1914) . . . . **I. L. R. 36 All. 461**

——— **O. XX, r. 19—(1882 Code, s. 216)**

See O. VIII, R. 6
I. L. R. 42 Mad. 873

——— **O. XXI, r. 1 (1882 Code s. 257)**—

See O. XXI, R. 53 AND 90.
4 Pat. L. J. 336

See EXECUTION.

——— *Decree—Payment of money ordered in a decree—Payment ordered on a fixed date—Delay in making payment into Court owing to closing of Court—Payment on the opening day—General Clauses Act (X of 1897), s. 10—Practice.* A decree provided as follows: "The plaintiff should pay, by the 10th day of April 1909, to the defendant Rs. 100. If the moneys

CIVIL PROCEDURE CODE (ACT V OF 1908)
—*contd.*

——— **O. XXI, r. 1 (1882 Code, s. 257)**—*contd.*

are not paid by the plaintiff as agreed upon, the property in dispute will remain with the defendants by right of ownership and the plaintiff will have no right of ownership over the same." The plaintiff chose to pay the money into Court, and finding it closed on the 10th, she paid the money on the 14th April 1909, the day on which the Court re-opened. A question having arisen whether the payment so made was within the terms of the decree:—*Held,* that the payment was properly made, for O. XXI, r. 1 of the Civil Procedure Code, 1908, intended to enact and did enact that payment into Court was a valid compliance with the decree even though the decree directed payment to the decree-holder. WANA MARD RAVJI *v.* NATU WALAD MURHA (1910)
I. L. R. 35 Bom. 35

——— *Payment of decree amount into Court—Notice to decree-holder—Cessation of interest whether from date of deposit or date of service of notice.* Interest does not cease to run in respect of a decree-debt deposited in Court until the decree-holder gets notice of the deposit. RAMARAYA SHANBOGUE *v.* SHERBOTT VENKATARAMANAYYA (1919) . . **I. L. R. 42 Mad. 576**

——— **O. XXI, r. 2 (1882 Code, s. 258)**—

See CIVIL PROCEDURE CODE 1882, s. 231.
I. L. R. 36 Mad. 357

See CIVIL PROCEDURE CODE 1908, s. 47.
6 Pat. L. J. 337

See DEKKHAN AGRICULTURAL RELIEF ACT 1879, s. 71. **I. L. R. 45 Bom. 1128**

See EXECUTION.
I. L. R. 42 Mad. 338

See EXECUTION OF DECREE.
I. L. R. 43 Calc. 207

See EXECUTION PETITION.
I. L. R. 41 Mad. 251

See EXECUTION PROCEEDINGS.
I. L. R. 40 Mad. 233

See LIMITATION . **I. L. R. 45 Calc. 630**

See REGISTRATION ACT 1908, s. 17.
I. L. R. 43 Mad. 688

1. ——— *Civil Procedure Code (Act XIV of 1882), ss. 244, 258—Decree—Execution—Satisfaction of the decree—Payment or adjustment not certified to the Court—Subsequent fraudulent execution.* A decree was compromised by the parties out of Court. The payment, however, was not certified to the Court. The decree-holder having fraudulently applied for the execution of the decree. *Held,* that the Court should not in the exercise of its duty under s. 244 of the Civil Procedure Code, 1882, allow a clear case of fraud to be covered and condoned by the provisions of s. 258 of the Civil Procedure Code, 1882, or O. XXI, r. 2, Civil Procedure Code, 1908. *Trimbak Ramkrishna* v. *Hari Laxman, I. L. R. 34 Bom. 575,* followed. HANSA GODHAJI *v.* BHAWA JOGAJI (1915). **I. L. R. 40 Bom. 333**

2. ——— *Execution of decree—Decree payable by instalments—Payment of instalments not certified—Limitation—Limitation Act (IX of 1908), Sch. I, Art. 182 (7).* The effect

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— O. XXI, r. 2 (1882 Code, s. 258)—*contd.*

of O. XXI, r. 2, is that a payment made on account of a decree and not certified to the Court executing the decree cannot be recognized by that Court for any purpose. Where, therefore, payments had been made towards liquidation of an instalment decree but such payments were not certified to the Court executing the decree, it was *held, that limitation ran against the decree-holder* from the date upon which the first instalment was due. "Certified and recorded" within the meaning of O. XXI, r. 2, signify that the executing Court being satisfied by either the decree-holder or judgment-debtors that a certain payment has been made in respect of decree has recorded the fact on the execution file. *Gokul Chand* v. *Bhika 12 All. L J. 387*, and *Bhajan Lal* v. *Cheda Lal, 12 All. L. J. 825*, referred to. *Lakhi Narain Ganguli* v. *Felamani Dasi, 20 C. L. J. 131*, dissented from. CHATTAR SINGH *v.* AMIR SINGH (1916) . . . . . I. L. R. 38 All. 204

3. ——————— *Limitation Act (IX of 1908), ss. 19, 20—Payment extending limitation—Certification of payment by decree-holders—Statement of payment in application for execution of decree if sufficient.* A decree-holder in his application for execution of his decree notified to the Court that he had received a certain sum from the judgment-debtor and relied on this payment as saving limitation. It was found that the payment had in fact been made by the judgment-debtor himself by way of interest *Held*, that the decree-holder may either apply to certify payment before execution or may do so in his application for execution of the decree. That there was sufficient certification by the decree-holder and under the circumstances it was not *necessary for the Court to record the certification*, and O. XXI, r. 2 did not stand in the way of the decree-holder. That in the face of the finding, the fact of the endorsement and the question as to who made it and the authority by which it was made were immaterial KHATIBANNESSA BIBI *v.* SANCHIA LAL NAHATA (1915)

20 C. W. N. 272

4. ——————— *Payment not certified if may be taken to extend limitation.* Under O XXI, r. 2 of the Civil Procedure Code, an adjustment or payment of a decree which is not duly certified cannot be recognised by the Court for any purpose whatever, *e g*, for extending the time of limitation. KUTBULLAH SARKAR *v* DURGA CHARAN RUDRA (1912) 16 C. W. N. 396

5. ——————— *Assignment of decree for benefit of judgment-debtor—Execution by assignee—Civil Procedure Code (Act XIV of 1882), s. 258.* *A* held a decree against *C*. It was arranged between *C* and *B* that *B* should advance the decree amount to *C* as a loan and that an assignment of the decree should be obtained in the name of *B* for the benefit of *C*. The decree was accordingly assigned to *B* who applied for execution. *C* set up the above arrangement as a bar to execution. *B* contended that such arrangement amounted to an adjustment of the decree and not being certified to the Court it could not be given effect to under O. XXI, r. 2, of the Civil Procedure Code. *Held* (their Lordships differing), *per* ABDUR RAHIM, *J.* That the arrangement amounted to an adjustment of the decree and not being certified, could not be pleaded as a bar to execution. The prohibition contained in O. XXI, r. 2, is not confined to cases where the parties to the transaction adjusting the decree stood at the date of such transaction in the relation of judgment-creditor and judgment-debtor. *Per* SUNDARA AYYAR, *J.* That O. XXI, r. 2, does not make uncertified adjustments invalid but merely forbids effects being given to such adjustments when they are set up as a defence to the execution of a decree by one entitled to do so. The section will not disentitle the judgment-debtor to prove facts which will show that the applicant is not the real transferee, even if the facts he relies on show that the decree has been adjusted. The prohibition regarding uncertified adjustments will not apply where the adjustment is made with a third party PONNUSAMI NADAR *v.* LETCHMANAN CHETTIAR (1912)

I. L. R. 35 Mad. 659

6. ——————— *Fraudulent decree obtained jointly by two brothers—Admission in partition suit between brothers by one that decree fraudulent and that debter released upon payment of portion—Entry of satisfaction by the other of his share only of decree as discharged by payment—Application to execute for the balance—Executing Court if may act on the admission.* *S1*, and *S2*, [illegible]

he admitted that the decree had been obtained by fraud on account of enmity between the brothers and *B* and that *B* had been released of his liability under it upon payment of Rs 200 only out of the decretal amount The payment, however, was certified in execution as made in part satisfaction only of the decree Subsequently *S1* died and *S2* filed a certificate in execution admitting receipt of another Rs 200 from *B* and the full satisfaction of his half share of the decree and then applied on behalf of the minor sons of *S1* for execution of the alleged unsatisfied balance of the decree. *Held*, that the case really did not fall under the provisions of r. 2, O. XXI, Civil Procedure Code, as it was not a question of payment or adjustment of the decree, and the executing Court was justified in placing reliance on an admission solemnly made by the decree-holder himself prior to the application for execution in a suit in which the genuineness of the decree was in issue, and in dismissing the execution petition on its basis. BABAR ALI BOSAR *v.* SHISIR KUMAR BASU (1912) . 16 C. W. N. 951

7. ——————— *Adjustment of decree, not certified through alleged fraud of decree-holder—Remedy of judgment-debtor—Execution* [illegible] not open the fact [illegible] ee which provided in cl (*1*) of r. 2, of O. XXI, Civil Procedure Code, even when the conduct of the decree-holder is alleged to have been fraudulent. *Gadadhar Panda* v. *Shyam Churn Naik, 12 C. W. N. 485, Ramayyar*

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— O. XXI, r. 2 (1882 Code, s. 258)—*contd.*

v. *Ramayyar, I. L. R. 21 Mad. 356, Trimbak Ram Krishna Ranade* v. *Hari Laxman Ranade, I. L. R. 34 Bom. 575 ; 12 Bom. L. R. 686,* referred to. *Semble:* It is open to the judgment-debtor to institute a suit for damages for fraud [*Promanand Khasnabish* v. *Khepoo Paramanik, I. L. R. 10 Calc. 354,* referred to] and the decree-holder also renders himself liable to proceeding under the criminal law. *Madhub* v. *Novodeep, I. L. R. 16 Calc. 126, R.* v. *Bapuji, I. L. R. 10 Bom. 288, R.* v. *Muthuraman, I. L. R. 4 Mad. 325, R.* v. *Pillala, I. L. R. 9 Mad. 101,* referred to. Where the judgment-debtor having appealed against the decree sought to be executed withdrew the appeal upon an adjustment come to with the decree-holder, and the fact of such adjustment was stated before the Appellate Court and was recorded in its order: *Held,* that an application by the judgment-debtor to the Court in which execution was subsequently applied for by the decree-holder praying for an investigation as to the facts of the adjustment was in substance one in continuation of the application before the Appellate Court and the two applications together constituted a sufficient compliance with the provisions of O. XXI, r. 2, cl. (*1*), and the fact of the payment should have been enquired into by the Court. BIROO GORAIN *v.* JAIMURAT KOER (1911) . . . **16 C. W. N. 923**

8. ——— *Adjustment of decree—certification by decree-holder—Limitation Act (IX of 1908), Sch. I, Art. 174 and 182 (7).* If a judgment-debtor pleads payment or adjustment he must issue notice upon the decree-holder within 90 days of the payment or adjustment before he can certify payment within the meaning of the rule, but there is no corresponding disability imposed upon the decree-holder. The latter may certify payment at any time under Art. 82 (*2*) of the Sch. I of the Limitation Act, 1908. The application for execution must be made within three years from the date on which payment becomes due and the decree-holder may certify payment or adjustment in his application for execution. In such a case the Court has power to hear evidence as to the payment. SHEIKH ELAHI BUX *v.* NAWAB LALL . **4 Pat. L. J. 159**

9. ——— *Adjustment of partition decree—Adjustment as to partition of immoveable property—Necessity for certification by decree-holder—Sale by one decree-holder to another of his share in some of the lands decreed—Sale, not certified to Court, effect of—Subsequent application in execution by vendor for partition of lands sold and for other reliefs—Bar of execution.* O. XXI, r. 2, Civil Procedure Code, applies to partition decrees which provide for the payment of money as well as for other relief, such as a partition of immoveable property, and to adjustments with regard to such property. Such an adjustment cannot be recognized, unless certified or recorded as required by the rule. *Abdul Lathif Saheb* v. *Bathula Bibi Ammal (1914), 15 M. L. T. 338,* and *Sethurama Saheb* v. *Chota Raja Saheb, (1917) M. W. N., 327,* followed; *Kelu Nair* v. *Meenakshi (1913), 25 M. L. J. 586,* not followed. RAMAKRISHNA RAO *v.* BALAKRISHNA RAO (1920) **I. L. R. 43 Mad. 476**

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— O. XXI, r. 2 (1882 Code, s. 258)—*contd.*

10. ——— *Adjustment of decree not certified if can be recognised by Court executing decree—Estoppel, if applies between decree-holder and judgment-debtor—Estoppel, if can be invoked to nullify an express statutory provision—Limitation Act (IX of 1908), Sch. I, Art. 174—Application for notice on decree-holder to show cause why adjustment should not be recorded, period of limitation for.* A decree-holder applied for execution on the 1st June 1912. On behalf of the judgment-debtors objection was taken on the 27th June 1912 to the effect that the decree could not be executed inasmuch as it had been adjusted on the 11th February 1912 and, under the adjustment, the decree-holder had agreed to accept the judgment debt in certain specified instalments. This adjustment was not recorded as prescribed in sub-rr, 1 and 2 of O. XXI, r. 2. *Held,* that as the adjustment had not been recorded, the Court executing the decree could not recognise it under O. XXI, r. 2, sub-r. 3. That even if the application of the 27th June were treated as an application for the issue of notice to the decree-holder to show cause why the adjustment should not be recorded, it was barred by limitation under Art. 174 of the Second Schedule of the Limitation Act. *Held* (as to the contention that the decree-holder having subsequent to the alleged adjustment received payments in accordance therewith was estopped and the Court was bound to determine whether there had or had not been an adjustment), that this argument was clearly opposed to the provisions of sub-r. 3; and the doctrine of estoppel cannot be invoked to nullify an express statutory provision. JOGENDRA NATH SARKAR *v.* PROBHAT NATH CHATTERJEE (1913) **19 C. W. N. 650**

10(a) ——— *Certification of of payment out of Court to decree-holder—Limitation Act (IX of 1908), s. 20 and Arts. 174 and 181—Period of limitation for certifying payment of money payable under a decree—Such certification if can be made in the application for execution.* In a mortgage suit the preliminary decree was made in May 1912, and the final decree in January 1916. In August 1919, the decree-holder applied for execution and sought to escape from the bar of limitation by reference to a payment alleged to have been made by the judgment-debtor in October 1917. The lower Courts dismissed the application for execution as the alleged payment had not been certified or recorded under O. 21, r. 2 of the Civil Procedure Code: *Held*—That Art. 174 of the Limitation Act is applicable only to a case under sub-r. (2) of r. 2 of O. 21, *i.e.*, where the judgment-debtor moves the Court for recording a payment as certified. The only article applicable in the case of a decree-holder certifying a payment to Court is Art. 181. The Court does not prescribe that such application must be distinct from an application for execution of the decree and there is obviously no objection to a combined application embodying a two-fold prayer, namely, first that the alleged payment be recorded, and secondly, that the decree be executed for the balance of the judgment-debt. Therefore if the application for execution is made within three years from date of the said payment, it is not

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

———— **O. XXI, r. 2 (1882 Code, s. 258)**—*contd.*

barred by limitation. The decree-holder is not bound by the same rule of limitation as a judgment-debtor **26 C. W. N. 528**

11. ———— *Payment or adjustment of decree—Certifying by Court—Limitation* There is no period of limitation for the certifying or recording of a payment or adjustment of a decree by the Court, under O. XXI, r. 2, cl. 3 of the Civil Procedure Code, 1908. An application for execution certifying the payments already made amounts to a certifying under O. XXI, r. 2, which the Court is bound to take notice of, and if the payment is disputed the [illegible]

12. ———— *Transferee-decree holder—Application to execute the decree— Transfer benami for one of the judgment-debtors—Objection by another judgment-debtor—Competency of executing Court to inquire into title of transferee.* O. XXI, r. 2 (3), Civil Procedure Code (Act V of 1908), does not disentitle a judgment-debtor from proving facts which will show that a transferee of a decree applying for execution is merely a benamidar of another judgment-debtor, even if the facts on which he relies show that there has been a payment which has not been certified; and, when the transferee is found to be such a benamidar, the Court is bound by O. XXI, r. 16, to refuse execution in his favour. Per Curiam—"We [illegible]

I. L. R. 46 Mad. [illegible]

13 ———— When no pay- [illegible]

tion does not state under O. XXI, r. [illegible] that the [illegible]

either in whole or in part and cannot after the lapse of the period fixed by Art. 174 of the Limitation Act permit the judgment-debtor to plead any adjustment under O. XXI, r. 2(2). When the rights have recorded a payment made in adjustment of a decree is barred by limitation the judgment-debtor is not entitled to agitate the matter under s. 47. RADHA KANT LAL *v.* MUSAMMAT PARBATI KUER **6 Pat. L. J. 337**

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

———— **O. XXI, r. 2 (1882 Code, s. 258)**—*contd.*

14. ———— *Uncertified adjustment of decree, effect of.* Omission on the part of the decree-holder to cause an adjustment of the decree to be certified under O. XXI, r. 2 *(1)*, of the Code of Civil Procedure, 1908, does not amount to fraud so as to give the judgment-debtor a right to relief by suit or otherwise. The provisions of r. 2 *(3)* of that order are imperative, that a court executing a decree is absolutely prohibited from entertaining directly or indirectly an uncertified adjustment of a decree. IMAMUDDIN KHAN *v.* BINDUBASINI PRASAD **5 Pat. L. J. 70**

———— **O. XXI, rr. 2 and 95**—Upon an application by the decree holder, for delivery of possession the judgment-debtor set up an agreement for setting aside the sale by which he alleged it had been stipulated that the judgment-debtor would allow the sale to be confirmed, but that the decree-holder should not take possession for two years, within which period, if the judgment-debtor made certain payments, the decree-holder was to reconvey the property to the judgment-debtor, and he prayed that the agreement should be certified under O. XXI, r. 2, of the Civil Procedure Code, and the Court rejected the judgment-debtor's application on the ground that the agreement did not come within the scope of O. XXI, r. 2 : *Held*, that the order was appealable as coming within s. 47 of the Civil Procedure Code. *Muttia* v. *Appasami, I. L. R. 13 Mad. 504, Mahdhusudan Das* v. *Govinda Pria Chowdhurani, I. L. R. 27 Calc. 34, Sariatoola Molla* v. *Raj Kumar Roy, I. L. R. 27 Calc. 709, Ram Narain Sahoo* v. *Bandi Pershad, I. L. R. 31 Calc. 737, Bhagwati* v *Banwari Lal, I. L. R. 31 All. 82*, relied on. *Bhimal Das* v. *Ganesh. Kuer, 1 C. W. N. 658, Mohomed Masraf* v. *Habia* [illegible]

———— **O. XXI, r. 2, and O. XXXIV, rr. 4 and 5**——*Mortgage suit—compromise agreement to pay by instalments, validity of—payment out of court, whether court may give effect to, in absence of certification.* The provisions of O. XXXIV, of the Code of Civil Procedure, 1908, relating to the preparation of a mortgage decree are not exhaustive. The parties to the mortgage suit may arrange among themselves as to the terms and form of the mortgage decree and they will be bound by the terms agreed upon unless they are opposed to public policy. A mortgage decree is not excluded from the operation of O. XXI, r. 2. The holder of a mortgage decree, or the judgment-debtor if he is within time under O. XXI, r. 2 (2), is entitled to certify payments made out of court. The court to which an application is made for a decree absolute is not a court executing the decree and, therefore, O. XXI,

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— **O. XXI, r. 2, and O. XXIV, rr 4 and 5**—*contd.*

r. 2 (*3*), does not prevent the court from recognizing a payment or adjustment made out of court although such payment or adjustment has not been certified. MANGAR SAHU *v.* BHATOO SINGH . . . . . **5 Pat. L. J. 672**

——— *Preliminary decree—Decree ordering payment by instalments and, in default of payment of any one instalment, ordering execution for whole amount—Default made—Payment out of Court—Application for decree absolute—Limitation Act (IX of 1908), Sch. I, Art. 181. Held*, that O. XXI, r. 2 of the Code of Civil Procedure has no application to a decree for sale on a mortgage by which the mortgage money happens to be made payable by instalments. RAMJI LAL *v.* KARAN SINGH (1917)

I. L. R. 39 All. 532

——— **O. XXI, r. 5, (1882 Code s. 223(6))**—

See CIVIL PROCEDURE CODE, 1882, ss. 263, 264, 318, 319.

I. L. R. 36 Bom. 373

See EXECUTION OF DECREE.

I. L. R. 35 All. 178

I. L. R. 43 All. 520

——— *Agreement between one of the judgment-debtors and the decree-holder to enter up satisfaction of the decree—Agreement prior to decree—Application to enter up satisfaction, if maintainable—Civil Procedure Code (Act XIV of 1882), s. 244.* An application was made to the executing Court by one of the judgment-debtors to enter up satisfaction of the decree as against him, on the ground that there was an agreement to that effect entered into between himself and the decree-holder prior to the passing of the decree. The latter objected that such an application was not sustainable. *Held*, that the application was maintainable under O. XXI, r. 5 of the Civil Procedure Code (Act V of 1908). *Rukmani Ammal* v. *Krishnamachary, 9 Mad. L. T. 464*, referred to. *Laldas* v. *Kishondas, I. L. R. 22 Bom. 463*, followed. *Hassan Ali* v. *Ganzi Alim, I. L. R. 31 Calc. 179*, dissented from. SUBRAMANIA PILLAI *v.* KUMARAVELU AMBALAM (1915) . **I. L. R. 39 Mad. 541**

——— **O. XXI, r. 6 (1882 Code, s. 224)**—

See s. 42 . . **I. L. R. 43 All. 394**

——— **O. XXI, rr. 6 and 22**—*Application for transfer of decree and for issue of notice upon judgment-debtor—Limitation Act (IX of 1908), Art. 182(5), latter application to the Court which passed the decree whether "an application in accordance with law or a step in aid of execution."* An application for transfer of a decree was made on the 4th November 1910, in which there was also a prayer for issuing notice on the judgment-debtor. The notice having been twice returned unserved, the decree-holder applied on the 24th January 1911 for issue of another notice which was served and the decree was duly transferred. On the 7th January 1914 an application for execution was made to the Court to which the decree was transferred: *Held*—That the application for execution, dated the 7th January 1914 having been made more than three years after the application (for transfer of the decree, dated the 4th November 1910 was barred by limitation. A Court which transfers a decree has no power to issue a notice under O. 21, r. 22, therefore the application made on 24th January 1911 was not an application "in accordance with the Law" within Art. 182. HAZARILAL *v.* BAIDYA NATH SAHA

26 C. W. N. 292

——— **O. XXI, r. 7—(1882 Code, s. 225)**—

See FOREIGN DECREE

I. L. R. 40 Bom. 551

——— *(Corresponding to Act XIV of 1882, s. 225)—Court of Wards Act (Bom. Act I of 1905), ss. 31 and 32—Executing Court, power of—Jurisdiction of the Court which passed the decree under execution—S. 32 of the Court of Wards Act (Bom. Act I of 1905) not retrospective.* Under O. XXI, r. 7, of the Civil Procedure Code (Act V of 1908) the executing Court has no power to question the jurisdiction of the Court which passed the decree under execution. S. 32 of the Court of Wards Act (Bom. Act I of 1905) was not intended to apply to pending suits. In terms it refers to suits "brought by or against" a Government ward. S. 32 must be read with s. 31 which provides that before such a suit is brought notice shall be delivered to, or left at, the office of the Court of Wards. Thus s. 32 does not apply to suits pending at the time of the assumption of superintendence of the ward's estate by the Court of Wards. HARI GOVIND *v.* NARSINGRAO KONHERRAO (1913) . . **I. L. R. 38 Bom. 194**

——— *Execution of decree—Decree passed against a deceased person—Objection by alleged representatives of the deceased judgment-debtor that the decree is a nullity and incapable of execution against them.* It is a good answer to an application for execution against the alleged representatives of a judgment-debtor to show that the judgment-debtor was dead at the time that the decree was made, and that such decree is void and incapable of a execution as against the person so dead. *Imdad Ali* v. *Jagan Lal, I. L. R. 17 All. 478*, followed. SRIPAT NARAIN RAI *v.* TIRBENI MISRA (1918) . . . **I. L. R. 40 All. 423**

——— **O. XXI, r. 10 (1882 Code, s. 230)**—

See CIVIL PROCEDURE CODE 1882, s. 230.

——— **O. XXI, r. 11 (1882 Code, ss. 235 and 256)**—

See ATTACHMENT **I. L. R. 38 Calc. 448**

See LIMITATION ACT 1908, ART. 182.

I. L. R. 40 Mad. 949

——— **O. XXI, r. 12 (1882 Code, s. 236)**—

See EXECUTION OF DECREE.

I. L. R. 37 All. 527

——— **O. XXI, r. 13 (1882 Code, s. 237)**—

See ADMINISTRATION SUIT.

I. L. R. 44 Calc. 890

See MORTGAGE . **I. L. R. 47 Calc 447**

——— **O. XXI, r. 14 (1882 Code, s. 238)**—

See LIMITATION ACT 1877, SCH. II, ART. 179 . . **I. L. R. 37 Bom. 317**

CIVIL PROCEDURE CODE (ACT V OF 1908) *—contd.*

———— **O. XXI, r. 15 (1882 Code 231)—**

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), s 231.
I. L. R. 36 Mad. 357

See EXECUTION OF DECREE.
4 Pat. L. J. 575

———— **O. XXI, r. 16 (1882 Code s. 232)—**

See EXECUTION
I. L. R. 44 Mad. 919

See EXECUTION OF DECREE.
5 Pat. L. J. 639

See MAINTENANCE.
I. L. R. 38 Calc. 13

1. ———— *Decree—Assignment—Application for execution—Attachment before hearing judgment-debtor's objections—Notice to assignor and judgment-debtor—Attachment proceedings not merely irregular but illegal.* The transferee of a decree having preferred a *darkhast* for execution, the judgment-debtor's property was attached in his shop by seizure before hearing his objections. The next day an order was made on the application of the judgment-debtor that the property should not be removed until his objections had been heard Subsequently the Court heard the judgment-debtor's objections and held that the transferee was entitled to execution of the decree against the judgment-debtor, the omission to hear the judgment-debtor's objections was a mere irregularity and proceedings in attachment should not be set aside *Held,* reversing the order and dismissing the *darkhast,* that Legislature having provided that the decree should not be executed until the objections had been heard, the proceedings were unlawful and not merely irregular as the objections of the judgment-debtor had not been heard. KASSUM GOOLAM *v.* DAYABHAI AMAPSI (1911)
I. L. R. 36 Bom. 58

2. ———— *Execution of decree—Decree for money and costs of suit—Transfer of decree as to costs merely: Held,* that a decree for payment of a sum of money and for costs of the suit is one and indivisible, and the decree holder cannot transfer the decree so far merely as it may be a decree for costs, retaining the right to execute the decree for the main sum awarded RAM CHANDRA NAIK KALIA *v.* ABDUL HAKIM (1913) . . . . **I. L. R. 35 All. 204**

3. ———— *Execution of decree—Res judicata.* On application by a person to have his name substituted as decree-holder upon the ground that he was in fact the true owner of the decree, an order was passed, after notice to the judgment-debtor, permitting the applicant to execute the decree as its transferee: *Held,* on application for execution of the decree, [illegible]

[illegible] (1916)
I. L. R. 38 All. [illegible]

4. ———— *Assignment of decree—execution by assignee—notice not served on assignor, effect of—Bengal Tenancy Act (VIII of 1885), s. 158 B (2)—Adjournment [illegible]*

———— **O. XXI, r. 16 (1882 Code, s 238)—** *contd*

bound to grant Where the interest of one of the decree-holders in a decree has been transferred by assignment the decree cannot be executed until notice has been served upon the assignor in accordance with O. XXI, r. 16, of the Code of Civil Procedure, 1908, and the fact that a notice purporting to be under s 158 B (2) of the Bengal Tenancy Act, 1885, has been shewn to the assignor will not dispense with the necessity of complying with the provisions of that rule. Where a case has been definitely fixed for hearing and witnesses have been called and expenses has been incurred, if it should turn out that owing to some default on the part of one of the parties the court has no power to hear the case, the court has a discretion to adjourn or dismiss it but. apart from an express provision of law, is not bound to grant an adjournment. MAHARAJA SIR RAMESHWAR SINGH *v.* HARIHAR JHA . **5 Pat. L. J. 390**

5. ———— A mortgagee purchaser in a execution sale " with all arrears of rent " can execute a rent decree subsequently obtained by the mortgagors He should be treated as an assignee thereof ANANDA MOHAN ROY *v.* PROMOTHO NATH GANGULI
25 C. W. N. 863

———— *Execution of decree by assignee—whether non-compliance with the provisions of the rule renders the execution proceedings void Held,* that the provisions of O. XXI, r. 16, of the Code of Civil Procedure are of a mandatory character and that non-compliance with them renders all proceedings in execution void. *Kassum Goolam Hoosein* v. *Dayabhai (I. L. R. 36 Bom. 58), Sreenath Dae* v. *Achutananda 6 Indian Cases 262), Bonomali* v. *Joy Kumar (29 Indian Cases 673), Gul Muhammad* v. *Bandu (56 Indian Cases 461),* and *Gulzari Lal* v. *Daya Ram (I. L. R. 9 All. 46),* followed. *Harnam Singh* v. *Hamira Mal (P. L. R. 1908, page 157),* distinguished. NOTAN DAS *v.* LACHMAN SINGH . **I. L. R. 2 Lah. 230**

———— **O. XXI, rr. 16 and 11, and O. XXII, r. 10**—In the case of a joint decree where there is an assignment of interest by one decree-holder an application is not a fresh application for execution. The Limitation Act 1908, s. 22 does not apply to proceedings in execution of a decree. MUSSAMMAT GULAB KUER *v.* SYED MOHAMMED ZAFFER HASSAN KHAN . . **6 Pat. L. J. [illegible]**

———— **O. XXI, r. 17 (1882 Code, s. [illegible])—**

See LIMITATION **I. L. R. [illegible] Calc. [illegible]**

———— **O. XXI, r. 18 (1882 Code, s. [illegible])—**

Cross decrees—[illegible] [illegible] a decree [illegible] from sale is passed [illegible] character [illegible] in a character different from the [illegible] a decree made [illegible] and which is enforceable against [illegible] by the arrest of his person and the attachment of his property. [illegible] other [illegible] has obtained his decree for [illegible] month in his individual and personal capacity.

CIVIL PROCEDURE CODE (ACT V OF 1908)
—*contd.*

——— **O. XXI, r. 18 (1882 Code, s. 246)**—*contd.*

other he is not ordered to pay any sum of money in his individual and personal capacity, but is only given an option to do so if he likes to save from sale some property in which he is interested. In such circumstances, therefore, r. 18 of O. XXI of the Code of Civil Procedure will not be applicable. *Nagar Mal* v. *Ram Chand, I. L. R. 31 All. 240,* distinguished. SHEO SHANKAR *v.* CHUNNI LAL (1916) . . **I. L. R. 38 All. 609**

——— **O. XXI, rr. 18, 19, 20**—*Execution of decree—Cross decree—Set off—Money decree—Decree for enforcement of charge. Held,* that under the Code of Civil Procedure, 1908 a Court is competent to set off a simple decree for recovery of money against a decree for recovery of money by enforcement of a charge. NAGAR MAL *v.* RAM CHAND (1919) . . **I. L. R. 33 All. 240**

——— **O. XXI, r. 19 (1882 Code 247)**—*Execution of decree Cross claims under the same decree—Set- off allowed even if one of the claims could not be recovered owing to bar of limitation.* The applicant applied to execute a decree for recovering the amount Rs. 445-8-0 which he was entitled to recover from the opponents as mesne profits. Under the same decree, the opponents were entitled to claim the sum of Rs. 855 as costs from the applicant; but they were prevented from recovering it as it was barred by limitation. They, however, claimed to set off the amount against the amount sought to be recovered by the applicant. The Subordinate Judge having allowed the set-off, the applicant appealed: *Held,* dismissing the appeal, that the applicant could not be allowed to execute his decree for the smaller sum, without reference to the larger sum which the decree awarded to the opponents. MADAPPA GANAPPA *v.* JAKI GHOSAL (1915) . . . . **I. L. R. 40 Bom. 60**

——— *Execution of decree under which two parties are entitled to recover money from each other.* Under O. XXI, r. 19, *C. P. C.* the execution of a decree under which two parties are entitled to recover sums of money from each other is to be taken out by the party entitled to the larger sum and for so much as remains after deducting the smaller amount for which satisfaction is to be entered upon the decree. ANNADA MOHAN ROY *v.* ATUL CHANDRA CHAKRABARTY
24 C. W. N. 465

——— **O. XXI, r. 21 (1882 Code, s. 230 (2)**—
See STEP IN AID OF EXECUTION.
4 Pat. L. J. 521

——— **O. XXI, r. 22 (1882 Code, s. 248)**—
See LIMITATION ACT 1908, ART. 183.
I. L. R. 40 Mad. 1127

——— *Execution proceeding without notice a nullity and without jurisdiction—Sale void.* An order for execution made without notice under s. 248 of the old Civil Procedure Code (O. XXI, r. 22 of the new Code) is without jurisdiction and is a nullity and therefore the sale at such an execution cannot stand. *Syam Mandal* v. *Satinath Banerji, 21, C. W. N. 776 (1916), Maharaj Bahadur Singh* v. *Indur Chand Bothra, 22 C. W. N. 390 (1917), Raghunath Das* v. *Sundar Das Khettri, I. L. R. 42 Calc. 72: s. c. 18 C. W. N.*

CIVIL PROCEDURE CODE (ACT V OF 1908)
—*contd.*

——— **O. XXI, r. 22 (1882 Code, s. 248)**—*contd.*

1058 (P. C.) (1914) and *Malkarjun* v. *Narahari, L. R. 27 I. A. 216: s. c. I. L. R. 25 Bom. 337 5 C. W. N. 10 (1900),* referred to. A mere issue of the notice is not sufficient compliance with the section; it must be served; nor is the issue of such a notice only at a previous execution, not followed by actual service, sufficient for the purpose of the proviso to the section. GURUDAS BISWAS *v.* BHOWANIPORE ZEMINDARY CO., LD.
25 C. W. N. 972

——— **O. XXI, r. 24 (1882 Code, ss. 250 and 251)**—
See PENAL CODE (ACT XLV OF 1860) s. 186 . . **I. L. R. 37 Calc. 122**
1 Pat. L. J. 550
See WARRANT OF ATTACHMENT.
3 Pat. L. J. 636

——— **O. XXI, r. 25 (1882 Code, s. 343)**—
See ATTACHMENT **I. L. R. 40 Calc. 849**

——— **O. XXI, r. 29 (1882 Code, s. 243)**—
See CHOTA NAGPUR TENANCY ACT, SS. 212 AND 215 . . **2 Pat. L. J. 153**

——— *Indian Arbitration Act (IX of 1899), ss. 11 and 15—"Award."* An award filed in Court under s. 11 of the Indian Arbitration Act (IX of 1899) is nothing more than an award, although it is enforceable as if it were a decree. Execution of such an award cannot be stayed under O. XXI, r. 29 of the Civil Procedure Code (Act V of 1908). TRIBHUWANDAS KALLIANDAS GAJJAR *v.* JIVANCHAND LALLUBHAI & Co. (1910) . . . . **I. L. R. 35 Bom. 196**

——— **O. XXI, r. 31 (1882 Code, s. 259)**—
See SPECIFIC MOVEABLE PROPERTY.
I. L. R. 39 Mad. 1

——— **O. XXI, r. 32 (1882 Code, s. 260)**—
See PENAL CODE, ss. 186 and 225.
3 Pat. L. J. 106

——— *Execution of decree—Decree declaring rights of certain parties and forbidding interference therewith by other parties to suit—Mode of enforcing such decree.* A decree was passed declaring the rights of certain parties to the suit to conduct certain religious ceremonies and enjoining on certain other parties to the suit to refrain from interfering with the celebration of the said ceremonies by the parties in whose favour the decree was passed. *Held,* that it was not competent to the Court passing such decree to secure obedience thereto by directing the Superintendent of Police to see that the ceremonies were carried out and to prevent interference therewith, nor was it competent to the Court to appoint a commissioner to see that the terms of the decree were given effect to. GOSWAMI GORDHAN LALJI *v.* GOSWAMI MAKSUDAN BALLABH (1918)
I. L. R. 40 All. 648

——— *Breach of prohibitory injunction—Remedy, if by suit or application in execution.* The remedy for a breach of a permanent injunction is by application for execution and not by suit. *Per* RICHARDSON, *J.* (BEACHCROFT, *J.* not expressing any opinion)—O. XXI,

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— **O. XXI, r. 32 (1882 Code, s. 260)**—*contd.*

r. 5 of the Civil Procedure Code applies to injunctions both mandatory and prohibitory. SACHI PROSHAD MUKERJI *v.* AMAR NATH ROY (1918) **22 C. W. N. 851**

——— **O. XXI, r. 33**—*Decree for restitution of conjugal rights—Decree should not be executed by wife's detention in prison—Husband protected against civil or criminal proceedings for maintenance if wife disobeys Court's order to live with husband.* A decree for restitution of conjugal rights was passed in favour of the plaintiff, the husband, by the lower appellate Court. It directed that the wife should go and live with the husband and in the event of wilful disobedience of the Court's order, the wife should be asked to go to jail as she had suffered rigorous imprisonment for three years on a criminal charge and was quite accustomed to that life. On appeal to the High Court, *held,* that under O. XXI, r. 33, Civil Procedure Code, 1908, the decree should not be executed by detention in Civil Prison, although the Court had power to order the wife, if she did not obey the decree, to go to jail. The tendency of modern legislation is against sending women to jail in civil matters It is a sufficient consequence for the refusal to obey a decree for restitution if the wife has to maintain herself, and cannot make any claim against her husband for maintenance. BAI PARWATI *v.* GHANCHI MANSUKH (1920) . **I. L. R. 44 Bom. 972**

——— **O. XXI, r 34—(1882 Code, ss. 261 and 262)**—

See COMPROMISE DECREE **25 C. W. N. 68**

——— *Compromise decree—Subject-matter of suit, what is—Suit for declaration that property attached belonged to Plaintiff and not to judgment-debtor—Compromise that Plantiff do execute mortgage* [illegible] *amount due fro*[illegible] *of mortgage bond* [illegible] *the compromise* [illegible] *V of 1908) O. XXI, r. 34.* The Respondents brought a suit for declaration that certain property attached by the Appellant in execution of a money decree against another person belonged to them. A compromise was arrived at to the effect that the Respondents would execute a mortgage bond for the amount due from the judgment-debtor in favour of the Appellant. A decree embodying the terms of the compromise was passed and the mortgage bond not being executed within the time specified in the decree the Appellant applied for execution of mortgage bond in execution of the decree: *Held,* that the question what is the subject-matter of a suit must depend upon the facts of each case and in the present case the execution of the mortgage bond was a matter relating to the suit and having been directed by the decree was capable of being enforced in execution of the decree under the provisions of O. XXI, r. 34 of the Civil Procedure Code. SAUDAMINA DASI *v.* BEHARI LAL BISWAS **25 C. W. N. 63**

——— **O. XXI, r. 35 (1882 Code s. 263)**—

See CRIMINAL PROCEDURE CODE s. 145 **5 Pat. L. J. 104**

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— **O. XXI, r. 35 (1882 Code, s. 263)**—*contd.*

See BAILIFF . **I. L. R. 42 Calc. 313**

Suit for recovery of joint possession—Form of decree—Practice. Held, that a plaintiff who is entitled to possession jointly with other persons can be granted a decree for joint possession, whether the plaintiff was originally in joint possession and was subsequently dispossessed, or whether he had never been in possession *Phani Singh* v. *Nawab Singh, I. L. R. 28 All. 161,* dissented from. *Bhairon Rai* v. *Saran Rai, I. L. R. 26 All. 588, Rahman Chaudhri* v. *Salamat Chaudhri, All. Weekly Notes, 1901 p. 48, Watson and Co.* v. *Ram Chand Dutt, I. L. R. 18 Calc. 10,* and *Bhola Nath* v. *Buskin, All. Weekly Notes, 1894 p. 127,* referred to. Per Curiam—"In the full Bench Case of *Bhairon Rai v Saran Rai, I. L. R. 26 All. 588,* it was held that where the plaintiff had been ousted from joint possession we fail to see that on principal there is any destinction between the case of a person who was in joint possession but was subsequently dispossessed, and the case of a person who was entitled to joint possession, JAGARNATH OJHA *v.* 94, RAM PHAL (1911) **I. L. R. 34 All. 150**

——— *Execution of decree—Purchase of undivided share in a house—Resistance to possession by judgment-debtor—Remedy to which purchaser is entitled.* In execution of a decree held by her the decree-holder purchased an undivided share in a house which the judgment-debtor owned jointly with one *S*. On attempting to get possession the decree-holder was resisted, not by *S*, but by the judgment-debtor. *Held,* on a construction of rr. 35 and 95 of O. XXI of the Code of Civil Procedure, that the decree-holder was entitled to have the judgment-debtor removed from the premises. SARVI BEGAM *v.* TAJ BEGAM (1914) . . . . **I. L. R. 36 All. 181**

——— **O. XXI, 36—(1882 Code s. 264)**—

See CRIMINAL PROCEDURE CODE, s. 145. **5 Pat. L. J. 104**

——— **O. XXI, r. 41—(1882 Code 268)**—

See PRACTICE . **I. L. R. 43 Calc. 285**

——— **O. XXI, r. 46 (1882 Code 268)**—

See DEPOSIT IN COURT. **I. L. R. 43 Calc. 267**

See PROHIBITORY ORDER. **I. L. R. 39 Calc. 104**

——— **O. XXI, rr. 46, 52**—*Annuity, instalments not accrued due if attachable—Right to annuity if may be attached—"Debt," meaning of. A* executed a conveyance of all his properties in favour of his son for the payment of his debts it being provided therein that the purchaser would pay the vendor a monthly sum of Rs. 40 the first payment to be made on the 1st October 1905 and the payment for every succeeding month

CIVIL PROCEDURE CODE (ACT V OF 1908)
—contd.

——— O. XXI, rr. 46, 52—*contd.*

on the first day of the month following between the hours of 1 A.M. and 6 A.M. the deed further providing that the vendor would not by mortgage or otherwise sell or charge or alienate the allowance payable to him; that on no account and in no circumstances was it to become payable to any person other than the vendor or his duly constituted attorney. The allowance was further declared to be a first charge upon a specified share of the estate so far as the subsisting mortgages executed by the vendor would allow: *Held*, that the allowance payable as annuity could not be regarded as a debt or even as a portion of the consideration for the conveyance payment of which was deferred, and no instalment of such allowance could be attached under r. 46 of O. XXI of the Civil Procedure Code until it should have actually fallen due. A sum payable upon a contingency is not a debt and does not become one until the contingency has happened. Whether a claim is a debt or not is in no respect determined by a reference to the time of payment. *Held*, further, that the allowance could not also be attached under r. 52 of O. XXI of the Code, as that rule does not allow of an anticipatory attachment of money expected to reach the hands of a public officer and is restricted only to money actually in his hand. *Quære:* Whether, notwithstanding the restrictions upon alienation embodied in the conveyance the right to receive the annuity is attachable in execution. PADMANAND SINGH *v.* RAMAPRASAD MALVI (1911) . . . . . **16 C. W. N. 14**

——— O. XXI, rr. 46, 54—*Sale in execution of a hypothecation debt—Moveable property.* For the purposes of execution a debt due to judgment-debtor under a hypothecation bond is moveable property within the meaning of O. XXI, r. 46, Civil Procedure Code, and the procedure as to moveable property is applicable; the language

CIVIL PROCEDURE CODE (ACT V OF 1908)
—contd.

——— O. XXI, rr. 46, 54—*contd.*

mortgagee in a certain property should be in the manner provided by O. XXI, r. 46, Civil Procedure Code, for the attachment of a debt and not in the form provided for the attachment of immoveable property. Where, therefore, there was an attachment of the usufructuary mortgagee's right in the manner prescribed for attachment of immoveable properties and the mortgagor who did not receive from Court any order prohibiting him from making payment of the usufructuary mortgage debt, discharged the same by payment and obtained from the mortgagee a release of his rights some time prior to the actual sale thereof in Court auction. *Held*, that the sale of the mortgagee's right in Court auction was invalid and that the purchaser acquired nothing by the purchase as against the mortgagor who had redeemed the mortgage by payment. The fact that on the date of the payment the mortgagee could not have got a personal decree against the mortgagor for the payment of the mortgage debt on account of limitation, is immaterial as limitation does not put an end to the debt and does not prevent the mortgagor and mortgagee from paying and receiving the mortgage amount. RAMASAMI MOOPHAN *v.* SRINIVASA IYENGAR (1915) . . . . **I. L. R. 39 Mad. 389**

——— O. XXI, rr. 46, 58 and 63—

See CONTRACT ACT 1872, s. 72.
I. L. R. 43 All. 272

——— O. XXI, r. 50—

See FOREIGN JUDGMENT
I. L. R. 36 Mad. 415

——— O. XXI, r. 52 (1882 Code s. 272)—

See DECREE . **I. L. R. 39 Bom. 80**

See EXECUTION OF DECREE.
1 Pat. L. J. 449
I. L. R. 44 Calc. 1072

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

———— **O. XXI, r. 52**—*contd.*

Court, the respondents filed a petition to the effect that the appellant was trying to take out the money but that it might be kept under attachment by an order of the Court. On this petition, the Court ordered that the appellant was not to receive payment of the money unless and until the respondent's application was disposed of. At the hearing of the execution cases, the respondents contended that the question of title and priority in respect of the money in Court should be decided under O. XXI, r. 52: *Held*, that the order of the Court withholding payment of the money to the appellant virtually amounted to an attachment of the money after it came into the custody of the Court. That O. XXI, r. 52, was clearly applicable to a case like the present and there was no reason to narrow the words of the rule so as to make it applicable only to a case in which the property sought to be attached was in the custody of a Court other than the Court executing the decree. That as regards the question of priorities neither party perfected their charge by giving notice to the persons who were to make the payments to their mortgagor and accordingly apart from any question of notice the respondent's charge, which was prior in date must prevail. SURAJMALL AGARWALLAH *v.* RAM CHANDRA MAINTRI (1915) . **20 C. W. N. 412**

———— **O. XXI, r. 52, s. 73**—*Attachment of property in custody of Court—Rateable distri-* [illegible]

is in the custody of a Court it is the duty of such Court to hold it at the disposal of the attaching Court and it is the duty of the attaching Court, if the property attached is money, to call upon the custody Court to pay it into the attaching Court and in other cases, to provide for the realization of the property, and to divide the money or proceeds rateably between the attaching decree-holder and the other decree-holders who are entitled to distribution under s. 73, Civil Procedure Code, *viz.*, those who have applied to it for execution before the receipt of such assets. Where the property in the custody Court is the subject of several attachments in execution of several decrees the custody Court must award priority to the first in point of time. If the other decree-holders want to share in the rateably distribution they must apply in time to the first attaching Court. The power conferred on the custody Court by the proviso to O. XXI, r. 52, Civil Procedure Code, to determine claims to priority, etc., does not entitle the custody Court itself to distribute the assets rateably among the attaching decree-holders. *Katum Sahiba* v. *Hajee Budsha Sahib (1915), I. L. R. 38 Mad. 221*, overruled. *Thakurdas Motilal* v. *Josep Isbinler, (1917), I. L. R. 41 Calc. 1072*, not followed. Where the attaching Court and the custody Court are the same, there is a receipt of assets within the meaning of s. 73, Civil Procedure Code, only when so much of the money standing to the credit of the judgment-debtor as is necessary to satisfy the decree-holders who have applied to it for execution, *is ordered to be transferred to the* credit of the first attaching creditor's suit. VISVANADHAM CHETTY *v.* ARUNACHALAM CHETTY (1921) **I. L. R. 44 Mad. 100**

———— O. XXI, r. 53 [illegible]

attached a mortgage-decree in favour of his judgment-debtors made under O. XXI, r. 53, Civil Procedure Code, 1908 The Court put up the decree for sale and it was purchased by the decree-holder for Rs. 200. The decree-holder having applied for execution of the balance of the decretal debt, the judgment-debtor contended that under the attached decree the decree-holder realized Rs. 600 which was much more than what was due on the decree which was sought to be executed and prayed that the Darkhast be struck off. *Held* dismissing the Darkhast. (1) that the decree attached ought not to have been put up for sale, (2) that under O. XXI, r. 53, the procedure to be followed when a decree either for the payment of money or for the sale in enforcement of a mortgage or charge is attached, the Court should under sub-r (2) on the application of the creditor who had attached the decree of the judgment-debtor proceed to execute the attached decree and apply the net proceeds in satisfaction of the decree sought to be executed. VITHALDAS *v.* SUBRAYA (1920) . . **I. L. R. 45 Bom. 343**

———— **O. XXI, rr. 53 and 90 and ss. 47 and 60**—*Immoveable property decree for redemption, costs, and mesne-profits whether decree for costs and mesne-profits, after redemption, is a money decree.* *O* obtained a decree on a mortgage giving him possession of the mortgage property unless it were redeemed by a certain date and awarding him costs and mesne-profits. The mortgage was accordingly redeemed, but the costs and mesne-profits remained unpaid. *L* attached *C's* decree in execution of a decree which he held against the latter. *C* objected that his decree was one for immoveable property within the meaning of s. 60 of the Code of Civil Procedure, 1908, and that, therefore, it was not attachable in execution of *L's* decree: *Held*, that as the only part of *C's* decree which was outstanding was the award on account of costs and mesne-profits, this decree was a decree for money, and that *L* was entitled to attach and execute it under the provisions of O. XXI, r. 53, of the Code of Civil Procedure, 1908. LACHMAN OJHA *v.* CHARITAR OJHA . . . **4 Pat. L. J. 330**

———— **O. XXI, r. 54 (1882 Code 274)**—

See s. 64 . **I. L. R. 42 Mad. 844**

See O. XXI, r. 46.—**I. L. R. 37 Mad. 51**

———— **O. XXI, rr. 54, (2), 66, 67 and 90**—*Non-publication of proclamation of sale in the village—Announcement of a wrong place as the place of sale—Sale held not in the place ordered by Court, but in the wrong place—Sale, illegal and null and void and not merely irregular.* Where a proclamation of sale of lands in execution of a decree, as framed by the Court, was not published in the village where the lands were situate but the process-server intimated at the village that the sale would be held at a place and by an officer

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— O. XXI, rr. 54, (2), 66, 67 and 90—*contd.*

different from those fixed by the proclamation, a sale held at the place and by the official fixed by the proclamation is illegal and a nullity and not merely 'irregular' within the meaning of O. XXI, r. 90, Civil Procedure Code. *Basharutulla* v. *Uma Churn Dutt (1889), I. L. R. 16 Calc. 794*, applied. JAYARAMA AYYAR *v.* VRIDHAGIRI AIYAR (1921) . . **I. L. R. 44 Mad. 35**

——— **O. XXI, r. 55 (1882 Code 276)**—

See ATTACHMENT **I. L. R. 44 Calc. 662**

——— **O. XXI, r. 57**—

See ATTACHMENT . **3 Pat. L. J. 310**

See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXXVIII.
I. L. R. 42 Mad. 1

1. ——— *Execution of decree—Attachment—Application for execution dismissed but subsequently restored on review.* By a mistake of the Court an application for execution against property which was under attachment was dismissed, but the decree-holder obtained a review of that order and the executing Court was directed to proceed. There was no order removing the attachment. *Held*, on application by the decree-holder to sell the attached property, that the attachment still subsisted and was valid as against a sale made by the judgment-debtor previous to the review. AZIZ BAKHSH *v.* KANIZ FATIMA BIBI (1912) . **I. L. R. 34 All. 490**

2. ——— *Attachment before judgment—Application for execution dismissed—Attachment if ceases—Second application for execution—Attachment if must be asked for.* An order for attachment before judgment obtained at the instance of the decree-holder subsists after the decree for the purpose not merely of the original application for execution but for purposes of subsequent applications for execution as well. Where in such a case the original application for execution was dismissed: *Held*, that the decree-holder might apply for sale of the properties without taking out fresh attachment. The attachment referred to in the concluding portion of O. XXI, r. 57, is an attachment made under the provisions of O. XXI and not an attachment under the provisions of O. XXXVIII. GANESH CHANDRA ADAK *v.* BANWARI LAL RAY (1912)
16 C. W. N. 1097

3. ——— *"Strike off," meaning of, if amounts to dismissal of attachment—Limitation.* Where a decree was passed on the 15th April 1897, and on the 22nd February 1909 execution was commenced and it was ordered that the land should be attached and proclamation should be issued, the 15th April being fixed, for the date of the proclamation; and on the 15th April the proclamation not having been made owing to laches on the part of the decree holder an order was passed—"proclamation not filed, struck off:" *Held*, that this amounted to a dismissal of the attachment and a fresh application for execution after the 15th April 1909 was out of time. MANDHYAN SHEIKIYA *v.* BADRAM DALNI (1912) . . . **17 C. W. N. 204**

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— **O. XXI, r. 57**—*contd.*

4. ——— *Execution of decree—Sale in execution—Sale set aside—Order purporting to maintain attachment—"Default" of decree-holder.* In execution of a decree the whole of a house was sold by auction instead of a share held or which alone was saleable in execution of the decree. Various objections were raised and in the end the Court executing the decree passed the following order:—"The sale is set aside the application for execution is struck off The attachment will remain." Further applications were made for the execution of the decree, but they did not relate to the house in question As the result of these execution proceedings the decree was satisfied in part and the papers were sent back to the Court which passed the decree. Later on the decree-holder applied for the execution of the decree by sale of a part of the house. In the interval between this application and the time when the decree was sent back to the Court which passed it, the judgment debtor had sold the property to the plaintiffs. The plaintiffs objected to the application for execution that they were the owners of the house and it was not saleable:—*Held*, that the attachment had come to an end on the decree-holders' application being struck off, and that a good title had passed to the plaintiffs by the sale. The word "default" used in O. XXI, r. 57, of the Code of Civil Procedure, is not restricted to default of appearance or matters of that description. It means a failure to do what the decree holder was bound to do, that is, to go on with his application and have the property sold. *Namuna Bibi* v. *Rosha Miah, I. L. R. 38 Calc. 482*, followed. *Valiakath Puthiah* v. *Manakkal Parameswaran, 35 Indian Cases 240*, and *Karaturi Satyanarayana* v. *Gopisetti Narayana Swami Naidu Garu, 38 Indian Cases 300*, dissented from. DILDAR HUSAIN *v.* SHEO NARAIN (1918)
I. L. R. 41 All. 157

——— *Restoring a dismissed application for execution, effect of—Attachment of property terminated by dismissal of application for default—Sale after dismissal of application, purchaser if affected by restoration order.* A property was attached in execution of a decree. subsequently the application for execution was dismissed for default; after the dismissal the judgment-debtor sold the property. The proceeding in execution was subsequently restored under O. XXII, r. 60, and sale-proclamation re-issued. On an objection by the purchaser to the sale: *Held*, that the attachment having under O. XXII, r. 57, come to an end the revival of the execution proceedings did not operate as a revival of the attachment so as to prejudice the rights of strangers who have in the interval acquired an interest in the property. *Zainulabdin* v. *Mahomed Ashgar, L. R. 15 I. A. 12; Janukdhari Lal* v. *Gossain Lal Bahiya, I. L. R. 37 Calc. 107, s. c. 11 C. L. J. 254; 13 C. W. N. 710, Chetiattil* v. *Kumhi, I. L. R. 29 Mad. 175; Sasirama Kumari* v. *Meherban Khan, 13 C. L. J. 240.* PATRINGA KOER *v.* MADHAVA NAND RAM (1911) **16 C. W. N. 332**

——— **O. XXI, rr. 57, 66**—

See EXECUTION OF DECREE.
I. L. R. 38 Calc. 482
15 C. W. N. 428

CIVIL PROCEDURE CODE (ACT V OF 1908)
—contd.

———— **O. XXI, r. 58 (1882 Code s. 278)—**

See PROVINCIAL INSOLVENCY ACT (III OF 1907), ss. 20, 22, 46.
I. L. R. 36 All. 8

———— *Execution of decree—Limitation Act (IX of 1908), Sch. I, Art 11—Limitation—Objection to attachment dismissed—Subsequent suit for possession—Investigation of objection by Court.* Art. 11 (*1*) of the first schedule to the Indian Limitation Act, 1908, applies only to those orders made under O XXI. r. 51, which are made after investigation of the claim or objection; but it does not follow that, merely because the claimant has not adduced evidence or has not appeared, there has been no investigation within the meaning of the rule. *Rahim Bun v. Abdul Kader, I. L. R. 32 Calc. 537 Shagun Chand, v. Shibbi, 8 A. L. J. 626, Chandi Prasad v. Nand Kishore, 20 Indian Cases 369, Lachmi Narain v. Martindell, I. L. R 19 All 253,* and *Kunj Behari Lal v. Kandh Prasad Narain Singh, 6 C. L. J. 362,* referred to. GOKUL *v.* MOHRI BIBI (1918) . . . **I. L. R. 40 All. 325**

———— *Execution of decree—Limitation Act (IX of 1908), Sch. I, Art 11—Limitation—Objection to attachment dismissed—Subsequent suit for possession—"Investigation" of objection by Court* Where an objection made to the attachment of property within the meaning under r. 58, O. XXI, of the Code of Civil Procedure (1908), is disallowed because the objector did not appear on the date fixed, the order disallowing the objection is an order "against" the objector within the meaning of r. 63. GULAB *v.* MUTSADDI LAL (1919) **I. L. R. 41 All. 623**

———— O. XXI, r. 58 —*Mortgage decree, for sale—Claim to mortgaged property, if lies—Claim*

[illegible]

a mortgage decree; and where such a claim was once allowed, but subsequently the decree-holder having again applied for execution of the decree

[illegible]

Code, that in view of the authority of the case, DEEFHOLTS *v.* PETERS (2), *the High Court could not interfere.* MAHABIR PRASAD SINGH *v.* JOGENDRA NATH MANDAL . . . **26 C. W. N. 50**

———— *Execution—Attachment—Purchaser from judgment-debtor applying for removal of attachment—Order in attachment proceedings declaring the sale-deed ineffective—Suit to set aside the order —Attachment withdrawn pending suit—Suit by vendee against vendor to recover possession—Order in attachment proceedings not to operate to the prejudice of the vendee—Indian Limitation Act (IX of 1908), Sch. I, Art. 11.* The defendant executed a sale-deed in favour of the plaintiff. After the date of the sale, the property was attached by a creditor of the defendant. The plaintiff applied for removal of the attachment under O. XXI, R. 58, Civil Procedure Code, 1908. In the attachment proceedings the Court by its order, dated the 14th December 1915, held that the sale-deed was inoperative as it was effected to defraud creditors. The plaintiff filed a suit to set aside the order but it was withdrawn because the defendant settled with the judgment-creditor and attachment was raised. The plaintiff, thereupon, filed a suit to recover possession. The defendant contended that the suit not having been brought within a year of the order passed in attachment proceedings was barred by limitation *Held,* that the suit was not barred; as soon as the attachment was withdrawn, there was no longer any attachment or any proceedings in execution in which the order against the plaintiff would operate to his prejudice *Gopal Purshottam v. Bai Divali (1893), 18 Bom. 211,* relied on. *Krishna Prosad Roy v. Bipin Behary Roy (1903), 31 Calc. 228,* referred to. MANILAL GIRDHAR *v.* NATHALAL MAHASUKHRAM (1920)
I. L. R. 45 Bom. 561

CIVIL PROCEDURE CODE (ACT V OF 1908)
—contd.

———— **Or. XXI r 58**—*contd.*

———— **O. XXI, r. 58—60—**

See CLAIM . . **15 C. W. N. 817**

———— **O. XXI, rr. 58, 59, 60**—*Claim petition if may be determined after property attached is sold—Revision* The Court acted in excess of its authority and in violation of the express provisions of the Statute in allowing a claim petition preferred under O. XXI, r. 58, after the property attached was sold, and the order allowing the claim was liable to be set aside on revision. GOPAL CHANDRA MUKERJEE *v* NOTOBAR KUNDU (1912)
16 C. W. N. 1029

———— **O. XXI, rr. 58, 60 and 63 s. 64—** *Release of attachment, and subsequent private transfer of the property, effect of—O. XXI, r. 63, regular suit to establish right to attach the property—Necessary parties to the suit—Lessee who took lease subsequent to release from attachment added as a Defendant after expiry of the period of limitation—Limitation Act (IX of 1908), Art. 11 and ss 22 (1) and 22 (2), applicability of—Attachment before judgment, difference in the rule—Property in the name of a female or other non-coparcener, presumption of ownership and burden of proof.* P. and K. purchased certain immoveable property from one Tulmala Dasi, the ostensible owner. D., who held a decree for money against Fulmala's father-in-law (R) and uncle-in-law (S, effected an attachment on the property on the allegation that though it stood in the name of Fulmala the beneficial owners thereof were R. and S. Thereupon P. and K. the purchasers, preferred a claim under O. XXI, r. 58 and the property was released from attachment, after which L, took lease of the property from P. and K. Thereafter D. instituted a suit under O. XXI, r. 63 to set aside the order in the claim case. P., K., R., S., and Fulmala were all joined as Defendants and L., was subsequently added as a Defendant more than a year after the date of the order in the claim case: *Held*—That the order for release from attachment does not put an end to the attachment so as to leave the claimant free to deal with the property as he likes; if a suit is brought by the decree-holder to establish his right to attach the property and a decree is passed in his favour, the effect of the decree is to set aside the order of release and to maintain uninterrupted the attachment orginally

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

———— O. XXI, rr. 58, 60 and 63 s. 64—*contd.*

made. Therefore in such a case any private transfer of the property by the claimant, though made after an order under r. 60 releasing the property from attachment, would be void under s. 64, Civil Procedure Code. *Sardhari Lal* v. *Ambika Prosad, L.R. 15 I. A. 123: s. c. I. L. R. 15 Calc. 521 (1888), Phulkumari* v. *Ghanashyam, I. L. R. 35 Calc. 202 s. c. 12 C. W. N. 160 (P. C.) (1907), Mahomed Warri* v. *Pitambar, 21 W. R. 435 (1874),* and *Bonomali* v. *Prosonna, I. L. R. 23 Calc. 829 (1896),* followed. *Lalu Mulji* v. *Kasi Bai, I. L. R. 10 Bom. 400 (407) (1886),* and other cases referred to. In a case of attachment before judgment, the revival of execution proceedings does not operate as a revival of the attachment so as to prejudice the rights of strangers who have in the interval acquired a title to the property. *Patringa Kuer* v. *Madhavananda, 14 C. L. J. 476 (1911)* and *Mahabharat* v. *Surjya Kanta, (1918) Pat. 343; 3 P. L. J. 310 (1918),* referred to. Under the provisions of Art. 11 and s. 22 (1), the suit as against L. was barred as she was not added as a party within one year from the date of the order in the claim case. S. 22 (2) did not save limitation as the assignment by the successful claimant took place after the order for release and as such the assignment was not "during the pendency of a suit." Though the general presumption is that all property acquired by or in the possession of a member of a joint Hindu family is joint property, there can be no such presumption where the disputed property stands in the name of a non-co-parcener. The onus lies on Plaintiff to prove that the ostensible owner is not the real owner. PROTAP CHANDRA GOPE *v.* SARAT CHANDRA GANGOPADHYAYA . . . **25 C. W. N. 544**

———— **O. XXI, rr. 58, 61**—*Claimant in possession under a collusive sale if in possession as trustee for judgment-debtor.* A judgment-debtor with the object of defrauding his creditor executed a collusive sale of his property in favour of a third person who was put in possession and preferred a claim to the property under r. 58 of O. XXI of the Civil Procedure Code, when the same was attached by the creditor in execution of his decree: *Held,* that the claim should be rejected on the ground that the property was in possession of the claimant in trust for the judgment debtor within the meaning of r. 61 of O. XXI of the Civil Procedure Code. It was not necessary, in order to defeat the claim, to show that the trust was one capable of enforcement by law. W. C. McINTOSH *v.* BIDHU BHUSAN SEN (1912) . . . . . **16 C. W. N. 959**

———— **O. XXI, rr. 58, 63**—

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), ss. 268, 278, 283.
I. L. R. 38 Bom. 631

See COMPANIES ACT (VI OF 1882) s. 169
I. L. R. 38 All. 537

See LIMITATION **I. L. R. 45 Calc. 785**

———— *Order refusing in effect to investigate claim whether an order 'against' claimant within O. XXI, r. 63, Civil Procedure Code and Art. 11 of Limitation Act (IX of 1908).*

———— **O. XXI, rr. 58, 63**—*contd.*

Held, by the Full Bench (*1*) that an order refusing to investigate a claim to attached property, on the ground that there was delay in filing it, is an order passed '*against*' the claimant within O. XXI, r. 63, Civil Procedure Code, and Art. 11 of the Limitation Act (IX of 1908) and (*2*) that an order on a claim petition merely stating that, as it was filed late, it will be notified to the bidders is in effect an order rejecting the claim to which the provisions of O. XXI, r. 63, will apply. *Narasimha Chetty* v. *Vijiapala Nainar, 2 L. W. 206,* and *Ponnusami Pillai* v. *Samu Ammal, 31 Mad. L. J. 247,* followed. *Thithikutti Umma* v. *Thalakodi Chekkammutti (Second Appeal No. 1986 of 1916),* overruled. VENKATARATNAM *v.* RANGANAYAKAMMA (1918) . **I. L. R. 41 Mad. 985**

———— *Property attached in execution proceedings—Claim preferred under O. XXI, r. 58, rejected under O. XXI, r. 63, without investigation—Suit brought by claimant more than one year after the order of rejection—Indian Limitation Act (IX of 1908), Art. 11—Suit whether barred.* In the course of certain execution proceedings the property in dispute was attached. The present plaintiff preferred a claim to the property under O. XXI, r. 58, C. C. P., which was rejected under O. XXI, r. 63, and the plaintiff then brought this suit to establish his title to the property and for consequential reliefs more than a year after the claim was rejected: *Held,* that the language of Art. 11 of the Indian Limitation Act of 1908 is more comprehensive than the language of the proceeding Act and the article cannot be restricted to those cases in which an investigation had taken place. NAGENDRO LAL CHOWDHURY *v.* FANI BHUSAN DAS (1918) .
23 C. W. N. 375

———— **O. XXI, r. 58; O. XXXVIII, rr. 5 to 12**—

See PROVINCIAL INSOLVENCY ACT III OF 1907, ss. 13 (*3*), 47
I. L. R. 36 All. 65

———— **O. XXI, r. 59 (1882 Code 279)**—

See CIVIL PROCEDURE CODE 1882, ss. 278, 283
I. L. R. 34 All. 365

———— **O. XXI, r. 60, (1882 Code s. 280)**—*Execution of decree—Attachment of property—Claim by a person in possession of maintenance charge on the property—Sale of the property in execution subject to the charge—Suit to recover possession of the property after the death of charge-holder—Parties to appeal—Practice and procedure.* Certain property in which a judgment-debtor was interested as a sharer was attached in execution of a decree against him. His mother applied to raise the attachment on the ground that she was in possession of the property, that she was entitled to retain it during her life-time and that it was subject to a charge for her funeral ceremonies. The property was sold subject to her charge and purchased by the plaintiff at the Court-sale. After the mother's death, the plaintiff sued to recover the judgment-debtor's share in the property by partition, when the judgment-debtor and a brother of his, defendants Nos. 2 and 1, respectively, contended that there was no attachment of the property at the time of

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— **O. XXI, r. 60 (1882 Code s. 280)**—*contd.*

sale and that the sale was, therefore, invalid. The *trial Court decreed the claim on the ground* that the sale was valid even though there was no attachment. Defendant No. 1 alone appealed; and the lower appellate Court held that absence of attachment vitiated the sale and dismissed the suit. The plaintiff having appealed. *Held,* that the property was sufficiently attached, that all the subsequent proceedings including the sale of the right, title and interest of the judgment-debtor were in order, and that there was no real basis for the objection that the sale was void in consequence of the absence of attachment. *Held,* also, that defendant No. 2 ought to have appealed from the decree of the trial Court; and that in his absence the decree could not be reversed by the lower appellate Court on the appeal of defendant No. 1 alone. The Court, however, ordered defendant No. 2 to be joined as party to the appeal. VAIKUNT SHRIDHAR *v.* MANJUNATH MADHAV (1920) **I. L. R. 44 Bom. 860**

——— **O. XXI, r. 61 (1882 Code 281)**—
See R. 58 . . **16 C. W. N. 959**

——— **O. XXI, rr. 61, 62 (1882 Code 281, 282)**—
See CIVIL PROCEDURE ACT 1880, ss. 278, 283

——— **O. XXI, r. 62 (1882 Code s. 282)**
See MORTGAGE . **I. L. R. 47 Calc. 447**

——— **O. XXI, rr. 62 and 63**—
See CIVIL PROCEDURE CODE 1882 s. 278 **I. L. R. 41 Bom. 64**

——— **O. XXI, r. 63 (1882 Code s. 283)**—
See O. XXI, R. 58 .
I. L. R. 41 Mad. 985

See LIMITATION ACT (IX OF 1908), SCH. I, ARTS. 11, 13
I. L. R. 39 Mad. 1196
I. L. R. 40 Mad. 733
I. L. R. 45 Calc. 785

See RES JUDICATA.
I. L. R. 44 Calc. 698

See TRANSFER OF PROPERTY ACT (IV of 1882), s. 53 **I. L. R. 42 Mad. 143**
I. L. R. 43 Mad. 730

——— *Order in favour of the claimant—Alienation by the claimant subsequently—Suit by decree-holder subsequent to the alienation to set aside the order—Lis pendens, doctrine of, if applicable—Pendency of proceedings —Suit, a form of appeal—Alienee, joined as party after one year from the date of order, not a necessary party—No bar of limitation—Limitation Act (IX of 1908), s. 22, cls. 1 and 2.* A purchaser of property from a claimant, after an order has been passed in his (claimant's) favour but before a suit under O. XXI, r 63 was instituted, is an [illegible] a neces- [illegible] parties [illegible] alienee [illegible] s s. 22, [illegible] xpressly [illegible] h cases. [illegible] he Code

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— **O. XXI, r. 63 (1882 Code, s. 283)**—*contd.*

of Civil Procedure (Act V of 1908) is a mere continuation *of the proceedings in a claim petition* and all alienations during the continuance of the proceedings originated by the claim petition to the disposal of the suit brought to set aside the order passed on the claim petition are affected by the doctrine of *lis pendens* formulated in s. 52 of the Transfer of Property Act. Suits of this [illegible] their [illegible] es of [illegible] to be [illegible] *Phu*[illegible] *Calc 202,* followed. *Veera Pannadi,* v. *Karupa Pannadi, Mad. L. T 154, Harishankar Jeabhi* v. *Naran Karsan, I. L. R. 18 Bom. 260, Keshori Mohun Rai* v. *Hursook Dass, I. L. R. 12 Calc. 696,* and *Settappa Goundan* v. *Muthia Goundan, I. L. R. 31 Mad. 268,* referred to. KRISHNAPPA CHETTY *v.* ABDUL KHADER SAHIB (1913)
I. L. R. 38 Mad. 535

2. ——— *Execution of decree—Suit for declaration that property is not liable to attachment and sale—Valuation of suit. Held* that in a suit for a declaration that property is not liable to attachment and sale in execution of a decree, where the value of the property is in excess of the amount claimed in execution of the decree, the proper valuation of the suit for the purpose of jurisdiction is, not the value of the property, but the amount for which the decree may be executed. *Dwarka Das* v. *Kameshar Prasad, I. L. R. 17 All. 69,* and *Dhan Devi* v. *Zamurrad Begam, I. L. R. 27 All. 440,* followed. *Phul Kumari* v. *Ghanshyam Misra, I. L. R. 35 Calc. 202,* referred to. KHETRA *v.* MUMTAZ BEGAM (1915) . . . **I. L. R. 38 All. 72**

3 ——— *Applicability to claims to property attached before judgment—O XXXVIII, r. 5. Held* by the Full Bench, that O XXI, r. 63, Civil Procedure Code, applies also to orders on claims preferred to property attached before judgment. *Ramanamma* v. *Bathula Kamaraju, I. L. R 41 Mad. 23,* overruled. PRASADA NAYUDU *v.* VIRAYYA (1918) . **I. L. R. 41 Mad. 849**

4 ——— *Mortgagee, filing claim petition—Petition dismissed—Suit to establish right dismissed—Subsequent suit by mortgagee to enforce his mortgage—Suit against mortgagor and purchasers in execution of a decree in another suit by the same creditor—Order on claim petition, whether conclusive.* An order on a claim petition which has not been set aside in a suit by the claimant under O. XXI, r. 63, Civil Procedure Code, becomes conclusive, not only for the purpose of the execution of the decree in connection with which the claim was preferred but also of the execution of other decrees between the same parties. The establishment of the decree-holder's right to bring property to sale free from a claimant's alleged right involves the right of the purchaser at the sale to get a title to the property free from such right. *Ramasamy Chetty* v. *Alagiri Chetty, (1905) 27 I. C. 800,* followed; *Umesh Chunder Roy* v. *Raj Bullubh Sen (1882), I. L. R. 8 Calc. 279,* dissented from. SINGARIAH CHETTY *v.* CHINNABBI (1921) . **I. L. R. 44 Mad. 268**

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

———— O. XXI, r. 65 (1882 Code 286)—

See RELIABLE DISTRIBUTION.
I. L. R. 44 Calc. 789

———— O. XXI, r. 66 (1882 Code s. 287)—

See EXECUTION OF DECREE
I. L. R. 38 Calc. 482

See LIMITATION ACT 1908 ART. 182
I. L. R. 40 Mad. 949

See MORTGAGE . **I. L. R. 47 Calc. 447**

1. ———— Ancestral property—*General rules of practice for Civil Courts, Ch. IV, r. 5.* Property to which title is made out by gift is not property *inherited* within the meaning of r. 4, Ch. IV, of the General Rules of Practice for the Civil Courts and such property is consequently not *ancestral*. FAZAL AHMAD *v.* WESAL-UD-DIN 1916) . . . . . **L. R. 38 All. 481**

2. ———— Sale proclamation—*Valuation of property to be sold—Appeal. Held,* that no appeal will lie from a statement made in a sale proclamation as to the value of the property advertised for sale. *Sivagami Achi* v. *Subrahmania Ayyar, I. L. R. 27 Mad. 259,* followed. AJUDHIA PRASAD *v.* GOPI NATH (1917)
I. L. R. 39 All. 415

3. ———— Suit for declaration that property is not liable to attachment—*And sale—Valuation of suit.* In a suit for a declaration that property is not liable to attachment and sale in execution of a decree, where the value of the property in question is in excess of the amount claimed in execution of the decree, the proper valuation of the suit for the purpose of jurisdiction is, not the value of the property, but the amount for which the decree may be executed. *Khetra Pal* v. *Mumtaz Begam, I. L. R. 38 All. 12,* followed. *Radha Kunwar* v. *Reoti Singh, I. L. R. 38 All. 488,* referred to. ANANDI KUNWAR *v.* RAM NIRANJAN DAS (1918) .
I. L. R. 40 All. 505

4. ———— Setting aside a sale—*Material irregularity in publication of sale proclamation—Under statement of revenue due on the land—Undervaluaton of property—Statement of the same by the decree-holder—No objection by the judgment-debtor to the amount of Government revenue or valuation—Mistake of the judgment-debtor as to interest in the property sought to be brought to sale—Duty of Courts in India in conducting sales in execution—Mistake of judgment-debtor due to action of decree-holder—Rule of estoppel of judgment-debtor, no application—Right of auction-purchaser before and after confirmation of sale—No absolute right for confirmation of sale.* Though it was not incumbent upon the Court to state the value of the property in a proclamation for sale, a materially incorrect statement of the revenue or of the value of the property where the value is stated would constitute an irregularity which if it caused substantial injury to the judgment-debtors, would entitle him to have the sale set aside. Where the judgment-debtor's act in not objecting to the statement of the peshkash and in stating the value on the footing of the peshkash being correctly stated by the decree-holder was due to a mistake of fact regarding what the Court intended to sell, the judgment-debtor should not be held to be estopped from objecting to the

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

———— O. XXI, r. 66 (1882 Code, s. 287)—*contd.*

sale on the ground of material irregularity. A party who does not raise an objection to the proclamation which he ought to have raised is estopped from complaining of an irregularity resulting from an erroneous statement which he should have corrected. *Gridhari Singh* v. *Hurdeo Narain Singh, L. R. 3 I. A. 230,* and *Olpherts* v. *Mahabir Pershad Singh, L. R. 10 I. A. 25,* referred to. *Arunachellam* v. *Arunachellam, I. L. R. 12 Mad. 19,* and *Behari Singh* v. *Mukhat Singh, I. L. R. 28 All. 273,* referred to. In India an execution sale is an act of the Court. Where an act of a Court is induced by the mistake of parties, it may be set aside. But the Court will not apply the rule of estoppel to cases where the judgment-debtor was not aware of the facts to which he was bound to object. KALAHASTI, RAJA OF *v.* MAHARAJA OF VENKATAGIRI (1913)
I. L. R. 38 Mad. 387

5. ———— Order of court fixing valuation—An order of a court fixing a valuation of the judgment-debtor's property under r. 66 of O. XXI of the Code of Civil Procedure, 1908, is not a decree and no appeal lies from such an order. DEOKINANDAN SINGH RAJAH DHAKESWAR PRASAD NARAIN SINGH . . . . **2 Pat. L. J. 13**

6. ———— *Sale proclamation order is a judicial act—Duty of court in setting value of property to be sold.* The action of a court in settling the terms of a sale-proclamation under O. XXI, r. 66 is a judicial act and the value of the property should be stated as fairly as possible. MUNSHI RAGHUNATH SINGH *v.* HAZARI SAHU
2 Pat. L. J. 130

7. ———— *Sale in execution of simple money decree—Notification of a mortgage in the proclamation of sale—Auction purchaser not precluded from challenging the validity of the mortgage. Held,* that the notification of an incumbrance on the property about to be sold in a proclamation of sale made under O. XXI, r. 66, of the Code of Civil Procedure (1908) will not preclude the auction purchaser from subsequently questioning the validity of the incumbrance. In this respect the Code of 1908 has made no difference in the law as it stood under the former Code. *Shib Kunwar Singh* v. *Sheo Prasad Singh, I. L. R. 28 All. 418,* and *Jairaj Mal* v. *Radha Kishan, I. L. R. 35 All. 257,* followed AGHA SULTAN KHAN *v.* MOHABBAT KHAN
I. L. R. 43 All. 489

———— O. XXI, rr. 66 and 70 (1882 Code s. 287)—

See BENGAL TENANCY ACT, ss. 158, 163 AND 167 . **2 Pat. L. J. 176**

See HINDU LAW—JOINT FAMILY
I. L. R. 43 All. 703

———— O. XXI, rr. 68, 69 (1882 Code 290 and 291)—

See SALE IN EXECUTION OF DECREE.
I. L. R. 39 Calc. 26

———— O. XXI, r. 70 (1882 Code 287)—

See BENGAL TENANCY ACT, ss. 158, 163 AND 167 . **2 Pat. L. J. 177**

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— O. XXI, r. 71 (1882 Code s. 293)—

See PROVINCIAL INSOLVENCY ACT (III OF 1907), s. 47 . I. L. R. 39 All. 267

See SECOND APPEAL.

I. L. R. 45 Bom. 223

——— O. XXI, rr. 71 and 84 to 87—*Purchase in a Court sale of judgment-debtor's right to get a reconveyance of certain lands—Default in payment of balance of purchase-money within fifteen days of Court sale—Liability of purchaser for deficiency on resale.* A purchaser in a Court auction of a judgment-debtor's right to get a reconveyance of certain lands on payment of a specified sum is, on default in payment of the purchased money within fifteen days of the Court sale, liable to pay under summary process under O. XXI, r. 71, Civil Procedure Code, any deficiency in the price on a resale, though the date stipulated for payment to get the reconveyance happens to be shortly after the Court sale and before the expiry of the fifteen days allowed for the payment of the balance. The loss of the

[illegible]

vided all the then existing rights of the judgment-debtor therein are correctly stated in the proclamation for the resale. Cases in which an existing encumbrance on the property is omitted to be mentioned at the time of the first sale but finds a place in the proclamation for the resale stand on a different footing. *Baijnath Sahai* v. *Moheep Narain Singh, I. L. R. 16 Calc. 535,* and *Kali Kishore Deb Sarkar* v. *Guru Prosad Sukal, I. L. R. 25 Calc 99,* distinguished. VENKATACHELLAMAYYA *v.* NILAKANTA GIRJEE (1917) I. L. R. 41 Mad. 474

——— O. XXI, r. 72 (1882 Code s. 294)—

See MORTGAGOR AND MORTGAGEE.

I. L. R. 41 Bom. 357

——— *Decree—Execution—Collector—Decree-holder allowed permission to bid by the Collector—Set-off—Power of the Court to allow set-off.* A decree-holder having received from the Collector permission to bid, and having been declared to be the highest bidder, can apply to the Court for permission to set off the decretal amount against the purchase money. MARTAND TRIMBAK *v.* DAYA *bin* ABAJI (1919)

I. L. R. 44 Bom. 346

——— O. XXI, rr. 73 and 83—*Several* [illegible]

off one of the decrees—Money paid into Court by alienee—Rateable distribution—"Assets held by a Court," meaning of Where several decree-holders in different suits had attached the same property of their judgment-debtor and applied for sale in execution of their respective decrees, but the judgment-debtor obtained permission of the Court under O. XXI, r. 83, to raise money by private alienation of the property to pay the decree amount due in one of the decrees, and the amount was paid into Court by the alienee. *Held* that the money, having been paid into Court under a pending execution application, was assets held by the Court under O. XXI, r. 73 of the Code, and was liable to rateable distribution among the several decree-holders who had applied for execution. *Sorabji Coovarji* v. *Kala Raghunath, I. L. R. 36 Bom. 156,* dissented from. *Kathum Sahiba* v. *Hajee Badsha Sahib, I. L. R. 38 Mad 221, 224,* referred to. *Galstaun* v. *Woomes Chundra Bonnerjee, I. L. R. 44 Calc. 789,* distinguished. THIRAVIYAM PILLAI *v.* LASKSHMANA PILLAI (1917) . . I. L. R. 41 Mad. 616

——— O. XXI, rr. 84, 89, 92 (*1882 Code ss. 306 310A, 312*)—*Execution of decree—Sale of immoveable property—Acceptance of final bid deferred—Application to set aside sale—Limitation: Held,* that a sale of immoveable property in execution of a decree is not complete until the sale officer has accepted the final bid and the purchaser has paid in the deposit of 25 per cent. of the purchase money required by r. 84 of O. XXI, of the Code of Civil Procedure, 1908. The period of thirty days prescribed by r. 92 will not, therefore, begin to run against a person applying under r 89 if for any reason the final bid remains for a time unaccepted by the sale officer. MUNSHI LAL *v.* RAM NARAIN (1912) I. L. R. 35 All. 65

——— O. XXI, r. 88 (1882 Code 310)—*Execution of decree—Sale in execution—Pre-emption—Title of pre-emptor defeasible: Held,* that a title to a share in undivided immovable property sold in execution of a decree which is still defeasible at the date of a sale in execution, is not sufficient to support a claim for pre-emption [illegible]

v. GHULAM HUSAIN (1913) I. L. R. 35 All. 296

——— O. XXI, r. 89 (1882 Code s. 310A)—

See s. 73 . I. L. R. 40 Calc. 619

See s. 115 . I. L. R. 44 Mad. 554

See BENGAL TENANCY ACT 1885.

4 Pat. L. J. 55

See CONTRACT ACT, s. 70.

I. L. R. 42 Bom. 556

See SALE . . I. L. R. 48 Calc. 69

1. ——— *Execution of decree—Application to set aside the sale within* [illegible]

after the sale. *Held,* that the judgment-debtor having done all that lay in his power to deposit the money in time and having been prevented by the action of the Treasury Officer, should be taken to have made the payment within the time allowed by law. *Mahomed Akbar Z*

CIVIL PROCEDURE CODE (ACT V OF 1908)
—*contd.*

———— O. XXI, r. 89 (1882 Code, s. 310A)—
contd.

v. *Sukhdeo Pande, 13 C. L. J. 467*, referred to. MUNNA LAL *v.* RADHA KISHAN (1915)
I. L. R. 37 All. 591

2. ———————— *Sale of immoveable property in Court-auction—Subsequent private sale by judgment-debtor—Application by judgment-debtor to set aside auction-sale—No locus standi to apply—Order rejecting application—Revision petition to High Court under Civil Procedure Code (Act V of 1908), s. 115—Not maintainable though order erroneous.* Where after a sale in Court auction of certain immoveable property, the judgment-debtor sold away all his rights in the same property to a stranger by a private sale, and subsequently applied under O. XXI, r. 89, of the Code of Civil Procedure (Act V of 1908) to set aside the auction-sale: *Held*, that the judgment-debtor had no *locus standi* to apply under O. XXI, r. 89, to have the sale set aside. *Anantha Lakshmi Ammall* v. *Kunnanchankarath Sankaran Nair (1913), Mad. W. N. 101*, referred to. *Ishar Das* v. *Asaf Ali Khan, I. L. R. 34 All. 186*, followed. *Per* SADASIVA AYYAR, *J.*—A Civil Revision Petition under s. 115 of the Code of Civil Procedure does not lie against an order of the Lower Court rejecting an application under O. XXI, r. 89, though the order was erroneous in law, as the lower Court did not act illegally or beyond its jurisdiction or with material irregularity in arriving at the decision. *Per* SPENCER, *J.*—Neither an amendment of the petition nor the presentation of a fresh petition by the private purchaser could be allowed by the High Court to be made, as he was not a party to the proceedings in the lower Court and more than one year had expired after the time allowed by Art. 166 of the Limitation Act (IX of 1908) for filing a petition in the lower Court. SUBBARAYUDU *v.* LAKSHMINARASAMMA (1913) . **I. L. R. 38 Mad. 775**

3. ———————— *Sale in execution of decree—Judgment-debtor privately selling the property so sold—Application by judgment-debtor to set aside Court sale.* A judgment-debtor whose property has been sold at a Court sale in execution of the decree against him, has a right to apply to have the sale set aside as a person owning the property sold in execution of the decree within the meaning of r. 89 of O. XXI of the Civil Procedure Code of 1908, in spite of the fact that he has transferred his interest in the property after the Court sale. PANDURANG LAXMAN *v.* GOVIND DADA (1916) . . **I. L. R. 40 Bom. 557**

4. ———————— *Non-transferable occupancy-holding—Purchase at mortgage sale—Subsequent rent sale and purchase by landlord—Right of first purchaser to set aside sale by deposit—Bengal Tenancy Act (VIII of 1885 as amended by E. B. and A. C. Act (1 of 1907), s. 170, (3).* Where (in a case governed by Act I of 1907 *E. B. and A. C.*) the landlord himself purchases a non-transferable occupancy-holding at a sale held in execution of a decree for rent obtained against the registered tenant of the holding, a person who had within 12 years purchased the whole holding at a sale in execution of a mortgage-decree, is not entitled to set aside the sale by making a deposit under O. XXI, r. 89 of the Civil Procedure Code. *Tarak Das Pal* v. *Harish Chandra Banerjee, 17 C. W. N. 163; s. c. 16 C. L. J. 548, Dyamayi Dasi* v. *Ananda Mohan Roy, 18 C. W. N. 971*, and *Ahmadulla Chowdhry* v. *Prayagsahu, 20 C. W. N. 39*, referred to. ABDUR RAHAMAN SARKAR *v.* PROMODE BEHARY DUTT (1915) . . . . . **20 C. W. N. 40**

5. ———————— *Application by judgment-debtor to set aside sale in execution of a decree—Execution of sale-deed by judgment-debtor, not registered—Subsequent application, whether competent—Fresh sale-deed executed by him after application and registered before final order—Sustainability of application—Rights of parties to suit or application, whether affected by subsequent events.* Where a judgment-debtor applied under O. XXI. r. 89, of the Civil Procedure Code, to set aside a sale of certain lands held in execution of a decree, and it appeared that he had previous to his application executed a sale-deed therefor which was not however registered, and that he had subsequent to his application executed a fresh sale-deed in respect of the same lands to the same vendee which was registered before final order was passed on the application, and the auction purchaser objected to the competency of the judgment-debtor to make or sustain the application: *Held*, that the judgment-debtor had *locus standi* to make the application, as he had not ceased to be owner of the lands at the time of his making the application; and that he did not lose the right to sustain the application by the subsequent execution and registration of a sale-deed as it is a well-recognized rule of law that the rights of the parties should be adjudicated as on the date of suit or application and not with reference to what transpires subsequently. *Kurri Verreddi* v. *Kurri Bapireddi, I. L. R. 29 Mad. 336*, and *Ramanathan* v. *Ranganathan, I. L. R. 40 Mad. 1134*, referred to. *Subbarayaud* v. *Lakshminarasamma, I. L. R. 38 Mad. 775*, distinguished, and *Karalia Manuhai* v. *Mansuxhram, I. L. R. 24 Bom. 400*, dissented from SETHURARAMASAMI NAYANIVARU *v.* SYED MIR HUSSAIN SAHIB (1918) **I. L. R. 42 Mad. 508**

6. ———————— *Auction sale Application made to the Mamlatdar to set aside sale—Mamlatdar not a Court within the meaning of O. XXI, r. 89—Application must be made to Civil Court—Limitation Act (IX of 1908), Sch. I, Art. 166.* An application by a judgment-debtor to have an auction sale held by the Mamlatdar set aside under O. XXI, rr. 89, Civil Procedure Code, 1908, must be made to the Civil Court. A Collector or other Revenue Officer, cannot be considered as a Court within the meaning of O. XXI, rr. 89, and, therefore, the judgment-debtor who presents his application to the Collector cannot stop limitation running against him. TIPPANGAVDA *v.* RAMANGAVDA (1919)
I. L. R. 44 Bom. 50

7. ———————— *Civil Procedure Code, (1882) s. 308—Execution of decree—Sale in execution—Forfeiture of auction-purchaser's deposit.* An auction-purchaser deposited in Court Rs. 1,000 out of a total sum of Rs. 2,200. Owing to the judgment-debtor making an application to have the sale set aside, the auction-purchaser did not deposit the remainder of the purchase

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— O. XXI, r. 89 (1882 Code, s. 310A)—*contd.*

money. The judgment-debtor's application was not accompanied, as it should have been, by court-fee stamps in payment of the expenses of the sale. *Held*, on application by the auction-purchaser for refund of the money deposited by him, that the Court would have exercised a proper discretion in allowing a refund as prayed, and it was allowed, subject to payment by the applicant of the expenses of the sale. MATHURA PRASAD PANDE *v.* GAURI SHANKAR DAS (1910) I. L. R. 32 All. 380

8. ——— *Execution of decree—Sale in* ...

... set aside. A decree-holder held two decrees against the same judgment-debtor, the one being a decree for sale on two mortgages, and the other a simple money decree. In execution of the latter decree the decree-holder caused part of the mortgaged property to be sold by auction, and it was purchased by a stranger. *Held*, that the decree-holder was not competent to apply under O. XXI, r. 89, of the Code of Civil Procedure, 1908, to get this sale set aside. MUHAMMAD AHMADULLAH KHAN *v.* AHMAD SAID KHAN (1911) I. L. R. 33 All. 481

9. ——— *Execution of decree—Property sold by judgment-debtor to a third person after execution sale—Judgment-debtor not competent to apply to have auction sale set aside.* Where a judgment-debtor after the ...
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14 Oudh Cases 33, approved. ISHAR DAS *v.* ASAF ALI KHAN (1911) . . I. L. R. 34 All. 186

10. ——— *Payment into Court of portion of a judgment-debt by persons other than the applicant, no right to take credit for—'Receipt,' meaning of.* O. XXI, r. 89, Civil Procedure Code, is in the nature of an indulgence to judgment-debtors; and a judgment-debtor who wishes to take advantage of its provisions must strictly comply with the same, by paying all the amounts as directed by the rule, less any amount that may have been ...
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minded to do so. *Trimbak* v. *Ramchandra, I. L. R. 23 Bom. 723*, and *Kripa Nath Pal* v. *Ram Lakshmi Dasya, 1 C. W. N. 703*, followed. *Anantha Lakshmi Ammal* v. *Sankaran Nair, 21 Mad. L. J. 205*, and *Vedala Lakshminarasimha Charyulu* v. *Pacha Lakshmiamma (1912), Mad. W. N. 756*, distinguished. KARUNAKARA *v.* KRISHNA (1915) . . I. L. R. 39 Mad. 429

11. ——— *Civil Procedure Code (Act XIV of 1882), s. 310-A—"Decree-holder"*

CIVIL PROCEDURE CODE (ACT V O —*contd.*

——— O. XXI, r. 89 (1882 Code, *contd.*

—Execution of decree—Auction sal tion by judgment-debtor to set aside sa within thirty days—Auction purchaser n sary party to the application—Notice to a Rateable distribution claimed by other de —Satisfaction of the decree under whic perty was sold. The deposit under O. of the Civil Procedure Code (Act V of be made within thirty days from the da It is not necessary that the notice requ given under r. 92 of the said order should within thirty days of the date of sal notice has been given under r. 89 to a affected thereby, the Court has full to set aside the sale. A decree-holde applied for execution of his decree, the ings in execution were transferred to the He issued a proclamation and procee the sale, but before the auction sale to he received from the Court intimation o tions made by other decree-holders ag same judgment-debtor for rateable dis The Collector inserted references to the ...

Code (Act V of 1908) on depositing in C payment to the purchaser a sum equal per cent of the purchase money, and for p to the decree-holder the amount specifie proclamation of sale as that for the reco which the sale was ordered. Although the was ...
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have been sufficient to satisfy not only his but also the claims of those decree-holders applications for rateable distribution ha brought to the notice of the Collector bef sale: *Held*, setting aside the sale, that th "decree-holder" in O. XXI, r. 89 of th Procedure Code (Act V of 1908), mean person alone for satisfaction of whose dec sale had been ordered and did not include persons who would have a right to claim ra distribution out of the sale-proceeds under of the Civil Procedure Code (Act V of GANESH BAB NAIK *v.* VITHAL VAMAN (1912) I. L. R. 37 Bom

12. ——— A person is out of possession of certain immovable property, but is litigating to establish his title th is not entitled to make a deposit in court aside a sale of such property held in exe of a decree. If such a person does make a d and eventually loses the suit in which he endeavouring to establish his title to the pro put up for sale, he cannot recover the amou such deposit from the person found to be en to the property. NANDKISHORE JHA *v.* PA MIAN . . . . . . 2 Pat. L. J.

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CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— O. XXI, r. 89 (1882 Code, s. 310A)— *contd.*

At any rate, the scope of the rule is not narrower than that of s. 310A of the Code of 1882; and where the provisions of the Eastern Bengal and Assam Tenancy (Amendment) Act applies, a permanent under-tenure-holder has *locus standi* to apply under O. XXI, r. 89, to set aside the sale of a taluk in execution of a rent-decree. SARAT CHANDRA DAS *v.* MATI LAL CHACKERBUTTY (1919)
23 C. W. N. 597

14. ——— *Application to set aside sale on deposit of decretal amount, if lies at the instance of mortgagor in the Original Side of the High Court.* O. XXI, r. 89 may apply ordinarily to sales on mortgage decrees after attachment under the Code of Civil Procedure (as in the Mofussil) but it does not apply to a suit on the Original Side of the High Court where without attachment the sale has been held by the Registrar in comformity with the rules of the Court. In these matters the practice under the rules of the High Court and the Code of Civil Procedure are not workable together. SURENDRO KRISTO ROY *v.* GURU PADA GHOSH
24 C. W. N. 536

15. ——— *Sale in execution of decree Judgment-debtor privately selling the property so sold to a third person after the execution sale but before confirmation of sale—Such subsequent purchaser, if entitled to apply under O. XXI, r. 89 to have the court-sale set aside.* Where a judgment-debtor, after the sale in execution of his immoveable property but before the confirmation of the sale, sold such property to a third person, and such subsequent purchaser applied to have the Court-sale set aside under O. XXI, r. 89, of the Civil Procedure Code: *Held*—That he was not entitled to make the said application. The interest, if any, which he held in the property was not by virtue of a title acquired by him before the execution sale: his interest, if any, was by virtue of a title acquired after such sale and consequently he was precluded by the very terms of the rule from applying under O. XXI, r. 80 of the Civil Procedure Code. LALA *v.* HARENDRA LAL DAS.
26 C. W. N. 148

16. ——— *Whether applicable to mortgage sale—Practice on the Original side of the High Court—Civil Procedure Code (Act XIV of 1882), s. 310A—Letters Patent, cl. 37—Hechle's High Court Rules and Orders, Original Side, Ch. XXVII.* O. XXI, r. 89 of the Civil Procedure Code 1908, applies to sales in execution of mortgage decrees on the Original Side of the High Court and the practice which at present prevails on the Original Side is contrary to law. *Surendra Kristo Roy* v. *Guru Prosad Ghose, 24 C. W. N. 536 (1915)*, distinguished. VIRJIBAN DASS MOOLJI *v.* BISSESSWAR LAL HARGOVIND
24 C. W. N. 1032

——— O. XXI, rr. 89 and 90—

See BOMBAY HIGH COURT CIVIL CIRCULAR, P. 106, R. 17
I. L. R. 45 Bom. 1132

——— *Application under latter if may proceed after application under the former dismissed—Transferee of non-transferable occupancy holding, if may apply.* There is no prohibition in the Code against an application being made under r. 90 of O. XXI of the Civil Procedure Code after an application under r. 89 has been made and has been withdrawn or dismissed. Rr. 89 and 90 of the Civil Procedure Code permit of applications by persons who could not have applied under ss. 310A and 311 of the Civil Procedure Code of 1882. BASIRUDDIN *v.* FAIMULLA (1911) . . . . . **17 C. W. N. 476**

——— A Reversioner to a Hindu widow's estate is entitled to apply under rr. 89 and 90 to set aside a sale of immoveable property on account of fraud or irregularity in publishing or conducting the sale. BRIJ KISHORE LAL *v.* PRATAP NARAIN . . **4 Pat. L. J. 360**

——— O. XXI, rr. 89, 92—*Sale in execution of a decree which is modified in review before confirmation—Sale if should be confirmed—Sale erroneously set aside under O. XXI, r. 89, before decree modified in review—Order setting aside sale reversed by higher Court—Application under s. 47 to set aside the sale—Limitation—Limitation Act (IX of 1908), Art. 181—Limitation in suspense.* O. XXI, rr. 89, 90, 91 and 92, C. P. C. pre-suppose a valid decree under which the sale is held, and r. 92 does not affect the power of the Court to refuse to confirm the sale, or make it compulsory to confirm the sale when the Court finds that the sale was held under a decree which did not authorise the sale. It would be unreasonable to require the Court to confirm the sale although it finds that the foundation of the sale is gone and then proceed under s. 47, C. P C., to set aside the sale which it has confirmed being fully aware that the sale was illegal. The Court in such circumstances would be justified in refusing to confirm the sale. When an order setting aside a sale under O. XXI, r. 89 was reversed on the ground that the deposit was insufficient, but in the meanwhile the decree itself was modified so that the sale had taken place for an amount in respect of which there was no subsisting decree, and the decree-holder thereupon applying for cofirmation of the sale the judgment-debtor objected to such confirmation and also applied under s. 47 to set aside the sale: *Held*—That the Court in such circumstances should refuse to confirm the sale. That Art. 181 of the Limitation Act would apply to the application of the judgment-debtor under s. 47 to set aside the sale, and the right to apply should be taken to have arisen when the order setting aside the sale under O. XXI, r. 89 was reversed or that right should be considered to have remained in suspense between the date on which the sale was set aside under O. XXI, r. 89 and its reversal by the superior Court. SHEIKH ARIATULLAH *v.* SASHI BHUSHAN HAZRAH . . . . . **24 C. W. N. 73**

——— *Execution of decree —Application to set aside sale in execution—Decree sent to Collector for execution—Tender of money to the Collector, the Civil Courts being closed— "Court."* The word 'Court" as used in rr. 89 and 92 of O. XXI of the Code of Civil Procedure means the Civil Court, and not, in the case of a decree being transferred to the Collector for execution, the Collector. FAZAL RAB *v.* MANZUR AHMAD (1918) . . . **I. L. R. 40 All. 425**

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

—— O. XXI, rr. 89 92—*contd.*

—— *Claimant of property sold in possession—Claimant paying into Court the decretal amount to set aside sale—Whether payment voluntarily or involuntarily made—Suit to recover amount paid* In execution of a decree obtained by the defendant against a third party the property was sold and purchased by the defendant. The plaintiff who claimed to be the owner in possession of the property protested against the sale and ultimately got it set aside under O. XXI, r. 89, Civil Procedure Code, 1908, by paying into Court the decretal amount and five per cent. of the purchase money. The amount being given to the defendant decree-holder and auction purchaser, the plaintiff sued to get it refunded as having been involuntarily paid *Held,* dismissing the suit, that under the terms of O. XXI, r. 89, the amount must be taken to have been

vided that the money [*sc.* paid into Court under O. XXI, r. 89] should be paid in for a particular purpose, such money could not be treated as assets held by a Court." *Sorabji Coovarji* v *Kala Raghunath (1911), 36 Bom. 156,* approved of. *Per* SHAH, *J.* —"When an application to set aside the sale is made under O. XXI, r 89, and the amount required by the rule is deposited, it is obligatory upon the Court to set aside the sale, as provided by r. 92, sub-rule (2). The result of setting aside the sale is generally speaking in favour of the judgment- debtor. This result can be ensured by any person interested in the property by satisfying the claims of the decree-holder and auction-purchaser according to the provisions of the Rule. I do not see how a person can be allowed to go back upon his own act and to claim the amount back from the decree-holder after he has secured the benefit of having the sale set aside." *Dooli Chand* v. *Ram Kishen Singh (1881), L. R. 8 I A. 93* and *Seth Kanhaya Lal* v. *The National Bank of India, Limited (1913), L. R. 40 I. A. 56,* considered. *Ram Tuhul Singh* v. *Bisseswar Lall Sahoo (1875), L. R. 2 I. A. 131,* observations relied on. NARAYAN *v.* AMGAUDA (1920) . **I. L. R. 45 Bom. 1094**

—— **O. XXI, r. 89, and s. 115**—*Auction sale of immovable property—subsequent private sale by judgment-debtor—Application to set aside execution sale, whether maintainable by judgment-debtor —Revision—Jurisdiction—Erroneous decision of law.* A judgment-debtor who, subsequent to the sale of his immovable property in execution, has sold his property privately, may apply to have the auction-sale set aside under O XXI, r. 89. An erroneous decision on a question of law or fact after jurisdiction has once been legally assumed is

LALL . . . . . . **4 Pat. L. J. 340**

—— **O. XXI, r. 90 (1882 Code s. 311)**—

See O. IX, R. 9 . **4 Pat. L. J. 135**

See O. XXI, R. 53 . **4 Pat. L. J. 336**

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

—— **O. XXI, r. 90 (1882 Code, s. 311)**—*contd.*

See s. 141 . . **19 C. W. N. 758**

See SALE . . **2 Pat. L. J. 157**

1. —— *Sale, application to set aside—Irregularity and consequent inadequacy of price established—Real value of the property found not to exceed decree which could not be further executed owing to limitation—Substantial injury whether made out—Debtor's right.* Where it was found that there had been irregularities in conducting and publishing a sale of immoveable property in execution of a decree and that the property was sold at an inadequate price in consequence, the mere fact that the real value of the property sold did not exceed the amount of the decree, and that the unsatisfied balance of the decree could not be realised from the judgment-debtors by reason of limitation, would not bring the case within the proviso to O. XXI, r. 90. A debtor is entitled to have those steps taken for which provision is made by the Code for the purpose of ensuring that his property will realise an adequate price and so enable him to pay off his debt in money or money's worth. SANTO PROSAD SINGH *v.* SHEW NARAIN (1912). **16 C. W. N. 1022**

2. —— *Attachment before judgment—Property sold in execution—Locus standi of attaching plaintiff to apply to set aside sale.* A plaintiff who has attached immoveable property before judgment, has no present interest in such property and is not entitled to apply under O. XXI, r. 90 to set aside a sale of the property in execution of a decree. *Seudat Ray* v *Sree Canto Maity, I. L. R. 33 Calc. 639, 643 : 10 C. W. N. 634, Basiram Malo* v *Kattyani Debi, I. L. R. 38 Calc. 448 : 15 C. W. N. 795,* relied on. JOGENDRA NATH CHATTERJEE *v.* MONMOTHA NATH GHOSH (1912) . . . **17 C. W. N. 80**

3. —— "*Immoveable property*"—*Whether sale of some of properties sold can be set aside—Substantial loss with regard to some, if vitiates sale as to whole.* Where four lots of immoveable properties were sold in execution and it was found that there was substantial injury caused to the judgment-debtors with regard to one of the lots, but not with regard to the other three: *Held,* that in O XXI, r. 90, "immoveable property" means any one of the immoveable properties, the sale of which is liable to be set aside upon the grounds mentioned in the section. That the Court was not bound to set aside sale of all four lots by reason of irregularity and substantial loss caused thereby with regard to one of them. *Macnaghten* v. *Mahabir Parshad Singh, I. L. R. 9 Calc. 656, 662,* referred to. RAJANI NATH RAKSHIT *v.* KUSUM KAMINI MAZUMDAR (1914) . . . . . **18 C. W. N. 947**

4. —— *Sale of immoveable property in execution of money-decree—Holder of another decree against the same judgment-debtor whose application for execution had been dismissed for non-prosecution prior to sale, if entitled to apply for setting aside the sale.* In execution of a decree for money, the immoveable properties of the judgment-debtors were sold and purchased by the opposite party on 9th April 1912. The petitioner, who also held a decree for money against the same

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— O. XXI, r. 89 (1882 Code, s. 310A)—*contd.*

At any rate, the scope of the rule is not narrower than that of s. 310A of the Code of 1882; and where the provisions of the Eastern Bengal and Assam Tenancy (Amendment) Act applies, a permanent under-tenure-holder has *locus standi* to apply under O. XXI, r. 89, to set aside the sale of a taluk in execution of a rent-decree. SARAT CHANDRA DAS *v.* MATI LAL CHACKERBUTTY (1919)

23 C. W. N. 597

14. ——— *Application to set aside sale on deposit of decretal amount, if lies at the instance of mortgagor in the Original Side of the High Court.* O. XXI, r. 89 may apply ordinarily to sales on mortgage decrees after attachment under the Code of Civil Procedure (as in the Mofussil) but it does not apply to a suit on the Original Side of the High Court where without attachment the sale has been held by the Registrar in comformity with the rules of the Court. In these matters the practice under the rules of the High Court and the Code of Civil Procedure are not workable together. SURENDRO KRISTO ROY *v.* GURU PADA GHOSH

24 C. W. N. 536

15. ——— *Sale in execution of decree Judgment-debtor privately selling the property so sold to a third person after the execution sale but before confirmation of sale—Such subsequent purchaser, if entitled to apply under O. XXI, r. 89 to have the court-sale set aside.* Where a judgment-debtor, after the sale in execution of his immoveable property but before the confirmation of the sale, sold such property to a third person, and such subsequent purchaser applied to have the Court-sale set aside under O. XXI, r. 89, of the Civil Procedure Code: *Held*—That he was not entitled to make the said application. The interest, if any, which he held in the property was not by virtue of a title acquired by him before the execution sale: his interest, if any, was by virtue of a [ti]le acquired after such sale and consequently [he] was precluded by the very terms of the rule [fr]om applying under O. XXI, r. 80 of the Civil [P]rocedure Code. LALA *v.* HARENDRA LAL DAS.

26 C. W. N. 148

16. ——— *Whether applicable to mortgage sale—Practice on the Original side of the High Court—Civil Procedure Code (Act XIV of 1882), s. 310A—Letters Patent, cl. 37—Hechle's High Court Rules and Orders, Original Side, Ch. XXVII.* O. XXI, r. 89 of the Civil Procedure Code 1908, applies to sales in execution of mortgage decrees on the Original Side of the High Court and the practice which at present prevails on the Original Side is contrary to law. *Surendra Kristo Roy* v. *Guru Prosad Ghose, 24 C. W. N. 536 (1915)*, distinguished. VIRJIBAN DASS MOOLJI *v.* BISSESSWAR LAL HARGOVIND

24 C. W. N. 1032

——— O. XXI, rr. 89 and 90—

See BOMBAY HIGH COURT CIVIL CIRCULAR, P. 106, R. 17

I. L. R. 45 Bom. 1132

——— *Application under latter if may proceed after application under the former dismissed—Transferee of non-transferable occupancy holding, if may apply.* There is no prohibition in the Code against an application being made under r. 90 of O. XXI of the Civil Procedure Code after an application under r. 89 has been made and has been withdrawn or dismissed. Rr. 89 and 90 of the Civil Procedure Code permit of applications by persons who could not have applied under ss. 310A and 311 of the Civil Procedure Code of 1882. BASIRUDDIN *v.* FAIMULLA (1911) . . . . . **17 C. W. N. 476**

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— O. XXI, rr. 89 and 90—*contd.*

———A Reversioner to a Hindu widow's estate is entitled to apply under rr. 89 and 90 to set aside a sale of immoveable property on account of fraud or irregularity in publishing or conducting the sale. BRIJ KISHORE LAL *v.* PRATAP NARAIN . . **4 Pat. L. J. 360**

——— O. XXI, rr. 89, 92—*Sale in execution of a decree which is modified in review before confirmation—Sale if should be confirmed—Sale erroneously set aside under O. XXI, r. 89, before decree modified in review—Order setting aside sale reversed by higher Court—Application under s. 47 to set aside the sale—Limitation—Limitation Act (IX of 1908), Art. 181—Limitation in suspense.* O. XXI, rr. 89, 90, 91 and 92, C. P. C. pre-suppose a valid decree under which the sale is held, and r. 92 does not affect the power of the Court to refuse to confirm the sale, or make it compulsory to confirm the sale when the Court finds that the sale was held under a decree which did not authorise the sale. It would be unreasonable to require the Court to confirm the sale although it finds that the foundation of the sale is gone and then proceed under s. 47, C. P. C., to set aside the sale which it has confirmed being fully aware that the sale was illegal. The Court in such circumstances would be justified in refusing to confirm the sale. When an order setting aside a sale under O. XXI, r. 89 was reversed on the ground that the deposit was insufficient, but in the meanwhile the decree itself was modified so that the sale had taken place for an amount in respect of which there was no subsisting decree, and the decree-holder thereupon applying for cofirmation of the sale the judgment-debtor objected to such confirmation and also applied under s. 47 to set aside the sale: *Held*—That the Court in such circumstances should refuse to confirm the sale. That Art. 181 of the Limitation Act would apply to the application of the judgment-debtor under s. 47 to set aside the sale, and the right to apply should be taken to have arisen when the order setting aside the sale under O. XXI, r. 89 was reversed or that right should be considered to have remained in suspense between the date on which the sale was set aside under O. XXI, r. 89 and its reversal by the superior Court. SHEIKH ARIATULLAH *v.* SASHI BHUSHAN HAZRAH . . . . . **24 C. W. N. 73**

———*Execution of decree—Application to set aside sale in execution—Decree sent to Collector for execution—Tender of money to the Collector, the Civil Courts being closed—"Court."* The word 'Court" as used in rr. 89 and 92 of O. XXI of the Code of Civil Procedure means the Civil Court, and not, in the case of a decree being transferred to the Collector for execution, the Collector. FAZAL RAB *v.* MANZUR AHMAD (1918) . . **I. L. R. 40 All. 425**

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— **O. XXI, rr. 89 92**—*contd.*

——— *Claimant of property sold in possession—Claimant paying into Court the decretal amount to set aside sale—Whether payment voluntarily or involuntarily made—Suit to recover amount paid.* In execution of a decree obtained by the defendant against a third party the property was sold and purchased by the defendant. The plaintiff who claimed to be the owner in possession of the property protested against the sale and ultimately got it set aside under O. XXI, r. 89, Civil Procedure Code, 1908, by paying into Court the decretal amount and five per cent. of the purchase money. The amount being given to the defendant decree-holder and auction purchaser, the plaintiff sued to get it refunded as having been involuntarily paid. *Held*, dismissing the suit, that under the terms of O. XXI, r. 89, the amount must be taken to have been deposited for payment to the decree-holder voluntarily and unconditionally and therefore no suit could lie for its recovery. *Per* MACLEOD, *C. J.* :—"It seems to me that when it is expressly provided that the money [sc. paid into Court under O. XXI, r. 89] should be paid in for a particular purpose, such money could not be treated as assets held by a Court." *Sorabji Coovarji* v. *Kala Raghunath (1911), 36 Bom 156*, approved of. *Per* SHAH, *J.* —"When an application to set aside the sale is made under O. XXI, r. 89, and the amount required by the rule is deposited, it is obligatory upon the Court to set aside the sale, as provided by r 92, sub-rule (2). The result of setting aside the sale is generally speaking in favour of the judgment- debtor. This result can be ensured by any person interested in the property by satisfying the claims of the decree-holder and auction-purchaser according to the provisions of the Rule. I do not see how a person can be allowed to go back upon his own act and to claim the amount back from the decree-holder after he has secured the benefit of having the sale set aside." *Dooli Chand* v. *Ram Kishen Singh (1881), L. R. 8 I. A. 93* and *Seth Kanhaya Lal* v. *The National Bank of India, Limited (1913), L. R. 40 I. A. 56*, considered. *Ram Tuhul Singh* v. *Bisseswar Lall Sahoo (1875), L. R. 2 I. A. 131*, observations relied on. NARAYAN *v.* AMGAUDA (1920) . **I. L. R. 45 Bom. 1094**

——— **O. XXI, r. 89, and s. 115**—*Auction sale of immovable property—subsequent private sale by judgment-debtor—Application to set aside execution sale, whether maintainable by judgment-debtor—Revision—Jurisdiction—Erroneous decision of law.* A judgment-debtor who, subsequent to the sale of his immovable property in execution, has sold his property privately, may apply to have the auction-sale set aside under O. XXI, r. 89. An erroneous decision on a question of law or fact after jurisdiction has once been legally assumed is [illegible] ler s. 115 of the [illegible] if the decision is [illegible] of jurisdiction in [illegible]

——— **O. XXI, r. 90 (1882 Code s. 311)**—
See O. IX, R. 9 . *4 Pat. L. J. 125*
See O. XXI, R. 53 . *4 Pat. L. J. 226*

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— **O. XXI, r. 90 (1882 Code, s. 311)**—*contd.*

See s. 141 . . **19 C. W. N. 758**
See SALE . . **2 Pat. L. J. 157**

1. ——— *Sale, application to set aside—Irregularity and consequent inadequacy of price established—Real value of the property found not to exceed decree which could not be further executed owing to limitation—Substantial injury whether made out—Debtor's right.* Where it was found that there had been irregularities in conducting and publishing a sale of immoveable property in execution of a decree and that the property was sold at an inadequate price in consequence, the mere fact that the real value of the property sold did not exceed the amount of the decree, and that the unsatisfied balance of the decree could not be realised from the judgment-debtors by reason of limitation, would not bring the case within the proviso to O. XXI, r. 90. A debtor is entitled to have those steps taken for which provision is made by the Code for the purpose of ensuring that his property will realise an adequate price and so enable him to pay off his debt in money or money's worth. SANTO PROSAD SINGH *v.* SHEW NARAIN (1912). **16 C. W. N. 1022**

2. ——— *Attachment before judgment—Property sold in execution—Locus standi of attaching plaintiff to apply to set aside sale.* A plaintiff who has attached immoveable property before judgment, has no present interest in such property and is not entitled to apply under O. XXI, r. 90 to set aside a sale of the property in execution of a decree. *Scudat Ray* v. *Sree [illegible] Maity, I. L. R. 33 Calc. 639, 643 : 10 C. W. N. 634, Basiram Malo* v. *Kattyani Debi, I. L. R. 38 Calc. 448 : 15 C. W. N. [illegible]* [illegible] JOGENDRA NATH CHATTERJEE *v.* [illegible] GHOSH (1912) . . . **17 C. W. N. [illegible]**

3. ——— "[illegible] perty"—*Whether sale of some [illegible] can be set aside—Substantial loss [illegible] if vitiates sale as to [illegible]* [illegible] immoveable properties [illegible] and it was found that there [illegible] caused to the judgment-debtor [illegible] one of the lots, [illegible] three: *Held*, that [illegible] able property" means [illegible] properties, the sale of [illegible] aside upon the ground [illegible] That the Court [illegible] of all four lots by [illegible] stantial loss caused [illegible] them. *[illegible] I. L. R. 9 C[illegible]* NATH [illegible] *(1914)* [illegible]

4. ——— *able [illegible] of [illegible] whose [illegible] for [illegible] for [illegible] for [illegible]* [illegible]

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

———— **O. XXI, r. 90 (1882 Code, s. 311)**—*contd.*

judgment-debtors, had applied on the 13th March 1912 for execution of his decree; but his application was dismissed for non-prosecution on the 13th May 1912, and on the 20th May 1912 the petitioner applied to the Court to have the sale set aside under r. 90, O. XXI, Civil Procedure Code, on the ground of fraud and material irregularity. The lower Court rejected this application holding that he was not entitled to make it. *Held,* that the dismissal of the petitioner's application for execution of his decree on the 13th May for non-prosecution did not affect the right of the petitioner to a share in a rateable distribution of the assets, and on the date on which the application to set aside the sale was made under r. 90, it was made by a person entitled to a share in the rateable distribution of the assets and consequently should have been entertained by the Court. BYOMKESH CHACKRABARTTY *v.* JATINDRA NATH ROY (1913) **18 C. W. N. 1311**

5. ———— *Application to set aside sale dismissed for default—Dismissal of application for restoration—Appeal, if lies.* An application to set aside a sale under r. 90 of O. XXI of the Civil Procedure Code having been dismissed for default, the applicant applied for restoration of the case, but this application was refused. *Held,* that no appeal lay against the order refusing to restore the case. Cl. (*e*) to r. 1 of O. XLIII of the Code did not apply to this order. S. 141 of the Code which replaces s. 647 of Act XIV of 1882 has not effected any alteration in the law. On the date fixed for hearing of appellant's application to set aside a sale, the appellant came to Court and finding the Judge engaged in the trial of another suit, left the Court and went on another business leaving no instructions to his pleader. Returning later, he found that his case had been called on in the meanwhile and dismissed for non-prosecution. *Held,* that there were no grounds for restoring the case. *Manilal Dhunji* v. *Gulam Hosain, I. L. R. 13 Bom. 12,* and *Ismail Ibrahim* v. *Jan Mahmed, 10 Bom. L. R. 904,* relied on. *Somayya* v. *Subbama, I. L. R. 26 Mad. 599,* and *Lalta Prasad* v. *Ram Karan, I. L. R. 34 All. 426,* not followed. CHARU CHANDRA GHOSH *v.* CHANDI CHARAN RAY CHOUDHURY (1914) . . **19 C. W. N. 25**

6. ———— *Step in execution of decree for arrears of rent—Non-transferable occupancy holding, transferee of a portion of, if entitled to apply for reversal of sale.* A transferee of a portion of a non-transferable occupancy holding is entitled to apply for reversal of a sale in execution of a decree for arrears of rent obtained by the entire body of landlords. The rule formulated in r. 90 of O. XXI of the Civil Procedure Code of 1908 has a wider scope and is of a more comprehensive character than the rule laid down in s. 311 of the Code of 1882. ABDUL AZIZ *v.* TAFAZUDDIN SHEIKH (1914) . **19 C. W. N. 326**

———— **O. XXI, r. 90**—

7. ———— *Sale in execution of a decree—Application to set aside a sale by person claiming to be the real owner.* Where immoveable property has been sold in execution of a decree against the ostensible owner, a person claiming to be the real owner is not competent to ask the Court to set aside the sale under O. XXI, r. 90. of the Code of Civil Procedure. *Abdul Aziz* v. *Tafajuddin, 23 Indian Cases 839,* referred to. HARDWARI LAL *v.* SALAMAT-ULLAH KHAN **I. L. R. 38 All. 358**

8. ———— *Persons entitled to apply for setting aside sale—"Persons whose interests are affected by the sale"—Purchaser of holding sold in execution of mortgage decree if can apply for setting aside sale subsequently held by landlord in execution of rent decree.* A holding was sold in execution of a mortgage decree against the tenant and purchased by the mortgagee; it was subsequently sold at the instance of the landlord in execution of a rent decree and the mortgagee applied under O. XXI, r. 90, Civil Procedure Code, to have the sale set aside on the ground of material irregularity and fraud in conducting the sale. *Held,* that the words of r. 90 "whose interests are affected by the sale" are very wide and the mortgagee had *locus standi* to make the application for setting aside the sale as his interests were clearly affected by the sale. SAILABALA DEBI *v.* NRITYA GOPAL SEN (1915) . . **22 C. W. N. 143**

9. ———— *Co-sharer landlord, whether entitled to apply under—Application after sale in execution of a decree in a suit under s. 148A of the Bengal Tenancy Act, whether proviso to s. 169 (1) of the Bengal Tenancy Act or s. 73 of the Code of Civil Procedure applies to such a case—S. 115 of the Code of Civil Procedure, case if for revision under.* In a suit framed under s. 148A of the Bengal Tenancy Act, the five-sixth co-sharer landlords obtained a decree against the tenants of a tenure for arrears of rent due in respect thereof and in execution of that decree, in proceeding taken under Chap. XIV of the Bengal Tenancy Act, the said decree-holders (five-sixth co-sharer landlords) brought the tenure to sale and themselves purchased the same. Then, the remaining one-sixth co-sharer landlord, who also had a rent-decree in his favour against the tenure in arrear, but which decree was time-barred, applied for setting aside the sale under O. XXI, r. 90, of the Code of Civil Procedure, whereupon the five-sixth co-sharer landlords contended, amongst, other matters, that the decree which was executed was in the nature of a money-decree, and as such, the applicant, the one-sixth co-sharer landlord, had no *locus standi* to make the application under O. XX, r. 90, of the Code of Civil Procedure as he was not entitled to the rateable distribution of assets under s. 73 of the Code of Civil Procedure, his decree being time-barred and he having made no application for execution thereof; and both the lower Courts so decided. *Held,* that as the decree has the force and effect of a rent-decree the suit being framed in the manner provided for in s. 148A, the applicant was interested in the results of the sale under s. 158B and the proviso to s. 169 (*1*) of the Bengal Tenancy Act and as such he was entitled to make the application under O. XXI, r. 90, of the Code of Civil Procedure. *Held,* further, that in dealing with the case merely under the provision of the Code of Civil Procedure and without advertence to the Bengal Tenancy Act the Court below had

CIVIL PROCEDURE CODE (ACT V OF 1908)
—*contd.*

———— **O. XXI, r. 90**—*contd.*

seriously erred *Per* COMING, *J.* It is doubtful whether the present motion falls within the scope of s. 115 of the Code of Civil Procedure. KHAGENDRA BHUSAN ROY *v.* JATINDRA NATH ROY (1918) . . . . . **23 C. W. N. 619**

———— **O. XXI, rr. 90, 91 and 93—**

See LIMITATION ACT (IX OF 1908), s. 22
I. L. R. 38 Mad. 837

———— **O. XXI, r. 90 and 92—**

See s. 104 . . **I. L. R. 40 All. 122**

See MADRAS ESTATES ACT, 1908, ss 111 AND 118. . **I. L. R. 43 Mad. 351**

Civil Procedure Code, within the time allowed by law, and the sale was confirmed, he cannot institute a suit to set aside the sale on the ground of material irregularity or fraud in the publication or conduct of the sale. Dictum of SADASIVA AYYAR, *J.*, in *Payidanna* v. *Lakshminarasamma, (1915), I. L. R. 38 Mad. 1076*, dissented from BRAHMAYYA *v.* APPAYYA SASTRI (1921)
I. L. R. 44 Mad. 351

———— *Application to set aside sale made before the new Code came into force—Fraud, general allegation of—Second appeal.* The fact that the execution-sale took place and the application to set it aside on the ground of fraud was made before the new Code of Civil Procedure came into operation does not make the order passed on the application after the new Code came into force subject to a second appeal under the provisions of the old Code. General allegations of fraud unaccompanied by particulars are insufficient even to amount to an averment of fraud of which any Court ought to take notice *Wallingford* v. *The Mutual Society, L. R. 5 A. C. 685, 697*, followed. RAJ MOHAN PAL *v.* GOVINDA CHANDRA PAL (1912) . . . **17 C. W. N. 524**

See ALSO BHADRESWAR GOLOI *v.* BISHNU CHARAN SEN (1910).
17 C. W. N. 525

———— **O. XXI, r. 91 (1882 Code, s. 313)—**

See BENGAL TENANCY ACT, s. 65.
14 C. W. N. 1096

See LIMITATION ACT, 1908, s 22
I. L. R. 38 Mad. 837

1 ———— *Contract Act (IX of 1872), s. 18, cl. (3)—Stamp Act (II of 1899), s. 35—Court-sale—Discovery that the judgment-debtor had no saleable interest—Failure of consideration—Suit by auction-purchaser for possession or return of purchase money—Relations of the judgment-creditor and auction-purchaser—Suit not cognizable by Small Causes Court—Unstamped document regarded as non-existent.* A Court-sale purchaser, having discovered that the judgment-debtor had no saleable interest in the property sold, brought a suit against the judgment-creditor for recovery of possession of the property, or in the alternative, return of the purchase money on the footing of

CIVIL PROCEDURE CODE (ACT V OF 1908)
—*contd.*

———— **O. XXI, r. 91 (1883 Code, s. 313)—**
contd.

total failure of consideration. A question having arisen as to whether the suit was maintainable. *Held*, that the suit was maintainable inasmuch as under the Civil Procedure Code (Act V of 1908) there was an implied warranty of some saleable interest when the right, title and interest of a judgment-debtor was put up for sale and the purchaser's right based on such implied warranty to a return under certain conditions of the purchase-money which had been received by the judgment-creditor was recognized. The relations of the parties, namely, the judgment creditor and the Court-sale purchaser were in the nature of contract. *Held*, further, that such a suit, though the subject-matter was less than R500, was not cognizable by a Court of Small Causes, there being a prayer for possesion of immoveable property. An unstamped document being inadmissible in evidence must be taken as non-existent. RUSTOMJI ARDESHIR IRANI *v.* VINAYAK GANGADHAR BHAT (1910)
I. L. R. 35 Bom. 29

2. ———— *Auction-purchaser induced to buy property of small value by misrepresentation—Remedy* Where it appeared that it was known to the decree-holder that 1 anna out of a 1 anna 16 krants share put up by him for sale in execution of his decree had been previously sold in execution of a mortgage decree: *Held*, that it was not open to the purchaser at the sale who got 16 krants at least of the property purported to be sold to apply under O. XXI, r. 91, of the Civil Procedure Code, on the ground that the judgment-debtor had no saleable interest in the property; though if he was induced to make the purchase by fraud, he might not be without other remedies. *Naharmul Marwari* v. *Sadut Ali, 8 C. L. R. 468, Protap Chandra Chakrabartty* v. *Panioty, I. L. R. 9 Calc. 506, Ram Coomar Dey* v. *Shushee Bhooshan Ghose, I L. R 9 Calc. 626, Sonaram Das* v. *Mohiram Das, I. L. R. 28 Calc. 235, Durga Sundari* v. *Govinda Chandra, I L. R. 10 Calc. 368, Sant Lal* v *Ramji Das, I L. R. 9 All. 167*, and *Birj Mohan Thakur* v. *Rai Umanath Chaudhuri, I L. R 20 Calc. 8 : L R. 19 I. A. 151*, referred to. SHEOGOBINDA SINGH *v* DHANUKDHARI SINGH (1915) . . **19 C. W. N. 1291**

———— **O. XXI, rr. 91 and 93—**

———— When in a pending application to set aside execution sale under this order, decree holders were allowed to withdraw a portion of the purchase-money on executing a bond, which did not contain any provision for interest *Held*, that the Court had power under r. 93 to order refund of the money with interest. MAHARAJ BAHADUR SINGH *v.* A. H. FORBES
25 C. W. N. 398

———— *Execution of decree—Auction purchaser deprived of property purchased—Suit for refund of purchase-money—Sale not set aside.* When, after a sale in execution of a decree has been confirmed, it is found that the judgment-debtor had no saleable interest in the

CIVIL PROCEDURE CODE (ACT V OF 1908) *—contd.*

———— **O. XXI, rr. 91 and 93**—*contd.*

has been set aside. *Nannu Lal* v. *Bhagwan Das, I. L. R. 39 All. 114,* followed. The following cases were also referred to in the judgments. *Hira Lal* v. *Karim-un-nissa, I. L. R. 2 All. 780, Ram Narain Singh* v. *Mahtab Bibi, I. L. R. 2 All. 828, Dorab Ally Khan* v. *Abdool Azeez, L. R. 5 I. A., 116, Munna Singh* v. *Gajadhar Singh, I. L. R. 5 All. 577, Kishun Lal* v. *Muhammad Safdar Ali Khan, I. L. R. 13 All. 383, Shanto Chandar Mukerji* v. *Nain Sukh, I. L. R. 23 All. 355, Sidheswari Prasad Narayan Singh* v. *Goshain Mayanand, I. L. R. 35 All. 419, Mohideen Imbrahim* v. *Mahomed Muza Levai, 23 M. L. J. 487, Kumar Shaha Peddar* v. *Ram Gour Shaha Chaudhari, I. L. R. 37 Calc. 67, Muhammad Najib-ullah* v. *Jai Narain, I. L. R. 36 All. 529, Dost Mahomed Khan* v. *Prossunnonath Roy, S. D. A., (L. P.) 549, Rughoonath Suhay* v. *Brijbeharee Lal, S. D. A., (L. P.) 486, Greesh Chunder Pottar* v. *Lookhooda Moyee Dabee, 1 W. R., C. R., 55, Brajendra Roy Chowdhry* v. *Jugurnath Roy, 1 W. R., C. R., 147,* and *Sheikh Mahomed Basir-ulla* v. *Sheikh Abdulla, 4 B. L. R. (App.), 35,* referred to. RAM SARUP *v.* DALPAT RAI

I. L. R. 43 All. 60

———— **O. XXI, r. 92, (1882 Code, s. 312)**

See s. 60 . **I. L. R. 40 All. 680**

See s. 144 . . **2 Pat. L. J. 206**

See O. XXI, R. 89.

I. L. R. 45 Bom. 1094
I. L. R. 40 All. 425
17 C. W. N. 476

See O. XLI, R. 23 AND 25.

4 Pat. L. J. 645

See BOMBAY HIGH COURT CIVIL CIRCULAR P. 106, R. 17 **I. L. R. 45 Bom., 1132**

See MADRAS ESTATES ACT, 1908, ss. 111, 118 . . **I. L. R. 43 Mad. 351**

———— **O. XXI, rr. 92, 93**——*Execution of decree—Auction purchaser deprived of property purchased—Suit for refund of purchase money—Sale not set aside—Procedure. Held,* that under the present Code of Civil Procedure an auction purchaser who has been deprived by means of a suit against the judgment-debtor of the property purchased by him cannot obtain a refund of the purchase money without getting the auction sale set aside. *Munna Singh* v. *Gajadhar Singh, I. L. R. 5 All. 577,* distinguished. *Muhammad Najib-ullah* v. *Jai Narain, I. L. R. 36 All. 529, Shanto Chandar Mukerji,* v. *Nain Sukh, I. L. R. 23 All. 355,* and *Dorab Ally Khan* v. *Abdool Azeez, L. R. 5 I. A. 116,* referred to. NANNU LAL *v.* BHAGWAN DAS (1916) . **I. L. R. 39 All. 114**

———— **O. XXI, rr. 92 and 94**—*Sale certificate application for, duty of court to grant.* The provisions of r. 94 of O. XXI of the Code of Civil Procedure are mandatory. Where the mortgage of a tenant's interest in a house purchased such interest in execution of a decree under the mortgage, *held,* that the court was bound to grant the purchaser a sale certificate, and was not justified in requiring him to produce a money-order receipt for the purpose of showing that he (the purchaser) had paid a mutation fee to the landlord in order to

CIVIL PROCEDURE CODE (ACT V OF 1908) *—contd.*

———— **O. XXI, rr. 91 and 94**—*contd.*

have his name entered in the landlord's books as transferee of the tenant's interest. BAIKUNTI MISSIR *v.* NARINDA SUNDARI DEBI

1 Pat. L. J. 446

———— **O. XXI, r. 93, (1882 Code, s. 315)**—

See O. XXI, R. 91 . **25 C. W. N. 366**

See EXECUTION SALE.

I. L. R. 39 Mad. 803

See LIMITATION ACT, 1908, s. 22

I. L. R. 38 Mad. 837

1. ———— *Civil Procedure Code (Act XIV of 1882), ss. 313, 315—Auction sale under the Code, 1882—Sale of property in which judgment-debtor had no saleable interest—Right of purchaser to refund of purchase-money—Suit—Application—Suit for possession—Cause of action—Right of suit, accrued before new Code—Effect of new Code on such right—General Clauses Act (X of 1897), s. 6 (c) and (e)—Repealing statute, construction of.* Where the plaintiff, who purchased some lands in court auction in 1907, brought a suit to recover possession thereof in 1908, and failed in the suit in 1909 and in the Second Appeal therefrom in 1911 on the ground that the judgment-debtor had no saleable interest in the property, subsequently instituted a suit in 1914 for the recovery of the purchase money from the decree-holder, and the latter contended that the suit was not maintainable. *Held,* that the suit was maintainable, notwithstanding the provisions of O. XXI, r. 93 of the Civil Procedure Code (Act V of 1908). The plaintiff had a right of suit under the old Civil Procedure Code (Act XIV of 1882); and such right having accrued to him while such Code was in force it could not be affected by the provisions of the new Code of Civil Procedure (Act V of 1908) by virtue of the provisions of s. 6 (c) and (e) of the General Clauses Act (X of 1897). As the right of the plaintiff to make an application under O. XXI, rr. 91 and 93, would have been barred before the new Code came into force the new Code should not be so construed as to apply to the present case. *Mohideen Ibrahim* v. *Mahomed Mura Levai, 23 Mad. L. J. 487, Parvathi Ammal* v. *Govindsami Pillai, I. L. R. 39 Mad. 803,* followed. *Rustomji Ardeshir Irani* v. *Vinayak Gangadhar Bhat, I. L. R. 35 Bom. 29,* dissented from. *Colonial Sugar Refining Company* v. *Irving, [1905], A. C. 369,* applied. *Abbott* v. *Minister for Lands, [1895], A. C. 425,* distinguished. *Gopeshwar Pal* v. *Jiban Chandra Chandra, I. L. R. 41 Calc 1125,* followed. TIRUMALAISAMI NAIDU *v.* SUBARMANIAN CHETTIAR (1916) . . . **I. L. R. 40 Mad. 1009**

2. ———— *Suit by purchaser of occupancy holding evicted in execution of landlord's decree to recover purchase-money if maintainable.* The plaintiff purchased an occupancy holding in execution of a decree obtained by the mortgagee of the property and took possession of it; he was sued in ejectment by the landlords in whose favour a decree was subsequently made. The plaintiff sued to recover the purchase-money with interest. *Held,* that under the present Code of Civil Procedure the suit was incompetent. JURANU MAHAMAD *v.* JATHI MAHAMD (1917)

22 C. W. N. 760

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— **O. XXI, r. 94 (1882 Code, 316)**—

See EXECUTION SALE.

I. L. R. 43 Mad. 309

——— The person who is declared to be the purchaser after the bids are concluded is the person in whose name the certificate is to be granted under O. XXI, r. 94, Civil Procedure Code. BABURAM MANDAL *v.* DOKHINA SUNDARI NAMASUDRANI . **24 C. W. N. 27**

——— **O. XXI, r. 95, (1882 Code, s. 318)**—

See EXECUTION OF DECREE

I. L. R. 43 All. 520

1. ——— *Execution sale—Purchase by decree-holder—Delivery of possession—Order, whether appealable—S. 47, Civil Procedure Code, whether applicable.* Where on a decree-holder auction-purchaser applying for delivery of possession of the properties purchased and obtaining possession by order of Court notwithstanding the objection by the judgment-debtor that the properties did not pass by the sale, the judgment-debtor preferred an appeal. *Held*, on a review of the authorities of all the Indian High Courts (which are conflicting), that the Patna High Court should not without very good reason depart from a long course of decisions in the Calcutta High Court where the balance of opinion has been since 1883 strongly in favour of the view that an appeal does not lie. ABDUL GANI *v.* RAJA RAM (1916)

20 C. W. N. 829

2. ——— *Execution of decree—Transferee from auction-purchaser—Order for delivery of possession—Appeal—Revision.* A purchased certain immovable property at an auction sale held in execution of a decree and thereafter transferred the property so purchased to B, the decree-holder B applied under O. XXI, r. 95, of the Code of Civil Procedure for an order for delivery of possession of the property purchased from A, and an order was passed. *Held*, that no appeal lay from the order for delivery of possession. *Bhagwati* v. *Bunwari Lal, I. L. R. 31 All. 82*, referred to. BUDDHU MISIR *v.* BHAGIRATHI KUNWAR (1917)

I. L. R. 40 All. 216.

3. ——— *Whether appeal lies from order under r. 95.* No appeal lies from an order under r. 95 of O. XXI of the Code of Civil Procedure, 1908. HAJI ABDUL GANI *v.* RAJA RAM . . . . . **1 Pat. L. J. 232**

——— **O. XXI, r. 95, and s. 47**—*Rent decree against tenants obtained by co-sharer landlords—Partition proceedings in which tenant's holding falls into share of some of the landlords—Suit by latter against tenant for possession, whether maintainable—Limitation—Chota Nagpur Tenancy Act (Beng. of 1908), ss. 139 and 231—Whether s. 139 is retrospective—Suit for recovery of possession from tenants whose holding has been sold, whether is a suit for ejectment.* Certain co-sharer landlords in a mouza [illegible]

that a suit by the latter against the tenants to recover possession was not barred by s. 47 of the Code of Civil Procedure, 1908. S. 139 of the Chota Nagpur Tenancy Act, 1908, is not retrospective

CIVIL PROCEDURE CODE (ACT V OF 1908) —*concld.*

——— **O. XXI, r. 95, and s. 47**—*concld.*

and, therefore, where a rent decree was obtained against certain tenants in Manbhum prior to the 22nd November, 1909, on which date the Act was extended to that district, a suit by the decree-holders against the judgment-debtors, for recovery of possession, was held not to be barred by ss. 139 and 231 merely by reason of it not having been brought in the Court of the Deputy Commissioner within one year from the date when the cause of action accrued. S. 139 (4) does not include a suit to recover possession from tenants whose holding has been sold in execution of a decree inasmuch as such a suit is not a suit to eject a tenant or cancel a lease, and the tenants cease to be tenants at the time their holding is sold and their rights in the holding pass to the purchaser *Per Jwala Prasad, J.* In the case of a decree awarding rent or money *no title to any property is created by the decree*, but if the decree-holder purchases property in execution of a rent decree he is entitled either to apply for delivery of possession under O. XXI, r. 95 or to institute a suit for recovery of possession. Wher [illegible] recov [illegible] the d [illegible] proce [illegible] sion is by execution of the decree and not by suit. SARDAR SIRDHAR *v.* JAGESHWAR SINGH MAHAPATRA . . . . . **4 Pat. L. J. 716**

——— **O. XXI, rr. 95, 96**—

See O. XXI, R. 35 **I. L. R. 36 All. 181**

——— *Court-sale—Symbolical possession—Judgment-debtor in actual possession—Adverse possession—Limitation.* In execution of a decree in a suit of 1890, the plaintiff purchased the plaint property at a Court-sale and a receipt for possession was given by the plaintiff to the bailiff on the 3rd July 1901. The defendants, judgment-debtors, who had been previously in possession of the property were, however, not disturbed in their possession at the date of the receipt. The plaintiff having sued to recover possession on the 3rd July 1913: *Held*, that the plaintiff was not entitled to succeed as the provisions of O XXI, r 95, Civil Procedure Code, 1908, under which the case fell were not complied with; a formal receipt for possession would not help the plaintiff to dispossess the defendants *Radha Krishna* v. *Ram Bahadur, 20 Bom L. R. 502*, distinguished. SHRIDHAR MADHAVRAO *v.* GANPATI PUNJA (1918)

I. L. R. 43 Bom. 559

——— **O. XXI, r. 96 (1882 Code, s. 319)**—

See O. XXI, R. 35 **I. L. R. 36 All. 181**

——— **O. XXI, r. 97 (1882 Code, s. 328)**—

See BAILIFF . **I. L. R. 42 Calc. 313**

——— **O. XXI, rr. 97 and 99**—

See POSSESSION . **I. L. R. 47 Calc. 907**

——— **O. XXI, rr. 97 to 103, (1882 Code, 335)**—*Effect of order under r. 99 in favour of a party in possession—suit by party against whom the order is made—limitation—Indian Limitation Act, IX of 1908, articles 11 A and 151.* The property in suit belonged to one B. L. who died in 1856 leaving a widow *Mussammat* M. who on 5th March 1866 sold it to R. M., a stranger. On 29th September 1904 *Mussammat* M. [illegible] arch

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

———— O. XXI, rr. 97 to 103, (1882 Code, 335)—*concld.*

1905 M. M., plaintiff, as daughter's son of B. L., sued for possession of the property making K. N. the adopted son of R. M., the sole defendant. *Mussammat* Ambo was the widow of R. M. The claim was decreed by the Chief Court on 7th July 1906 subject to payment of Rs. 1,400 for improvements to *Mussammat* Ambo. M. M. tried in execution of this decree to get possession of the property decreed to him, but was obstructed by *Mussammat* Ambo who alleged that she was in possession in her own right under a will by her husband, R. M. The decree-holder complained of the obstruction and *Mussammat* Ambo also applied to the Executing Court which found under O. XXI. r. 99, Civil Procedure Code, that *Mussammat* Ambo was in possession of the property on her own account and was claiming in good faith. That order was passed on the 18th June 1909. The Court definitely refrained from going into the question of title. On 20th October 1909 M. M. applied to the Chief Court for revision, but that application was rejected on 22nd April 1911 on the ground that he had another remedy available to him by suit under O. XXI, r. 103. On the 2nd March 1914 M. M. filed the present suit. *Held*, that the effect of the order of 18th June 1909, under O. XXI, r. 99, Civil Procedure Code, was to hold *Mussammat* Ambo entitled to possession as against the decree-holder unless and until a regular suit was brought against her, *vide* r. 103, and the plaintiff had to establish by that suit his own right to present possession as well as his own title and he could not succeed merely by showing that the finding under r. 99 was erroneous. *Sardari Lal* v. *Ambika Pershad (I. L. R. 15 Calc. 521), (P. C.)*, and *Khub Lal* v. *Ram Lochun (I. L. R. 17 Calc. 260, 262)*, referred to. *Sarat Chandra* v. *Tarini Prasad (I. L. R. 34 Calc. 491), Raghunath Jha* v. *Brijnanda Singh (31 Indian Cases 444)*, and *Bhagwanti* v. *Goman (42 P. R. 1909)*, distinguished. *Held also*, that the present suit for possession of the property against *Mussammat* Ambo having been brought more than a year after the date of the order under r. 99 was barred by time under article 11-A of the Limitation Act and was not governed by art. 141. *Mahadev Ram* v. *Bibi Chimnaji (I. L. R. 26 Bom. 730), Bhimappa* v. *Irappa (I. L. R. 26 Bom. 146), Shagun Chand* v. *Shibbi (8 All. L. J., 626)* and *Chandi Prasad* v. *Nand Kishore (20 Indian Cases 369)*, referred to. CHAIL BEHARI LAL *v.* KIDAR NATH **I. L. R. 1 Lah. 57**

———— A fresh writ for possession can in certain cases be obtained even outside the period of the Limitation Act without making an application under order O. XXI, r. 97 within the period. RAGHUNANDAN PRASAD MISSRA *v.* RAM CHARAN MANDA . . **4 Pat. L. J. 95**

———— O. XXI, rr. 98, 99, 101—*Scope of suit under r. 103.* The scope of a suit under r. 103 of O. XXI, Civil Procedure Code, filed to contest an order made under either r. 98, or r. 99, or r. 101 is not the determination of the mere question of possession of the parties concerned but the establishment of the *right* or *title* by which the plaintiff claims the present possession of the property. *Nabadwipendra Mookerjee* v. *Madhu Sudan Mandal, (1912), 16 I. C., 741, (Calc.)*, followed. UNNI MOIDIN *v.* POOKER (1921) **I. L. R. 44 Mad. 227**

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

———— O. XXI, rr. 98 to 103—Art. 11A of the Limitation Act will only apply to an order under rr. 98 to 103 which has been made upon investigation. SREEMATI NIRODE BARANI DASI *v.* MANINDRA NARAYAN CHANDRA **21 C. W. N. 853**

———— O. XXI, r. 99, (1882 Code, s. 331 335)—*Civil Procedure Code (Act V of 1908), O. XXI, rr. 58, 63, 99—Claim, dismissed for non-prosecution—Obstruction by claimant to taking of possession by purchaser—Court if bound to investigate into bonâ fides of claim.* Where a claim preferred under O XXI, r. 58, to immoveable property attached in execution of a money decree was dismissed for non-prosecution, and the property was sold, but the purchaser on proceeding to take possession was obstructed by the claimant: *Held*, that the only remedy of the claimant after his claim was dismissed under O. XXI, r. 63, though for default, was by a fresh suit and he could not ask the Court to hold an investigation of the claim under O. XXI, r. 99. JUGAL KISHORE MARWARI *v.* AMBIKA DEVI (1912) **16 C. W. N. 882**

———— O. XXI, rr. 100 and 101 (1882 s. 332)—*Judgment-debtor—Meaning of.* The words "judgment-debtor" in O. XXI, r. 100 and 101, of the Code of Civil Procedure, 1908, include the representative of the judgment-debtor and all persons, who are bound by a decree against the judgment-debtor and by a sale in execution of such decree. A person who has purchased a portion of a holding prior to the institution of a suit for rent under s. 148A of the Bengal Tenancy Act, 1885, is, so far as his interest is concerned, bound by a decree obtained under that section and by a sale in execution of such decree. Such a purchaser is not entitled to make an application under O. XXI, rr. 100 and 101. BHIKHIA JHA *v.* BRIJ BIHARI SINGH . . . . . **2 Pat. L. J. 478**

———— O. XXI, rr. 100 and 101—*Limitation Act (IX of 1908), art. 11.* Where an application under O. XXI, r. 100, of the Code of Civil Procedure, 1908, has been dismissed for default a suit under r. 103 is governed by art. 11 of the Limitation Act, 1908. SAIYID RAZIUDDIN HUSSAIN *v.* BINDESRI PRASAD SINGH . . **5 Pat. L. J. 652**

———— O. XXI, rr. 100, 101 and 103, (1882 Code, 332)—*Application made under r. 100—Order dismissing the application under r. 101—Whether such an order is an order "made under r. 101" within the meaning of those words in R. 103—Conclusive nature of the order.* An order made against an applicant refusing him relief under r. 101 of O. XXI of the Civil Procedure Code, 1908, is as much an order under that Rule, as an order granting him relief would be and the order would be conclusive under r. 103 subject to the result of a separate suit. ZIPRU *v.* HARI SUPDUSHET (1917) **I. L. R. 42 Bom. 10**

———— O. XXI, r. 101, (1882 Code, 332)—

See O. XXI, R. 98. **I. L. R. 44 Mad. 227**

See O. XXI. R. 100 . **2 Pat. L. J. 478**

———— *Joint possession with judgment-debtor if possession in one's own interest—Scope of section.* A claimant who has an interest in the land of which possession has been deli-

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— **O. XXI, r. 101 (1882 Code, s. 332)** —*concld.*

vered in execution of a decree either as a member of the family of the judgment-debtor or otherwise and who is affected by the delivery of possession, is a person who is in possession in [illegible]

meaning of r. 101, [illegible] Code. RADHA GOBINDA MISRA *v.* RAGHU NATH MISRA (1913) . . 18 C. W. N. 695

——— **O. XXI, r. 103 (1882 Code s. 332)**—

See O. VI, R. 17 **I. L. R. 44 Bom. 515**

See O. XXI, R. 97 **I. L. R. 1 Lah. 57**

See O. XXI, R. 100.

I. L. R. 42 Bom. 10

——— **O. XXI, r. 103, and O. XXXIV, r. 1** *Transfer of Property Act (IV of 1882), ss. 52* [illegible]

in execution of mortgage decree—Right of the later purchaser to oust the former from possession—Order as to possession—Appeal—Suit. Where lands [illegible]

made a party thereto, the purchaser [illegible] decree is not entitled to [illegible]

[illegible] Procedure Code, fall also under s. 47 of the Code, O. XXI, r. 103, does not prevent an appeal against an order therein, as it falls under s. 47 of the Code. VEYINDRAMUTHU PILLAI *v.* MAYA NADAN (1920)

I. L. R. 43 Mad. 696

——— **O. XXII, (1882 Code 361 to 372)**—

See PARTIES . **I. L. R. 45 Calc. 862**

——— **O. XXII, r. 1, (1882 Code, s. 361)**— [illegible] *s. 89*— [illegible] *the* [illegible] ion [illegible] lies [illegible]

and before judgment is given in the suit, the right to sue does not survive within the meaning of O. XXII, r. 1 of the Code of Civil Procedure. The expression "personal injuries not causing the death of the party" in s. 89 of the Probate and Administration Act does not mean injuries [illegible]

wronged against the wrong doer [illegible] the death of either party. *Haridas Ramdas v. Ramdas Mathuradas, (1889), I. L. R. 13 Bom. 667*, and *Ramchode Doss v. Rukmany Bhoy, (1905), I. L. R. 28 Mad. 487*, followed RUSTOMJI DORABJI *v.* NURSE (1921) . *I. L. R. 44 Mad. (F.B.),* 357

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— **O. XXII, rr. 2 and 4**—

See SUBSTITUTION OF HEIRS.

25 C. W. N. 595

——— **O. XXII, r. 3, (1882 Code, 363)**—

See O. XVII, R 2.

I. L. R. 44 Bom. 767

——— *Death of appellant—application by some of the legal representatives under* [illegible]

itself sufficient to invalidate the award [illegible] plaintiffs appealed to the High Court At the hearing it was objected that appeal had abated, as the appellant had died and only his sons and [illegible]

were governed by custom and they therefore *bona fide* believed that the sons were the sole heirs and legal representatives of their father. *Held,* that as the applicants (present appellants) *bona fide* believed that they were the sole heirs and legal representatives of the deceased appellant and had made their application for substitution on that belief the appeal did not abate, notwithstanding that by Muhammadan Law other persons would also be co-heirs of the deceased *Musala Reddi* v. *Ramayya (I. L. R 23 Mad. 125)*, followed. *Ghumandi Lal* v. *Amir Begum (I. L. R. 16 All. 211)* and *Haidar Hussain* v. *Abdul Ahad (I. L. R. 30 All. 115)*, referred to. *Held also*, that an award cannot be [illegible] this country simply on the [illegible]

minds upon the matter [illegible] Law of Arbitration in India, second edition, pages 230 and 231. *Bhabasundari Dasi* v. *Makhunlal Dey (8 Beng. L. R. 128)*, *Muthukutti Nayakan* v. *Acha Nayakan (I. L. R. 18 Mad. 22)* and *In re Hopper (2 Q. B. 361)*, approved. *Thammiraju* v. *Bapiraju (I. L. R. 12 Mad. 113)* and *Nand Ram* v. *Fakir Chand (I. L. R. 7 All. 523)*, distinguished. *Bhagwan Das* v. *Shiv Dial (92 P. R. 1913)*, not followed. ABDUL RAHMAN *v.* SHAHAB-UD-DIN

I. L. R. 1 Lah. 481

——— **O. XXII, rr. 3 and 5**—*Death of plaintiff—Order made to bring the legal representatives on record—Subsequent application by other persons to alter the order—Power of the Court to correct the order.* A suit was filed by five persons one of whom R died while the suit was pending. Thereupon an application was made [illegible] of the minor G, son of the 1st plaintiff [illegible] should be brought on the record as legal representative of the deceased R [illegible] alleged adoption of G to R. [illegible]

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

———— **O. XXII, rr. 3 and 5**—*concld.*

Judge granted the application and amended the record by substituting *G*'s name for that of *R*. Subsequently the petitioners (minor daughters of *R*) having learnt of the application applied that *G*'s name should be deleted and that their names should be brought upon the record in his place and *G*'s adoption to *R* was fictitious. The Subordinate Judge held that he could not alter his previous order in view of r. 3 of O. XXII, Civil Procedure Code, 1908. *Held*, that under r. 5 of O. XXII, Civil Procedure Code, 1908, the Subordinate Judge had the power to correct the order previously made and to determine who were the real legal representatives of the deceased plaintiff. VATSALABAI *v.* SAMBHAJI PANDURANG (1918)

I. L. R. 43 Bom. 168

———— **O. XXII, rr. 3, 5, 9**—*Order dismissing application to be brought on the record as representative of the deceased plaintiff—whether appealable—O. XXII, r. 3—order of abatement of suit—whether a decree, and whether a person, not a party to the suit, can appeal—O. XXII, r. 9—whether applicable when abatement is not due to application not having been made within time.* Ram Kanwar brought a suit against Narsing Das. While the suit was pending Ram Kanwar died, and the present appellant Ram Sarup made an application to be brought on the record as being the legal representative of the deceased plaintiff. The Court, finding that the applicant was not the legal representative, dismissed his application. The Court also passed separate order under O. XXII, r. 3, recording that the suit had abated inasmuch as no application by any legal representative had been made within six months of plaintiff's death. Ram Sarup next applied to have this Order of abatement set aside but his application was dismissed under O. XXII, r. 9. Ram Sarup then appealed to the High Court against all three orders. *Held*, that the present Civil Procedure Code provides no appeal from an order dismissing the application of a person to be brought on the record as the legal representative of a deceased plaintiff (*vide* O. XXII, r. 5) and that such an order is not a decree. *Pakkai* v. *Pathumma* (*1913, Mad. W. N. 673*), *Balabai* v. *Ganesh* (*I. L. R. 27 Bom. 162*) and *Parsotam Rao* v. *Janki Bai* (*I. L. R. 28 All. 109*), followed. *Held also*, that an order of abatement of the suit amounts to a decree, but that appellant in this case, not being a party to the suit, has no *status* to appeal therefrom. *Balabai* v. *Ganesh* (*I. L. R. 27 Bom. 162*) and *Niranjan Nath* v. *Afzal Hussain* (*128 P. R. 1916*) (*F. B.*), referred to. *Held further*, that an order under O. XXII, r. 9, can only be passed in cases in which an abatement takes place by reason of an application not having been made within the time permitted by law to implead the legal representative of the deceased plaintiff, and has no applicability to cases in which the suit has abated on account of some other cause, as in the present case. Although, therefore, an appeal is allowed from an order under r. 9 (*vide* O. XLIII (*i*) (*k*)) this rule has no application to the circumstances of the present case and the appeal must be dismissed on this ground alone. *Niranjan Nath* v. *Afzal Hussain* (*128 P. R. 1916*) (*F. B.*), followed. RAM SARUP *v.* MOTI RAM **I. L. R. 1 Lah. 493**

———— **O. XXII, rr. 3 and 9**—

See O. IX, RR. 8 AND 9.

. L. R. 35 All. 331

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

———— **O. XXII, r. 4 (1882 Code, s. 368)**—

See LIMITATION ACT, 1908, ART. 44 AND 144 . . **I. L. R. 43 Mad. 842**

See MUHAMMADAN LAW-WILL.

I. L. R. 42 All. 497

See ABATEMENT . **I. L. R. 1 Lah. 225**

1. ———— *Partnership—Suit for dissolution—Death of defendant after preliminary decree—Application for substitution—Limitation.* In a suit for dissolution of partnership, after the preliminary decree was passed, one of the defendants died. Some two years after his death the plaintiff applied for substitution of the name of the heir of the deceased defendant, and asked the Court to proceed with the suit. *Held*, that in the circumstances O. XXII, r. 4 of the Code of Civil Procedure applied and the application was too late. *Jamnadas Chhabildas* v. *Sorabji Kharsedji, I. L. R. 16 Bom. 27*, followed. MOTI LAL *v.* RAM NARAYAN (1917) . . . . **I. L. R. 39 All. 551**

2. ———— *Abatement of suit—Death of plaintiff respondent after decree in her favour and pending an appeal—Application in appeal to declare the suit to have abated.* An appellate Court has no power under O. XXII, r. 4, of the Code of Civil Procedure to declare that a suit, as distinct from an appeal, has abated in a case in which there has been a decree already made before the death in consequence of which the suit is alleged to have abated took place. SUNDAR PANDE *v.* MUSAMMAT KUMARI (1918)

I. L. R. 41 All. 283

3. ———— B, obtained a preliminary decree against T, in a mortgage suit and applied subsequently more than 6 months after the death of T for an order absolute and substitution of the heirs of T and preferred an appeal on refusal. This was dismissed and a second appeal was preferred. *Held*, that the appeal to the Lower Appellate Court was not an appeal from an order. The original order was an order rejecting the application to make the mortgage decree absolute and had the effect of finally dismissing the mortgage suit and was a decree and therefore a second appeal lay. *Held further*, that the suit had abated as the application had not been made within 6 months of the death. An application following on a preliminary decree for sale is not an application for execution. Until the final decree is passed the proceedings following the preliminary decree in a mortgage suit must be looked on as a proceeding in a pending suit. BHUTNATH JANA *v.* TARA CHAND JANA

25 C. W. N. 597

4. ———— In a suit for dissolution of partnership after the preliminary decree was passed one of the defendants died. Some 2 years later plaintiff applied for substitution of the name of the heir of the deceased defendant. *Held* that O. XXII, r. 4 applied and the application was too late . . . **I. L. R. 39 All. 551**

———— **O. XXII, rr. 4, 6 and 9**—

See EXECUTION OF DECREE.

4 Pat. L. J. 240

———— **O. XXII, r. 4 and O. XLI, rr. 20 and 33**—*Suit by several Plaintiffs jointly for recovery of possession—Joint decree in their favour—Death of one, pending Defendant's appeal—Failure to bring his representatives on the record—Defect of parties*

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

———— **O. XXII, r. 4 and O. XLI, rr. 20 and 33**—*concld.*

[illegible]

Plaintiffs pending the appeal leaving three sons and two grandsons by a predeceased son as his [illegible]

died within six months. At the hearing of the [illegible] the deceased's grandsons [illegible]

under O. XXII, r. 4, Civil Procedure Code, the appeal abated as against the heirs of the deceased Plaintiff only, the result of such abatement was that the appeal was imperfectly constituted, and, in the absence of necessary parties, the Court could not proceed to decide the appeal on the merits *Bejoy Gopal* v. *Umesh Chandra, 6 C. W. N. 196* [illegible]

power should be exercised. *Upendra* v. [illegible], *I. L. R. 25 Calc. 565 (1898), Hudson* v. *Basdeo, I. L. R. 26 Calc. 109 : s. c. 3 C. W. N. 76 (1898)* and *Rupjaun* v. *Abdul, I. L. R. 31 Calc. 643 : s. c. 8 C. W. N 496, (F. B.) (1904)*, referred to. *Quære.* Whether the decisions in *Sibo Sundari* v. *Raj* [illegible]

of the common manager. KALI DAYAL BHATTACHARJEE *v.* NAGENDRO NATH PAKRASHI

24 C. W. N. 44

———— **O. XXII, rr. 4 and 9**—

See LIMITATION ACT, 1908, s 5.

I. L. R. 36 All. 235

———— **O. XXII, r. 5 (1882 Code, s. 367)**—

See HINDU LAW—PARTITION.

I. L. R. 42 Bom. 535

See s. 115 . **I. L. R. 42 Mad. 76**

———— **O. XXII, rr. 5 and 6**—

See O. XXII, R. 3.

I. L. R. 1 Lah. 493

———— **O. XXII, r. 6 (1882 Code, s. 461)**—

See DEFENDANT, DEATH OF.

I. L. R. 38 Mad. 682

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

———— **O. XXII, r. 6 (1882 Code, s. 461)**—*concld.*

See EXECUTION OF DECREE.

4 Pat. L. J. 240

———— **O. XXII, r. 7 (1882 Code, ss. 369** [illegible]

[illegible]

but is voidable at the instance of the minor. *Virupakshappa* v. *Shidappa (I. L. R. 26 Bom. 109), Ganesha* v. *Mul Chand (95 P. R. 1912, F. B.),* and *Muhammad Ibrahim* v. *Allah Bakhsh (145 P. R. 1919)* [illegible] *Muhammad Ishaq* v. *Bhabuti* [illegible] tinguished. [illegible] set aside [illegible] the Limita[illegible]

I. L. R. 2 Lah. 10[illegible]

———— **O. XXII, r. 8**—*Appeal—Insolvency of one appellant and death of the other—Abatement of appeal—Substitution of names—Limitation.* Of two appellants in a civil appeal, one died and the other became an insolvent. Neither the representatives of the deceased appellant nor the official assignee applied within the time limited by the Court for substitution in place of the [illegible]

Assignee to appear and apply for the restoration of his name on the record after the adjudication is annulled, until an order is obtained under O. XXI, r. 8, of the Code of Civil Procedure, the proceedings cannot abate and must be deemed to continue. KHUNNI LAL *v.* RAMESHAR

I. L. R. 43 All. 621

———— **O. XXII, r. 9 (1882 Code, ss. 371 and 372)**—

See EXECUTION OF DECREE.

4 Pat. L. J. 240

See LIMITATION ACT, 1908, s 5.

I. L. R. 36 All. 235

———— *Abatement of appeal—Application for substitution presented after time—Act No IX of 1908 (Indian Limitation Act), s. 5.* Whether or not a formal order to that effect is passed, a suit or appeal abates automatically when no application is made within time to bring upon the record the representative of a deceased plaintiff or appellant. If no formal order has been made, an application for substitution must be considered as an application under O. XXII, r. 9 (2), of the Code of Civil Procedure. Under the rule above-mentioned a court is competent to decide whether in the circumstances of the case [illegible]

v. MUHAMMAD YUSUF . **I. L. R. 42 All. 540**

CIVIL PROCEDURE CODE (ACT V OF 1908)
—*contd.*

———— **O. XXII, r. 10 (1882 Code, s. 372)**—

See O. I r. 10 . . **2 Pat. L. J. 199**

See O. XXI, r. 16 . **6 Pat. L. J. 358**

See Parties . **I. L. R. 40 Calc. 328**

1. ———— *Assignee's application to be substituted for plaintiff, and to add plaintiff's son as defendant—Ex parte order upon unsworn petition—Ex parte order if may be recalled —Notice to parties interested, necessity of.* A judicial order which may possibly affect or prejudice any party cannot be finally made unless he has been afforded an opportunity to be heard. When a person alleging to be the assignee of the interests of the plaintiff applied to be substituted in his place, and prayed that the plaintiff and his son who was no party to the suit be made defendants, and the Court made the order as prayed *ex parte* and without notice to the plaintiff. *Held*, that all orders of this character made *ex parte* are subject to the implication that they may be revoked at the instance of any party prejudicially effected thereby, and the Court has inherent power to give such directions as the justice of the case may require. That it was incumbent on the Court to reconsider the order in so far as it directed the substitution of the applicant in the place of the plaintiff, when the latter preferred objections to the order. That the addition of the plaintiff's son who was no party to the suit (though he himself had consented to be so added) could not be made without hearing the defendant as the applicant appeared, by that means, to be really seeking a relief not included in the plaint as originally framed. *Semble.* Applications of this character should be supported by an affidavit. Ajant Singh *v.* F. T. Christian (1912)

17 C. W. N. 86

2. ———— *Lease, forfeiture of —Insolvency of a defendant—Vesting of his estate and effects in the Official Assignee—Refusal of Official Assignee to defend the suit—Inability of defendant to defend independently of the Official Assignee—Practice.* In a suit by the lessor against the lessee for forfeiture of a lease by reason of breaches of covenant, no cause of action survives against a defendant who has become insolvent and whose estate has vested in the Official Assignee. If in such a case the Official Assignee refuses to defend a suit affecting the estate of the insolvent, the latter cannot defend independently of the Official Assignee. Tribhovandas Narotamdas *v.* Abdulally Hakimji (1914)

I. L. R. 39 Bom. 568

3. ———— *Preliminary decree—Sale of mortgaged property—Right of purchaser to be made a party to the suit.* A preliminary decree for redemption of a usufructuary mortgage was passed in 1908, but there was an appeal, and the decree of the High Court, which confirmed the decree of the Court below, was passed in 1910, and the time for payment of the mortgage money was extended. After the time fixed for payment had expired, but before the final decree was passed, the plaintiff decree-holder sold the mortgaged property, leaving with the purchasers a sum sufficient for redemption. *Held*, that the suit was still pending at the time of the sale and the purchasers entitled to have their names entered in the record as plaintiffs. *Bhugwan Das Khettry* v. *Nilkanta Ganguli, 9 C. W. N. 171,* referred to. Muhammed Masih-ullah *v.* Jarao Bai (1915).

I. L. R. 37 All. 226

CIVIL PROCEDURE CODE (ACT V OF 1908)
—*contd.*

———— **O. XXII, r. 10 (1882 Code, s. 372)**
—*contd.*

4. ———— *Whether r. 10 includes leases granted* pendente lite—*addition of lessees* pendente lite *to the proceedings.* The language of r. 10 of O. XXII of the Code of Civil Procedure, 1908, is sufficiently wide to cover the case of leases granted by defendants during the pendency of a case. Where the defendants, during the pendency of the litigation, had leased several mica mines included in the property in suit, for a period of 20 years, to one person and for a shorter period to another person, *held,* that "interests" were created in the property in suit within the meaning of r. 10 of O. XXII, in favour of the lessees, and that the plaintiffs were entitled to have the lessees added as parties to procedings taken to ascertain the mesne-profits due to the plaintiffs under the decree in the suit and to compel the lessees to account for any profits which they had received from the land. Ram Kumar Lal Bhagat *v.* Raja Makund Sahi . . . **1 Pat. L. J. 596**

———— **O. XXII, rr. 10 and 13**—

See s. 47. . . **4 Pat. L. J. 166**

———— **O. XXII, r. 11 (1882 Code, s. 582)**—

See Limitation Act, 1908, Art. 182.
5 Pat. L. J. 731

———— **O. XXII, r. 12**—

See O. XXII, r. 4. **25 C. W. N. 595**

———— **O. XXIII, r. 1 (1882 Code, s. 373)**—

See s. 115 . **I. L. R. 44 Calc. 454**
1. R. J.

See Contract Act, IX of 1872, ss. 134, 137 . . **I. L. R. 39 Bom. 52**

See Jurisdiction (meaning of).
I. L. R. 48 Calc. 138

See Letters Patent, 1865, cl. 15.
I. L. R. 45 Bom. 377

See Limitation **I. L. R. 46 Calc. 168**

See Probate . . **2 Pat. L. J. 535**

See Withdrawal of Suit.
3 Pat. L. J. 651

———— *Withdrawal without permission—Suit for ejectment—Insufficiency of notice to quit—Withdrawal of the suit without permission of the Court—Fresh suit after proper notice—Whether the previous suit a suit for the same subject matter—Res Judicata—Subject matter, meaning of.* A suit was brought by the plaintiff to eject the defendant. Finding however that there was no sufficient notice to quit, he withdrew the suit without obtaining the leave of the Court. Subsequently the plaintiff having given a formal notice to quit brought a fresh suit for ejectment. The defendant contended that the withdrawal of the former suit without permission operated as a bar to the second suit under O. XXIII, r. 1 of the Civil Procedure Code, 1908. *Held*, that the withdrawal did not operate as a bar as the previous suit was not a suit for the same subject matter as the second suit within the meaning of O. XXIII, r. 1 of the Civil

CIVIL PROCEDURE CODE (ACT V OF 1908) *—contd.*

——— **O. XXIII, r. 1 1882 Code, s. 373)** *—contd.*

Procedure Code, 1908. 'Subject-matter' means 'the series of acts or transactions alleged to exist giving rise the relief claimed.' RAKHMABAI *v.* MAHADEO NARAYAN (1917) I. L. R. 42 Bom. 155

——— *Withdrawal of suit when to be allowed.* Courts in India have no general power of dismissing a suit with liberty to the plaintiff to bring a fresh suit on the same matter. The only power they have in this respect is that given by O. XXIII, r 1, sub-r. (2), Civil Procedure Code It is not the object of that Rule to enable the plaintiff, after he has failed to conduct his suit with proper care and diligence and after his [illegible] failed to support his case, to obtain [illegible] fresh in [illegible] miscondu[illegible] opposite [illegible] CHANDRA [illegible]

——— *Trial of a suit—Close of the trial after recording all evidence produced* [illegible] closed and [illegible] the Court gave time to the plaintiff to adduce documents to counteract the effect of the documents already produced by the defendant. On the plaintiff's inability to adduce the documents on the appointed day, he applied for leave to withdraw from the suit with permission to file a fresh one on the same cause of action and the Court having passed an order granting the leave: *Held,* setting aside the order, that the Court acted with material irregularity in the exercise of its jurisdiction. The hearing was finished and it was improper to allow plaintiff to try and produce docume[illegible] ments. ments [illegible] fendan[illegible] suit. [illegible] I. L. R. 37 Bom. [illegible]

——— *Appellate Court, powers of—Withdrawal of suit. Held,* that an Appellate Court can, under O. XXIII, r. 1, of the Code of Civil Procedure (1908), give a plaintiff whose suit has been dismissed by the Court of first instance, permission to withdraw his suit and give him leave to institute a fresh one. *Ganga Ram* v. *Data Ram, I. L. R. 8 All. 82,* followed. *Choragudi Chinna Kotayya* v. *Raja Varada Raja Appa Row, 27 Mad. L. J. 244,* and *Eknath* v. *Ranoji, I. L. R. 35 Bom. 261,* dissented from. AFZAL BEGAM *v.* AKBARI KHANUM (1915). I. L. R. 37 All. 326

——— *Withdrawal of a suit in Appellate Court—Power of the Court to* [illegible] *permission to withdraw with liberty to file a fresh suit—Jurisdiction.* An Appellate Court can, [illegible] an appeal has been admitted, and [illegible] parties are represented before it, allow [illegible] to withdraw his case on proper [illegible] him to start afresh. *Eknath* v. [illegible] *Bom. 261,* distinguished. [illegible] *v.* DAHYABHAI GOVIND [illegible]

CIVIL PROCEDURE CODE (ACT V OF 1908) *—contd.*

——— **O. XXIII, r. 1 (1882 Code, s. 373)** *—concld.*

——— *Order for with-* [illegible] *a fresh suit, if* [illegible] *circum-* [illegible] rder for [illegible] a fresh suit made under O. XXIII, [illegible] ocedure Code, but in circumstances not within the scope of the Rule, *cannot be treated as an order made* without jurisdiction; such an order is consequently not null and void. A fresh suit instituted upon leave so granted is not incompetent. The Court trying the subsequent suit is not competent to enter into the question whether the Court which granted the Plaintiff permission to withdraw the *first suit with liberty to bring a fresh suit* had properly made such order HRIDAY NATH ROY *v.* RAM CHANDRA BARNA SHARMA . 24 C. W. N. 723

——— Inability to produce important evidence is not sufficient ground for granting permission to withdraw a suit with liberty to file a fresh one on the same subject matter. UCHANT AHIR *v.* BASAWAN AHIR

6 Pat. L. J. 113

——— *Application to withdraw from suit with liberty to sue again—Court, if may grant application but without liberty.* Where the trial Court, being of opinion that no sufficient ground had been made out for allowing the plaintiff to withdraw from the suit with liberty to institute a fresh suit in the same cause of action, passed order allowing him to withdraw without such leave: *Held,* that the suit was not disposed of by the order. Where a plaintiff does not desire to withdraw from the suit unless with liberty to bring a fresh suit, and the Court considers that such liberty ought not to be granted, the proper course is simply to dismiss the application. *Mohant Biharidasji Guru Govindasji* v. *Parshotamdas Ramdas, I. L. R. 32 Bom. 345,* followed. SURADHANI DEBYA *v.* CHANDRA NATH PRAMANIK (1915)

20 C. W. N. 1011

——— *Suit dismissed by trial Court, on evidence allowed to be withdrawn with liberty to sue again by appeal Court, though no formal defect by reason of which suit might fail was made out—Fresh suit if barred—Res judicata.* Where a contested suit, in which evidence was called on both sides, having been dismissed by the [illegible] Court, the plaintiff was allowed by the [illegible] Court to withdraw from the suit with [illegible] bring a fresh suit, though no formal [illegible] reason of which the suit would [illegible] and really because the plaintiff [illegible] duce the necessary evidence [illegible] the order of the [illegible] jurisdiction and a [illegible] the same [illegible] was [illegible]

CIVIL PROCEDURE CODE (ACT V OF 1908)
—*contd.*

——— **O. XXIII, r. 1 (2) (a) and (b), O. VII, r. 10 and s. 115**—*Withdrawal of suit—Suit grossly under valued in the plaint—Real valuation beyond the jurisdiction of the District Munsif's Court—Application by plaintiff for leave to withdraw portion of the suit with liberty to bring fresh suit—Leave, whether properly can be granted—Judicial discretion — Jurisdiction—Ejusdem—generis—Material irregularity in exercise of jurisdiction—' Other sufficient grounds' in O. XXIII, r. 1 (2) (b), construction of.* The plaintiffs instituted a suit in a District Munsif's Court for recovery of possession of several items of immoveable property including a house, valuing the house at Rs. 200 and other items at Rs. 1,917 and odd for purposes of jurisdiction. The defendant objected that the house was grossly under-valued and that the suit was, on proper valuation beyond the jurisdiction of the District Munsif. A commissioner, appointed to ascertain its value, reported that the house alone was worth Rs. 6,500. The plaintiff thereupon applied to the Court for leave to withdraw the suit in respect of the house with liberty to bring a fresh suit therefor: the Court granted the application, notwithstanding the objection of the defendant. The latter preferred a Civil Revision Petition to the High Court against the order. *Held,* that, assuming that the lower Court had jurisdiction to act under O. XXIII, r. 1 (2) (*b*) it acted with material irregularity in the exercise of its jurisdiction, as it did not exercise a *judicial discretion* in passing the order; that the plaintiff ought not to have been permitted to withdraw his claim for the house, as the undervaluation in the plaint was so gross that he could not have acted honestly in doing so and did not deserve any indulgence from the Court; and that consequently the High Court should interfere under s. 115 of the Civil Procedure Code and set aside the order. *Per* SADASIVA AYYAR, *J.* The words 'other sufficient grounds' O. XXIII, r. (*2*) (*b*), should not be interpreted *ejusdem generis* with 'formal defect' in r. 1 (*2*) (*a*). Limits of the doctrine of *ejusdem generis* discussed. After a Court of first instance has come to the conclusion that the suit as brought is beyond its jurisdiction, it has no power to pass any other judicial order in the suit except those which the statute expressly empowers it to pass, such as an order returning the plaint for presentation to the proper Court under O. VII, r. 10, or an order awarding costs under s. 35 of the Code. KANNUSWAMI PILLAI *v.* JAGATHAMBAL (1918).

I. L. R. 41 Mad. 701

——— **O. XXIII, r. 1 (3)**—*Suit by reversioners to declare an alienation invalid during widow's lifetime, withdrawal of—Subsequent suit after widow's death, for possession—Defence, the same as in the first suit—Subsequent suit not barred by Civil Procedure Code, O. XXIII, r. 1 (3).* The next presumptive reversioners of a deceased Hindu instituted a suit against his widow and her alienee for a declaration that an alienation by her was invalid, and not binding on them. Pending the suit, the widow died and the reversioners withdrew the suit but did not ask for permission to bring a fresh suit. They subsequently brought a suit against the alienee for the recovery of possession of properties from him and he set up the very same defences on the merits which he had set up in the first suit.

CIVIL PROCEDURE CODE (ACT V OF 1908)
—*contd.*

——— **O. XXIII, r. 1 (3)**—*concld.*

Held, that the subsequent suit was not barred by the provision of O. XXIII, r. 1 (*3*), Civil Procedure Code (Act V of 1908). Where the cause of action and the relief claimed in the second suit are not the same as the cause of action and the relief claimed in the first suit, the second suit cannot be considered to have been brought in respect of the same subject-matter as the first suit and the plaintiff in the second suit is not debarred from contesting the allegations made by the defence in the first suit. *Gopal Chandra Banerjee* v. *Purna Chandra Banerjee, 4 C. W. N. 110,* followed. *Achuta Menon* v. *Achutan Nair, I. L. R. 21 Mad. 35, Machana Uajhala Dikshatulu* v. *Gorugantulu Yaggamma, (1910), Mad. W. N. 782,* and *Sennava Reddiar* v. *Venkatachala Reddiar, 2 M. L W. 177,* overruled. SINGA REDDI *v.* SUBBA REDDI (1915)

I. L. R. 39 Mad. 987

——— **O. XXIII, r. 1 and s. 107 (2)**—*Whether an Appellate Court has power to allow the withdrawal of the suit with liberty to file a fresh suit. Held,* by the Full Bench, that it is open to an Appellate Court in proper cases, when reversing the decree of the lower Court, to give the plaintiff leave to withdraw the suit, with liberty to file a fresh suit. *Choragudi China Kotayya* v. *Raja Varadaraja Appa Row, 27 Mad. L. J. 244,* overruled. KAMAYYA *v.* PAPAYYA (1916)

I. L. R. 40 Mad. 259

——— **O. XXIII, r. 1, s. 115**—*Application by plaintiff to withdraw suit with leave to bring a fresh one made when hearing of suit was nearly concluded—Leave granted to bring a fresh suit—Exercise of discretion—Revision.* A suit was instituted in the Court of the Munsif. After the evidence had concluded and either during or after the argument, the plaintiffs applied for leave to withdraw with liberty to bring a fresh suit. They based their application upon the fact that they had failed to give formal proof of a plaint which was essential to their success. The Court granted leave to bring a fresh suit. Upon an application in revision against this order. *Held,* that the Court had jurisdiction to grant leave to the plaintiffs to bring a fresh suit, and the fact that the Court may have exercised, and probably did exercise, a wrong discretion in granting the plaintiffs' application was not sufficient to bring the case within the purview of s. 115 of the Code of Civil Procedure. JHUNKU LAL *v.* BISHESHAR DAS (1918)

I. L. R. 40 All. 612

——— **O. XXIII, r. 2**—
See HINDU LAW—PARTITION.
I. L. R. 48 Calc. 1059

——— **O. XXIII, r. 3, (1882 Code, s. 375)**—
See ARBITRATION . **25 C. W. N. 127**

See COMPROMISE.
3 Pat. L. J. 43 and 255

See DEKKHAN AGRICULTURISTS' RELIEF ACT, s. 15-B . **I. L. R. 37 Bom. 614**

See HINDU LAW—PARTITION.
25 C. W. N. 990

See PROBATE AND ADMINISTRATION ACT, s. 83 . . . **1 Pat. L. J. 377**

1. ——— *Compromise—Terms outside the scope of the suit, recorded in the*

CIVIL PROCEDURE CODE (ACT V OF 1908) *contd.*

—— O. XXIII, r. 3, (1882 Code, s. 375)— *contd.*

decree—Decree so far as it relates to the suit, effect of—Terms forming consideration for those relating to the subject matter of the suit—Decree, not ultra vires—Objection in execution, maintainability of—Contract Act (IX of 1872), ss. 38 and 54—Reciprocal promises—Non-performance by one party wrongfully—Consequent non-performance by the other, rightfully

simple money-bond executed by the first defendant and the father of the second and third defendants. The parties entered into a compromise by which the disputes between them, including the claim in the suit, were adjusted and a decree was passed in the suit in accordance with the compromise 'so far as it related to the suit' Under the compromise the defendants agreed to get a release of certain properties which had fallen to the share of the plaintiff in a partition between the plaintiff and the first defendant and some other properties purchased by the former from the latter, from the claims of a mortgagee (decree-holder) of the same, on the plaintiff depositing in Court within a certain time a sum of money for payment to the mortgagee towards his decree. The plaintiff failed to deposit the amount. The defendants gave notice to the plaintiff, by a posted letter offering to get a release of the properties if the plaintiff paid the amount in one week, but the plaintiff did not pay

the compromise-decree to recover a sum of money as due to them under the compromise, alleging that they had performed or offered to perform the conditions laid on them under the compromise The plaintiff contended that the defendants could not recover the amount as the claim for it could not be deemed to have been included in the decree, and if it were included the decree was *ultra vires*, and further that the defendants, having failed to fulfil their part of the agreement, were not entitled to enforce the other terms of the compromise. *Held*, that all the terms recorded in the compromise decree which formed part of the consideration for the adjustment of the subject-matter in the suit, must be deemed to be part of the decree and can be enforced in execution proceedings. A compromise-decree, even if it includes matters beyond the scope of the suit, is not *ultra vires*, and no objection can be taken to the enforcement of the same in execution proceedings. When the parties to a contract fail to perform their reciprocal promises, the one wilfully and the other because he was not bound to fulfil his part unless the former had fulfilled his preliminary part, the contract itself comes to an end by the acts of both the parties except for the purpose of enabling the innocent party to claim compensation from the other. An offer of performance must be unconditional, if it is to have the same effect as performance. A mere offer by a posted letter that the party liable was ready to execute a release without having a document of release ready, is not a valid offer under s. 38 of the Contract Act. *Held* (on the facts of the case), that though the plaintiff failed to pay the

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

—— O. XXIII, r. 3, (1882 Code, s. 375)— *contd.*

money into Court, as the defendants failed to fulfil their part of the agreement to make a valid unconditional offer to perform the same, and as the defendants disabled themselves from performing their part by reason of the purchase of the properties by the third defendant, the defendants were not entitled to enforce the other terms included in the compromise-decree. SABAPATHY *v.* VANMAHALINGA (1914) . . **I. L. R. 38 Mad. 959**

2. —————— *Lawful compromise—Hindu Law—Office of archaka, alienation of—Custom, validity of—Disqualification of females to perform duties of—Right of females to inherit—Performance of duties by proxy—Public policy—Undue influence—Low price, effect of—Contract Act (IX of 1872), s 16, cl (2).* Where the parties to a suit instituted in respect of a half share in the *archaka* miras in a Saivite temple, entered into a compromise during the pendency of a Second Appeal in the case, by which one of the parties alienated for a pecuniary benefit a portion of his right to the office in favour of the other party (who was a female), and the latter applied by a petition to the High Court to pass a decree in accordance with the compromise: *Held*, that the compromise was not lawful and that no decree could be passed in accordance therewith under O XXIII, r. 3, of the Civil Procedure Code. *Per* SADASIVA AYYAR, J An alienation of a religious office by which the alienor gets a pecuniary benefit cannot be upheld, even if a custom is set up sanctioning such an alienation It is the settled custom that females by reason of their sex are permanently disqualified from performing the duties of an *archaka* in a Saivite temple. A person, who is permanently disqualified to do the duties of an office, cannot inherit the office while at the same time delegating the duties to others, whether the permanent disqualification is the result of conversion to any other religion or insanity or sex A trusteeship for secular purposes can be held by a female. The fact that a person is obliged to part with his property for what he considers an unduly low price owing to his pressing necessities, is not a ground for holding that the contract is vitiated by undue influence. SUNDARAMBAL AMMAL *v.* YOGAVANAGURUKKAL (1914).
I. L. R. 38 Mad. 850

3. —————— *Compromise—Petition of compromise filed in subsequent suit—Registration—Registration Act (XVI of 1908), s. 17.* In a suit for a declaration of title to certain immovable property, the plaintiff applied to the Court stating that the suit had been compromised and ... might be made under O. XXIII, ... In support of ... petition which ... by both parties ... gs for mutation of names in respect of the same property as was in the dispute in the Civil Court, and which set forth that the matter before the Revenue Court had been ... stated ... The ... by the ... was end- ... dispute ... ence in the Civil Court that the matter between the parties had been adjusted out of Court.

CIVIL PROCEDURE CODE (ACT V OF 1908)
—*contd.*

———— O. XXIII, r. 3, (1882 Code, s. 375)—*concld.*

and that it did not require to be registered. SITAL PRASAD *v.* GOBIND PRASAD (1915)

I. L. R. 38 All. 75

4. ———— *Order recording petition of compromise—Jurisdiction of Court to decide whether suit has been settled out of Court when one party denies the settlement—Absence of authority of persons negotiating compromise.* There can be no doubt that when one party alleges, and the other denies that a suit has been settled by a lawful agreement out of Court, the Court has power to decide whether there has been such a settlement and if this question is decided in the affirmative to grant a decree in accordance with the agreement. The Full Bench decision in *Broja Durlabh Sinha* v. *Romanath Ghose, I. L. R. 24 Calc. 908 : s. c. 1 C. W. N. 597,* has been now given effect to by the alterations made from the language of s. 375 of the Civil Procedure Code of 1882 in O. XXIII, r. 3 of the Code of 1908. In this case the High Court on a consideration of the circumstances set aside the order of the lower Court recording a petition of compromise on the ground that none of the persons who took part in the negotiations were authorized to effect a compromise that was binding on the parties to the suit. ANADI KRISHNA DUTT *v.* PRIYA SHANKAR MAJUMDAR (1916).

21 C. W. N. 366

———— O. XXIII, r. 3, and s. 96, cl. (3)—*Compromise—Power of vakil to enter into—Construction of vakalat—Recording of compromise—Duty of Court to inquire—Decree in terms of compromise—Appeal, when allowed.* A *vakalat* containing a provision authorizing the vakil "to present if necessary petitions for *razinama*, for withdrawal and for referring to arbitration and to sign the *razinama*, etc., petitions," does not give authority to the vakil to enter into a compromise without reference to his clients. An appeal lies against a decree passed in accordance with a compromise, where the authority to enter into it, is impeached. *Ayyagiri Veerasalingam* v. *Koopur Basivi Reddi, 27 Mad. L. J. 173,* followed. *Jagapati Mudaliar* v. *Ekambara Mudaliar, I. L. R. 21 Mad. 274,* and *Raghoji Rao* v. *Lakshman Rao Sahib, 22 Mad. L. J. 381,* referred to. Duty of Courts to scrutinize compromises before recording them pointed out. THENAL AMMAL *v.* SOKKAMMAL (1917) . . . I. L. R. 41 Mad. 233

———— O. XXIII, r. 3, O. VIII, rr. 8 and 9 and second Sch. paras. 1 to 17 and paras. 20 and 21—*Reference to arbitration after suit without intervention of Court—Award—An agreement to refer to arbitration combined with the award is an adjustment or compromise of the suit—Parties may plead the award and have case set down for hearing on the issue whether the award is binding or the adjustment be recorded—Parties cannot proceed by motion—Practice—Procedure.* The plaintiffs filed a suit against the defendants claiming Rs. 2,925 as damages for breach of a contract. Subsequently, the parties referred the matters in dispute by an agreement of reference to the sole arbitration of R. S. without the intervention of the Court. Both the parties attended the first meeting before R. S.; but before the second meeting was held, when only the defendants were present, the plaintiffs wrote to R. S. that they revoked his authority as arbitrator and cancelled the submission. R. S., however, made his award allowing Rs. 1,750 only for damages and Rs. 56 for costs to the plaintiffs. The plaintiffs then moved for an *ex parte* decree on the ground that the defendants had not filed their written statement but the Court gave time to the defendants to enable them to file the award. Thereafter, the defendants moved the Court that the award should be recorded as an adjustment or compromise of the suit, and for a decree being passed in terms thereof. Kajiji J. dismissed the motion holding (i) that the award could not be recorded as an adjustment under O. XXIII, R. 3 and (ii) as the agreement to refer had been made without the intervention of the Court while a suit was pending, the award was not valid and the application could not be made under the Second Schedule of the Civil Procedure Code. The defendants appealed. *Held,* allowing the appeal, (1) that the award could not be regarded as invalid merely because it was made in a reference by parties to the suit without the intervention of the Court, but that the Court should have tried the issue whether the award was not binding upon the parties under the general principles of the law of contract by proceeding under O. XXIII, R. 3; (2) that the order giving the defendants time to file the award when the plaintiffs moved for an *ex parte* decree was wrong, and the Court should have ordered the defendants to file their written statement pleading the award. The view expressed by the English Courts in *Storey* v. *Bloxam* (1796) 2 *Esp. 504* and *Doleman & Sons* v. *Ossett Corporation (1912), 3 K. B. 257* that an award made on an agreement to refer after writ should be pleaded as a plea *puis darrein continuance,* referred to and followed. O. XXIII, R. 3 of the Civil Procedure Code, contains provisions corresponding to the plea of "accord and satisfaction" after writ. For the purposes of such a plea, the agreement to refer to arbitration after suit together with the award thereon is on the same footing as a direct settlement between the parties. But the award to be effective for such a plea must be a valid one according to the general rules of law governing the validity of awards in arbitration proceedings. MANILAL MOTILAL *v.* GOKALDAS ROWJI.

I. L. R. 45 Bom. 245

———— O. XXIII, r. 3 and O. XXXIV, r. 5—*Mortgage—Preliminary decree—Adjustment between date of preliminary decree and final settlement of accounts.* The question of what is actually due upon a mortgage on the date of the final taking of accounts is a matter relating to the suit. Although O. XXXIV, R. 5, of the Code of Civil Procedure contemplates that all payments made upon a preliminary decree should be paid into court there is nothing to justify the view that O. XXIII, r. 3, does not apply to adjustments of accounts made between the date of the preliminary decree and the date on which the accounts between the parties are finally settled. JOGENDRA PRASAD NARAIN SINGH *v.* GOURI SHANKAR PRASAD SAHU.

2 Pat. L. J. 533

———— O. XXIII, XLI, r. 11—*Suit to recover possession—Dismissal of suit—Appeal—Application for withdrawal of suit with leave to bring a fresh*

CIVIL PROCEDURE CODE (ACT V OF 1908)
—concld.

——— **O. XXIII, XLI, r. 11**—*contd.*

suit—Power of the Court. Plaintiff's suit to recover possession of lands having been dismissed by the first Court, he appealed to the District Court and, before the admission of the appeal, he applied to that Court for leave to withdraw the suit and bring a fresh suit. The application was heard and granted by the District Judge without any notice to the defendant. The defendant having applied for revision, under the extraordinary jurisdiction (s. 115 of the Civil Procedure Code, Act V of 1908), of the order granting the withdrawal. *Held,* setting aside the order, that it was beyond the power of the Court to allow a withdrawal from a suit with leave to file a fresh suit on the same cause of action after the defendant had obtained a decree in his favour. EKNATH v. RANOJI (1911).

I. L. R. 35 Bom. 261

——— **O. XXIII, r. 3, Sch. II, cls. 1, 16**—*Suit—Reference to arbitration without leave of Court—Application to stay further progress of the suit—Application not according to law.* After the institution of a suit, the plaintiff and one of the defendants entered into an agreement to submit the matter in difference between them to arbitration without the leave of the Court. Thereupon, the defendant having applied to the Court to stay the ... ted the ... at the ... of the ... XXIII, ... 1908). On appeal by the defendant the District Judge confirmed the order. The defendant having applied under the extraordinary jurisdiction. *Held,* confirming the order, that where the Court was seized of a cause, its jurisdiction could not be ousted by the private and secret act of parties, and if they, after having invoked the authority of the Court and placed themselves under its superintendence, desired to alter the tribunal and substitute a private arbitrator for the Court, they proceed according to the law laid down in the first sixteen clauses of the Second Schedule of the Civil Procedure Code (Act V of 1908). *Held,* further, that parties litigating in Court had perfect liberty to compose their differences amongst themselves into any lawful agreement, compromise or satisfaction, and that when this was done, they had only to apply to the Court under O. XXIII, r. 3, of the Civil Procedure Code (Act V of 1908), but that a mere agreement to refer to arbitration, even though in other respects valid, could not be such an adjustment in whole or in part of the suit as the Court could give effect to under O. XXIII, r. 3. VYANKATESH MAHADEV v. RAMCHANDRA KRISHNA (1914). . . **I. L. R. 38 Bom. 687**

——— **O. XXIV, rr. 1, 2 and 3**—When ...

I. L. R. 40 All. 125

See PRACTICE . **I. L. R. 35 Bom. 339**

——— **O. XXV, r. 1 (1882 Code, ss. 380, 382)**—*Addition of parties at late stage of case—Order for security for defendant's costs—Poverty of plaintiff if alone can justify such order.* The plaintiff before bringing the suit made an agreement with one *S*

CIVIL PROCEDURE CODE (ACT V OF 1908)
—contd.

——— **O. XXV, r. 1 (1882 Code, ss. 380, 382)**—*contd.*

by which the latter undertook to advance any amount that might be necessary to prosecute the suit up to the Privy Council. The amount so advanced was to be realised from any property recovered by a final decision or on compromise and the plaintiff and *S* agreed to divide equally the balance of what was recovered. *S* was to be able to compromise the suit and if the suit was unsuccessful the plaintiff was not to be liable to *S* for costs. The plaintiff brought the suit on the 31st July 1911. It came on for hearing on the 1st April 1913. The plaintiff closed his case on 22nd April and just before that the defendant applied to the Court to have *S* made a plaintiff and to have *S* and the plaintiff ordered to give security for the payment of the defendant's costs. The Court refused to make *S* a plaintiff, but ordered the plaintiff to give security for the costs of the suit up to Rs 5,000. The High Court issued a rule to show cause why *S* should not be made a defendant and why the order about costs should not be set aside. *Held,* that *S* should not be made a party defendant partly because the original application to make *S* a party plaintiff was made at too late a stage of the case and partly because it did not appear that *S* had any actual present interest in the property. That the order about costs was not made and could not be supported under O XXV, but the Court has inherent power to make it. The question, however, which should determine the granting of such an order was whether the plaintiff had got a substantial interest in the suit or was he suing for another as a mere puppet. Such an order could not be made merely because the plaintiff was a poor man, and the lower ...

Chetty v. *Runga Krishna, L. R. 1 I. A. 241, 264 : s c 22 W. R. 149, 152* HARI NATH SINGH v. RAM KUMAR BAGCHI (1913) . **18 C. W. N. 119**

——— *Woman plaintiff—Ap-* ...

to pay Rs. 5,000 or such other sum as the Court should think fit as damages. *D* took out a summons in Chambers calling upon *N* to show cause why she should not give security for the payment of *D*'s costs under O. XXV, r. 1, Civil Procedure Code (Act V of 1908). *Held,* that, under the circumstances of the case, it would be a wrong use of the Court's discretion if the Court practically defeated the suit at that stage when it was almost, if not quite, ripe for hearing, by ordering the plaintiff to lodge security. *Held,* further, that the Court was entitled, as a discretion was given it to exercise that ...

——— *Female plaintiff, security for costs from—Suit to recover ornaments or their value if suit for payment of money.* A suit by a

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

—————— **O. XXV, r. 1 (1882 Code, ss. 380, 382)**—*concld.*

lady against the adopted son of her deceased husband and others for a declaration of her title to certain ornaments and other moveable properties alleged to have been wrongfully removed from her custody by the defendants and for recovery of possession of the same and in the alternative for the value of the properties, was a suit for payment of money within the meaning of O. XXV, r. 1, cl. (*3*), of the Civil Procedure Code. *Degumbari Debi* v. *Ashutosh Banerjee, I. L. R. 17 Calc. 610, Sonabai* v. *Tribhowandas Narotamdas Malvi, I. L. R. 32 Bom. 602,* followed. ANANDAMOI CHOWDHURANI *v.* GOKUL CHANDRA ROY (1912). **16 C. W. N. 763**

—————— **O. XXV, r. 1 and O. XXXIII, r. 1**—*Order for security for costs—Leave granted to continue suit as a pauper—Practice.* An order to give security for costs obtained in a suit filed in the ordinary course must cease to operate as regards antecedent costs if leave is given to continue the suit as a pauper, provided the leave is granted before the time limited for giving security has expired. BAI LAXMI *v.* HARJIVAN NATHU (1911). **I. L. R. 36 Bom. 415**

—————— **O. XXVI, r. 1 (1882 Code, s. 383)**—*Commission to examine witnesses.* The Courts should not allow witnesses to be examined on commission without adequate reasons. PANACHAND CHHOTALAL *v.* MANOHARLAL NANDLAL (1917) . . . **I. L. R. 42 Bom. 136**

—————— **O. XXVI, r. 9 (1882 Code 392)**—

See RIGHT OF SUIT.
I. L. R. 39 Mad. 501

—————— *Agra Tenancy Act (II of 1901), s. 164—Suit for profits—Commissioner appointed to report as to actual collections—Evidence—Admissibility of report. Held,* that the report of a commissioner appointed by a Court of Revenue to ascertain the amount of actual collections in a suit for profits under s. 164 of the Agra Tenancy Act is admissible in evidence having regard to rr. 9, 16, 17, 18 of O. XXVI of the Code of Civil Procedure. BAKHTAWAR LAL *v.* SHEO PRASAD (1917). . **I. L. R. 39 All. 694**

—————— **O. XXVI, r. 9, and O. XVIII, r. 18**—*Commission for local investigation—Personal inspection by Judge—Old Code (Act XIV of 1882), s. 392—Alteration in language, effect of.* Under O. XXVI, r. 9, read with O. XVIII, r. 18, of the Civil Procedure Code a Judge has power to make a local investigation in person in any case in which he sees fit to do so for he can issue a commission for local investigation if he thinks fit, irrespective of the question whether it is convenient for himself to conduct the investigation in person. The Privy Council in *Kessowji Issur* v. *Great Indian Peninsula Railway Company (1907), I. L. R., 31 Bom. 381 (P. C.)*, does not lay down that Judges should under no circumstances hold an inspection of the site in dispute but only objects to opinions being formed upon an inspection made under conditions quite different from those which were material to the question at issue at the trial. SABAPATHY PATHAN *v.* PERUMAL PADAYACHI (1921). **I. L. R. 44 Mad. 640**

—————— **O. XXVI, r. 10 (1882 Code 393)**—*Commissioner, right of parties to examine—Court's leave if may be withheld arbitarily—Report not*

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

—————— **O. XXVI, r. 10 (1882 Code 302)**—*contd*

giving reasons for conclusion. The Legislature in making the report of the Commissioner, admissible in evidence by itself and his examination in connection therewith subject to the Court's leave intended to afford protection to him from vexatious examination at the instance of either party. The permission to examine the Commissioner cannot, however, be arbitarily withheld. When the Commissioner has not given reasons for his conclusions it is a proper case for the examination of the Commissioner as a witness. SITARAM *v.* RAMA PROSAD RAM (1913) . . . **18 C. W. N. 697**

—————— **O. XXVI, rr. 11 and 12—(1882 Code, ss. 394 and 395)**

See s. 2 . . **I. L. R. 38 Bom. 392**

—————— **O. XXVI, rr. 16, 17, 18—(1882 Code, ss. 398 to 400)**

See O. XXVI, R. 9 .
I. L. R. 39 All. 694

—————— **O. XXIX--(1882 Code, ss. 435 and 436)**

See PLAINT. . . . . .
I. L. R. 43 Calc. 441

—————— **O. XXX, r. 2**—

See INSURANCE **I. L. R. 41 Calc. 581**

—————— **O. XXXI, r. 1**—

See HINDU LAW—JOINT FAMILY.
2 Pat. L. J. 306

—————— **O. XXX, r. 2**—

See INSURANCE **I. L. R. 41 Calc. 581**

—————— **O. XXXII, r. 1 (1882 Code 440)**—*Application to sue in* formâ pauperis. The mere fact that the applicant's husband has property is not sufficient reason for disallowing her application for leave to sue *in formâ pauperis.* SHARFUNNISSA *v.* NAZNI KHANUM. . . **3 Pat. L. J. 178**

—————— **O. XXXII, r. 3**—

See O. IX, R. 13 .
I. L. R. 37 All. 179

See CHOTA NAGPUR EMCUMBERED ESTATES ACTS 1876 . .
4 Pat. L. J. 580

—————— *Appointment of certificated guardian as guardian* ad litem *R. 4, sub-r.* (3), *Courts' power to appoint a guardian without his consent—Decree against a minor where his guardian was appointed without his consent, if binding, upon him —Classes of guardians to whom sub-r.* (3) *applies—Guardians and Wards Act (VIII of 1890), s. 10, sub-s. (3)—Willingness of the guardian to act, essential—S. 99, applicability of.* The generality of the language used in O. XXXII, r. 4, sub-r. (3), makes it clear that the Legislature has prescribed that no person who is competent to act as guardian of an infant, either under sub-r. (1) or under sub-r. (2), shall be appointed guardian for the suit without his consent. The willingness of the proposed guardian is essential even in cases of appointments of guardians under the Guardians and Wards Act as guardians *ad litem.* When a person has been appointed guardian without his consent, the infant is not represented and a decree made in a suit so constituted has no binding effect

CIVIL PROCEDURE CODE (ACT V OF 1908) *—contd.*

———— **O. XXXII, r. 3**—*concld.*

upon him. The provision as to the consent of the person proposed to be appointed guardian for the suit is mandatory and imperative. The fact that the guardian preferred an appeal cannot be

SARKAR . . . . **26 C. W. N. 781**

———— *O. XXXII*, **r. 3 and 7, (1882 Code 443, 456, 462)**—

See COMPROMISE . **3 Pat. L. J. 255**

———— **O. XXXII, r. 4, (1882 Code 440, 445)**

See PROBATE . . . **24 C. W. N. 541**

See PROBATE PROCEEDINGS **24 C. W. N. 538**

———— *Existence of a guardian appointed for a minor by a competent authority—Suit and decree against such minor represented by another guardian, validity of* If a minor has a guardian appointed for him by a competent authority he alone can represent the minor in any litigation; hence a decree obtained against such a minor represented not by such guardian, but by another, though the Court Acted in ignorance of the existence of such appointed guardian is not binding on the minor. *Rashid-un-nisa* v. *Muham-* ... *'I. 572 (P. C.)*, ... *Singh (1907)*, BHIMAJI v. HUSAIN SAHIB (1920) . **I. L. R. 43 Mad. 808**

———— *Guardian* ad litem—*Consent of guardian to his appointment not necessarily express—Inference from silence of guardian—Matters for consideration when a decree against a minor is challenged.* Where a decree affecting a minor is challenged upon the ground that the minor was not properly represented in the suit against him, two questions arise—(1) whether the appointment of the guardian *ad litem* was irregular, and (2) whether the minor was in fact prejudiced by such irregularity. The question whether or not a

Barechha Ram v. *Tarak Tewari, 11 A. L. J., 589*, followed CHHATTAR SINGH v. TEJ SINGH **I. L. R. 43 All. 104**

———— **O. XXXII, r. 6 (1882 Code s. 461)**—

See s 145 . **I. L. R. 41 Mad. 40**

———— **O. XXXII, r. 7, (1882 Code 462)**—

See COMPROMISE . **3 Pat. L. J. 255**

———— *Arbitration, reference to—Minors, parties—Guardian* ad litem, *submission by, without leave of Court—Award-decree, validity of*

opened against whom. A suit can be brought on

CIVIL PROCEDURE CODE (ACT V OF 1908) *—contd.*

———— **O. XXXII, r. 7, (1882 Code 462)**—*contd.*

behalf of minors to set aside a decree passed on

obtained by a guardian *ad litem* of minors for agreeing on their behalf to refer through Court the subject-matter of a suit to arbitration; where no such leave was obtained, a decree passed on an award is not binding on the minors and a suit can be instituted on behalf of the minors to obtain a declaration that the decree does not bind them. The avoidance of a decree in a partition suit will have the effect of re-opening the whole suit in respect of all the parties thereto, and on an application being made to the Court, it will proceed with the trial of the suit. A suit will lie to set aside a decree passed on an award, when the objection raised is as to the validity of the award on the ground that no leave of Court was obtained for the submission to arbitration on behalf of minors who were parties to the suit, under O. XXXII, r. 7 of the Civil Procedure Code. *Ghulam Khan* v *Muhammad Hassan, I. L. R. 29 Calc. 167*, explained. *Raja Har Narain Singh* v. *Chaudrain Bhagwant Kuar, I. L. R. 13 All 300, Hardeo Sahai* v. *Gauri Shankar, I. L. R. 28 All. 35. Latawan* v. *Lachya, I. L. R. 36 All. 69, Lakshmana Chetti* v. *Chinathambi Chetti, I. L. R. 24 Mad 326, Venkatachalla Reddi* v. *Rangiah Reddi, 21 Mad L. J. 990, Ganesha Rao* v. *Tulajaram Row, I. L. R. 36 Mad. 295, Bhimaji Gobind* v. *Rakmabai, I. L. R. 10 Bom. 338, Tincoury Dey* v. *Fakir Chand Dey, I. L. R 30 Calc. 218, Khajooroonissa* v. *Rowshan Johan, I. L. R. 2 Calc. 184*, and *Manohar Lal* v. *Jadunath Singh, I. L. R 28 All. 585*, referred to. VIJAYA RAMAYYA v. VENKATASUBBA RAO (1915). **I. L. R. 39 Mad. 853**

———— *Minor—Decree against minor's father—Minor represented in execution proceedings by his brother as guardian* ad litem—*Compromise application by minor's mother—Leave of the Court not obtained—Compromise ineffectual without*

ceedings. The mother then executed a sale-deed of the property on the same terms as had been agreed upon by the compromise. The minor plaintiffs having sued to set aside the sale-deed. *Held*, that the sale-deed was voidable as the mother had applied to the Court to sanction the compromise and thereby she put it out of her power to settle the creditor's claim as the minor's natural guardian without the Court's consent under O. XXXII, R. 7, Civil Procedure Code ... *Per* MACLEOD, *C.J.* "Though O. XXXII, R. 7 Civil Procedure Code, 1908, applies to ...

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— **O. XXXII, r. 7, (1882 Code 462)**— *concld.*

proceedings, there seems to be a distinction between a case where minor's liability has been determined by a decree in his father's life-time and a case where the minor's liability in the first instance is in dispute. For in the former case there is a debt which the guardian is clearly entitled to pay off in full, and the fact that the judgment-creditor has issued execution against the minor making an outsider his guardian *ad litem* does not alter the situation." *Per* HEATON, *J.* "O. XXXII, r. 7, Civil Procedure Code, 1908, implies that during the continuance of the proceedings in Court, the dispute between the minor and another party which the Court had to decide could not be compromised except by the guardian *ad litem* of the minor, and by him only with the leave of the Court." GURMALLAPPA *v.* MALLAPPA MARTANDAPPA (1919).

I. L. R. 44 Bom. 574

——— *Held,* whether or not the order applies to execution proceedings its principle applies and in this case when minors were concerned in a compromise recorded in proceedings to set aside the execution proceedings the omission to record the Court's sanction did not render the compromise void especially as the minors were not prejudiced. RAMGULAM SAHU *v.* SAM SAHAI DAS . . . . . . **5 Pat. L. J. 379**

——— It cannot be inferred that the Court has sanctioned a compromise within the meaning of this order merely because the petition of compromise gave notice to the Court that interests of minors were going to be effected and that the Court passed a decree in accordance with the compromise. RAMGHULAM SAHU *v.* DURGA PERSHAD (1921). **6 Pat. L. J. 190**

——— *Minor—Next friend—Compromise in suits—Necessity for order of Court specially permitting next friend to enter into compromise on* [illegible] *minor.* Where a compromise in a su[illegible] ing [illegible] on behalf of minors appear- [illegible] is entered into on behalf of minors appearing by a next friend, it is necessary to the validity of such compromise that there should be on the record a specific order of the Court giving leave to the next friend to enter into the compromise on behalf of the minors. *Manohar Lal* v. *Jadunath Singh I. L. R. 28 All. 585*, distinguished. BADRI PRASAD *v.* GOPAL BIHARI LAL (1919).

I. L. R. 41 All. 553

——— **O. XXXII, r. 7, Sch. II (20)**—*Minor—Arbitration—Reference to arbitration out of Court by minor's guardian—Award—Application by the guardian to have the award filed—Application not an agreement with reference to suit—Minor not entitled to protection of O. XXXII, r. 7.* A dispute to which a minor was a party was submitted to arbitration out of Court by the minor's mother. After the award was published, the mother, on behalf of her minor son, applied to the Court under cl. 20 of the Second Schedule of the Civil Procedure Code, 1908, to have the award filed in order that a decree might be passed on such award. The other party did not object to such filing and the award was accordingly filed and a decree passed thereon. Subsequently the minor through his mother sued to set aside the decree. The trial Court dismissed the suit. In appeal, as the Court was of the opinion that there was a conflict between the case of *Mahadev Balkrishna*

CIVIL PROCEDURE CODE (ACT V OF 1908) *contd.*

——— **O. XXXII, r. 7, Sch. II (20)**—*contd.*

Kelkar v. *Krishnabai, (1896), P. J. 609,* and the case of *Vithaldas* v. *Dattaram, I. L. R. 26 Bom. 298,* the following question was referred to a Full Bench: When a dispute to which a minor is a party has been submitted to arbitration out of Court, and the award made upon such submission has been brought into Court, under cl. 20 of the Second Schedule, Civil Procedure Code, and the Court has been asked to file it and thereafter pass a decree upon it, neither party objecting, is not the Court bound to sanction this agreement to have the award filed and a decree passed upon it, as for the benefit of the minor, and so also to certify the decree? and if the Court fails to do so is not the minor entitled to the protection of O. XXXII, r. 7, of the Civil Procedure Code? *Held,* the question must be answered in the negative. *Held,* further, that there was no conflict between the cases of *Mahadev Balkrishna Kelkar* v. *Krishnabai, (1896) P. J. 609,* and *Vithaldas* v. *Dattaram, I. L. R. 26 Bom. 298.* HANMANTRAM RADHAKISON *v.* SHIVNARAYAN (1918).

I. L. R. 43 Bom. 258

——— **O. XXII, r. 8**—*Appeal—Insolvency of one appellant and death of the other—Abatement of appeal—Substitution of names—Limitation.* Of two appellants in a civil appeal, one died and the other became an insolvent. Neither the representatives of the deceased appellant nor the official assignee applied within the time limited by the Court for substitution in place of the deceased appellant, nor did the insolvent himself, who was said to have compounded with his creditors, apply. The defendant, on the other hand, asked for the dismissal of the suit. *Held* that, there being no limitation provided for the Official Assignee to appear and apply for the restoration of his name on the record after the adjudication is annulled, until an order is obtained under O. XXI, r. 8, of the Code of Civil Procedure the proceedings cannot abate and must be deemed to continue. KHUNI LAL *v.* RAMESHAR.

I. L. R. 43 All. 621

——— **O. XXXIII, r. 1, (1882 Code s. 401)**—

See O. 1, R. 3 **I. L. R. 34 Bom. 358**

See O. XXV, R. 1 **I. L. R. 36 Bom. 415**

1. ——— **Company**—*Official liquidator, right of, to apply for leave to sue* in formâ pauperis—*'Person' definition of—General Clauses Act (X of 1897), whether applicable to O. XXXIII—Explanation to r. 1 and r. 3 of O. XXXIII, construction of.* An official liquidator of a company is competent to apply for leave to sue *in formâ pauperis* on behalf of the company under O. XXXIII of the Civil Procedure Code, if the company is a pauper within r. 1 thereof. The reference to "necessary wearing apparel" in the explanation to r. 1 and the provisions of r. 3 requiring presentation of petition by 'applicant in person' in O. XXXIII do not necessarily exclude the application of the Order to a company, and the definition of 'person' as including a company under the General Clauses Act (X of 1897) applies to O. XXXIII of the Code as there is nothing in the definition which is repugnant to the subject or context of the Order. The fact that the liquidator in his personal capacity is not a pauper does not

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

———— **O. XXXIII, r. 1, (1882 Code s. 401)**— *concld.*

affect the question; nor does the fact that the liquidator receives a commission on collections realized, make him a person interested in the subject-matter of the suit within cl (*e*), r. 5 of O. XXXIII. *Cortes* v. *Kent Water-Works Company, 7 B. & C. 314,* and *Venkatanarasayya* v. *Achemma, I. L. R. 3 Mad 3,* followed *In the matter of the will of Demubai, I. L. R. 18 Bom. 237,* and *Manaji Rajinji* v. *Kandoo Baloo, I. L. R. 36 Bom. 279,* distinguished. PERUMAL GOUNDAN v THIRUMALARAYAPURAM JANANUKOOLA DHANASEKHARA SANGHA NIDHI (1917).

I. L. R. 41 Mad. 624

2. ———— **Inquiry**—*into pauperism—Claim for redemption of mortgage—Applicant able to raise money upon security of equity of redemption. Held.* that a plaintiff seeking to sue for redemption *in formâ pauperis* cannot claim to sue as a pauper so

KAPIL DEO SINGH v. RAM RIKHA SINGH (1910)

I. L. R. 33 All. 237

3. ———— **Death of plaintiff**—*Right of executor who is not a pauper to continue the suit* in formâ pauperis. The privilege of maintaining a pauper suit is a personal privilege granted to people who have no means of carrying on or continuing litigation, and there seems to be no authority whatever for holding that the representative of a pauper is entitled to continue the suit of his testator or testatrix, even though admittedly he is not a pauper, simply because his testator or testatrix was a pauper. MANAJI RAJUJI (RAO SAHEB) v. KAHANDOO BALOO (1911)

I. L. R. 36 Bom. 279

———— **O. XXXIII, rr. 1, 2 and 5**—*Application to sue as pauper—Disqualification—Subject-matter of suit—Cause of action—Civil Procedure Code (Act V of 1908), O. XXXIII, rr. 1, 2 and 5.* A mortgagor applied for permission to institute a

disclose a cause of action. *Dwarkanath* v. *Madhavrav, I. L. R. 10 Bom. 207,* not followed. FATMABAI v. DOSSABHOY RUSTOMJEE UMRIGAR (1909).

I. L. R. 34 Bom. 638

———— **O. XXXIII, rr. 2, 5 (a) and 15**—*Pauper suit—application for permission dismissed because not accompanied by schedule of property—whether second application is barred.* The petitioners applied for permission to sue as paupers. This application was rejected because it was not accompanied by a schedule of moveable and immoveable property belonging to the applicants—*vide* rr. 2 and 5 of O. XXXIII of the Code of Civil Procedure. They then presented a second applica-

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

———— **O. XXXIII, rr. 2, 5 (a) and 15**— *concld.*

tion for permission which was rejected as barred under r. 15 of the same order *Held,* that r. 15 of O. XXXIII of the Code does not bar a second application, ... under r. 5 (*a* ... *803 F. B.*), r ... *Peary Moho* ... distinguished ... DAS . . . . . **I. L. R. 1 Lah. 151**

———— **O. XXXIII, rr. 4, 5, 7 (1882 Code ss. 406, 407 and 409)**—

See PAUPER SUIT. **I. L. R. 46 Calc. 651**

———— **O. XXXIII, r. 5, (1882 Code 405 and 407)**—*Application for leave to sue* in formâ pauperis—*Question to be decided by Court before granting leave—Limitation—Doubtful question—Difference of judicial opinion—Duty of Court.* Upon an application for leave to sue *in formâ pauperis,* the Court is not justified in determining, at the stage contemplated by O. XXXIII, r. 5 of ... f limitation ... difference ... (*d*) applies only to cases where the allegations of the petitioner do not show a cause of action, and this should appear *clearly upon the face* of the petition. GOVINDASAMI PILLAY v. MUNICIPAL COUNCIL, KUMBAKONAM (1917). . **I. L. R. 41 Mad. 620**

———— **O. XXXIII, rr. 5, 6**—*Whether next friend of pauper minor plaintiff should prove his own pauperism.* The father as next friend of a girl of about two years of age applied for leave to sue *in formâ pauperis* for damages for serious bodily injuries received by her. The Court rejected the application under O. XXXIII, r. 5, Civil Procedure Code, on the ground that the next friend, the father of the applicant, was not a pauper: *Held,* that the order should be set aside and the matter inquired into under O. XXXIII, r. 6, of the Civil Procedure Code. AMIRMON v. SECRETARY OF STATE FOR INDIA (1919)

23 C. W. N. 955

———— **O. X...** ...—*Shebait* ... *of idol's* ... in formâ ... *in hands of co-shebaits contesting suit.* A *shebait* applied for leave to sue *in formâ pauperis* to recover certain endowed properties which, he alleged, some of the defendants who were his *co-shebaits* had illegally alienated in favour of the other defendants. Neither in his personal capacity nor as *shebait* was he possessed of sufficient means to enable him to pay the court-fees prescribed for the plaint: *Held,* in revision, that the application could not be rejected merely because the *shebait* defendants held properties of the idol sufficient to pay the requisite court-fees. NANDA LAL CHATTERJEE v. DWARKA NATH DAS (1911).

16 C. W. N. 93

———— **O. XXXIII, r. 8 (1882 Code s. 410)**—*Application to sue* in formâ pauperis *not determined—Attachment before judgment, if may issue.* No order of attachment before judgment can be made at the instance of a person who has applied for leave to sue *in formâ pauperis* before his application has been ...

CIVIL PROCEDURE CODE (ACT V OF 1908) —*concld.*

——— **O. XXXIII, r. 8 (1882 Code, s. 410)** —*concld.*

determined in his favour. O. XXXIII, r. 8, clearly shows that there is no suit in existence until the application to sue *in formâ pauperis* has been granted. PURNA CHANDRA CHABRI *v.* TARA PRASAD MAITY (1916) . . **21 C. W. N. 870**

——— **O. XXXIII, rr. 10, 11 (1882 Code, s. 411)**—*Stamp duty on a pauper's plaint—Decree for less than the amount claimed.* In a suit brought *in formâ pauperis*, the plaintiff succeeded only in part and failed as to the rest of the claim; the lower Court ordered the defendant to pay the entire costs incurred by the plaintiff including the amount of court-fees which would have been payable on the plaint. *Held*, that the court-fees payable on the plaint should be apportioned under the provisions of rr. 10 and 11 of O. XXXIII of the Code of Civil Procedure. *Chandraka* v. *Secretary of State for India, I. L. R. 14 Mad. 163*, followed. GANGA DAHAL RAI *v.* MUSAMMAT GAURA (1916).

I. L. R. 38 All. 469

——— **O. XXXIII, rr. 10 and 13—**

See s. 47 . . **4 Pat. L. J. 166**

——— **O. XXXIII, r. 13**—*Civil Procedure Code (Act XIV of 1882), s. 412—Suit* in formâ pauperis—*Settlement of suit out of Court—Court passing no order for payment of Court-fees—Government applying for the payment—Practice and procedure.* A suit for partition brought *in formâ pauperis* was settled out of Court. On the 7th October 1908 the Court dismissed the suit but made no order for the payment of Court-fees under s. 412 of the Civil Procedure Code of 1882. At that date Government had ninety days' time within which to apply to the High Court under its extraordinary jurisdiction. Before the expiry of the period the new Civil Procedure Code came into force. The Government, thereupon, applied to the Court under O. XXXIII, r. 12, for an order as to payment of Court-fees, but the Court declined to make the order. On appeal, *Held*, (i) that the order passed by the Court under O. XXXIII, r. 12, was an order within the meaning of s. 47, and it was therefore appealable; (ii) that, before the expiry of the period within which the Government could have applied to the High Court under the old Code, the new Code had come into force and by it the Government were enabled to apply to the Court for an order under r. 12 of O. XXXIII; (iii) that the suit having been dismissed there was a failure of it, and the right accrued to Government to have the Court-fee from the party defeated. SECRETARY OF STATE FOR INDIA *v.* NARAYAN (1911) . . **I. L. R. 35 Bom. 448**

——— **O. XXXIII, r. 15**—*Application to sue* in formâ pauperis, *effect of rejection under r. 5—Distinction, if any, between orders under r. 5 and r. 6.* On the rejection of an application for leave to sue as pauper, the only course open to the applicant is to institute a suit in the ordinary way. There is no distinction between rejection under r. 5 and an order of refusal under r. 7. ATUL CHANDRA SEN *v.* RAJA PEARY MOHAN MOOKERJEE (1915).

20 C. W. N. 669

——— **O. XXXIV (Transfer of Property Act, 1882, ss. 85 to 90)—**

See MORTGAGE . . **37 Calc. 907**

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— **O XXXIV (Transfer of Property Act, 1882, ss. 85 to 90)**—*concld.*

See PALAS OR TURNS OF WORSHIP.

I. L. R. 42 Calc. 455

See TRANSFER OF PROPERTY ACT, 1882, s. 88 . . **I. L. R. 34 All. 72**

——— *Mortgage suit, application for decree absolute in—Limitation—Scope and effect of Order.* The decree nisi in a mortgage suit was made when the Civil Procedure Code of 1882 was in force. The application for making the decree absolute was made more than 12 years after the date of the decree and after the Civil Procedure Code of 1908 came into operation. *Held*, that prior to the Code of 1908, there was no period of limitation within which a plaintiff was bound to apply for the order absolute for sale in a suit brought for sale of the mortgaged property, and the provisions of O. XXXIV of the First Schedule to the Code of Civil Procedure, 1908, which repealed ss. 85 to 90 of the Transfer of Property Act do not apply so as to take away a vested right which the plaintiff had of applying to have the decree for sale made absolute and the application filed by him was not barred by limitation. *Gopeshur Pal* v. *Jiban Chandra, 18 C. W. N. 804*, followed. KISTA BAR *v.* BANAMOYI DEBIA (1914).

19 C. W. N. 470

——— *Limitation Act (IX of 1908), Sch. I, Art. 181,—Consent decree—Instalments—Application for decree absolute for sale—Limitation.* An application for a decree absolute for sale of a mortgage charge under the terms of a consent decree, which provided for satisfaction of the decretal debt by instalments is an application under the Civil Procedure Code (Act V of 1908), O. XXXIV, and is governed by Article 181, Sch.I, of the Limitation Act (IX of 1908). Such application must be made within three years from the time the right to apply accrues. DATTO ATMARAM *v.* SHANKAR DATTATRAYA (1913).

I. L. R. 38 Bom. 32

——— **O. XXXIV, r. 1 (Transfer of Property Act, 1882, s. 85)—**

See O. 1, R. 9 . **1 Pat. L. J. 468**

See O. 1, R. 10(2) **I. L. R. 45 Bom. 1009**

See O. XXI, R. 103 **I. L. R. 43 Mad. 696**

See HINDU LAW—JOINT FAMILY.

I. L. R. 34 All. 549, 572

2 Pat. L. J. 306

See HINDU LAW MORTGAGE.

I. L. R. 42 Calc. 1068

See MORTGAGE . **I. L. R. 37 Calc. 907**

See TRANSFER OF PROPERTY ACT, 1882, SS. 88 AND 89 . **I. L. R. 40 Bom. 321**

1. ——— *Mortgage suit—Al persons interested in the mortgage to be parties to the suit—Some only of the heirs of mortgagor joined as parties—Suit not bad for non-joinder of parties.* The plaintiff, a mortgagee, sued to recover the mortgage debt by sale of mortgaged properties. The original mortgagor, who was a Mahomedan, having died before the suit, only his widow and daughters were made defendants. It was contended that the suit was bad for non-joinder of other heirs of the mortgagor, *viz.*, his brother and

CIVIL PROCEDURE CODE (ACT V OF 1908)
—*contd.*

———— **O. XXXIV, r. 1 (Transfer of Property Act, 1882, s. 85)**—*contd.*

sister's children. *Held*, that the non-joinder of parties was not fatal to the suit, inasmuch as the suit was properly constituted at the date of the plaint so as to enable the Court to adjudicate as between the parties impleaded. SHAHASAHEB *v.* SADASHIV SUTDU (1918).

I. L. R. 43 Bom. 575

2. ———— *Mortgage suit—non-joinder of parties—joinder of parties after expiration of period of limitation.* R. 9 of O 1 of the Code of Civil Procedure, 1908, is subordinate to r. 1 of O. XXXIV. A mortgage is indivisible and if all the parties entitled to a share in the money due on the mortgage are not upon the record the suit must be dismissed in its entirety. When a necessary party has not been impleaded at the time of the institution of the suit but has been brought on the record after the period of limitation has expired, the whole suit must be dismissed. When it is intended to sue in the name of a managing member of a joint Hindu family governed by the *Mitakshara*, on account of a breach of contract made by a former managing member of the family, it must be clearly stated in the plaint that the suit is by that managing member It is not sufficient that he should be accidentally on the record as one out of many members of the family of whom several have been omitted. GIRWAR NARAIN MAHTON *v.* MUSSAMMAT MAKBUNESSA. . **I Pat. L. J. 468**

3. ———— *Mortgage—Redemption*

— [illegible]

m [illegible]

as [illegible]

a suit for redemption of a mortgage in favour of defendant No. 1. To this suit defendants Nos. 2 and 3 were added as parties in possession under O. XXIV, R 1, Civil Procedure Code, 1908. These defendants were not in possession through defendant No 1 and they claimed independently of the mortgage. A question being raised whether defendants Nos. 2 and 3 were necessary parties *Held*, that as these defendants claimed independently of the mortgage and against both the mortgagor and the mortgagee they could not be proper parties to the suit which was a redemption suit. SATAGAUDA APPANNA *v.* SATAPA (1919).

I. L. R. 44 Bom. 698

4. ———— *Mortgage—Suit for sale—Intentional non-joinder of subsequent mortgagee—Effect of such non-joinder.* Subsequently to the execution of a mortgage of a 4 biswa zamindari share in favour of A S, the mortgagor executed a further (usufructuary) mortgage of a portion of the same share in favour of A S. and his brother N.S. A S brought a suit for sale on the earlier mortgage, but without making N S a party [illegible]

[illegible]

sequent mortgage. ALAM SINGH *v.* GOKAL SINGH (1913) . . . . **I. L. R. 35 All. 424**

———— **O. XXXIV, r. 1; O. 1, r. 9**—*Parties to suit—Mortgage—Joint mortgage of separate properties—Suit barred as against one mortgagor—Remaining property liable for whole debt.* The separate properties of two mortgagors were jointly mortgaged to secure one debt. The mortgagee sued

———— **O. XXXIV, r. 1; O. 1, r. 9**—*contd.*

for sale just within limitation, making one of the heirs of one mortgagor a party defendant, and stating that nothing had been heard of the other for twenty-five years. In the written statement it was pleaded that this heir was alive, but by that time the suit as against him was time-barred. *Held*, that the unimpleaded heir of the mortgagor was not a necessary party to the suit, and that the suit might be proceeded with against the other representative of the mortgagor and his separate property for the whole amount due on the mortgage. *Jai Gobind* v. *Jas Ram, All W. N. (1898) 120*, followed. *Gendan Lal* v. *Babu Ram, 9 All. L. J. 86*, distinguished. *Imam Ali* v. *Baij Nath Ram Sahu, I. L. R. 33 Calc. 613*; *Hakim Lal* v. *Ram Lal, 6 C. L. J. 46*; *Krishna Ayyar* v. *Muthukumarasawmiya Pillai, I. L. R. 29 Mad. 217*; *Haro Kumari* v. *Eastern Mortgage Co., 7 C. L. J. 274*; and *Devendra Nath Sen* v. *Mirza Abdul Samad, 10 C. L. J. 150*, referred to SANWAL SINGH *v.* GANESHI LAL (1913)

I. L. R. 35 All. 441

———— A suit by the Kharta of a joint family to enforce a mortgage is valid even though the other members of the family are not impleaded and the Plaintiff has not expressly stated he is suing as Karta provided it is obvious for the pleading. JAG SAH *v.* RAM CHANDRA PRASAD

6 Pat. L. J. 640

———— **O. XXXIV, rr. 1, 2, 3**—*Execution of decree—Payment of part of decretal amount into Court—Effect of payment as regards running of interest on the decree.* Where money is paid into Court by the judgment-debtor in satisfaction of a decree, interest on the decree will cease from the date of payment in proportion to the amount paid although such amount may not in fact be the whole amount due under the decree. AMTUL HABIB *v.* MUHAMMAD YUSUF (1917) . . . .

I. L. R. 40 All. 125

———— **O. XXXIV, rr. 1, 14—**

See MORTGAGE . **I. L. R. 41 Calc. 727**

See TRANSFER OF PROPERTY ACT (IV OF 1882), ss. 61, 85 AND 90.

I. L. R. 38 Mad. 927

———— **O. XXXIV, r. 2 (*Act IV of 1882, s. 86*)—**

See O. 2, R. 2 . **I. L. R. 39 All. 669**

———— *Decree of first Court allowing redemption within six months of the date of the decree—Appeal by the judgment debtor against the decree and cross-objection by the decree-holder both dismissed—"Six months' time," whether to run from the date of the original decree or of the Appellate decree.* A decree declared the right of the decree-holder to recover possession of certain property subject to the right of the judgment-debtor to redeem on payment of a certain sum within six months of the date of the decree. Against that decree the judgment-debtor appealed and [illegible] [illegible] and the decree of [illegible] within six months of [illegible] decree but from the [illegible] of the original decree

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— O. XXXIV, r. 2, (Act IV of 1882, s. 86)—*contd.*

into Court the sum necessary for the redemption. The decree-holder applied for execution of the decree: *Held*—That where in a suit on a mortgage the decree of the Appellate Court simply dismisses the appeal leaving the decree of the first Court untouched, the time for redemption runs from the date of the decree of the first Court. BASANTA KUMAR ADAK *v.* SRIMATI RADHA RANI DASI . . . . . 26 C. W. N. 440

——— O. XXXIV, rr. 2, 3, 4 and 5—*Lease to mortgagee—Transfer of equity of redemption—Preliminary decree on mortgage—Suit by transferee for rent due subsequently to due date, maintainability of.* In a suit on a mortgage the amount due is calculated only up to the due date fixed in the preliminary decree, and a suit to recover the amount which becomes due after the due date is not barred. Where the mortgagee took a lease of the mortgaged property from the mortgagor and subsequently obtained a preliminary decree on the mortgage, *held*, that a suit by the transferee of the equity of redemption for rent accruing due subsequently to the due date fixed in the preliminary decree was maintainable. TARA CHAND MARWARI *v* BROJA GOPAL MUKHERJI. 5 Pat. L. J. 595

——— O. XXXIV, rr. 2 and 4—

See O. II, R. 2 . I. L. R. 39 All. 506

——— O. XXXIV, rr. 2 and 4, and appendix D, Forms 4, 7, 8, 9—*Mortgage suit—Decree for sale—Default of payment—Subsequent interest after date fixed in decree—Right of mortgagee—Subsequent interest, whether payable on aggregate sum of principal, interest and costs—Rate of interest—Discretion of Court—Mortgage bond—Stipulation for enhanced interest after default at twelve per cent, whether penal.* In a decree for sale on a mortgage, the decree-holder is, on default of payment by the mortgagor on the date fixed in the decree, entitled to subsequent interest on the aggregate amount of principal, interest and cost declared or found to be payable on that date; and such further interest should ordinarily be at the rate of six per cent. per annum, but the Court has a discretion in the matter. *Sunder Koer* v. *Rai Sham Krishen, I. L. R. 34 Calc. 150,* and *Subbaraya Ravuthaminda Nainan* v. *Ponnusami Nadar, I. L. R. 21 Mad. 364,* referred to. Where in a mortgage-bond there was a stipulation to pay enhanced interest at *twelve per cent. on principal and interest on default* of payment of the principal with interest at nine per cent. on a day fixed therein and where it appeared that the debts to discharge which the mortgage was executed carried interest at twelve per cent. and more: *Held,* that the stipulation for such enhanced interest was not penal and could be enforced. VENKATACHELAPATHY AYYAR *v.* THAVASI SERVAI (1918). . I. L. R. 42 Mad. 465

——— O. XXXIV, r. 3 (Act IV of 1882, s. 87)—

See MORTGAGE DECREE.
4 Pat. L. J. 347

——— *Mortgagor's right to redeem by offering payment after the date fixed for the same, but before the final decree for foreclosure is passed.* A preliminary decree for foreclosure was passed on 5th October 1917, and six months'

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— O. XXXIV, r. 3 (Act IV of 1882, s. 87)—*contd.*

time was allowed, *i.e.*, up to 5th April 1918. On the 9th April 1918 the decree-holder applied to make the decree in the foreclosure suit final and notices were issued on the mortgagors fixing the 1st May 1918 as the date for passing the final decree. Before the final decree was passed, the mortgagors on the 15th April made an application to the Court to pay off the decretal amount. On the 1st May 1918, the Court rejected this application and passed the final decree: *Held*—That the mortgagors were entitled to redeem at any time before the final decree was passed. The right of the mortgagors to redeem was not extinguished until the final decree was passed. YSAF ALI *v.* KASIM ALI . . . 26 C. W. N. 532

——— O. XXXIV, rr. 3 and 5—

See MORTGAGE . I. L. R. 43 All. 469

——— *Mortgage—Conditional decree for sale—Application for final decree—Limitation Act (IX of 1908), Sch. 1, Art. 181*—An application is necessary for a final decree for foreclosure or sale. Plaintiff obtained a conditional decree for sale of certain property on the 6th July, 1908. In March, 1913 he applied for a final decree: *Held*, that the application was barred by Art. 181 of Sch. I to the Limitation Act, 1908. An application for such a final decree presented after the passing of the Code of Civil Procedure, 1908, and the Limitation Act, 1908, is governed by Art. 181 of the latter Act. BALA RAM NAIK *v.* KANHAI BHARAN MAHAPATRA
1 Pat. L. J. 364

——— O. XXXIV, rr. 3, 6—

See LIMITATION I. L. R. 42 Calc. 294

——— O. XXXIV, rr. 3, 8—*Extension of time for paying mortgage amount only upon good cause—Non-passing of a foreclosure decree, not a good cause for extension—Civil Procedure Code (Act V of 1908), s. 115—No interference, even with an order passed without jurisdiction, if justice does not require.* Extension of time for payment of the mortgage amount due under a decree in suits instituted either by the mortgagor or the mortgagee, can be given only where good cause is shown therefor and a party is not entitled to it as a matter of right, under O. XXXIV, rr. 3 and 8, of the Code of Civil Procedure. An extension of time cannot be granted on the sole ground that no order for foreclosure absolute has been passed. The High Court is not bound to interfere in revision with an order for extension of time wrongly passed. English practice referred to. MURUGESA MUDALY *v.* RAMASAMI CHETTY (1915)
I. L. R. 39 Mad. 882

——— O. XXXIV, r. 4 (Act IV of 1882, s. 88)—

See O. XXI, R. 2 . 5 Pat. L. J. 672

See EQUITY OF REDEMPTION.
2 Pat. L. J. 587

See MORTGAGE DECREE
4 Pat. L. J. 207

——— O. XXXIV, rr. 4, 5—

See LIMITATION I. L. R. 42 Calc. 776

See O. XXI, R. 2 . 5 Pat. L. J. 672

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

—— O. XXXIV. rr. 4, 5—*contd.*

—— *Mortgage—Preliminary decree in favour of puisne mortgagee—allowing redemption of prior mortgage—Rights of puisne mortgagee on redemption to a decree absolute for sale of the property comprised in both mortgages.* In a suit for sale by puisne mortgagees, the preliminary

property which the mortgagees plaintiffs were entitled, in the event of non-payment, to bring to sale. *Held,* that the plaintiffs mortgagees, having paid the amount due on the prior mortgage, were entitled, notwithstanding this omission, to a final decree for sale of the property comprised in both mortgages. UDHISHTER SINGH *v.* KAUSILLA (1916) **I. L. R. 38 All. 398**

—— **O. XXXIV, rr. 4, 5, 10**—*Suit for sale on a mortgage—Form of decree—Construction of decree—Costs—Appeal.* A suit for sale on a mortgage was decreed by the Court of first instance, dismissed by the Court of first appeal, and again decreed by the High Court. In the judgment of the High Court it was stated. "We must allow the appeal, set aside the decree of the lower Appellate Court, and restore the decree of the Court of first instance with costs in all Courts." The decree

stance restored. It went on to state. "And it is further ordered that the respondent do pay to the appellant Rs. 554-6-9, the amount of costs incurred by the latter in this Court and in the lower Appellate Court." *Held, that in construing this decree it was open to the Court to consider, first, the nature of the suit, secondly, the judgment of*

awarding the costs incurred in the suit and up to the time of the final decree to be realized by sale of the mortgaged property. *Maqbul Fatima* v.

I. L. R. 40 All. 109

—— *Mortgage—Decree for sale—Appeal by mortgagor—Appeal dismissed—Costs, how recoverable—Limitation Act (IX of 1908), ss. 6 and 7—Limitation—Minority—Minor plaintiffs represented by their mother.* Held, that the question whether costs in a mortgagor's unsuccessful appeal against a decree in a suit for sale are recoverable from the mortgagor personally, or only, as part of the mortgage money, out of the property mortgaged, is a question in each case of the interpretation of the decree. *Dambar Singh* v. *Kalyan Singh, I. L. R. 40 All 109,* and *Mohanya Ojha* v. *Ram Bahadur Singh, 16 C. W. N. 731,* referred to. *Held,* also, that a Mahomedan mother cannot, as *de facto* guardian of her minor sons, give a valid discharge for any payment made to the minors. *Imambandi* v. *Mutsaddi, I. L. R. 45 Calc. 818,* referred to. Nor can she, as guardian *ad litem,* give such a discharge without the leave of the

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

—— O. XXXIV, rr. 4, 5, 10—*contd.*

Court. AMINA BIBI *v.* RAM SHANKAR MISRA (1910) . . . . **I. L. R. 41 All. 473**

—— **O. XXXIV, rr. 4, 5, 14 and 15**—*Where* a decree has been obtained to the effect that the plaintiff do get maintenance at a certain rate and that the allowance decreed will be a charge on certain properties named, the properties may be brought to sale in execution of the decree. There need not be a suit for sale. RAJA BRAJASUNDAR DEB *v.* SURAT KUMARI . . **2 Pat. L. J. 55**

—— **O. XXXIV, rr. 4, 5 ; O. XLI, r. 20**—
See MORTGAGE **I. L. R. 38 Calc. 913**

—— **O. XXXIV, r. 5 (Act IV of 1882, s. 89)**—

See O XXIII, R. 3 . **2 Pat. L. J. 533**

See O. XXXIV, R 4. **2 Pat. L. J. 55**

I. L. R. 38 All. 398

I. L. R. 40 All. 109

See CIVIL PROCEDURE CODE, 1908, O. XXI, R. 2. . **5 Pat. L. J. 672**

See COURT FEES ACT (VII OF 1870), SCH. I, ART. 1 ; SCH. II, ART. 11. **I. L. R. 35 All. 476**

See DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879), s. 15B. **I. L. R. 4[illegible]**

See LIMITATION ACT (IX OF 1908), SCH. I, ARTS. 181, 182. **I. L. R. 42 Bom. 309**

See MORTGAGE DECREE.

See REDEMPTION . **4 Pat. L. J. 213**

3 Pat. L. J. 490

See TRANSFER OF PROPERTY ACT, 1882,

ss. 85 AND 89 . **I. L. R. 43 All. 204**

ss. 88 AND 89 . **I. L. R. 40 Bom. 321**

1. —— *Limitation Act (IX of 1908), Sch. I, Art. 181, application under*

date fixed for payment being 28th January 1906. On 31st May 1909, he applied for the decree being made absolute and that application was granted. Against this the defendant appealed and the case was remanded on the 7th March 1910 Against the order of remand there was an appeal to the High Court, but the proceedings continued in the first Court and was disposed of on the 19th September 1910, the Court holding that the application for decree absolute was barred by limitation. On the 21st April 1911 the High Court dismissed the appeal against the order of remand and on the 16th May
Appellate
September
O. XXXIV
Art. 181.
was barred by limitation under Art. 181 of the Limitation Act That the appeal to the lower Appellate Court against

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

————— **O. XXXIV, r. 5 (Act IV of 1882, s. 89)**—*contd.*

September 1910 was also barred by limitation. That s. 14 of the Limitation Act has no application to appeals and the present case does not come within s. 5. BENI SINGH *v.* BERHAMDEO SINGH (1915) . . . . **19 C. W. N. 473**

2. ————— *Application for decree absolute for sale on a mortgage—Limitation—Terminus a quo—Limitation Act (IX of 1908), Sch. I, Art. 181.* An application under O. XXXIV, r. 5 (2) of the Code of Civil Procedure (1908), is an application in the suit and not an application in execution, and is governed, as regards limitation, by Art. 181 of the first schedule to the Indian Limitation Act, 1908. *Datto Atmaram Hasabnis* v. *Shankar Dattatraya, I. L. R. 38 Bom. 32, Amlook Chand Parrack,* v. *Sarat Chander Mukerjee, I. L. R. 38 Calc. 913, Ali Ahmad* v. *Naziran Bibi, I. L. R. 24 All. 542,* and *Udit Narain* v. *Jagan Nath, 1 All. L. J., 15,* referred to. The right to make such an application accrues on the date when the time limited by the preliminary decree expires, unless such time has been extended by a Court of Appeal. The principle of the decision in *Gaya Din* v. *Jhumman Lal, I. L. R. 37 All. 400,* applied. MADHO RAM *v.* NIHAL SINGH (1915)

I. L. R. 38 All. 21

3. ————— *Limitation Act (IX of 1908), Sch. I, Art. 181—Limitation—Decree for sale on mortgage—Appeal from preliminary decree—Application for decree absolute. Held,* that in a suit for sale on a mortgage, if an appeal has been preferred from the preliminary decree, the decree which is to be made absolute is the decree of the final Court of Appeal. In such a case, therefore, limitation for an application for a decree absolute runs not from the expiry of the term fixed for payment by the original decree, but from the date of the decree of the final Court of Appeal. *Shohrat Singh* v. *Bridgman, I. L. R. 4 All. 376, Muhammad Sulaiman Khan* v. *Muhammad Yar Khan, I. L. R. 11 All. 267,* and *Abdul Majid* v. *Jawahir Lal, I. L. R. 36 All. 350,* referred to. *Madho Ram* v. *Nihal Singh, I. L. R. 38 All. 21,* overruled *quoad hoc.* GAJADHAR SINGH *v.* KISHAN JIWAN LAL (1917) . . **I. L. R. 39 All. 641**

4. ————— *Suit for sale on a mortgage—Application for final decree—Limitation—Limitation Act (IX of 1908), Sch. I, Art. 181.* An application for a final decree under O. XXXIV, r. 5, of the Code of Civil Procedure is an application in the suit, and not an application in execution: the limitation applicable is that prescribed by art. 181 of sch. I to the Indian Limitation Act, 1908, and time begins to run, if there has been an appeal in the suit, from the date of the decree of the final Court of Appeal. *Gajadhar Singh* v. *Kishan Jiwan Lal, I. L. R. 39 All. 641,* referred to. NIZAM-UD-DIN SHAH *v.* BOHSA BHIM SEN (1918) . . . . **I. L. R. 40 All. 203**

5. ————— *Preliminary mortgage decree for sale—Non-payment into Court of decree amount within the time limited—Obligation on Court to pass a final decree for sale.* O. XXXIV, r. 5, Civil Procedure Code, recognizes only one method of payment, *viz.,* payment *into Court* of the amount fixed by a preliminary mortgage decree; hence, on default of payment *into Court* within the time fixed by the decree, the Court is bound on the application of the decree-holder to pass a final decree for sale. *Jogendra Prasad Narain Singh,* v. *Gouri Shankar Prasad Saku, 2 Pat. L. J. 533,* followed. *Semble.* If any payment had been made *to the decree-holder* in the interval and *certified* by Court under O. XXI, r. 2, Civil Procedure Code, credit may be given for the same at the time of passing the final decree. SINGA RAJA *v.* PETHU RAJA (1918)

I. L. R. 42 Mad. 61

6. ————— *Act No. IV of 1882 (Transfer of Property Act), s. 89—Mortgage—Final decree for sale—Mortgagor's right not absolutely extinguished until sale.* Under the present Code of Civil Procedure, which repeals s. 89 of the Transfer of Property Act, 1882, the mere passing of a final decree for sale under O. XXXIV, r. 5, does not extinguish the mortgagor's right until a sale has actually taken place in pursuance of the decree. SHAH MEHDI HASAN *v.* ISMAIL HASAN.

I. L. R. 42 All. 517

7. ————— *Application for final decree—objection by defendants—objection not entertained and decrees made absolute—whether application in revision lies against the order.* Where, in two suits on two mortgages, the plaintiff applied for a decree absolute under O. XXXIV, r. 5 (2), of the Code of Civil Procedure, 1908, and the defendants filed objections, *held,* that an application in revision did not lie to the High Court against an order declining to entertain the objections and making the decrees absolute. KUMAR GANGANAND SINGH *v.* RAI PIRTHI CHAND BAHADUR

5 Pat. L. J. 342

8. ————— *Application for order absolute—Limitation Act (IX of 1908), Art. 181, such application after three years, if barred when there was an interim suspension of right to apply.* A third mortgagee obtained a preliminary decree and the last date for payment was 31st July 1911. The payment not having been made, he made an application on the 2nd October 1915 to make the decree absolute. Prior to this the second mortgagee had instituted a suit to enforce his security, in which the High Court in its appellate judgment, dated the 10th March 1914, expressed the opinion that the third mortgagee could not sell the property before he had paid up the second mortgagee, and a payment was made by him to the second mortgagee on the 22nd May 1915: *Held*—That as the third mortgagee could not have made an application to have his decree made absolute between the 10th March 1914 and the 22nd May 1915, his right to apply for order absolute was temporarily suspended and was not revived till the 22nd May 1915. Therefore, assuming that Art. 181 of the Limitation Act applied his application, dated the 2nd October 1915, was not barred by limitation for not having been made within three years from the last date fixed for payment, *i.e.*, from 31st July 1911. *Pulteney* v. *Warren, 6 Ves., 73 (92) (1801)* and *East India Company* v. *Campion, 11 Bli. (N. S.) 158 (1837)* referred to. *Lakhan Chandra* v. *Madhu Sudan, I. L. R. 35 Calc. 209 (218) (1907), Nritvamoni* v. *Lakhan Chandra, I. L. R. 43 Calc. 660 (1916). Ranee Sarnamoyee* v. *Sorhi Mookhee, 12 M. I. A. 244 (1868)* and *Prannath* v. *Rookea Begum, 7*

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

———— **O. XXXIV, r. 5 (Act IV of 1882, s. 89)**—*contd.*

M. I. A. 323 (1859), followed. HEMENDRA MOHAN KHASNOBIS *v.* DHARANINATH CHANDA ROY
25 C. W. N. 376

———— **O. XXXIV, r. 6, (Act IV of 1882 s. 90)**—

See CIVIL COURTS ACT (XIII OF 1887) s. 21. . . **I. L. R. 41 All. 384**

See DECREE-HOLDER. **I. L. R. 38 Mad. 677**

See HINDU LAW (ALIENATION). **I. L. R. 43 Mad. 421**

See LIMITATION . **I. L. R. 42 Calc. 294**

See MORTGAGE **I. L. R. 40 Calc. 342**
I. L. R. 45 Calc. 702
2 Pat. L. J. 51

See MORTGAGE DECREE **3 Pat. L. J. 649**

See PROVINCIAL INSOLVENCY ACT (III OF 1907), SS. 16 AND 31.
I. L. R. 34 All. 106

1. ———— *Application for decree over against the mortgagor—Limitation—Limitation Act (IX of 1908), Sch. I, Art. 181.* An application for a decree under the provisions of O. XXXIV, r. 6 of the Code of Civil Procedure is not an application for the execution of the original decree for sale, but is an application in the original suit for a new decree. Such an application is governed as to limitation by art. 181 of sch. I to the Indian Limitation Act, 1908, and must be made within three years from the date when the right to apply accrued *Bihari Lal* v. *Bisheshar Dayal, 9 A. L. J. 569*, referred to MUHAMMAD ILTIFAT HUSAIN *v.* ALIM-UN-NISA BIBI (1918)
I. L. R. 40 All. 553

2. ———— *Indian Limitation Act (IX of 1908), Sch. I, Art. 66—Mortgage—Application for personal decree against mortgagor—Limitation.* A mortgage bond executed in 1902, provided that the money advanced on it was to be paid after the lapse of seven years and the interest was to be paid yearly. The mortgagee was given the option of suing either on default in the payment of interest or after the expiry of the term. He brought his suit in 1914, and obtained a decree under which he brought the mortgaged property to sale. The sale proceeds proving insufficient to satisfy the decree, he then applied under O XXXIV, r. 6, for a personal decree against the mortgagors. *Held*, that the application was not time-barred. *Gaya Prasad* v. *Sher Ali, 15 A. L. J. 313*, followed. MAKRAND SINGH *v.* KALLU SINGH (1919) . . . . **I. L. R. 41 All. 581**

3. ———— If a mortgage decree holder is unable to realise enough to pay off the amount due owing to some of the properties being in a Native State he is entitled to a personal decree. SAMANTA GAGARNATH MAHAPATRA *v.* LOKENATH SUKUL (1921) . **6 Pat. L. J. 106**

4. ———— *Mortgage—Decree over—Sale of mortgaged property, but not in execution of applicant's decree.* A second mortgagee sued on his mortgage and obtained a final decree for sale of the mortgaged property. He did not put his decree into execution and made no attempt to get the property sold Subsequently, the first mortgagee obtained a decree for sale of the property, and the property was sold in satisfaction of that decree The second mortgagee then applied for a decree over under O XXXIV, r. 6, of the Code of Civil Procedure. *Held*, that he was not entitled to a decree over, as the mortgaged property had not been put to sale in execution of his decree. *Kamla Prasad* v *Saiyed Ahmad, I. L. R. 31 All. 373, Muhammad Akbar* v. *Munshi Ram, Weekly Notes, 1899, p 208* and *Badri Das* v. *Inayat Khan, I. L. R. 22 All 404*, followed. *Kedar Nath* v *Chandu Mal, I L. R. 26 All. 25, Pirbhu Narain Singh* v. *Amir Singh, I L R. 29 All. 369*, and *Jeuna Bahu* v *Parmeshwar Narain Mahtha, I. L. R. 47 Calc 370*, distinguished. DARBARI MAL *v* MULA SINGH . **I. L. R. 42 All. 519**

5. ———— *Mortgage suit—small portion of property, omitted from plaint.* The omission to include in the plaint a portion of the mortgaged property does not debar the plaintiff in a mortgage suit from applying for an order under O. XXXIV, r 6, of the Code of Civil Procedure, 1908, provided that the omission was not intended to, and has not prejudiced the Judgment-debtor. GOPAL PANDA *v.* BAIKUNTHA MAHAPATRA.
2 Pat. L. J. 538

———— **O. XXXIV, r. 7**—

See USUFRUCTUARY MORTGAGE
26 C. W. N. 123

———— **O. XXXIV, r. 8 (Act IV of 1882 s. 93)**—

See O. XXXIV, R. 3
I. L. R. 39 Mad. 882

See s 148 . . **I. L. R. 34 All. 388**

1. ———— *Decree for sale on a mortgage conditioned on redemption of prior mortgages—Power of Court to extend time for payment of redemption money* When a suit for sale by a subsequent mortgagee became by reason of the intervention of a prior mortgagee also a suit for redemption of the prior mortgage and a decree was passed accordingly, it was *held* that the Court had power under O. XXXIV, r. 8, to extend the time for payment of the sum found necessary to redeem the prior mortgage, the plaintiffs having through a *bonâ fide* mistake paid into Court an insufficient amount. KALIAN *v.* SADHO LAL (1912)
I. L. R. 35 All. 116

2. ———— *Proviso—Preliminary mortgage-decree by Appellate Court—Power to extend time for payment, only for first Court—Order of extension by Appellate Court—Appeal against,*
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ment of the mortgage-amount due under a decree; such an order is not a decree within s. 2, cl. (2) of the Code of Civil Procedure. Even in cases where the preliminary mortgage-decree is passed by the Appellate Court, it is only the Court of first instance that can extend time for payment under O. XXXIV, r. 8, proviso, of the Civil Procedure Code (Act V of 1908). *Venkatakrishna Ayyar* v. *Thiagaraya Chetti, I. L. R. 23 Mad. 521, Sheo-*

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— **O. XXXIV, r. 8 (Act IV of 1882, s. 93)**—*contd.*

narain v. *Chunni Lal, I. L. R. 23 All. 88,* and *Ramdhani Sahu* v. *Lalit Singh, I. L. R. 31 All. 328,* followed. S. 148 of the Civil Procedure Code (Act V of 1908) does not enable a Court to extend time for doing acts allowed by a decree. *Het Singh* v. *Tika Ram, 9 All. L. J. 381* and *Suranjan Singh* v. *Rama Bahal Lal, 17 Ind. C. 912,* followed. DHARMARAJA AYYAR *v.* SRINIVASA MUDALIAR (1915) . . . . **I. L. R. 39 Mad. 876**

3. ——— *Suit for redemption—Decree modified in appeal—Application to postpone day fixed for payment. Held,* that the power given by the proviso to O. XXXIV, r. 8 of the Code of Civil Procedure, 1908, is a power exercisable by the Court which has to execute the decree. Hence in the case of a decree passed by an Appellate Court an application for postponement of the day fixed for payment must be made to the Court of first instance, and not to the Court which passed the decree. *Ram Dhani Sahu* v. *Lalit Singh, I. L. R. 31 All. 328,* and *Dharmaraja Ayyar* v. *K. G. Srinivasa Mudaliar, I. L. R. 39 Mad. 876,* followed. BENI PRASAD *v.* HARNAM DAS (1917) **I. L. R. 39 All. 396**

4. ——— *Prior and subsequent mortgages—Suit and sale of mortgaged property by prior mortgagee—Subsequent suit for sale by puisne mortgagee not impleaded in former suit—Court not competent to extend time limited for payment of purchase money to auction purchaser. Held,* that a suit by a puisne mortgagee, who had not been made a party to the prior mortgagee's suit in the course of which the mortgaged property had been sold by auction, to pay off the auction purchaser and bring the mortgaged property to sale, is not *quoad* the auction purchaser a suit for redemption, and the Court has no power under O. XXXIV, r. 8, to extend the time limited for payment of whatever may have been found due to the auction purchaser. *Kalian* v. *Sadho Lal, I. L. R. 35 All., 116,* distinguished. *Idumba Parayan* v. *Pethi Reddi, I. L. R. 43 Mad. 357,* dissented from. NAND KUNWAR *v.* SUJAN SINGH . **I. L. R. 43 All. 25**

5. ——— *Partition suit decree for recovery of plaintiff's share on payment to alienees on a certain date—Payment on subsequent date—Jurisdiction of Court to extend time for payment—Construction of decree.* A decree in a suit for partition provided *inter alia* that the plaintiffs could recover certain properties from the alienees on payment of a sum of money into Court by a certain date, without any provision as to effect of non-payment. Plaintiffs, however, paid the money on a subsequent date. *Held,* that the decree was in terms and in effect one for redemption; and that the Court had jurisdiction under O. XXXIV, r. 8, to extend the time for payment. IDUMBA PARAYAN *v.* PETHI REDDI (1920) **I. L. R. 43 Mad. 357**

——— **O. XXXIV, r. 10—**

See O. XXXIV, R. 4 **I. L. R. 40 All. 109**

——— **O. XXXIV, r. 14 (Act IV of 1882, s. 100)—**

See O. II, R. 2 . **I. L. R. 36 All. 264**

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— **O. XXXIV, r. 14 (Act IV of 1882, s. 100)**—*contd.*

See EXECUTION OF DECREE. **2 Pat. L. J. 197**

See MADRAS ESTATES LAND ACT, 1908, s. 5. . . **I. L. R. 42 Mad. 114**

See MORTGAGE **I. L. R. 42 Calc. 780**
I. L. R. 47 Calc. 377

See s. 145 . . **I. L. R. 38 All. 327**

See O. II, R. 2 . **I. L. R. 36 All. 264**

See TRANSFER OF PROPERTY ACT, s. 99. **I. L. R. 36 All. 516**

1. ——— *Execution of decree—Usufructuary mortgage—Suit for possession of mortgaged property—Decree for possession and costs—Execution for costs by attachment of part of the mortgaged property.* Certain usufructuary mortgagees suing for possession of the mortgaged property, which had not been delivered to them, obtained a decree for possession and for costs. In execution of their decree for costs, the mortgagees applied for attachment of part of the mortgage property. *Held,* that this application was not barred by the provisions of O. XXXIV, r. 14, of the Code of Civil Procedure, 1908. *Khiarajmal* v. *Daim, I. L. R. 32 Calc. 296,* distinguished. *Muhammad Abdul Rashid Khan* v. *Dilsukh Rai, I. L. R. 27 All. 517,* referred to. HARIBANS RAI *v.* SRI NIWAS NAIK (1913) . . **I. L. R. 35 All. 518**

2. ——— *Transfer of Property Act (Act IV of 1882), s. 68—Execution of decree—Decree against heirs of deceased debtor—Execution sought against property once subject to a mortgage which had become time-barred. Held,* that a decree in a suit under s. 68 of the Transfer of Property Act, 1882, against the heirs of a deceased mortgagee, as such heirs, for payment of money originally due under a mortgage, which, however, had become unenforceable by lapse of time, could be executed against any property of the deceased in the hands of the heirs, including the property once the subject of the mortgage, and that the bar of O. XXXIV, r. 14 of the Code of Civil Procedure did not apply. *Madho Prasad* v. *Debi Dial, All. W. N. 1891, page 168, Arunachalam Chetti* v. *Ayyavayyan, I. L. R. 21 Mad. 476, Khub Chand* v. *Kalian Das, I. L. R. 1 All. 240, Ponnappa Pillai* v. *Pappuvayyangar, I. L. R. 4 Mad. 1, Ganesh Singh* v. *Debi Singh, I. L. R. 32 All. 377, Madho Prasad Singh* v. *Baij Nath, All. W. N., 1905, page 152, Kishan Lal* v. *Umrao Singh, I. L. R. 30 All. 146,* and *Indarpal Singh* v. *Mewa Lal, I. L. R. 36 All. 264,* referred to. CHEDI LAL *v.* SAADAT-UN-NISSA BIBI (1916) **I. L. R. 39 All. 36**

2(*a*). ——— Under s. 145 of the Civil Procedure Code, a party who has obtained a decree for costs in Privy Council can proceed by application to realise the amount of costs decreed against the surety (for the judgment-debtor) personally, but not against the property which he had charged under s. 602 of the old Civil Procedure Code. Even under O. 34, r. 14, of the Civil Procedure Code, which has replaced s. 99 of the Transfer of Property Act, the properties charged cannot be sold except by instituting a mortgage suit. MUSSAMMAT CHANDRABATI *v.* MADHO PROSAD . **19 C. W. N. 17**

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— **O. XXXIV, r. 14 (Act IV of 1882, s. 100)**—*contd.*

3. ——— *Usufructuary mortgage—Possession not given to mortgagee—Suit for, possession compromised, mortgagee taking a simple money decree—Sale of mortgaged property.* A usufructuary mortgagee who had not obtained possession of the mortgaged property brought a suit for possession. The suit was compromised and by consent a simple money decree was passed in favour of the mortgagee. *Held*, that, the decree being a decree passed on a compromise, the mortgagee was not precluded from bringing the mortgaged property to sale in execution thereof. *Madho Prasad Singh* v. *Baij Nath, All. Weekly Notes (1905) 152, Hem Ban* v. *Bihari Gir, I. L. R. 28 All. 58,* and *Narsingh Das* v. *Munna, 6 A. L. J. 731,* distinguished. *Rai Kashi Pershad Singh* v. *Babu Duleep Narain Sahu, 8 C. W. N. 261,* followed. GANESH SINGH *v.* DEBI SINGH (1910)

I. L. R. 32 All. 377

4. ——— *Transfer of Property Act (IV of 1882), s. 99—Repeal—Decree on mortgage—Execution sale—Proceeds insufficient to satisfy decree—Attachment of mortgagor's other property comprised in redemption decree for the recovery of the balance—Property attached to be sold.* *H* and *G* mortgaged their property H to *R* who also held

got a redemption decree against *R* with respect to property B. In execution of *R*'s decree, property A was sold but the sale-proceeds were not sufficient to satisfy the decretal debt. *R*, thereupon, sought to recover the balance by execution against property B and the said property was attached. After

Procedure Code (Act V of 1908) in so far as it repealed s. 99 of the Transfer of Property Act (IV of 1882) and substituted in its place O. XXXIV, r. 14, merely effected a change of procedure in the manner in which mortgaged property has to be realized in execution of money decrees and, therefore, the statutory rule in force for the purpose of the execution of the unsatisfied portion of the decree on mortgage was the rule contained in O. XXXIV of the Civil Procedure Code (Act V of 1908). *R* was, therefore, entitled to an order that the attached property B be sold in execution of his decree with respect to property A. BAI GANGA *v.* RAJARAM ATMARAM (1911)

I. L. R. 35 Bom. 248

5. ——— *Charge on immoveable property credited by a money-decree—Execution proceedings of the decree—Charged property can be sold in execution—No separate suit for bringing the property to sale necessary.* A decree for money directed the defendant to pay a sum of money to plaintiffs, and further declared a first charge and a lien on certain immoveable property of the defendant. In execution of the decree the plaintiffs applied to sell the property charged. *Held*, by SHAH, J. agreeing with HEATON, J. (PRATT, J. dissenting) that the plaintiffs had the right to bring the property charged to sale in execution proceedings; and that no separate suit for the sale of the property was necessary. AMBALAL BAPUBHAI *v.* NARAYAN TATYABA (1919)

I. L. R. 43 Bom. 631

6. ——— *Usufructuary mortgage comprising (1) a fixed rate holding and (2) a right to receive offerings at a temple. Subsequent agreement between mortgagor and mortgagee for payment by former of a fixed sum instead of the offerings—Decree for arrears—Execution of decree—"Claim arising under the mortgage."* The property comprised in a usufructuary mortgage consisted of (i) a fixed rate holding and (ii) of the right to receive certain offerings at a temple. Inasmuch, however, as the mortgagee was a Mahomedan, a subsequent agreement was entered into between the parties whereby the mortgagor bound herself to pay annually a fixed sum of money in lieu of the offerings and also, in case of default, to

execution of this decree he attached the mort-

as the claim under the subsequent agreement was one arising under the original contract of mortgage within the meaning of O. XXXIV, r. 14, of the Code of Civil Procedure. *Haribans Rai* v. *Sri Niwas Naik, I. L. R. 35 All. 518,* distinguished. KADMA PASIN *v.* MUHAMMAD ALI (1919)

I. L. R. 41 All. 399

7. ——— *Instalment decree —Failure to pay one instalment—Darkhast to recover amount of the instalment by sale of a portion of the property mortgaged—Premature darkhast.* A decree passed on a mortgage was made payable in instalments and provided that if any two instalments remained unpaid till six months after the date of the second instalment, the whole amount of the

ment by sale of a part of the mortgaged property.— *Held*, that the application was premature, in view of the precise terms of the decree itself and of the principles underlying O. XXXIV, r. 14, of the Civil Procedure Code, which showed that where a mort-

8. ——— *Mortgage—Property mortgaged with possession—Simultaneous execution of rent note by mortgagor—Decree obtained by mortgagee on the rent-note—Execution of the decree by sale of mortgaged property—Claim arising out of mortgage transaction—Mortgagee's right to bring the mortgaged property to sale otherwise than by suit.*

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

———— O. XXXIV, r. 14 (Act IV of 1882, s. 100)—*contd.*

One H mortgaged with possession his property to F and on the same date executed a rent note in favour of F for a period of twelve months. H having failed to pay the rent under the rent note, the mortgagee F filed a suit and obtained a decree for the rent due. The mortgagee sought to execute the decree by sale of the mortgagor's equity of redemption in the mortgaged property. It was contended that the mortgagee could not be allowed to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage under O. XXXIV, r. 14 of the Civil Procedure Code, 1908. *Held*, upholding the contention, that on the facts of the case, the claim on which the mortgagee got a decree was really a decree for payment of money in satisfaction of the claim arising out of the mortgage and therefore fell under O. XXXIV, r. 14 of the Civil Procedure Code, 1908. IBRAHIM *walad* GOOLAM *v.* NIHALCHAND (1919) . . **I. L. R. 44 Bom. 366**

9. ———— *Mortgage—Suit on mortgage, but only simple money decree given—Execution of decree.* O. XXXIV, r. 14, of the Code of the Civil Procedure does not apply when the mortgagee, having already brought a suit upon his mortgage, has obtained only a simple money decree on the finding that his mortgage was not legally enforceable. On such a decree execution can be had against any property of the judgment-debtor. *Chedi Lal* v. *Saadat-un-nissa Bibi, I. L. R. 39 All. 36*, followed. SURAJ NARAYAN SINGH *v.* JAGBALI SHUKUL . . **I. L. R. 42 All. 566**

10. ———— *Suit arising out of a mortgage referred to arbitration—Award ignoring the mortgage and giving a simple money decree—Decree held to be executable against the property formerly mortgaged.* The parties to a suit based on a mortgage bond referred the matters in dispute between them to arbitration. The arbitrator, apparently, with the agreement of the parties, treated the mortgage as no longer in existence, or as no longer effective as a valid security, and made an award which resulted in a simple money decree in favour of the mortgagees. *Held* that in the circumstances this decree was not a decree in satisfaction of a claim arising under the mortgage within the meaning of r. 14 of O. XXXIV of the Code of Civil Procedure which would preclude the decree-holder from bringing the property once the subject of his mortgage to sale in execution thereof. *Chedi Lal* v. *Saadat-un-nissa Bibi, I. L. R. 39 All. 36*, and *Suraj Narain Singh* v. *Jagbali Shukul, I. L. R. 42 All. 566*, referred to. TANSUKH RAI *v.* SRI GOPAL . **I. L. R. 43 All. 677**

———— O. XXXIV, rr. 14, 15—

See O. XXXIV, R. 4 **2 Pat. L. J. 255**

See EXECUTION OF DECREE.
I. L. R. 45 Calc. 530

———— O. XXXIV, r. 15—

See PROVINCIAL SMALL CAUSE COURT ACT, 1887, s. 23 . . **5 Pat. L. J. 248**

———— O. XXXVI (1882 Code ss. 527 to 536)—Where a special case is stated by consent it cannot be reopened unless all parties consent. MONIE *v.* SCOTT

I. L. R. 43 Bom. 283

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

————O. XXXVII, r. 2 (1882 Code s. 532)

See APPEAL . **I. L. R. 42 Calc. 735**

———— O. XXXVIII (1882 Code ss. 477, 490)—*Order to attach before judgment—Attachment effected after decree—Alienation after attachment validity of—O. XXI, r. 57, applicability of to attachment before judgment.* An attachment ordered before judgment invalidates an alienation made after the property is actually attached in pursuance of the order even though the actual attachment was made after the passing of the decree. O. XXI, r. 57, Civil Procedure Code, has no application to attachments *before* judgment. Hence an attachment before judgment does not cease to have effect because of the dismissal of subsequent application for execution for default of prosecution. *Bavuddin Sahib* v. *Arunachala Mudali, 26 M. L. J. 215*, and *Kosuri Suraparaju* v. *Mandapaka Narasimham, 26 I. C. 81*, followed. A private purchaser from the judgment-debtor pending an attachment has no right of suit for damages on the ground that the decree was satisfied and became unexecutable until he is damnified by any execution of the decree. VENKATASUBBIAH *v.* VENKATA SESHAIYA (1918)

I. L. R. 42 Mad. 1

———— O. XXXVIII, r. 2 (1882 Code s. 479)—*Arrest of defendant before judgment—Deposit of money in Court—Right of the plaintiff to the amount on obtaining decree—Rights of Official Receiver in insolvency and of other attaching creditors of the defendant.* The defendant was arrested before judgment and was ordered to be released from custody on his depositing in Court a sum of money sufficient to meet the plaintiff's claim in the suit, under O. XXXVIII, r. 2, of the Civil Procedure Code. There was subsequently an attachment of the money by a decree-holder and an adjudication of the defendant as an insolvent. *Held*, that the money was paid into Court to the general credit of the action and charged with a lien in favour of the plaintiff on the latter obtaining a decree in his favour; and that the attaching creditor's and the Official Receiver's claims were subject to this lien. RAMIAH AIYAR *v.* GOPALIER (1918) . **I. L. R. 41 Mad. 1053**

———— O. XXXVIII, r. 3 (1882 Code s. 480)

See s. 135

I. L. R. 43 Mad. 272

———— O. XXXVIII, r. 5 (1882 Code s. 483)—

See s. 27 . . . **26 C. W. N. 169**

See MORTGAGE **I. L. R. 46 Calc. 245**

See CIVIL PROCEDURE CODE, 1908, s. 73 **I. L. R. 37 All. 575**

O. 21. r. 63 **I. L. R. 41 Mad. 849**

1. ———— *Attachment before judgment—Money decree—Death of judgment-debtor—Property passing by survivorship to his co-parcener—Subsequent execution of decree—Right of survivorship not defeated by execution.* In 1906 the plaintiff obtained a money decree against *B*, having first obtained attachment before judgment of certain property which was joint-family property. In 1907 *B* died while joint with defendant 2. The plaintiff applied to execute the decree in 1909 and again in 1911. The lower Courts dismissed the application on the ground that the title

CIVIL PROCEDURE CODE (ACT V OF 1908)
—contd.

———— **O. XXXVII, r. 5**—*contd.*

of defendant 2 to the property by survivorship was not defeated by the attachment before judgment. The plaintiff having appealed. *Held*, that the attachment before judgment did not defeat the right of defendant 2 by survivorship; and that the plaintiff had taken no measure to which could be attributed the effect of defeating that right. SUBRAO MANGESH *v.* MAHADEVI (1913)
I. L. R. 38 Bom. 105

2. ———— *Application for attachment before judgment—Summons to defendant to furnish security—Money paid into Court—Subsequent insolvency of defendant—Plaintiff's right over the deposit—No charge for the decree amount—Right of the Official Assignee.* When, on an application made by the plaintiff under O. XXXVIII, r. 5 of the Code of Civil Procedure for attachment before judgment of certain properties belonging to the defendant, the Court issued summons to the defendant to furnish security for a certain amount or to show cause against it and further ordered that certain goods belonging to the defendant should be attached until further notice, and the defendant paid into Court the amount specified in the summons but subsequently became an insolvent. *Held*, that the plaintiff had no charge on the money paid into Court as against the Official Assignee of the insolvent. ERRIKULAPPA CHETTY *v.* THE OFFICIAL ASSIGNEE, MADRAS (1915)
I. L. R. 39 Mad. 903

3. ———— *Attachment before judgment—A mere agreement to sell property—Not sufficient to prove intent to defraud—Court must be satisfied on additional circumstances.* Before an order for attachment before judgment can be made, the Court must be satisfied by an affidavit or otherwise, that the defendant with intent to obstruct or delay the execution of any decree that may be passed against him is about to dispose of the whole or any part of his property; but from a mere agreement to sell a portion of his property by the defendant it cannot be presumed that he actually had that intention. There must be additional circumstances before the Court can be satisfied that such an intention exists. NOWROJI (SARDAR) PUDAMJI *v.* THE DECCAN BANK, LIMITED (1921)
I. L. R. 45 Bom. 1256

———— **O. XXXVIII, rr. 5 to 11**—
See ANTE . **I. L. R. 42 Mad. 1**

———— **O. XXXVIII, r. 5; O. XXXIX, r. 1, s. 94**—*Injunction—Malikana dues.* One *M. I.* mortgaged *malikana* dues from certain villages to one *N. N.* sued on his mortgage and obtained an order absolute for sale of the property. Later, he obtained an injunction restraining the judgment-debtor from receiving the *malikana* dues. *Held*, that the Court below was not justified in either attaching the *malikana* dues or restraining the judgment-debtor by injunction from receiving it inasmuch as all that the decree-holder was entitled to do under his decree, was to have the property sold. MUHAMMAD INAMULLAH KHAN *v.* NARAIN DAS (1915) . . . **I. L. R. 37 All. 423**

———— **O. XXXVIII, r. 5, ss. 115, 145**—*Attachment before judgment—Surety for defendant—Death of defendant before hearing—Legal representative brought on record—Application by surety for discharge, whether premature.* The petitioner plaintiff having obtained an attachment before judgment against the defendant the opponent stood surety for the defendant whereupon the attachment was raised. The defendant died before the hearing of the suit and his widow was immediately brought on record as his legal representative. The surety afterwards applied to the Court for his discharge on the ground of the death of the defendant. The lower Court ordered that the

ings had not come to an end, because they had been revived by the substitution of the widow of the defendant and the stage had not been reached at which the liability of the surety could be decided. CHANDULAL DALSUKHRAM *v.* JESHANGBHAI CHHOTALAL (1917) . . . **I. L. R. 41 Bom. 402**

———— **O. XXXVIII, r. 6 (1882 Code s. 485)**—
See DIVORCE . **I. L. R. 37 Calc. 613**

———— **O. XXXVIII, r. 8 (1882 Code s. 487)**—
See s. 73 . . **I. L. R. 37 All. 575**
See LIMITATION ACT, 1908, ART. 13.
I. L. R. 41 Mad. 23

———— **O. XXXVIII, r. 9 (1882 Code s. 488)**—
See ATTACHMENT
I. L. R. 38 Calc. 448

———— **O. XXXVIII, rr. 9 and 11**—
See ATTACHMENT BEFORE JUDGMENT.
I. L. R. 45 Calc. 780

———— **O. XXXIX, r. 1 (1882 Code s. 492)**—
See O. XXXVIII, R. 5
I. L. R. 37 All. 423
See s. 151 . . **3 Pat. L. J. 456**
See TEMPORARY INJUNCTION.
I. L. R. 43 Calc. 1001

1. ———— *"Wrongfully sold in execution of a decree"—Temporary injunction—Civil Procedure Code, 1882, s. 492—Act No. X of 1877, s. 492—Act No. VIII of 1859, s. 92.* *Held*, that when the words "wrongfully sold in execution of a decree" were added by the Legislature to the Civil Procedure Code of 1877, it was clearly intended that an injunction might be granted when property which the claimant claimed to be his was in danger of being sold in execution of a decree against another person or even against himself. *In the matter of the petition of Chanda Bibi, I. L. R. 26 All. 311*, and *Meghraj Singh v. Lala Mal, 1 All. L. J. 312 (Reporter's Diary)*, overruled. *Brojendra Kumar Rai Chowdhuri v. Rup Lal Doss, I. L. R. 12 Calc. 515*, *Ganga Nand v. Balgobind Das, All. Weekly Notes (1884), 319*, and *Kripa Dayal v. Rani Kishori, I. L. R. 10 All. 80*, followed. ABDULLA KHAN *v.* BANKE LAL (1910) **I. L. R. 33 All. 79**

2. ———— *Civil Procedure Code (Act XIV of 1882), s. 211—Temporary injunction—What Courts bound to consider before granting—Debutter estate—Decision against previous shebait, effect of, on succeeding shebaits—Order passed in*

CIVIL PROCEDURE CODE (ACT V OF 1908)
—contd.

——— **O. XXXIX, r. 1 (1882 Code s. 492)**—*contd.*

execution case disallowing objection, effect of, on successive shebaits—Contingent right—Suit for declaration of, if lies. The appellants obtained a decree which was ultimately affirmed by the Privy Council against P, the *shebait*, representing a *debutter* estate, for expenses incurred by their father who was the *shebait* before P in carrying on the worship of the idol and in the course of a litigation for establishing his title to the *shebaitship* which was challenged by P. An application for execution of this decree was opposed by P who suggested that the decree-holders should get Rs. 1,500 per year out of the rents and profits of the *debutter* estate but the Subordinate Judge disallowed the objection on 3rd December 1910. On 12th August 1911 the respondents, the brother's son and the brother's grandson, respectively, of P, instituted a suit against the appellants and other members of the family making P also a party defendant for a declaration of their future rights to the *debutter* property as also for a declaration that that property was not liable to sale in execution of the decree obtained by the appellants. An application made on the same day to have the execution of the said decree stayed was refused by the Subordinate Judge. On 14th August 1911 the plaintiffs applied under O. XXXIX, r. 1, for the issue of a temporary injunction to stay the sale in execution of the said decree and the Subordinate Judge granted the injunction. *Held,* that the order granting injunction was wrong and improper. Before granting the injunction the Court was bound to consider how far there was any possibility of plaintiffs succeeding in the suit. *Preston* v. *Luck, L. R. 27 Ch. D. 497, 505,* relied on. The decision in the previous suit which was contested by P as *shebait* of the *debutter* estate was binding on all successive *shebaits.* The order passed by the Subordinate Judge in the execution case on the 3rd December 1910, was an order under the provisions of s. 244, Civil Procedure Code, 1882, and would be binding on all successive *shebaits.* The contingent interest which the plaintiffs claimed in *shebaitship* was very remote and a person cannot sue for a declaration of his right unless he has an existing right and a mere contingent right which may never ripen into an acutal existing right is not sufficient to ground an action for such declaration. NAGENDRA NATH MUKERJEE *v.* PROBAL CHANDRA MUKERJEE (1912) . . **17 C. W. N. 964**

3. ——— *Execution of decree—Limitation—Temporary injunction granted by High Court on appeal "pending final decision of the suit"—Meaning of "final decision."* A stay of execution granted by the High Court on appeal "pending the final decision of the suit" does not imply that execution is to be suspended until the period of limitation for an appeal has expired or until such appeal has been decided, but means no more than until the decision of the suit by the court of first instance. So *held* by PIGGOT, *J.,* with whom WALSH, *J.,* agreed with hesitation, being inclined to the view that the words "pending the final decision of the suit" meant until the disposal of the suit by a final unappealable order. *Shaikh Moheeooddeen* v. *Shaikh Ahmed Hossein, 14 W. R., C. R., 384, Balkaran Rai* v. *Gobind Nath Tiwari, I. L. R. 12 All. 129,* and *Shri Vishwambhar Pandit* v. *Shri Vasudeo Pandit, I. L. R. 16 Bom. 708,* referred to. MADHO PRASAD *v.* DRAUPADI BIBI . . . . **I. L. R. 43 All. 383**

4. ——— *Injunction to restrain marriage of principal defendant pending the decision of an appeal in a suit for restitution of conjugal rights.* In this case the High Court refused to grant to the plaintiff appellant in a suit for restitution of conjugal rights a temporary injunction against the principal defendant, or against the other defendants, her relations, in restraint of the marriage of the principal defendant pending the hearing of the plaintiff's appeal. MAHAMMAD YAMIN *v.* RAZIA BEGAM

I. L. R. 42 All. 134

——— **O. XXXIX, rr. 1 and 7**—*What justifies relief under these sections. Held,* that an application by the defendants for an injunction restraining the plaintiff, pending the disposal of the suit, from interfering with the defendant's right to worship in, and to free access to the temples which were the subject matter of the suit, did not fall within O. XXXIX, r. 1 of the Code of Civil Procedure, 1908. KAROBI CHAND *v.* MAHARAJ BAHADUR SINGH . . **1 Pat. L. J. 560.**

——— **O. XXXIX, r. 1 ; O. XLIII, r. 1**—*Temporary injunction—Order refusing injunction—Appeal. Held,* that an appeal lies from an order refusing, as well as from one granting a temporary injunction. LACHMI NARAIN *v.* RAM CHARAN DAS (1913) . . . **I. L. R. 35 All. 425**

——— **O. XXXIX, r. 2 (1882 Code, s. 493)**—

See O. XLIII, R. 1. **I. L. R. 39 Mad. 907**

See APPRAISEMENT. . **I. L. R. 48 Calc. 1086**

See INJUNCTION **I. L. R. 41 Mad. 208**
I. L. R. 42 All. 98

——— *Interlocutory injunction—Mandatory injunction—Power of Court to grant, pending trial.* The defendants erected on their own land a screen for blocking up the openings which the plaintiff had made in his wall. The plaintiff filed a suit to have the screen removed; and pending the suit applied for and obtained a mandatory injunction directing the defendants to remove the screen. The defendants applied to the High Court. *Held,* setting aside the order, that the lower Court had acted illegally and with material irregularity in the exercise of its jurisdiction, in granting the mandatory injunction. *Quære:* Whether a mandatory injunction can be considered as a "temporary" injunction under O. XXXIX, r. 2, of the Code of Civil Procedure. RASUL KARIM *v.* PIRUBHAI AMIRBHAI (1914)

I. L. R. 38 Bom. 381

——— **O. XXXIX, r. 2, s. 24**—*Temporary injunction by Munsif—Suit transferred to the file of District Judge after injunction by Munsif—Breach of injunction after transfer—Jurisdiction of District Judge to punish for contempt—Bengal Civil Courts Act (XII of 1887).* In case of breach of disobedience of a temporary injunction, the Court which actually granted the injunction may punish the contempt under O. XXXIX, r. 2 (3). These

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

———— O. XXXIX, r. 2, s. 24—*contd.*

is nothing in s. 24 of the Civil Procedure Code or in Chap. IV of the Bengal Civil Courts Act authorising, either expressly or by necessary implication, a Court to which the suit may be transferred but ... ise the ... 2 (3).

... 18 C. W. N. 470

———— O. XXXIX, r. 7 (1882 Code, s. 499)—*Inspection of property—Preparation of inventory, Court if may order—Interlocutory order—Interference on revision—Receiver, injunction, or inspection, whether proper remedy—Practice.* Whenever in respect of the property of one individual a right accrues to another which cannot be measured without inspection of the subject of the property, the Court is competent to compel the proprietor to permit that inspection as indispensable for administering the justice of the case. Such inspection is no invasion of his rights but a legal consequence of the obligations affecting the property and the proprietor. The power to direct an inspection includes the power to direct the preparation of an inventory, if the Court is of opinion that the preparation of an inventory is essential for the proper decision of the case. But in directing an inspection and preparation of an inventory, the matter should be so ordered as to cause the least inconvenience to the owner. AMJAD ALI *v.* ALI HUSSAIN JOHAR (1910)
15 C. W. N. 353

———— O. XXIX, r. 10 (1882 Code, s. 502)—

See GUARDIANS AND WARDS ACT. s. 12.
I. L. R. 36 Bom. 20

———— O. XL, r. 1 (1882 Code, s. 503)—

See CIVIL PROCEDURE CODE (ACT V OF 1908)—

S. 60 (*1*) . I. L. R. 40 Mad. 302

S. 151 . . I. L. R. 42 Calc. 433

See COMMON MANAGER.
I. L. R. 43 Calc. 986

See RECEIVER I. L. R. 40 Calc. 862
I. L. R. 43 Calc. 124
I. L. R. 40 Mad. 18
I. L. R. 46 Calc. 70
3 Pat. L. J. 573
5 Pat. L. J. 513
14 C. W. N. 248

———— *Injunction—Receiver—Application for temporary injunction as to property in suit—Order putting each party in possession of part pending the suit* The defendants in a suit for partition made an application to the Court touching the custody of the property, the subject-matter of the suit. The Court thereupon directed that until the determination of the suit the plain- ...

legal order and a proper order in the circumstances, and not the less so because the Court had acted *suo motu.* The order practically amounted to one under O. XL, r. 1, of the Code of Civil Procedure, 1908. DAN PRASAD *v.* GOPI KISHAN (1913)
I. L. R. 36 All. 19

CIVIL PROCEDURE CODE ACT V OF 1908) —*contd.*

———— O. XL, r. 1 (1882 Code, s. 503)—*contd.*

———— A creditor put into possession for the purpose of realising his debt is not protected by this order and the Court can appoint a Receiver of the property. HITENDRA SINGH *v.* MAHARAJA SIR RUMESHWAR SINGH BAHADUR . . . . 6 Pat. L. J. 37

———— The words "just and convenient" in O. XL, r. 1, are derived from ...

cretion and one should not be appointed supersession of a *bonâ fide* possessor of the property in controversy unless there is some substantial ground for interference. SRIMATI MATHURIA DEBYA *v.* SHIBDAYAL SINGH HAZARI . 14 C. W. N. 252

———— *Receiver—Suit for possession and mesne profits—Mere poverty of defendant not adequate ground for appointing a receiver and removing the defendant from possession.* A Muhammadan lady settled a considerable amount of immoveable property on trustees for certain specified purposes and the trustees were put in possession. After the death of the settlor a suit for possession of the trust property was brought ...

trust property itself. *Held,* ... alleged for the appointment of a receiver were insufficient. The principles laid down in *Srimati Prosonomoyi Devi* v. *Beni Madhab Rai, I. L. R. 5 All. 556,* followed MUHAMMAD ASKARI *v.* NISAR HUSAIN . . . I. L. R. 43 All. 311

———— O. XL, rr. 1 and 4—

See RECEIVER . 5 Pat. L. J. 97

———— O. XL, rr. 1 and 4, O. XLII, r. 1—*Receiver whether decision declaring liability of, is appealable—Remedy for recovery of dues by Receiver, after handing over of estate—appointment of Receiver by appellate court this succession by first court—whether successor is officer of first court or High Court.* An order declaring a Receiver liable in ...

A Receiver who has ... estate must institute a separate suit for recovery of sums due to him in respect of salary, allowances, ...

Receiver, *held,* that the successor was ... the first court and not of the High Court, and, therefore, his accounts were subject to examination by the first court. The High Court declined to examine them. GANESH LALL *v.* KUMAR SATYA NARAYAN SINGH . . . 4 Pat L. J. 636

———— O. XL, r. 1, and O. XLIII, r. 1—

See RECEIVER . I. L. R. 40 Mad. 18

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— **O. XL. r. 1, and O. XLIII, r. 1**—*contd.*

——— *Receiver, misappropriation of income by—Property, meaning of—Wilful default, meaning of—Death of receiver—Application against legal representatives, if maintainable.* Under O. XL, r. 4 of the Code of Civil Procedure (Act V of 1908), an application can be made for execution being levied against the properties of a receiver in the hands of his legal representatives, in respect of his misappropriation of the income of the properties entrusted to his charge. RAMAN NAIR *v.* GOPALA MENON (1915)

I. L. R. 39 Mad. 584

——— **O. XLI, rr. 1 and 3 ; O. XLII, r. 1**—*Rules of the High Court, chapter III, r. 2—Second appeal—Memorandum of appeal not accompanied by a copy of the judgment of the court of first instance—Court not competent to dispense with copy of judgment—Act No. IX of 1908 (Indian Limitation Act), s. 5.* R. 2 of Chapter III of the rules of the High Court must be taken to have been made under the provisions of s. 122 of the Code of Civil Procedure, 1908. Both that rule and r. 1 of O. XLI of the Code of Civil Procedure, as revised by the High Court, requiring the filing of a copy of the first Court's judgment along with a memorandum of second appeal, are imperative. A memorandum of appeal from an appellate decree which is not accompanied by a copy of the judgment of the court of first instance is not a valid memorandum, and the court to which it is presented has no alternative but to reject it or to return it to the appellant to be put in order. The court to which such a memorandum of appeal is presented cannot dispense with the filing of a copy of the judgment of the court of first instance. *Chunni Lal Jethabhai* v. *Barot Dahyabhai Amulakh, I. L. R. 32 Bom., 14*, distinguished. *Narsingh Sahai* v. *Sheo Prasad, I. L. R. 40 All. 1*, referred to by SULAIMAN, *J.* BHAIRON GHULAM *v.* RAM AUTAR SINGH

I. L. R. 43 All. 660

——— **O. XLI, rr. 1 and 23**—*Remand—Decision on preliminary point, whether finding of undue influence is.* One *R* gave a lease to *F* which was to expire in 1913. In 1911 *R* gave a lease of the same land to *G* who gave notice of the lease to *F*. On the expiry of *F*'s lease *G* endeavoured to obtain possession but failed. He found that *F* had obtained a renewal of the first lease in 1913. *G* sued for recovery of possession. It was pleaded, *inter alia*, first that *G*'s lease had been obtained by deception, and secondly, that it had been obtained by undue influence. The first court found for the defendant on the second plea and dismissed the suit. The appellate court reversed the finding of the first court and remanded the case for trial of the first plea. Defendants appealed. *Held*, that the decision of the issue of undue influence made it unnecessary to consider the other issues in the case and that, therefore, the decision amounted to a decision on a preliminary point within the meaning of O. XLI, r. 23, of the Code of Civil Procedure, 1908, and the lower appellate court had power to remand the case. MAHUNT RAIHU GIR *v.* MAHANT RAGHUNATH GIR . . . **2 Pat. L. J. 398**

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— **O. XLI, r. 2 (1882 Code, s. 542)**—Under s. 561, Civil Procedure Code, 1882 (O. XLI, r. 2 of the Code of 1908), the Court may receive a memorandum of cross-objections at any time and it is not prevented from receiving it by the fact that only an application to file it in *formâ pauperis* was filed in time while the memorandum was filed out of time. *Quære:* Whether s. 5 of the new Limitation Act (VIII of 1908) includes a memorandum of cross-objections. GOVIND RANI DASI *v.* RADHA BALLAV DAS (1910)

15 C. W. N. 205

——— **O. XLI, r. 3 (1882 Code, s. 543)**—

See HINDU LAW—PARTITION.

I. L. R. 38 Mad. 556

——— **O. XLI, r. 4 (1882 Code, s. 544)**—

See HINDU LAW—ADOPTION.

I. L. R. 40 Mad. 846

1. ——— *Appeal—Discretion of Court—Decree based on ground common to all defendants—Court not bound to set aside decree as against non-appellant defendant.* Where an Appellate Court reverses a decree in favour of a plaintiff upon grounds common to all the defendants, it is not therefore bound to set aside the decree as against a defendant who has not appealed from it. *Seshadari* v. *Krishnan, I. L. R. 8 Mad. 192*, referred to. NARAIN DIKSHIT *v.* BINAIK BHAT (1914) . . . . **I. L. R. 36 All. 510**

2. ——— *Power of Appellate Court to reverse decree in favour of non-appealing defendant—Record-of-rights, suit to correct entry in—jurisdiction of Revenue Officer to allow commutation of rent during pendency of such suit—Chota Nagpur Tenancy Act (Beng. VI of 1908), ss. 61 (2), 61 (8), 139 (2).* In the finally published record-of rights it was entered that the rent was payable in kind with small cash payments in addition and the tenants applied for commutation of the rent. The landlord sued in the Civil Court for a declaration that the rent was payable wholly in cash. The Revenue Officer during the pendency of the civil suit allowed the commutation. *Held*, that the institution of the suit in the Civil Court did not take away the Revenue Officer's jurisdiction. That the suit was barred by s. 139 (2) of the Chota Nagpur Tenancy Act. O. XLI, r. 4, Civil Procedure Code, gives the Appellate Court power to reverse the decree in favour of all the defendants even though the appeal is preferred by only some when the decree proceeds on any ground common to all of them. RAKHAL CHANDRA CHATTERJEE *v.* BAJI SANTHAL (1915) . . . **23 C. W. N. 372**

——— **O. XLI, rr. 4, 32 and 33**—

See CROSS OBJECTIONS. **5 Pat. L. J. 328**

——— **O. XLI, rr. 4 and 33**—*Appeal by one of two defendants—Whether defendant who does not appeal can benefit by the appeal of his co-defendant.* The object of rr. 4 and 33 of O. XLI of the Civil Procedure Code, 1908, is to prevent contradictory decisions in the matter of the same suit. There is no justification for the proposition that a defendant who suffers a decree to be passed *ex-parte* against him can not benefit by the appeal of the contesting co-defendant. R. 33 of O. 41, read with r. 4 of the same order, gives the Court power to interfere with a decree if that decree is based upon grounds common to all the defendants, although only one

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— **O. XLI, rr. 4, 32 and 33**—*contd.*

of such defendants appeals against that decree. RAM TAHAL SINGH *v.* SUKESWAR REYAIN **1 Pat. L. J. 143**

——— **O. XLI, r. 5 (1882 Code, s. 545)**—

See CHOTA NAGPUR TENANCY ACT, s. 215 **4 Pat. L. J. 371**

See EXECUTION OF DECREE. **I. L. R. 38 Calc. 754**

See RECEIVER **4 Pat. L. J. 642**

1. ——— *Stay of execution by an Appellate Court—Order for execution by Court of first instance in ignorance of order of stay—Order for execution, validity of.* *Held*, by the Full Bench. Where subsequent to an interim order for stay of execution made by an Appellate Court without notice to the decree-holder but before its communication to the Court of first instance, an order of attachment is made by the latter Court, the order of attachment is not void and ineffectual as having been made without jurisdiction, but is legally valid. The order is effective only from the time it is communicated to the first Court. *Muthu-kumarasami Rowther Minda Nayinar v. Kunna-* ...

... *Mad. 166,* overruled. VENKATACHALAPATI RAO *v.* KAMESWARAMMA (1917) . . **I. L. R. 41 Mad. 151**

2. ——— *Whether applicable to stay execution not of the decree appealed against, but of some other decree—Petition to stay sale of immovable properties—Jurisdiction of Appellate Court to grant.* An application under O. XLI, r. 5, to stay the sale of immovable property in execution of a decree pending an appeal therefrom can be made not only to the Court ...

... *Mad. L. J. 677,* ... *Chetty,* 23 ... dissented from; *Tribeni Sahu v.* ... *Bux, I. L. R. 21 Calc. 1037* and *Rama Prasad v. Ankhel Chandra, 20 C. L. J. 512,* referred to. LAKSHMANAN CHETTY *v.* P. P. V. PALANIAPPA CHETTY (1918) . . **I. L. R. 41 Mad. 813**

3. ——— *Stay of execution during pendency of an appeal when immovable property is concerned.* *Held*, that under O. XLI, r. 5 of the Code of Civil Procedure no order of stay of execution during the pendency of an appeal can be made unless the Court is satisfied that substantial loss may result to the applicant and this rule applies to immovable equally with movable property. *Gobind Chand v. Samuel Das (I. L. R. 1 Lahore, 319)* penultimate paragraph, distinguished. PURAN MAL *v.* HAIDAR SHAH **I. L. R. 2 Lah. 61**

4. ——— *Order under—Immovable property given as security for decree by judgment-debtor, whether realizable in execution—Judgment-debtor taking advantage of a favourable order in execution—Estoppel.* Immovable property given by a judgment-debtor as security for the due performance of a decree, pursuant to an order made under O. XLI, r. 5 (3), Civil Procedure Code, can be realized in execution without attachment, the matter being one relating to execution within s. 47, Civil Procedure Code, and a separate suit does not lie. *Sadasiva Pillai v. Ramalinga Pillai, L. R. 2 I. A. 219,* applied. *Shyam Sunder Lal v. Bajpai Jainarayan, I. L. R. 39 Calc. 1060,* followed. *Mulla Prasad v. Mahadeo Prasad, I. L. R. 38 All., 327,* and *Saminatha Pathan v. Sarnathi Ammal, 22 Mad. L. J. 190,* referred to. *Tokhan Singh v. Girwar Singh, I. L. R. 32 Calc. 431,* distinguished. Where a judgment-debtor who could have been arrested for the entire amount of a decree is on his objection ordered to be arrested only for a certain amount on the ground that the balance could be realized by the sale of the lands given by him as security for the decree amount, he is estopped from afterwards disputing the right of the decree-holder to sell the lands for all the then balance of the decree even though such balance may exceed the amount for which the lands were originally tendered as security. *Sadasiva Pillai v. Ramalinga Pillai, L. R. 2 I. A. 219,* followed. SUBRAMANIAN CHETTIAR *v.* RAJA OF RAMNAD (1917) . . . **I. L. R. 41 Mad. 327**

5. ——— *Applications, for stay of execution in the Original side of the High Court pending an intended appeal must ordinarily be made to the judge who tried the case and such an application must be made without unreasonable delay.* CHATARBHUJ CHANDRA NEIL *v.* BANDHO DAS DAGA . . . . **25 C. W. N. 928**

——— **O. XLI, r. 6 (1882 Code, 546)**—*Rent decree—Order for sale of holding in execution—Refusal by Court to stay execution upon taking security—High Court's power to entertain original application under r. 5 or to revise the order under r. 6 (2)—Practice.* Where an order having been made for the sale of certain holdings in execution of decrees for rent, the Court refuses the judgment-debtor's application under O. XLI, r. 6 (2) of the Civil Procedure Code to stay execution pending the hearing of appeals preferred by them against the decrees, the High Court may ...

... order of the lower Court ... may also deal ... the Code, and direct the lower Court under s. 115 of the Code, and direct the execution to be stayed on the judgment-debtor furnishing sufficient security, in terms of O. XLI, r. 6 (2). RAM NATH SINGH *v.* KAMLESHWAR PROSAD SINGH (1911) **15 C. W. N. 432**

——— **O. XLI, r. 10 (1882 Code, 549)**—

See INSOLVENCY **I. L. R. 43 Calc. 263**

See LETTERS PATENT **25 C. W. N. 557**

See PROCEDURE **I. L. R. 48 Calc. 431**

See SECURITY FOR COSTS. **I. L. R. 42 Bom. 5**

1. ——— *Security for costs of appeal—Discretion of the Court—Inability of appellants to pay costs—Appeal by Government servant—Interest of the Government—Nature of security—Bond of the Secretary of State for India in Council.* When the Plaintiff-respondent applies under O.

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— **O. XL. r. 1, and O. XLIII, r. 1**—*contd.*

——— *Receiver, misappropriation of income by—Property, meaning of—Wilful default, meaning of—Death of receiver—Application against legal representatives, if maintainable.* Under O. XL, r. 4 of the Code of Civil Procedure (Act V of 1908), an application can be made for execution being levied against the properties of a receiver in the hands of his legal representatives, in respect of his misappropriation of the income of the properties entrusted to his charge. RAMAN NAIR *v.* GOPALA MENON (1915)

I. L. R. 39 Mad. 584

——— **O. XLI, rr. 1 and 3 ; O. XLII, r. 1**—*Rules of the High Court, chapter III, r. 2—Second appeal—Memorandum of appeal not accompanied by a copy of the judgment of the court of first instance—Court not competent to dispense with copy of judgment—Act No. IX of 1908 (Indian Limitation Act), s. 5.* R. 2 of Chapter III of the rules of the High Court must be taken to have been made under the provisions of s. 122 of the Code of Civil Procedure, 1908. Both that rule and r. 1 of O. XLI of the Code of Civil Procedure, as revised by the High Court, requiring the filing of a copy of the first Court's judgment along with a memorandum of second appeal, are imperative. A memorandum of appeal from an appellate decree which is not accompanied by a copy of the judgment of the court of first instance is not a valid memorandum, and the court to which it is presented has no alternative but to reject it or to return it to the appellant to be put in order. The court to which such a memorandum of appeal is presented cannot dispense with the filing of a copy of the judgment of the court of first instance. *Chunni Lal Jethabhai* v. *Barot Dahyabhai Amulakh, I. L. R. 32 Bom., 14,* distinguished. *Narsingh Sahai* v. *Sheo Prasad, I. L. R. 40 All. 1,* referred to by SULAIMAN, J. BHAIRON GHULAM *v.* RAM AUTAR SINGH

I. L. R. 43 All. 660

——— **O. XLI, rr. 1 and 23**—*Remand—Decision on preliminary point, whether finding of undue influence is.* One *R* gave a lease to *F* which was to expire in 1913. In 1911 *R* gave a lease of the same land to *G* who gave notice of his lease to *F*. On the expiry of *F*'s lease *G* endeavoured to obtain possession but failed. He found that *F* had obtained a renewal of the first lease in 1913. *G* sued for recovery of possession. It was pleaded, *inter alia,* first that *G*'s lease had been obtained by deception, and secondly, that it had been obtained by undue influence. The first court found for the defendant on the second plea and dismissed the suit. The appellate court reversed the finding of the first court and remanded the case for trial of the first plea. Defendants appealed. *Held,* that the decision of the issue of undue influence made it unnecessary to consider the other issues in the case and that, therefore, the decision amounted to a decision on a preliminary point within the meaning of O. XLI, r. 23. of the Code of Civil Procedure, 1908, and the lower appellate court had power to remand the case. MAHUNT RAJHU GIR *v.* MAHANT RAGHUNATH GIR . . . **2 Pat. L. J. 398**

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— **O. XLI, r. 2 (1882 Code, s. 542)**—Under s. 561, Civil Procedure Code, 1882 (O. XLI, r. 2 of the Code of 1908), the Court may receive a memorandum of cross-objections at any time and it is not prevented from receiving it by the fact that only an application to file it in *formâ pauperis* was filed in time while the memorandum was filed out of time. *Quære:* Whether s. 5 of the new Limitation Act (VIII of 1908) includes a memorandum of cross-objections. GOVIND RANI DASI *v.* RADHA BALLAV DAS (1910)

15 C. W. N. 205

——— **O. XLI, r. 3 (1882 Code, s. 543)**—

See HINDU LAW—PARTITION.

I. L. R. 38 Mad. 556

——— **O. XLI, r. 4 (1882 Code, s. 544)**—

See HINDU LAW—ADOPTION.

I. L. R. 40 Mad. 846

1. ——— *Appeal—Discretion of Court—Decree based on ground common to all defendants—Court not bound to set aside decree as against non-appellant defendant.* Where an Appellate Court reverses a decree in favour of a plaintiff upon grounds common to all the defendants, it is not therefore bound to set aside the decree as against a defendant who has not appealed from it. *Seshadari* v. *Krishnan, I. L. R. 8 Mad. 192,* referred to. NARAIN DIKSHIT *v.* BINAIK BHAT (1914) . . . . **I. L. R. 36 All. 510**

2. ——— *Power of Appellate Court to reverse decree in favour of non-appealing defendant—Record-of-rights, suit to correct entry in—jurisdiction of Revenue Officer to allow commutation of rent during pendency of such suit—Chota Nagpur Tenancy Act (Beng. VI of 1908), ss. 61 (2), 61 (8), 139 (2).* In the finally published record-of rights it was entered that the rent was payable in kind with small cash payments in addition and the tenants applied for commutation of the rent. The landlord sued in the Civil Court for a declaration that the rent was payable wholly in cash. The Revenue Officer during the pendency of the civil suit allowed the commutation. *Held,* that the institution of the suit in the Civil Court did not tak[e] away the Revenue Officer's jurisdiction. That t[he] suit was barred by s. 139 (2) of the Chota Nag[pur] Tenancy Act. O. XLI, r. 4, Civil Procedure C[ode] gives the Appellate Court power to revers[e a] decree in favour of all the defendants even [if] the appeal is preferred by only some w[here the] decree proceeds on any ground common [to] them. RAKHAL CHANDRA CHATTERJ[EE v.] SANTHAL (1915) . . . **23 C.**

——— **O. XLI, rr. 4, 32 and 33**

See CROSS OBJECTIONS. 5 P[at.]

——— **O. XLI, rr. 4 and 33**—*of two defendants—Whether defenda[nt] appeal can benefit by the appeal of* The object of rr. 4 and 33 of O. Procedure Code, 1908, is to pre[vent] decisions in the matter of the no justification for the proposi[tion] who suffers a decree to be him can not benefit by the co-defendant. R. 33 of O. same order, gives the Cou[rt] a decree if that decree common to all the def[endants]

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— O. XLI, r. 19 (1882 Code, 558)—*contd.*

See TRANSFER OF APPEAL.
3 Pat. L. J. 218

——— O. XLI, r. 20 ; O. XXII, r. 10 ; O. I, r. 10—

See MORTGAGE I. L. R. 38 Calc. 913

See PARTIES . I. L. R. 40 Calc. 323

——— O. XLI, r. 21 (1882 Code, 560)—

1. ——— *Jurisdiction of Court to set aside* ex parte *decree against a defendant when another defendant's appeal against the decree dismissed.* Where a decree was passed against several defendants against some of whom it was *ex parte*, and a defendant who appeared unsuccessfully appealed against that decree, the Court passing the decree has jurisdiction to set aside the *ex parte* decree as against a defendant who had not appealed *Damodar Manna* v *Sarat Chandra, 13 C. W. N. 846 ; Kamud Nath v. Jotindra Nath, 13 C. L. J. 221,* referred to. *Dhonai Sardar* v. *Tarak Nath, 12 C. L. J. 53,* distinguished ; and in so far as it lays down the contrary disapproved. INTU MEAH *v.* DAR BAKSH BHUIYAN (1911)
15 C. W. N. 798

2. ——— *Appeal decided* ex parte—*Application by respondent for rehearing—Non-appearance of counsel for respondent due to* [illegible]

instructing counsel and of seeing that the appeal was properly prosecuted. Nathu Ram did instruct counsel but after a time took away the papers so that counsel was unable to appear, and the consequence was that the appeal was decreed *ex parte*. *Held*, that this misconduct on the part of the agent afforded his principal no ground for applying for rehearing of the appeal. *Har Prasad* v. *Abdul Rahman, All. W. N., 1905, page 14,* referred to. BAJI LAL *v.* NAWAL SINGH (1917)
I. L. R. 39 All. 388

——— O. XLI, rr. 20 and 33—

See O. XXIV, R. 4 24 C. W. N. 44

——— O. XLI, r. 22 (1882 Code, 561)—

See CROSS OBJECTION. 4 Pat. L. J. 164

See PROVINCIAL INSOLVENCY ACT, 1907, SS. 46 AND 47 I. L. R. 41 Mad. 904

1. ——— [illegible]

Dorabji v. *Nurse (1921), I. L. R. 44 Mad. 357 (F. B.),* and *Joriam Tiruvenkadachariar* v. *Sawmi Iyengar (1911), I. L. R. 34 Mad. 76,* followed. After such abatement any Memorandum of Objections filed by the respondent cannot be heard. *Alagappa Chettiar* v. *Chockalingam Chettia (1918), I. L. R. 41 Mad. 907 (F. B.),* followed. MURUGAPPA CHETTIAR *v.* PONNUSAMI PILLAI (1921)
I. L. R. 44 Mad. 828

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— O. XLI, r. 22 (1882 Code, 561)—*contd.*

2. ——— *Cross-objections against co-respondent, when may be entertained—Registration Act III of 1877, s. 47—Mortgage, execution—Collateral agreement postponing operation till fulfilment of conditions—Fulfilment of conditions—Operation as from date of execution—Delivery, if essential.* The language of O XLI, r 22, sub-r. (1) of the Civil Procedure Code, is comprehensive enough to admit of a cross-objection being preferred by one respondent against another. As a general rule, the right of any respondent to urge a cross-objection should be limited to his urging it only against the appellant, and it is only by way of exception to this general rule that one respondent may urge a cross-objection as against another respondent ; but as to this no exhaustive rule can be formulated and the entertainment of cross-objections against co-respondents cannot be limited to those cases only where the appeal opens up questions which cannot be disposed of completely without matters being allowed to be re-opened as between the co-respondents. The true test ought to be whether for the ends of justice it is necessary upon the appeal of one party that the matter should be re-opened so far only as he is concerned or whether the whole case should be reviewed and some of the respondents allowed to urge a cross-objection against their co-respondents. JADUNANDAN PROSAD SINGH *v* DEO NARAIN SINGH (1911) . . . . . 16 C. W. N. 612

3. ——— *Procedure—Cross-objections entertainable though appeal was not so—Specific Relief Act (I of 1877), ss. 39 and 42—Separate suits for cancellation of a document and for possession—Practice.* A respondent may file [illegible]

4. ——— *Cross-objections, who may file and against whom—Co-respondent, cross-objections not ordinarily allowed as against.* The ordinary rule is that the cross-objections provided for by O. XLI, r. 22 of the Code of Civil Procedure [illegible]

could have referred them by way of appeal. NURSEY VIRJI *v.* ALFRED H. HARRISON (1913)
I. L. R. 37 Bom. 511

5. ——— *Suit for dissolution of partnership—Appeal—Cross-objection—Cross-objections filed by one respondent against another. Held,* that on an appeal in suit for dissolution of partnership it is competent to the Court to allow a respondent to take cross-objections against another respondent. *Jadunandan Prasad Singh* v. *Deo Narain Singh, 16 C. W. N. 612,* and *Abdul Ghani* v. *Muhammad Fasih, I. L. R. 28 All. 95,* referred to. BALGOBIND *v.* RAM SARUP (1914).
I. L. R. 36 All. 505

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— O. XLI, r. 22 (1882 Code 561)—*contd.*

6. ——— *Respondent, if may support decree on ground decided against him without filing cross-objections.* The respondent in an appeal can urge in support of the judgment a point not decided in his favour without presenting a cross-appeal. IMAM ALI PATWARI *v.* ARFATUNNESSA (1913) . . . 18 C. W. N. 693

7. ——— *Cross-objections memorandum of, by one respondent against another, maintainability of.* Under O. XLI, r. 22, Civil Procedure Code, one respondent can file a memorandum of cross-objections against another. *Jadunandan Prosad Singh* v *Koer Kallyan Singh, 15 C. L. J. 61*, not followed. MUNISAMY MUDALY *v.* ABBU REDDY (1915) . I. L. R. 38 Mad. 705

8. ——— *Appeal—Cross-objection—Objection taken by respondent against co-respondent.* In a suit for sale on a mortgage, the deed upon which the suit was based purported to have been executed by six persons. In the Court of first instance, however, execution was held to have been proved as against four only of the alleged executants. These four appealed, making the other two alleged executants respondents along with the plaintiffs. The plaintiffs also filed cross-objections in which they sought to fix the two defendants respondents with liability for the mortgage deed. *Held,* that the plaintiffs were not precluded from filing objections against their co-respondents *Abdul Ghani* v. *Muhammad Fasih, I. L. R. 28 All. 95,* followed. *Kallu* v. *Manni, I. L. R. 23 All. 93,* referred to. MUSLEHA BIBI *v.* RAM NARAIN SAHU (1918) I. L. R. 40 All. 536

9. ——— Held that when an appeal is dismissed as filed out of time a memorandum of objections filed by a respondent cannot be heard. ALAGAPPA CHETTIAR *v.* CHOCKALINGAM CHETTIAR (1918) . . . . I. L. R. 41 Mad. 904

10. ——— Held that this order is not applicable to Letters Patent appeals and therefore cross-objection not maintainable in these appeals. BROJENDRO CHANDRA SARMA *v.* PROSANNA KUMAR DHAR . . . . . 24 C. W. N. 1016

——— O. XLI, rr. 22 (3), 33—

See SALE . . I. L. R. 43 Calc. 790

——— *Claim decreed against one of two defendants—appeal by judgment-debtor—Cross-objections by plaintiff—whether Appellate Court can decree claim against the other defendant.* Plaintiffs sued the 2 defendants for recovery of the amount due on a *bahi* account; the last balance was struck in 1915 and was signed by defendant No. 2 alone, while a previous balance in 1911 was signed by both. Defendant No. 1 pleaded that he was not liable at all, and that the debt was incurred only by defendant No. 2, which was admitted by the latter. The first Court decreed part of the claim against defendant No. 2 only. Defendant No. 2 appealed, and plaintiffs filed cross-objections in which they impleaded defendant No. 1 as a respondent, but no notice was given to the latter. The Appellate Court hold both defendants were liable to the extent of part of the debt and decreed the claim to that extent against both defendants. Defendant No. 1, then preferred this second appeal

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— O. XLI, rr. 22 (3), 33—*contd.*

to the High Court. *Held,* that the ground of defence in the present case being in no sense common the Lower Appellate Court had no power to decree the claim against defendant No. 1 on the mere cross-objection of the plaintiffs to the appeal of defendant No. 2, either under the provision of O. XLI, r. 22, or of O. XLI, r. 33 of the Code of Civil Procedure. *Nga Tin* v. *Nga Saw (29 Indian Cases 610), Bakshi Bindeswari Prasad* v. *Dheninder Das (39 Indian Cases 662)* and *Khsum Chand Bhuturia* v. *Ghane Muhammad Saha (38 Indian Cases 361),* followed. ILAHI BAKHSH *v.* JIWANDA MAL . . . . I. L. R. 1 Lah. 396

——— O. XLI, r. 22 (4)—The death of appellant who has sued for malicious prosecution and obtained a decree but preferred an appeal claiming more damages than he had been awarded caused the appeal to abate. MURUGAPPA CHETTIER *v.* PONNUSAMI PILLAI I. L. R. 44 Mad. 828

——— O. XLI, r. 23 (1882 Code, s. 562)—

See XLI R. 1 . . 2 Pat. L. J. 393

See O. XLIII, R. 1 (4) 23 C. W. N. 1049

See AGRA TENANCY ACT, 1901, s. 182 . I. L. R. 38 All. 181

See PENSIONS ACT, 1871, s. 6 I. L. R. 39 Bom. 352

See REMAND . I. L. R. 43 Calc. 148 and 938

——— *Remand not on preliminary point—Whether an appeal lies—How can Appellate Court direct further investigation.* Where the Court of first instance after considering the evidence adduced by the parties decided the suits, but the lower Appellate Court remanded them to the Court of the first instance with directions to re-admit the suits and determine them after getting a local investigation made according to the directions given in the judgment and allowing the parties to adduce additional evidence if they wished to do so, upon a preliminary objection taken in second appeal on the ground that as the Court of first instance did not decide the cases on a preliminary point no appeal under O. XLI, r. 23 lay against the order of remand. *Held,* that the order made by the lower Appellate Court purported to be and was in form and substance an order under O. XLI, r. 23, although the Court ought not to have remanded the case under the provisions of that rule, and that therefore an appeal lay. *Held,* also that the order remanding the case to the trial Court was erroneous. If the lower Appellate Court thought that the investigation was wrong and that there should be further investigation or that it was necessary to take additional evidence in order to enable it to pronounce judgment, it might direct such investigation or take such additional evidence, retaining the appeals on its file. PROSANNO CH. CHATTOPADHYA *v.* BAIDYA NATH MISTRY 24 C. W. N. 708

——— It is not a good ground for passing an order of remand to say that the preliminary issue has been decided by the Court of first instance on a wrong view of the burden of proof unless the appellate Court also finds that decision is wrong. WABIBULLAH KHAN *v.* LALTA PRASAD . . I. L. R. 34 All. 612

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— O. XLI, r. 23 (1882 Code, s. 562)—*contd.*

1. ——— *Decision of first Court not on a preliminary point—Power of Appellate Court to remand.* There are cases in which an

valli, 9 Mad. L. T. 373, followed. A case in which there was no regular hearing of a matter by the first Court and the evidence on which the disposal of the case was made by that Court was not placed on record, is a fit one for remand. JAMBULAYYA *v.* RAJAMMAL (1913) . I. L. R. 36 Mad. 492

2. ——— *Suit dismissed for default of appearance, but restored by Appellate Court—Remand—Appeal. Held,* that no appeal ... directing that a ... because neither ... restored to the file of pending cases and heard. WAHID-UN-NISSA *v.* KUNDAN LAL (1913)
I. L. R. 35 All. 427

3. ——— *Remand—Preliminary point—Issues framed and evidence taken, but suit decided upon one issue only. Held,* that it is

decided the suit with reference to its finding upon one of the issues framed by it, leaving the other issues undecided. *Mata Din* v. *Jamna Das, I. L. R. 27 All. 691,* followed. KAMTA *v.* PARBHU DAYAL (1916) . . I. L. R. 39 All. 165

4. ——— *Whether Appellate Court on remanding a case is empowered to direct first Court to pass another decree.* A subordinate Appellate Court is not competent to remand a case for further evidence to the Court of first instance and to require that Court to pass another decree. All that the Appellate Court is empowered to do is to frame an issue and to send that issue to the Court below for the return of a finding, and it is

possessed, is not debarred when the summary relief under that section has become barred by limitation, from relying, in a suit for ejectment, on s. 110 of the Evidence Act, 1872. As soon as he has proved that the defendant has dispossessed him the *onus* is thrown upon the latter to prove his title HARADHAN MANDAL MODAK *v.* ISWAR DASS MARWARI
2 Pat. L. J. 61

——— O. XLI, rr. 23, 25—*Remand—Preliminary point, a point involving merits of the case if.* A suit principally involved the consideration of two issues, ... lands ... to *kha* ... the pl

refer the second issue for trial to the first Court under O. XLI, r. 25. *Per* CHETTY, *J.* The decision of the Munsif was not on a preliminary point within the meaning of O. XLI, r. 23. The law as to *remands under O. XLI, r. 25, has not changed* the old law. *Per* COXE, *J.* When there are two points to be decided, and it is necessary for the decision of the second point that the first point must be first decided, the decision of the first point is necessarily preliminary to the decision of the second. The question whether a point is connected with the merits of the case or only with considerations of law does not affect the question whether it is or is not a preliminary point. *Salim Sheikh* v. *Nazir Khan, 8 C. L. J. 159,* referred to. ABDUL KARIM *v.* FAYEZ BUX (1911) . 15 C. W. N. 575

——— There is no reason why there cannot be an order under rr. 23 and 25 at the same time. An execution sale is a nullity if held without jurisdiction. BHADAI SAHU *v.* SHAIKH MANOWAR ALI . . .4 Pat. L. J. 645

——— O. XLI, rr. 23, 25 and s. 115—

See REMAND . . 5 Pat L. J. 146

——— O. XLI, r. 25 (1882 Code, s. 566)—

See APPELLATE COURT 24 C. W. N. 145

1. ——— *Failure by Appellate Court to frame material issue not raised and tried—Material irregularity—Revision by High Court.* A suit for damages against a Steamer Company for loss due to short delivery was decreed by the Munsif who did not frame and try the issue whether notice under s. 10 of the Carriers Act had been served on the Company, that issue not having been presented to him by the parties. The Subordina ... dismis ... notice ... out. Judge to frame and try the requisite issue under r. 25, O. XLI, Civil Procedure Code, was in the circumstances a material irregularity which might have led to a failure of justice. RAMJAS AGARWALLA *v.* INDIA GENERAL NAVIGATION AND RAILWAY COMPANY, LD. (1911) . 16 C. W. N. 424

2. ——— *High Court, if bound by opinion of Bench expressed in remanding a case.* Where a Bench of the High Court, in remanding an appeal for a finding under s. 566 of the Civil Procedure Code of 1882, had expressed an opinion as to the way in which the case should be decided upon the finding, the Bench before

——— O. XLI, r. 27 (1882 Code, s. 568)—

See O. XVII, R. 3 I. L. R. 23 All. 610

See APPEAL . I. L. R. 42 Calc. 675

See MUNICIPAL ELECTION.
I. L. R. 46 Calc. 119

1. ——— *Evidence, admission of, by lower Court.* R. 27 (*b*) of O. XLI of the Code of Civil Procedure, 1908, does not ... that, in order to enable the Appellate C

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— O. XLI, r. 27 (1882 Code, s. 568)—*contd.*

nounce judgment in favour of a particular party, additional evidence should be admitted in appeal; it means only that where it is impossible to pronounce judgment at all on the evidence the Court may call for a document. KALIKA DUTT MANDAR *v.* TULSI MANDAR . . . 1. Pat. L. J. 435

2. ——— *Additional evidence on appeal—Powers of the Appellate Court—Test to be applied for admitting—State of mind of the Judge, after hearing the appeal—No external standard—'Any other substantial cause,' meaning of.* Where a Subordinate Judge first heard an appeal and then passed an order for the admission of some additional documents in evidence on the ground that "it was necessary to have the documents before the Court to enable it satisfactorily to pronounce its judgments." *Held*, that the admission of the documents as additional evidence was permissible under O. XLI, r. 27 of the Code of Civil Procedure (Act V of 1908). The test laid down under cl. (*b*) of O. XLI, r. 27, is not whether any tribunal would be unable to pronounce any judgment without production of the additional evidence in question but whether the mind of the Appellate Judge is in such a condition on the evidence on record that he requires any documents to be examined to enable him to pronounce judgment. The expression 'any other substantial clause' added in O. XLI, r. 27, confers a wide discretion on the Appellate Court to admit additional evidence when the ends of justice require it to be done. *Kessowji Issur v. G. I. P. Railway Company, I. L. R 31 Bom. 381*, explained and distinguished. *Krishnama Chariar* v. *Narasimha Chariar, I. L. R. 31 Mad. 114*, referred to. *Andiappal Pillai* v. *Muthu kumara Thevan, (1912) Mad. W. N. 450*, followed. *Subha Naidu* v. *Ethirajammal, 22, Mad. L. J. 14*, dissented from. AMBUJA AMMAL *v.* APPADURAI MUDALI (1912) I. L. R. 38 Mad. 414

3. ——— *Appellate Court—Admission of fresh evidence—Practice regarding admission.* Where an Appellate Court desires to admit fresh papers in evidence, under r. 27 of O. XLI of the Civil Procedure Code (Act V of 1908), it must record its reasons in writing for doing so and admit them formally in evidence. DAJI BABAJI *v.* SAKHARAM KRISHNA (1914) I. L. R. 38 Bom. 665

4. ——— *Additional evidence called for by Appellate Court—Re-summoning of witness already examined before the Court of first instance.* *Held*, that O. XLI, r. 27, of the Code of Civil Procedure, 1908, is not intended to enable an Appellate Court to recall and re-examine before it a witness who has already been examined and cross-examined before the Court of first instance. MUHAMMAD SIDDIQ *v.* MAHMUD-UN-NISSA BIBI (1916) . . . . I. L. R. 38 All. 191

5. ——— *Additional evidence—Refusal by the lower Appellate Court to admit—Second Appeal—Power of High Court to interfere and direct admission—Jurisdiction—Exercise of discretion, whether revisable.* *Held* (by WALLIS, C. J., and AYLING, J., SADASIVA AYYAR, J., *dissenting*), that, where a lower Appellate Court refuses to admit a certain material document as additional evidence in the appeal under O. XLI, r. 27, Civil Procedure Code, the High Court cannot interfere in second appeal and hold that such additional evidence ought to have been admitted by the lower Appellate Court. *Per* WALLIS, *C.J.* —It has long been the practice of all the High Courts not to entertain second appeals from refusals of the lower Appellate Court to admit fresh evidence under O. XLI, r. 27, Civil Procedure Code, and such practice should not be departed from. *Per* SADASIVA AYYAR, *J.*, *contra.*—The High Court has power in second appeal to consider the propriety of the exercise of discretion by the lower Appellate Court as regards the admission of additional evidence. VAITHINATHA PILLAI *v.* KUPPU THEVAR (1919) . I. L. R. 42 Mad. 737

——— O. XLI, r. 27 and s. 115—*Appellate Court—Additional evidence.* A mistake in law on the part of the Appellate Court in directing evidence to be tendered which it is not competent to receive in accordance with the provisions of the Code of Civil Procedure, 1908, is not revisable by the High Court. *Semble*, that an Appellate Court is not competent to examine an attesting witness who by inadvertence has not been called in the first Court. GAYA SINGH *v.* NAME SINGH 5 Pat. L. J. 263

——— O. XLI, rr. 22, 33 (1882 Code s. 577)—

See CROSS OBJECTIONS 5 Pat. L. J. 328

——— O. XLI, r. 33—

See ARBITRATION I. L. R. 46 Calc. 1059

See HINDU LAW—GIFT. I. L. R. 40 Mad. 818

See HINDU LAW—LEGAL NECESSITY. I. L. R. 38 Calc. 721

See LIMITATION ACT, SCH. I, ART. 181. I. L. R. 43 All. 320

See MORTGAGE. I. L. R. 43 Mad. 803

See REMAND . I. L. R. 46 Calc. 738

See SALE . I. L. R. 43 Calc. 790

See O. XLI, R. 4 . 1 Pat. L. J. 143

1. ——— *Appeal—Procedure—Power of Appellate Court to interfere with portion of decree not challenged by either party.* Plaintiff sued defendant for rent and obtained a decree for a portion of his claim. Plaintiff then appealed against the disallowance of the balance of the amount claimed, but defendant submitted to the decree and neither filed a cross appeal nor took objections under O. XLI, r. 22 of the Code of Civil Procedure, 1908. *Held*, that it was not competent to the Appellate Court acting under O. XLI, r. 33, to interfere with the decree obtained by plaintiff in so far as it had not been challenged by defendant. *Attorney General* v. *Simpson [1901], 2 Ch. 671*, referred to. RANGAM LAL *v.* JHANDU (1911) . . . . I. L. R. 34 All. 32

2. ——— *Civil Procedure Code (Act XIV of 1882), ss. 562, 564—Repeal of s. 564 in the new Code—Effect of repeal—Remand order by the Court of appeal.* In a suit to redeem a mortgage, the first Court took accounts between the parties and decreed redemption. The lower Appellate Court having found that there were

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

———— O. XLI, r. 33—*contd.*

some errors in the taking of accounts and that a piece of land wrongly taken to be in the mortgagee's possession, reversed the decree and remanded the suit for trial to the first Court. On appeal from the order of remand: *Held*, setting aside the order of remand, that an Appellate Court could remand a case to the trial Court only when the latter had disposed of the suit upon a preliminary point and the decree was reversed in appeal. *Held*, further, there was no reason why the first ... versed, ... was to ... differ- ... dars of accounts which could have been met by a slight re-adjustment of the decree. *Per* CURIAM: The removal of s. 564 of the Civil Procedure Code of 1882 has apparently no other object but to withdraw those restrictive provisions of the section which in practice had been found embarrassing; such restrictions occurring, for instance, in cases where the Appellate Court has allowed an amendment of the pleadings, or has added a party to the record. NAROTTAM RAJARAM *v.* MOHANLAL KAHANDAS (1912) . . **I. L. R. 37 Bom. 280**

3. ———— *Plaintiff claiming alternative reliefs obtaining a decree—Right of appeal.* A plaintiff who claims for alternative reliefs in his plaint can prefer an appeal although he obtained a decree. O. XLI, r. 33, confers on the Appellate Court the power to pass such decree as ought to have been passed. BISWANATH GOSAIN *v.* SURENDRA MOHAN GHOSH (1913)

19 C. W. N. 102

4. ———— *Appellate Court, power of, to allow withdrawal of suit with liberty to bring fresh suit when part only of decree is appealed against.* The plaintiff's suit for recovery of possession of land on declaration of title was decreed in part and the defendants appealed against the decree in so far as it was against them. The plaintiff did ... so as to enable him to evade the provisions of other statutes, *e.g.*, the Limitation Act and the Court-Fees Act. In the circumstances of the case the High Court allowed the plaintiff on terms as to ... favour by the lower Court. AKIMUNNESSA BIBI *v.* BEPIN BEHARY MITTER (1915)

20 C. W. N. 544

5. ———— *Scope and effect of as to powers of Appellate Courts—Dismissing entire suit on plaintiff's appeal when part of claim admitted by defendant who prefers no appeal.* In a suit for arrears of rent, the plaintiff claimed rent at a particular rate. The defendants admitted a lower rate and the Court of first instance decreed the suit at this admitted rate. The plaintiff having appealed, the District Judge dismissed the entire suit although the defendants did not prefer an

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

———— O. XLI, r. 33—*contd.*

appeal nor file any cross-objection. *Held*, that r. 33 of O. XLI is very widely expressed but it should not be applied so as to enable a party litigant to ignore the other provisions of the Code or the provisions of statutes like those which relate to limitation or payment of court-fees. That ordinarily r. 33 should be limited to those cases where as a result of the Appellate Court's interference with the decree in favour of the appellant further ... substance to evade ... cedure Code, the ... Fees Act; and ove ... cable to a case o ... discretion vested in the Court of Appeal below was not properly exercised. ABJAL MAJHI *v.* INTOO BEHARI (1915) . . . **20 C. W. N. 512**

6. ———— *Powers of the Appellate Court to reverse a finding of the lower Court in the appellants' favour, against which no cross-objection was preferred by the respondent under O. XLI, r. 22—Construction of document.* Plaintiff ... and the buildings ... n defendants by a ... for recovery of a ... that it had not passed by the *kobala*. The Munsif gave a partial decree, and the Subordinate Judge partially allowed the defendants' appeal, but reversed a portion of the Munsif's decree which was in favour of the defendants and against which the plaintiff had not preferred any cross-objection. *Held*, that in the appeal by the defendants, the lower Appellate Court, under the circumstances of the case, was not justified under O. XLI, r. 33, in interfering with the portion of the Munsif's decree which was in favour of the defendants, as the plaintiff had not filed any cross-appeal or taken cross-objection under O. XLI, r. 22. *Held*, further, on a construction of the *kobala* with reference to the pleadings and other documentary evidence, that the whole passage was sold, as there were statements in the deed which were inconsistent with the plaintiff having reserved any portion of the passage. GOPAL CHANDRA DAS *v.* NABIAN CHAND DAS (1917)

22 C. W. N. 520

7. ———— *Decree against three defendants—Appeal by two only, the third not being made a party to the appeal—Jurisdiction of Appellate Court to modify decree in favour of the non-appealing defendant.* A decree was passed for varying amounts against three defendants, of whom two only appealed, the third not being made a party to the appeal. *Held*, that it was competent to the Appellate Court to modify the decree in ... I. L. R. 31 All. 32, distinguished. JAWAHAR BANO *v.* SHUJAAT HUSAIN . . **I. L. R. 43 All. 88**

———— O. XLI, r. 35 (1882, Code, s. 579)—

See BENGAL TENANCY ACT, 1885, s. 105

5 Pat. L. J. 472

———— O. XLII, r. 1—

See O. XL, rr. 1 AND 4. 4 Pat. L. J. 636

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— O. XLII, r. 1—*contd.*

See Res Judicata . I. L. R. 1 Lah. 83

See RESTORATION OF SUIT. 2 Pat. L. J. 720

——— O. XLIII, r. 1 (1882 Code, s. 588)—

See s. 47 . . . 2 Pat. L. J. 361

See s. 115, 151 . . 4 Pat. L. J. 51

See O. IX, r. 9 . 20 C. W. N. 1203

See O. X, r. 4 . I. L. R. 39 All. 450

See O. XXXIX, r. 1. I. L. R. 35 All. 425

See O. XL, r. 1. I. L. R. 40 Mad. 18

See O. XLI, r. 23 I. L. R. 35 All. 427

See SCH. II, PARA. 2 I. L. R. 38 All. 297

See MADRAS CIVIL COURTS ACT (III OF 1873), s. 14 . I. L. R. 41 Mad. 721

See RECEIVER . I. L. R. 41 Calc. 746
I. L. R. 40 Mad. 18
14 C. W. N. 183

1. ——— cl. (a)—*Valuation of claim for purposes of jurisdiction—Decision, if final and bars appeal.* Where a suit for the declaration of the plaintiff's right to an easement and for a permanent injunction to restrain the defendant from interfering with such right was valued at Rs. 1,100 but the Court having found the value to be Rs. 790 returned the plaint for presentation to the proper Court : *Held*, that an appeal lay against the order under cl. (*a*) of r. 1 of O. XLIII of the Civil Procedure Code. S. 12 of the Court Fees Act has no application to a case where the valuation, though it may indirectly affect the amount of Court-fees payable on the plaint, is necessary for the purpose of determining the jurisdiction of the Court to entertain the suit. *Brojo Kumar* v. *Eshan Chandra, 3 C. L. R. 79*, referred to. PEARI SHA *v.* SURUJMAL MARWARI (1912) . . . 17 C. W. N. 503

2. ——— A case against the order of an Appellate Court returning a memorandum of appeal to be presented to the proper Court. NUR-UD-DIN KHAN *v.* PRAN KRISHAN CHAKRAVARTI (1918) . . . I. L. R. 40 All. 659

3. ——— cl. (1)—*Suit by Hindu widow—Adoption pending suit—Widow allowed to prosecute suit, though divested, on strength of ante-adoption agreement—Order, if appealable.* Where during the pendency of a suit brought by a Hindu widow, the defendant objected that by an adoption made since the institution of the suit, the plaintiff had divested herself of the estate of her husband and so could no longer prosecute the suit, but the Court overruled the objection in the view that plaintiff was entitled to prosecute the suit under an *ante*-adoption agreement with the natural father of the adopted son: *Held*, that the order was not one under r. 10 of O. XXII of the Civil Procedure Code and was not appealable under O. XLIII, r. 1, cl. (*1*). PROMOTHA NATH ROY CHOWDHURY *v.* DINAMONI CHOWDHARANI (1916) 20 C. W. N 552

4. ——— cl. (K) and (L)—*Appeal—Order dismissing an application to be substituted in an appeal in place of the original plaintiff. Held,* that an order dismissing an application to be brought upon the record as a plaintiff is not a decree and no appeal lies against such an order. DUMI CHAND *v.* ARJA NAND (1915) I. L. R. 37 All. 272

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— O. XLIII, r. 1 (1882 Code, s. 588)—*contd.*

5. ——— cl. (r)—*Temporary injunction—Order refusing injunction if appealable.* An appeal lies against an order refusing a temporary injunction. *Reasut Hussain* v. *Hadjee Abdullah, I. L. R. 2 Calc. 131*, referred to. HARI LAL *v.* PRAYAG RAM (1913) . . 17 C. W. N. 996

6. ——— cl. (s)—*Mortgage suit—Appointment of Receiver at mortgagee's instance under terms of mortgage deed—Court's order on Receiver to pay money to mortgagor to enable him to appeal, if appealable—Interest, non-payment of, ground for appointing Receiver.* When a mortgage deed provided for the appointment, at the instance of the mortgagees, of a Receiver in circumstances specified in the deed and laid down the mode in which the rents and profits were to be distributed by the Receiver, and in pursuance of these provisions a Receiver was appointed with powers to dispose of the rents and profits in a certain manner in the course of a suit brought by the mortgagees to enforce the mortgage ; but after a preliminary decree for sale had been passed in the suit, the Court upon the application of the judgment-debtor passed an order directing the Receiver to pay certain sums to the judgment-debtor in order to enable him to prefer an appeal against the decree : *Held*, that an appeal lay against the order under O. XLIII, r. 1, cl. (*s*) of the Civil Procedure Code. *Mohunt Anand Das* v. *Ram Perkash Das, 14 C. W. N. 183*, relied on. That the Receiver not having had power to make the payments in question either under the mortgage deed or the terms of his appointment, the Subordinate Judge was wrong in making the order. The power given by Court to the Receiver "to institute or defend suits regarding the properties whether for collection of rents or for any other purpose, or, the provision in the mortgage deed that pecuniary grants might be allowed for law-expenses did not justify the orders of the Subordinate Judge for payment to the judgment-debtor until after sums had been deposited in Court sufficient to recover interest due on the mortgage debt as required by the mortgage deed and the terms of appointment of the Receiver. The mortgagee in this case not having had any payment as interest since the loan was made, was entitled under the provisions of the law to apply for the appointment of a Receiver pending the disposal of the suit. EASTERN MORTGAGE AND AGENCY COMPANY, LD. *v.* FAKURUDDIN MOHAMED CHOUDHURY (1912) . 17 C. W. N. 16

——— *Appeal from order directing submission of accounts. See Receiver.* 5 Pat. L. J. 97.

7. ——— *Order expressing merely an intention to appoint a Receiver—Appeal.* An appeal lies only from an order actually appointing a Receiver, and not from an order by which the Court expresses an intention to appoint a receiver

CIVIL PROCEDURE CODE (ACT V OF 1908)
—*contd.*

——— O. XLIII, r. 1 (1882 Code, s. 588)—*contd.*

and calls upon the plaintiff to suggest names with particulars regarding security, remuneration, etc. *Ramji* v. *Koman Das, 13 A. L. J. 79* followed. MUHAMMAD ASKARI *v.* NISAR HUSAIN

I. L. R. 42 All. 227

8. —
—*Order*
—*Appea*

granting leave to sue a Receiver for damages arising from his negligent discharge of duty. SHRINIWAS *v.* M. C. WAZ (1920) . I. L. R. 45 Bom. 99

9. ——— (u)— *Remand—Appeal —Suit of the nature cognizable by a Court of Small Causes.* A mahal having been divided by perfect partition into two, thereafter the owner of one of the new mahals was made to pay a sum of Rs. 127 as Government revenue, which was in fact payable by the owner of the other mahal. He then sued the owner of the other mahal to recover the sum so paid. The suit was filed in the Court of a Munsif, who held that the suit did not lie and dismissed it. The plaintiff thereupon appealed to the Subordinate Judge, who reversed the finding of the Munsif and remanded the suit for disposal on the merits. *Held,* that no appeal lay from the order of remand, inasmuch as the suit was one of the nature cognizable by a Court of Small Causes. Since, however, the plaintiff had paid the money which he was seeking to recover and it had not been refunded, the High Court declined to treat the appeal as an application in revision. *Nath Prasad* v. *Baij Nath, I. L. R. All. 66, Qutub Husain* v. *Abul Hasan, I. L. R. 4 All. 134,* and *Tulsa Kunwar* v. *Jageshar Prasad, I. L. R. 28 All. 563,* referred to. AMBA PRASAD *v.* MUSHTAQ HUSAIN

I. L. R. 42 All. 200

10. ——— *Execution of decree—Appeal—No appeal from order in execution proceedings if an appeal would not lie in the suit itself. Held,* that a second appeal will not lie

I. L. R. 11 Calc. 169, Shyama Charan Mitter v. *Debendra Nath Mukerjee, I. L. R. 27 Calc. 484, Mavula Ammal* v. *Mavula Maracoir, I. L. R. 30 Mad. 212,* and *Narayan Parmanand* v. *Naginda, Bhaidas, I. L. R. 30 Bom. 113,* followed. SANT PRASAD *v.* BHAWANI PRASAD

I. L. R. 43 All. 403

11. ——— *Appeal from order of remand—Whether findings of fact can be questioned. Held,* that an appellant coming to the High Court in appeal under O. XLIII, r. 1 (u) of the Code of Civil Procedure from an order of remand under O. XLI, r. 23, cannot question findings of facts arrived at by the Lower Appellate Court. *Sawan Singh* v. *Methu (85 P. R. 1914),* followed. HONDA RAM *v.* HOTU RAM

I. L. R. 2 Lah. 25

——— O. XLIII, r. 1 (a) and s. 115—*Suit for rent in a Revenue Court-Service inam—Discontinuance of service—Ryoti land—Decree in Revenue* [illegible] *nue Court—* [illegible] *be returned* [illegible] *to the High* [illegible] *if competent*

CIVIL PROCEDURE CODE (ACT V OF 1908)
—*contd*

——— O. XLIII, r. 1 (a) and s. 115—*contd.*

—*Order whether a decree—Estates Land Act (Madras Act I of 1908), s. 192, cl. (a)—Prohibition of appeals—Conversion of appeal into civil revision petition.* A landholder sued for arrears of rent in a Revenue Court from the defendants who originally held the lands on service tenure but had ceased to perform the services prior to the suit. The Revenue Court passed a decree in favour of the plaintiff. On appeal, the District Judge set aside the decree holding that the Revenue Court had no jurisdiction to entertain the suit and ordered that the plaint should be returned to the plaintiff for presentation to a proper Court. On [illegible]

cl. (a) of the Estates Land Act prohibited the applicability of O. XLIII of the Civil Procedure Code to proceedings under the Act, and the order was not a decree under the Civil Procedure Code. *Held,* also, that the appeal should be converted into a civil revision petition under s. 115 of the Civil Procedure Code, as the latter section was not excluded by s. 192 of the Act; and that the Revenue Court had jurisdiction to entertain the suit, as the lands were ryoti lands and did not fall within the exception to ryoti land in s. 3 of the Act, inasmuch as the services were not performed at the date of the suit. *The Secretary of State for India* v. *Chelekani Rama Rao, I. L. R. 39 Mad 617,* distinguished. RAJAH VENKATA RAMAYYA *v.* VEERASWAMI (1917

I. L. R. 41 Mad. 554

——— O. XLIII, r. 1 (r) and O. XXXIX, r. 2, cl. (3)—*Interlocutory injunction, disobedience of—Order declining to arrest or attach property—Appealability—Petition to commit while suit pending —Order thereon after dismissal of suit, legality of—Imprisonment, order of, without first ordering attachment, illegal.* An appeal lies under O. XLIII, r. 1, cl. (r) of the Civil Procedure Code (Act V of 1908) from an order declining to order arrest or attachment of property for disobedience of an interlocutory injunction and the Appellate Court can on appeal pass the order which the Lower Court should have passed. Where the injunction was disobeyed and the application to commit was put in while the suit was pending, the fact that the order on the application was made after the suit was dismissed does not affect the powers of the Court to take action for the breach. The Court can in its discretion order either arrest or attachment of property and is not bound in the first instance to attach and then only order imprisonment. SUPPI *v.* KUNHI KOYA (1916)

I. L. R. 39 Mad. 907

——— O. XLIII, r. 1 (u); O. XLI, r. 23—*Remand order passed otherwise than under O. XLI, r. 23, if appealable.* No appeal lies against an order passed by an Appellate Court remanding a case otherwise than under O. XLI, r. 23 of the Civil Procedure Code. MOHENDRA NATH CHAKRAVARTY *v.* RAMTARAN BANDOPADHYA (1919)

23 C. W. N. 1049

——— O. XLIII, r. 1 (w); O. XLVII, rr. 1, 4, 7, 8—
See O. XLI, R. 10 (2).

I. L. R. 42 All. 626

See REVIEW . I. L. R. 45 Calc. 60

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— O. XLIII, r. 1 (w) and O. XLVII, r. 7 ——— *Review, appeal from order granting, grounds for.* An order granting a review merely for sufficient ground is not appealable. An appeal under O. XLIII, r. 1 (*w*) against an order granting a review is subject to the provisions of O. XLVII, r. 7. SUNDAR MAL *v.* UPENDRA NATH SEAL . . . . 1 Pat. L. J. 193

——— *Appeal against order granting review—Scope of jurisdiction.* An application for review was filed within one month of the date of the order sought to be reviewed and was allowed. An appeal was preferred against the order granting review and the Appellate Court set it aside on the ground that the order sought to be reviewed was really on earlier order. *Held*, that although O. XLIII, r. 1 (*w*), allows an appeal against an order granting a review that clause must be read with O. XLVII, r. 7, by which the grounds on which an order granting a review can be set aside on appeal are limited. The Lower Appellate Court therefore had no jurisdiction to set aside the order granting the review. SURYA NARAIN CHOWDHRY *v.* RANGA BEHARY MAL . 25 C. W. N. 884

——— O. XLIV, r. 1 (1882 Code, s. 592)— *Application for leave to appeal in forma pauperis—Application rejected—Further application for leave to pay the full court-fee also rejected—Revision.* The rejection of an application made under O. XLIV, r. 1 of the Code of Civil Procedure, for leave to appeal as a pauper, is not the rejection of the appeal. It is, therefore, no ground for rejecting a subsequent application for permission to pay the full court-fee on the appeal. MUHAMMAD FARZAND ALI *v.* RAHAT ALI (1918) I. L. R. 40 All. 381

——— O. XLV, rr. 2, 3 and 8—

See s. 109 . 3 Pat. L. J. 179

See APPEAL TO PRIVY COUNCIL. I. L. R. 42 Mad. 32

———O. XLV, rr. 4, 7 and 8—

See CIVIL PROCEDURE CODE, 1908, s. 110, AND O. XLV . 4 Pat. L. J. 198

——— O. XLV, r. 5 (1882 Code s. 627—

See VALUATION OF SUIT. I. L. R. 43 Calc. 225

——— Where a single Judge of the High Court sitting as Vacation Judge granted a stay of execution of a decree passed by a subordinate Court before any appeal has been filed but on the vakil's assurance it would be *held*, the order was without jurisdiction. PURSHOTTAM SARAN *v.* HARGU LAL I. L. R. 43 All. 198

——— O. XLV, r. 7 (1882 Code, s. 601)

See PRIVY COUNCIL. 14 C. W. N. 420

——— O. XLV, rr, 10, 11 (1882 Code, 605 and 606).

See LIMITATION ACT, 1908, ART. 15. 5 Pat. L. J. 39

——— O. XLV, r. 13 (1882 Code, s. 608)—

See PRIVY COUNCIL, PRACTICE OF. I. L. R. 38 Calc. 335

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— O. XLV, r. 13 (1882 Code, s. 608)— *contd.*

——— *Partition —Appeal from preliminary decree—Application for stay of further proceedings in the suit.* O. XLV, r. 13, of the Code of Civil Procedure does not authorize the staying of proceedings in a suit for partition, where a preliminary decree has been passed and it remains to pass the final decree, because an appeal from the preliminary decree has been filed and is pending. *Laliteswar Singh* v. *Bhabeswar Singh, 9 C. L. J., 561,* referred to. RAM NARAIN *v.* HARNAM DAS . . . . I. L. R. 42 All. 170

——— *Appeal to His Majesty in Council—Special leave to appeal—Receiver, whether High Court has power to appoint.* It is competent to the High Court to appoint a Receiver to an estate which is the subject- matter of an appeal for which special leave has been granted by the Privy Council. RAJA WUZIR NARAIN SINGH *v.* RANI JAGDAMBA KURI . 4 Pat. L. J. 482

——— O. XLV, rr. 13 and 14—

See STAY OF EXECUTION. 3 Pat. L. J. 40

——— O. XLV, r. 15 (1882 Code, s. 10)—

See LETTER PATENT (PAT.) CL. 39. 2 Pat. L. J. 684

——— *Privy Council—Restoration of property pending appeal to the Privy Council—Procedure.* The word 'execution' as used in O. XLV, r. 15, was intended to cover case of restitution as well as a case of enforcement of a decree for possession of the like passed for the first time in the case on an appeal to His Majesty in Council and a person who desires to obtain execution of any kind, whether by way of restitution or otherwise, must apply in the first instance to the Court indicated by r. 15. A decree was passed by the High Court against *B* who appealed to the Privy Council. During the pendency of the appeal *D and others obtained possession of the property* in suit from *B*. The Privy Council reversed the decree and *B* applied to the Subordinate Judge to restore him to possession of the property and filed a copy of the printed judgment of their Lordships of the Privy Council in proof of the fact that the judgment of the High Court had been reversed. *Held*, that the application should have been made to the High Court and the Subordinate Judge could not entertain it. *Held*, further, that the Subordinate Judge was not entitled to take any action on the printed copy of the judgment of their Lordships of the Privy Council without proof that an Order-in-Council had followed thereon. DAMODAR DAS *v.* BRIJ LAL (1915) I. L. R. 37 All. 567

——— *Order-in-Council, execution of—Only those persons (or their representatives) who have made an application under r. 15 are entitled to apply for execution of an order in Council.* Where several persons sued together to recover possession of separate specific shares of an *ijmali* share which had been wrongly sold for arrears of Government revenue, and the suit was eventually decided in their favour by an Order-in-Council. *Held*, that an application under Order

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— **O. XLV, r. 15 (1882 Code, s. 10)**—*contd.*

XLV, rule 15, made by some of the plantiffs, did not entitle all of them to apply for execution to the Court to which the Order-in Council was sent for execution. Prior to the passing of the Order-in-Council proceedings for the partition of the *ijmali* share were completed by the Collector. This fact was not brought to the notice of the Privy Council and the order declared the plaintiffs' right to recover the specific separate shares claimed in the plaint. *Held,* that the plaintiffs were nevertheless entitled to execute the order with reference to the estates or interest substituted by the partition for the shares originally claimed in the suit. MAHARAJA SIR RAMESHWAR PRASAD SINGH *v.* RAI BAIJNATH GOENKA . . . . **2 Pat. L. J. 496**

2. ——— *Order-in-Council, execution of—Limitation Act (IX of 1908), Sch. I, Art. 183—"Reviver."* After several attempts to enforce an Order-in-Council, dated the 28th November, 1899, the decree-holder applied to the High Court on the 2nd December, 1907, under s. 610 of the Code of Civil Procedure, 1882. The High Court ordered notices to be issued, but there was

Act, 1908, and that the application was therefore time-barred. TRIBIKRAM DEO NARAYAN SINGH *v.* BADRI MISSER . . . **1 Pat. L. J. 385**

——— **O. XLV, rr. 15 and 16; O. XXI, r. 16; ss. 37, 38 and 50**—*Privy Council order of, transmitted to the original Court—Execution—Application to the original Court—Application by transferee of the decree—Competency of the original Court to entertain application—Power-of-Attorney, construction of.* Where an order of His Majesty in Council was transmitted under O. XLV, r. 15 of the Civil Procedure Code, by the High Court to the District Court as the Court which passed the first decree, the latter Court has jurisdiction to entertain an application made by an assignee of the decree under O. XXI, r. 16 of the Civil Procedure Code, to recognize the assignment and to allow him to execute the decree. It is established law that a Power-of-Attorney must be construed

I. L. R. 38 Mad. 832

——— **O. XLVI, r. 1 (1882 Code, s. 617)**—
See s. 141— **I. L. R. 38 Mad. 353**

——— **O. XLVI, r. 7**—*Court of Small Causes,*

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— **O. XLVI, r. 7**—*contd.*

diction and powers of High Court in. A suit valued

moved the District Judge who made a reference to the High Court under O. XLVI, r. 7, on the ground that the Munsif had no jurisdiction to try the suit as a Small Cause Court suit. *Held,* that on such a reference the High Court has full power to consider the matter on the merits in each case and

——— **O. XLVII, r. 1 (1882 Code, s. 623)**—

See APPEAL . **I. L. R. 42 Calc. 675**

See APPEAL TO PRIVY COUNCIL **I. L. R. 41 Calc. 734**

See CIVIL PROCEDURE CODE, 1908—
O. XLI, R. 27 **I. L. R. 42 Calc. 675**
O. IX, R. 9 . . **1 Pat. L. J. 547**

See LAND ACQUISITION ACT, s. 53. **5 Pat. L. J. 253**

See PRACTICE . **I. L. R. 44 Calc. 28**

See RECEIVER . . **14 C. W. N. 183**
I. L. R. 41 Calc. 809

See RES JUDICATA . **2 Pat. L. J. 313**

See REVIEW . . . **5 Pat. L. J 343**
I. L. R. 44 Calc. 1011

See SMALL CAUSE COURT SUIT. **I. L. R. 44 Calc. 590**

1. ——— Ex parte *decree, if may be reviewed on the ground that defendant had sufficient cause for not appearing—Limitation* The fact that a defendant against whom an *ex parte* decree was passed did not apply within time under O. IX, r. 13, Civil Procedure Code, for a revival of the case is no bar to his applying for a review of the decree under O XLVII, r 1 of the Code on the ground that he was prevented by sufficient cause from appearing at the hearing. *Raj Narain Purkait* v. *Ananga Mohan Bhandari, I. L. R. 26 Calc. 598,* relied on. CHET NARAIN SAHI *v* RAMPAL MANJHI (1911) . . . **16 C. W. N. 643**

2. ——— *Order setting aside sale, alleged to be made by consent of parties—Decree-holder, alleging that order made in his absence—Review, if may be granted.* Where a sale in execution of a decree was set aside upon the strength of a petition of compromise to which the decree-holder was alleged to be a consenting party, and the decree-holder subsequently applied for a review alleging that he was not present at the time when the order was made and that as a matter of fact

dure Code. HAKIMGIR *v.* BASDEO SAHI (1911) **17 C. W. N. 631**

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— O. XLVII, r. 1 (1882 Code, s. 623)—*contd.*

3. ——— *Review of judgment—Suit dismissed for want of necessary notice as well as on the merits—Ground of review touching the merits only.* A suit against the Court of Wards was dismissed on two grounds: (i) that the notice given by the plaintiff under the Court of Wards Act was defective; and (ii) that the plaintiff was illegitimate. An application was made for review of judgment on the ground of discovery of new and important evidence on the question of legitimacy. *Held*, that the application was properly dismissed, inasmuch as the decision on the question of legitimacy on the reception of new evidence would not lead to the modification or setting aside of the original decree. MAHABIR PRASAD *v.* THE COLLECTOR OF ALLAHABAD (1914)
I. L. R. 36 All. 277

4. ——— *Review petition—Subsequent filing of appeal—Jurisdiction of Court to hear review petition is not taken away by appeal subsequently filed—Practice.* An application for review of judgment was filed in a District Court and a rule *nisi* was granted. The party subsequently filed an appeal in the High Court. The District Court rejected the review application on the ground that it could not proceed with the application as an appeal was already filed. The applicant having applied to the High Court, *Held*, setting aside the order and directing the District Court to dispose of the application on the merits, that there was no express provision in the Civil Procedure Code which rendered the application for review incompetent on the mere presentation of an appeal by the same party at any subsequent time. *Chenna Reddi* v. *Peddaobi Reddi, I. L. R. 32 Mad. 416*, followed. NARAYAN PURUSHOTTAM *v.* LAXMIBAI (1914) . I. L. R. 38 Bom. 416

5. ——— *Review of judgment—Adducing of further evidence not sufficient ground.* An application was made to a District Judge for a review of his order that a certain property was not the property of an insolvent. The ground upon which the application was in substance made was that if another opportunity was given to the applicants they would satisfy the Court that its former order was wrong. *Held*, that this was not a 'sufficient reason' for entertaining the application within the meaning of O. XLVII, r. 1 of the Civil Procedure Code. BINDA PRASAD *v.* RAGHUBIR SARAN (1915) I. L. R. 37 All. 440

6. ——— *Application for review—Limitation—Jurisdiction to entertain.* Where the Judge having decided to modify the decision of the first Court, erroneously passed a decree dismissing the appeal, but later on on the application of the landlord modified the decree and brought it in conformity with his judgment without notice to the tenants, and on the latter's appeal, the High Court directed the Judge to restore his previous decree leaving it open to the landlord to apply by way of review; and in pursuance of the High Court's order, the successor in office of the Judge restored the previous decree of his predecessor, and later on entertained an application for review made by the landlord; and purporting to act under s. 151 of the Civil Procedure Code passed a decree disallowing the custom so far as it permitted the tenants to appropriate the timber trees. *Held*, that the order to be reviewed was the order passed by the Judge in pursuance of the High Court's directions, both in regard to the limitation applicable to and the jurisdiction to entertain the application for review. GURAI KAR *v.* RANI KUARMONI SINGHA MANDHATA (1915) . . . 19 C. W. N. 1188

7. ——— *Review of decree not appealed against.* On a proper construction of O. XLVII, r. 1 (*1*), the decree mentioned therein means a decree from which no appeal has been preferred by the applicant for review himself. That there is no implied reference to O. XLI, r. 4 in O. XLVII, r. 1 (*2*), the effect of which is to restrict the right which would otherwise be possessed by one defendant to apply to review of judgment, notwithstanding an appeal by a co-defendant. The law, in effect, is that a defendant who has not himself appealed may apply for a review of judgment, notwithstanding the pendency of an appeal by a co-defendant except in two contingencies, namely, *first*, where the ground for review is identical with the ground of appeal; and *secondly*, when as respondent in the appeal he can present to the Appellate Court the case on which he seeks review. CHANDRA KANTO BHATTACHARJA *v.* LAKSHMAN CHANDRA CHAKRAVARTY (1916) . . . . 21 C. W. N. 430

8. ——— *Appeal and application for review filed by same party—Appeal withdrawn—Jurisdiction of Court to entertain application for review not ousted.* An appeal which has been withdrawn must be treated as if it had never been "presented" within the meaning of O. XLVII, r. 1 of the Code of Civil Procedure. *Ramappa* v. *Bharma, I. L. R. 30 Bom. 625*, referred to. A party to a suit filed an appeal against the decree and thereafter an application for review of judgment. After the review had been filed the applicant withdrew his appeal. *Held*, that the fact of an appeal having been filed and withdrawn was no bar to the hearing of the application for review. *Partab Singh* v. *Jaswant Singh, I. L. R. 42 All. 79. In the matter of the petition of Nand Kishore, I. L. R. 32 All. 71*, and *Pandu* v. *Devji, I. L. R. 7 Bom. 287*, referred to. RAM PRASAD *v.* ASA RAM
I. L. R. 43 All. 288

9. ——— *Must be read as in itself definitive of the limits within which review is permitted, and reference to practice under former and different statutes is misleading.* The words "any other sufficient reason" in O. 47, r. 1, mean a reason sufficient on grounds at least analogous to those specified immediately previously, that is to say, to excusable failure to bring to the notice of the Court new and important matters or error on the face of the record. Upon an application for review the Court cannot proceed to deal with the case on the merits as if on an appeal. CHHAJJU RAM *v.* NEKI (P. C) . . 26 C. W. N. 698

10. ——— *Review of judgment—Decisions after judgment sought to be reviewed—"New and important matter."* The plaintiff instituted a suit for ejectment. The defendants pleaded that they were tenants of the plaintiff. The Munsi ordered the defendants to get a declaration of their tenancy. The Assistant Collector declared them to be tenants and the Munsif thereupon dis-

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*.

——— **O. XLVII, r. 1 (1882 Code, s. 623)**—*contd*.

missed the suit. On appeal, however, the Commissioner set aside the order of the Assistant Collector and this decision was upheld by the Board of Revenue. The plaintiff then applied within 90 days of the decision of the Board of Revenue for review of the Munsif's judgment. *Held*, that the judgments of the Commissioner and the Board were "new and important matters" within the meaning of O. XLVII, r. 1 of the Code of Civil Procedure. *Waghela Raisangji Shivsangji* v. *Shaik Masludin, I. L. R. 13 Bom. 330*, and *Waman Hari* v. *Hari Vithal, I. L. R. 31 Bom. 128*, referred to. RAM LAL *v.* KALKA PRASAD (1911)
I. L. R. 33 All. 566

——— **O. XLVII, rr. 1, 4**—*Review of judgment upon fresh evidence—Sufficient reasons not shown why the evidence was not produced at trial.* Where no sufficient reasons appeared on the affidavit upon which an application was made, after judgment, for a re-hearing upon additional evidence, to show why the proposed new evidence was not timeously submitted: *Held*, that the application was properly rejected. SHIVALINGAPPA BASAPPA SHINTRE *v.* REVAPPA (1915) . **19 C. W. N. 762**

See REVIEW . **I. L. R. 47 Calc. 568**

——— **O. XLVII, r. 1; O. XLI, r. 19**—*Consent decree obtained by fraud, setting aside of—Inherent jurisdiction of Court—Such decree if can be set aside on review—Court-fee.* A decree passed by [illegible]

petition of compromise filed and that the respondent came to know about the compromise decree only after process in execution of the decree was taken out. *Held*, that O. XLI, r. 19, had no application to the case, but the decree could be set aside on review under O. XLVII, r. 1, and the Court had also inherent jurisdiction to set aside the decree. That it is an inherent power of every Court to correct its own proceedings, when it has been misled, and the order of the lower Court should not be set aside merely because it was [illegible]

19 C. W. N. 419

——— **O. XLVII, r. 2 (1882 Code, s. 623)**—[illegible]

made to Judge who signed the decree but did not write or deliver the judgment in accordance with

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*.

——— **O. XLVII, r. 2 (1882 Code, s. 623)**—*contd*

which the decree was drawn up. The expression "the Judge who passed the decree" in r. 2, O. XLVII, Civil Procedure Code, means the Judge [illegible]

former had granted an application for review which was set aside on the ground of the order having been passed without notice to the other side did not authorise the latter to entertain the application. TAMIJUDDI SHEIKH *v.* SATYA SANKAR GHOSHAL (1915) . . **20 C. W. N. 391**

——— Where an order of remand by the High Court directed the Lower Court to ascertain the rate of rent payable for the years in suit, *Held*, that the decision of the rate of rent by the Lower Court did not operate as *Resjudicata* as regards rent payable in other years. KISHEN DEYAL RAI *v.* MUSSAMAT KULPATI KUER . . . . **3 Pat. L. J. 372**

——— **O. XLVII, rr. 2, 7, sub-r. 1. cl. (1)** [illegible]

ground other than the discovery of new or important matter or evidence or the existence of a clerical or arithmetical error was, owing to the absence of [illegible] ordinate [illegible] to the [illegible] himself [illegible] to the postponement of the hearing and analogous matters, but died before the case could be heard on the merits; and the review application was subse- [illegible]

Where an order setting aside a sale was set aside on review and the sale confirmed: *Held*, that an appeal against the order passed on review preferred [illegible]

——— **O. XLVII, r. 4 (1882 Code 626)**—

See APPEAL . **I. L. R. 43 Calc. 178**
6 Pat. L. J. 625

See LIMITATION ACT (IX OF 1908), ss. 5, 14 **I. L. R. 42 Bom. 295**

See REVIEW . **I. L. R. 41 Calc. 809**

——— **O. XLVII, rr. 4, 7 (See 1882 Code, ss. 626 and 629)**—

See APPEAL . **I. L. R. 42 Calc. 433**
I. L. R. 43 Calc. 178

See REVIEW . **I. L. R. 42 Calc. 8[illegible]**

——— **O. XLVII, r. 4; O. XLI, r. 11**—*Appeal summarily dismissed—Application for review if may be granted without notice to respondent—Practice—Hearing of appeal, if to be restricted to grounds on which review based—*[illegible]

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

—————— **O. XLVII, r. 4; O. XLI, r. 11**—*contd.*

Act (VIII of 1885), ss. 22, 85, 159, 161, 167. The practice of the Court allowing applications for review of orders dismissing appeals under O. XLI, r. 11 of the Civil Procedure Code, to be granted without the issue of any notice to the respondents is in conformity with the law and should not be departed from. *Semble:* The Division Bench which granted the review can alone consider the propriety of the order previously made and either maintain or vacate the original order of dismissal. *Semble:* An order granting a review of an order of dismissal under O. XLI, r. 11, without issue of notice to the respondent, if contrary to law, is not a nullity. At most it is one made irregularly or with material irregularity in the exercise of jurisdiction possessed by the Judges and cannot be ignored or vacated by the Bench hearing the appeal. When an application for review of an order of dismissal under O. XLI, r. 11, is granted the hearing of the appeal cannot be restricted to the grounds which were made the basis of the application for review. JANAKINATH HORE *v.* PRABHASINI DASI (1915) . **19 C. W. N. 1077**

—————— **O. XLVII, r. 5 (1882 Code, s. 627)**—*Application for review heard by one of a Bench of two Judges, the other having gone on a month's leave—Jurisdiction—Appeal under the Letters Patent.* Where one of a Bench of two High Court Judges who had disposed of an appeal, having left the Court on a month's leave, an application for review of the judgment was heard and dismissed by the remaining Judge: *Held,* that the learned Judge had no jurisdiction to dispose of the application, by reason of r. 5 of O. XLVII of the Civil Procedure Code and an appeal lay against that order. JAGAT CHANDRA ACHARYA *v.* SHYAMA CHARAN BHATTACHARYA (1917) . **22 C. W. N. 550**

—————— **O. XLVII, r. 7 (1882 Code, s. 629)**—

See O. XLI R. 10 **I. L. R. 42 All. 626**

See O. XLIII, r. 1. **1 Pat. L. J. 193**

See APPEAL . **I. L. R. 42 Calc. 433**

1 —————— *Reference by District Judge of case tried by Small Cause Court S. 115, Civil Procedure Code—S. 25, Small Cause Courts Act (IX of 1887)—Interference by High Court on question of fact.* The plaintiff brought his suit in the Court of Small Causes for recovery of damages against the defendant who was said to have held some land under a contract to take half the proceeds as remuneration for his labour and expense. The Small Cause Court found that the defendant was a servant remunerated by the receipt of half the produce and decreed the suit. On a reference by the District Judge recommending the setting aside of the decree of the Small Cause Court Judge on the ground that the defendant should have been held to be a tenant against whom the suit could not be entertained: *Held,* that the Court of Small Causes was a Court subordinate to the District Judge and O. XLVII, r. 7, contemplated a reference by the District Judge of cases tried by such Court. That in cases of revision under s. 115, Civil Procedure Code, or under s. 25 of the Small Cause Courts Act, the High Court does not generally interfere with findings of fact arrived at by the first Court if those proceedings are supported by evidence before the Court. No case having been made out for interference on a question of fact, the reference was discharged. RATAN BEPARI *v.* HIRA LAL SARKAR (1916) **20 C. W. N. 1110**

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

—————— **O. XLVII, r. 7 (1882 Code, s. 629)**—*contd.*

2. —————— *Review of judgment—Appeal from order granting of review—Grounds of appeal.* In an appeal under O. XLVII, r. 7 of the Code of Civil Procedure, 1908, from an order granting an application for review of judgment, the appellant is strictly limited to the grounds set forth in the rule. KHURSHED ALAM KHAN *v.* RAHMAT-ULLAH KHAN (1917) **I. L. R. 40 All. 68**

—————— **O. XLVII, r. 8 (1882 Code, s. 630)**—*Decree of Division Bench of High Court of two Judges found erroneous giving plaintiff more than he claimed—Application for amendment before one of them—Jurisdiction of single Judge to amend decree—Court in granting application for review, if bound to rehear whole case — Rehearing of case by single Judge without authority from Chief Justice —Jurisdiction.* An application for amendment of a decree made in favour of the plaintiff by a Division Bench of the High Court of two Judges was moved by some of the defendants before one of them (the other Judge having left the Court) and a Rule was issued on the plaintiff to show cause why the decree should not be set aside or amended, or why such other order should not be made as might seem fit, on the ground that the decree purported to give plaintiff a relief not claimed by him. The Judge made the Rule absolute, and then in terms of r. 8, O. XLVII, C. P. C. proceeded to rehear the case with the result that the judgment and decree of the Division Bench were amended. The plaintiff appealed against this last decision. *Held (Per* JENKINS C. J. and N. R. CHATTERJEA J.), that in the absence of an order by the Chief Justice authorising the learned Judge alone to sit for the hearing of the case, his decision was without jurisdiction. The case thereafter was heard before the Regular Bench, the Judges whereof refused to rehear the whole case, and confining themselves to the point of amendment only passed a decree amending the judgment and decree. Some of the defendants having applied for review of this last decree, on the ground that the learned Judges should have reheard the whole appeal, *held,* that the decree of the Division Bench stood amended, as soon as the Rule to amend it was made absolute, and all subsequent proceedings were superfluous. That as the last decree of the High Court only affirmed that order, it was not necessary to set it aside. *Per* MOOKERJEE J.-R. 8 of O. XLVII of the Civil Procedure Code clearly leaves it optional with the Court to determine whether, when a review is granted, the case should be reopened in part or in its entirety. GOUR SUNDAR BHOWMIK *v.* RAKHAL RAJ BHOWMIK (1916) . . . . **20 C. W. N. 1165**

—————— **O. XLVIII, r. 9**—*Review of judgment—Second application for review—Practice. Semble:* That there is nothing in the Code of Civil Procedure which prevents a second application for review being made after a previous application for review has been made and rejected. *Gobinda Ram Mondal* v. *Bhola Nath Bhatta, I. L. R. 15 Calc. 432,* referred to. PALLIA *v.* MATHURA PRASAD (1916)

I. L. R. 38 All. 280

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

———Sch. II. *See* ARBITRATION.

———*Reference of suit to arbitration by Judge and two others as arbitrators—Award—Decree in accordance therewith—Finality of decree—Reference whether under second schedule—Proceedings, extra cursum curiæ—Adjustment of suit under O XXIII, Civil Procedure Code-Consent decree.* A reference of a pending suit to arbitration by the presiding Judge along with others as arbitrators is not a reference under the second schedule to the Civil Procedure Code but is a proceeding extra *cursum curiæ*, and a decree passed in accordance with their decision should be regarded as a consent decree not subject to the provisions of the second schedule, and is therefore final. *Nanjappa* v. *Nanjappa, 23 M. L. J. 290 ;* and *Praydas* v. *Girdhardas, I. L. R. 26 Bom. 76,* followed. It is undesirable that a Judge before whom a case is pending should associate himself with other persons as an arbitrator. CHINNA VENKATASAMI NAICKEN *v.* VENKATASAMI NAICKEN (1919) . . . . I. L. R. 42 Mad. 625

———Sch. II, para. 1 (1882 Code, s. 506)—

——— *Award.* Reference by parties interested. Defendant who did not appear not joining. Validity of reference discussed

14 C. W. N. 420

——— *Reference to arbitration by some only of the parties to the suit—Ex-parte defendant, not a party to the reference—Reference, whether valid, award—Decree, validity of—Jurisdiction of Court to make a reference—"Party interested," meaning of.* Where a suit was referred to arbitration at the instance of some of the parties thereto but a defendant, against whom relief was claimed in the plaint who was *ex parte* in the suit, did not join in the reference though he had an interest in the subject-matter of the reference and a decree was passed in accordance with the award of the arbitrators : *Held,* that the Court had no jurisdiction to make the order of reference under Sch II, r. 1, of the Civil Procedure Code, that the decree was invalid and should be set aside, and that the suit should be proceeded with on the merits If a person is *ex parte* in a suit, he does not thereby cease to be a party interested in the reference. *Ishar Das* v. *Keshab Deo, I. L. R. 19 All. 657,* and *Vaithianatha Iyer* v. *Vaithialinga Mudaliar, 18 M. L. T. 374,* dissented from. *Girija* v. *Karai, 27 C. L. J. 939,* followed. POTITA PAVANA PANDA *v.* NARASINGA PANDA (1919)

I. L. R. 42 Mad. 632

——— A pardanashin lady and her two sons were defendants to a suit. An agreement was said to have been made by the parties to refer the matter to arbitration and the Court made an order of reference The agreement to refer, so far as it purported to be made by the lady, was signed by her pleader, to whom a *gomasta* had given a *vakalatnama.* The *vakalatnama,* however, did not contain a power to refer the suit to arbitration though it contained powers to file petitions of compromise and so forth : *Held,* that the provisions of para. 1 of Sch II to the Civil Procedure Code were not complied with in the case of the female defendant who was undoubtedly interested in the matters in difference in the suit along with her sons. The provisions of this paragraph must be strictly complied with in order that there may be a valid reference. *Ramjiwan Ram* v. *Kali Charan Singh*

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd*

——— Sch. II, para. 1 (1882 Code, s. 506)—*contd.*

I. L. R. 29 All. 429 (1907), Seth Dooley Chand v. *Mamuji Musaji, 21 C. W. N 387 (1916)* and *Girija Nath* v. *Kanai Lal, 27 C. L. J. 339 (1917),* referred to. An appeal lies in a case where the referen [illegible] of the [illegible] DWARK [illegible] 832

[illegible]

trator in the place of one who has refused to act does not arise unless and until the Court has [illegible]

——— Sch. II, rr. 8 and 15—

See ARBITRATION . 4 Pat. L. J. 265

I. L. R. 45 Bom. 1071

———Sch. II, para. 10 (1882 Code, s. 516)—

See ARBITRATION . I. L. R. 46 Calc. 721

——— Sch. II, para. 11—

——— *Arbitration—Reference to arbitration on condition that certain adjustments should not be taken into consideration—Adjustment difference between treating as an account stated and as a mere admission—Admissibility of documents in support of particular items though excluded as evidence of a general settlement—Arbitrator, mis-* [illegible]

claimed by the plaintiff under a mortgage and two deeds of further charge consented to the suit being referred to arbitration on a condition, which was embodied in the consent order referring the case to arbitration, to the following effect :—"And it is further ordered that the said arbitrators do proceed on the basis of there having been no adjustments, and the adjustments relied upon by the plaintiff in this suit shall not be taken into consideration " The arbitration proceedings were carried on before arbitrators appointed for the purpose and afterwards before an umpire and in the course of the proceedings the umpire in spite of the defendant's protests admitted one of the adjustment in evidence as proof of an admission by the defendant that a certain item of Rs 1,300 included in the adjustment was due from him to the plaintiff. Previously the other of the two adjustments had been used by the plaintiff without protest from the defendant to prove one item therein. The defendant protested and asked the umpire to submit a special case for the consideration of the Court under clause 11 of the Civil Procedure Code. The umpire doubted whether that clause would apply, but postponed further consideration of the item in question to enable the defendant to move the Court, if so advised, for leave for the umpire to state a special case. The defendant, thereupon, purported to put an end to the umpire's authority and refused to go on with the reference, which nevertheless was proceeded with before the umpire *ex parte* and an award made. *Held,* that the passage in the con-

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— Sch. II, para. 11—*contd.*

sent order quoted above was reasonably susceptible of two constructions, that it was either a particular and specific, following upon a general, exclusion of all adjustments *qua* adjustments; or, as contended by the defendant, a stipulation that certain documents containing the adjustments should not be admitted in evidence for any purpose; and that it was possible to admit a document as evidence in support of a particular item and at the same time exclude it as evidence of a general settlement. *Held*, further, that if the defendant's contentions were correct, the stipulation relied on was a rule of evidence introduced *pro hac vice*, and that the honest though mistaken admission by the umpire of a document in violation of that rule would not be a ground for setting aside the award, and that the defendant's conduct in rejecting the umpire's offer to adjourn consideration of the item under discussion in order to give the defendant an opportunity to obtain the Court's leave for a statement of the case and in deciding to withdraw from the reference without the leave of the Court was incorrect. AISHABAI *v.* ESSAJI (1913) . I. L. R. 38 Bom. 66

——— Sch. II, para. 12 (1882 Code, s. 506)—*Arbitration—Award—Clerical mistake in award—Commissioner appointed to examine the award—Report of the Commissioner reversed by the Court—Court passing a decree different from the award—Practice—Procedure.* The matters in dispute in the suit were referred to arbitrators who made their award. Both parties filed objections to the award. On an application being made by the parties to amend the award on the ground that there were certain clerical errors the Court issued notice to the arbitrators to rectify the award under paragraph 12 of the Second Schedule of the Civil Procedure Code. The arbitrators considered the objections and submitted their opinion regarding the alleged errors. The Court, thereupon, made an order appointing two Commissioners to examine accounts made by the arbitrators. The Commissioners made their report supporting the opinion of the arbitrators. The Court then considered the objections with regard to certain disputed items, reversed the report of the Commissioners on these items and directed them to make a second report. The said report was made and eventually the Court passed a decree in favour of the defendants which was different from the award of the arbitrators. On appeal to the High Court: *Held* (setting aside the decree of the lower Court and passing a decree in terms of the arbitrators' award), (1) that a wrong procedure was followed by the Court from the commencement of the proceedings inasmuch as the Court in effect directed the Commissioner to sit in appeal on the award of the arbitrators with regard to the disputed items, and when the Commissioner supported the decision of the arbitrators the Court itself sat in appeal on the decision of the Commissioner: (2) that the Court could not be said to have exercised the only powers it had under para. 12 (*b*) and (*c*) of Schedule II, Civil Procedure Code, 1908, which were either to amend an obvious error which could be amended without affecting the decision, or to rectify a clerical mistake or an error arising from an accidental slip or omission. *Shiam Lal* v. *Parshottam Das* (1920) *42 All. 277*, referred to. GOPAL DINKAR *v.* GANESH NARAYAN (1920) . I. L. R. 45 Bom. 512

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— Sch. II, para. 14 (1882 Code, s. 520)—*Award 'Illegal on the face of it,' meaning of—Patent illegality—Remittance to arbitrators for reconsideration, when permissible.* In a suit for partition and recovery of a share in the family properties, the defendants pleaded *inter alia* that the plaintiff was born blind and was therefore not entitled to any share under Hindu Law. After issues were framed the whole dispute was, by agreement of the parties, referred to arbitrators who, without deciding the question as to congenital blindness, passed an award to the effect that the plaintiff was entitled to a life-interest in one-fourth share subject to its becoming an absolute interest in case the plaintiff married. *Held*, on objection to the award, that the award was not so patently illegal as to come within the meaning of cl. (*c*) of paragraph 14 of the second schedule of the Civil Procedure Code, and that the award could not be remitted to the arbitrators for reconsideration. English and Indian cases reviewed. MADEPALLI VENKATASWAMI *v.* MADEPALLI SURANNA (1917) . . . I. L. R. 41 Mad. 1022

——— Sch. II, paras. 14, 15 and 16—*Arbitration—Award—Ground for remitting or setting aside an award—Arithmetical error.* It is not a ground for remitting an award on a matter referred to arbitration or for setting aside an award that the arbitrator has made a mistake in arithmetic and apparently unintentionally has awarded a larger sum of money to be paid by one party to the other than he would have awarded if his attention had been directed to the mistake. Nor does the decision of an arbitrator appointed to divide family property that a certain debt is due from the family to a person not a party to the reference amount to the determination of a matter not referred to arbitration, and in any case such a decision, so far as it might be considered as an award in favour of the creditor, would be entirely separable from the rest of the award. *Allarakhia Shivji* v. *Jehangir Hormasji, 10 Bom., H. C. Rep., 391*, and *Mustafa Khan* v. *Phulja Bibi, I. L. R., 27 All., 526*, referred to. SHIAM LAL *v.* PARSHOTTAM DAS . . . I. L. R. 42 All. 277

——— Sch. II, paras, 14, 15, 20—

See ARBITRATION . I. L. R. 36 All. 336

——— Sch. II, Para. 15 (1882 Code, s. 521)—

See ARBITRATION . I. L. R. 36 All. 354
I. L. R. 38 Calc. 522
4 Pat. L. J. 265

——— Sch. II, paras. 15, 16—

See APPEAL . . 1 Pat. L. J. 306

See ARBITRATION I. L. R. 39 Calc. 822
I. L. R. 36 All. 354

See AWARD . I. L. R. 38 Mad. 256

——— *Arbitration—Agreement to refer pending suit—Agreement not made by all the parties to the suit—Award—Objection to validity of agreement to refer—Revision.* Out of twenty-one defendants, sixteen joined with the plaintiff in an application to refer the matter in the suit to arbitration. Of the remaining five defendants, three had not entered an appearance, and the Court had already passed an order that the case would be proceeded with *ex parte* as to them and as to the remaining two the plaintiff abandoned his claim against them. A reference

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd.

——— Sch. II, paras. 15, 16—contd.

was made and an award was delivered for payment of a sum of money by one of the defendants alone, and a decree followed in accordance with the award. *Held*, that there was a valid order of reference, or ... defendant against whom ... itted to ... R. 24 ... R. 29 ... J. 333, ... Ill. 657, ...

16 of the second schedule to the Code of Civil Procedure, 1908, the question whether there had been a valid reference to arbitration was a question reserved to the decision of the trial Court and ought not to be made the subject of the revisional jurisdiction of the High Court. *Lutawan v. Lachya, I. L. R. 36 All. 69*, referred to. AJUDHIA PRASAD *v.* BADR-UL-HUSAIN (1917) . I. L. R. 39 All. 489

——— *Arbitration decree in accordance with award—Appeal, grounds for.* No appeal lies from the decree of a Court as to the validity or invalidity of an award, except in cases where the decree pronounced in pursuance of the award is in excess of, or not in accordance with, the provisions of the award itself. KHUDIRAM MAHATO *v.* CHANDICHARAN MAHATON

1 Pat. L. J. 306

——— Sch. II, paras. 15 and 16 ; O. XXXII, r. 7—*Arbitration—Agreement by guardian ad litem of minor party to refer—No objection taken to validity of award—Decree in accordance with award—Appeal.* Per RICHARDS, C. J. and BANERJI and RYVES, JJ. Where an objection to the validity of an award, which might have been raised under article 15 of the second schedule to the Code of Civil Procedure, is not raised within the time limited, or, being raised, is rejected and the Court proceeds to pronounce judgment and to frame a decree, no appeal will lie except on the grounds stated in article 16 of the same schedule. *Semble* (per RICHARDS, C.J., and RYVES, J.): That Order XXXII, rule 7, of the Code of Civil Procedure, 1908, does not control article 1 of the second schedule. It is not therefore necessary for the guardian of a minor party to obtain the express leave of the Court before agreeing to a reference to arbitration being made by the Court. *Ghulam Khan v. Muhammad Hassan, I. L. R. 29 Calc. 167*, and *Hardeo Sahai v. Gouri Shankar, I. L. R. 28 All. 35*, referred to. *Lakshmana Chetti v. Chinnthambi, I. L. R. 24 Mad. 326*, distinguished. LUTAWAN *v.* LACHYA (1913) . I. L. R. 36 All. 69

——— Sch. II, para. 16—

See s. 115 I. L. R. 45 Bom. 832

——— Sch. II, paras. 16, 21 ; O. XXIII r. 3—*Reference to arbitration—Decree on award—Appeal.* A suit was instituted against four defendants. Defendants Nos. 1 to 3 were absent, ...

CIVIL PROCEDURE CODE (ACT V OF 1908) —contd.

——— Sch. II, para. 16—contd.

adjourned date the defendant No. 4 made an application intimating to the Court that Mr. W. S. Marris (then Collector of Aligarh) has been appointed as arbitrator, by agreement between the plaintiff and himself, and that the said arbitrator had consented to act and had begun to make inquiries, and prayed for an adjournment. The application was endorsed by the plaintiff's counsel. The adjournment was granted, and similar applications were from time to time made to the Court, and they were granted. Finally, the Court communicated with Mr. Marris himself, inquiring how soon he hoped to be able to complete the award, and fixed another date for the case. On that date the Court was informed that the inquiries had been completed and the award might be expected shortly. The absent defendants had in the meantime stated to Mr. Marris their agreement to accept his award. The award, having been submitted to the Court, the defendant No. 4 applied that the award might be filed and be made a rule of Court. The plaintiff objected on a variety of grounds. The Court below overruled all the objections and ... conformity with the award. On ... *Held*, that having regard to the ...

matter a reference to arbitration by the Court under the earlier paragraphs of the second schedule to the Code of Civil Procedure, and in the circumstances the appeal, which was against the decree based on the award, was not maintainable. *Nidamarthi Krishnamoorthy v. Gangiparti Ganapathin-* ...

I. ... R. ... All. ...

——— Sch. II, para. 17 (1882 Code, s. 523)—

See s. 9 I. L. R. 37 Bom. 442

Agreement to refer to arbitration a pending litigation, privately, not coming under—Order filing agreement—Appeal, maintainability of—Civil Procedure Code (Act V of 1908), O. XXIII, r. 3—Mere agreement is not an adjustment under. An order of a Court filing an agreement to arbitrate presented by the parties to a suit is the decree and is appealable as such even under the old Civil Procedure Code (Act XIV of 1882) as well as under s. 104 (*d*) of the new Code. *Ghulam Khan Muhammad Hassan, I. L. R. 29 Calc. 167, Narayana Rao v. Sarabaiah, 21 Mad. L. J. 263* and *Tiruvengadathiengar v. Vaidinatha Ayyar, I. L. R. 29 Mad. 303*, followed. Paragraph 17 of second schedule to Civil Procedure Code (Act V of 1908) corresponding to s. 523, Civil Procedure Code (Act XIV of 1882), covers only cases where parties without having recourse to litigation agree to refer their differences to arbitration. So an agreement to refer to arbitration a pending litigation made without the intervention of the Court cannot be filed under paragraph 17 of the second schedule. *Ghulam Khan v. Muhammad Hassan, I. L. R. 29 Calc. 167*, and *Tincowry Dey v. Fakir Chand Dey, I. L. R. 30 Calc. 218*, followed. A mere agreement to refer to arbitration a matter pending before a Court cannot be

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— Sch. II, para. 17 (1882 Code, s. 522)—*contd.*

treated as an adjustment of the dispute under O. XXIII, r. 3, corresponding to s. 375, Civil Procedure Code (Act XIV of 1882), though an award consequent on the arbitration may be so treated. MACLEAN, C. J.'s view in *Tincowry Dey* v. *Fakir Chand Dey, I. L. R. 30 Calc. 218,* followed. *Pragdas* v. *Girdhardas, I. L. R. 26 Bom. 76, Brojodurlabh Sinha* v. *Ramanath Ghosh, I. L. R. 24 Calc. 908,* and *Lakshmana Chetti* v. *Chinnathambi Chetti, I. L. R. 24 Mad. 326,* distinguished. VENKATACHALA *v.* RANGIAH (1913)

I. L. R. 36 Mad. 353

——— *Agreement to refer to arbitration—Mahomedan Law, mother as "defacto" guardian if can execute the agreement on behalf of her minor children—A party to the agreement if can subsequently question the validity of the agreement and withdraw therefrom—Subsequent assent of the "de jure" guardian if can validate the agreement—Subordinate Judge if may allow mother to act for her infants in partition proceedings—Kazi, who is.* A Mahomedan mother on behalf of her minor children entered into an agreement with some others to refer to arbitrators a dispute about some properties and they all made an application to Court under r. 17 of the Second Schedule to the Civil Procedure Code. The guarding of the minors' properties appointed by the District Judge subsequently gave his assent to the agreement to refer and participated in the said application under r. 17. The Court thereupon acted upon the agreement and referred the dispute to arbitration. *Held,* that the mother was not competent to bind the infants by the agreement to refer to arbitration. The mother has no larger powers to deal with her minor child's property than any outsider or non-relative who happens to have charge for the time being of the infant. MOHSENUDDIN AHMED *v.* KHABIRUDDIN AHMED

26 C. W. N. 246

——— Sch. II, paras. 17, 18—

See ARBITRATION **I. L. R. 46 Calc. 1041**

——— *Arbitration—Failure of arbitrators to make an awarud—Suit as to part of the matters referred—Direction by Court to proceed with the arbitration accepted by the parties.* Certain persons agreed to refer matters in dispute between them to arbitration and two arbitrators and an umpire were appointed. But, owing to further disputes arising, the arbitration was not proceeded with, and one of the parties sent a notice to the umpire purporting to revoke his authority as umpire. Thereafter one of the parties to the submission filed a suit in a Munsif's Court as to part of the matters referred to arbitration (the whole of such matters being beyond the pecuniary jurisdiction of the Munsif). The Munsif at first dismissed the suit; but, the case having been remanded to him on appeal, then passed an order staying the suit under paragraph 18 of the Code of Civil Procedure and further went on to issue a precept to the arbitrators and the umpire to continue the arbitration. No exception, however, being taken by any one concerned to this order, the arbitration proceeded, the parties argued their respective cases fully before the arbitrators and an award was made. An application to have this award made a rule of Court was accepted by the Subordinate Judge and an appeal against this order was dismissed by the District Judge. *Held* that in the circumstances there was no ground for holding that the arbitrators had no jurisdiction to proceed with the case and deliver an award *Appavu Rowther* v *Seeni Rowther, I. L. R. 41 Mad., 115,* and *Sheo Babu* v. *Udit Narain, 12 A. L. J., 757,* referred to. SUKHNATH RAI *v.* NIHAL CHAND . . **I. L. R. 42 All. 661**

CIVIL PROCEDURE CODE (ACT V OF 1908) —*contd.*

——— Sch. II, paras. 17 and 18—*contd.*

——— Sch. II, cls. 17, 20—*Award—Application to file an award on reference made out of Court—Proceedings in Court continued—Limitation Act (IX of 1908), ss. 5 and 14; Sch. I, Art. 178.* Pending proceedings for mutation of names, the parties concerned referred to arbitration out of Court the whole question of their title to the property in dispute, and the arbitrator delivered his award. The mutation proceedings were nevertheless continued. More than six months after the date of the award, some of the parties filed an application in the Civil Court purporting to be under cl. 17 of the Second Schedule to the Code of Civil Procedure, and subsequently an amended application under cl. 20. *Held,* that the application was time-barred. *Cl. 17 of the Second* Schedule to the Code of Civil Procedure was totally inapplicable, and neither s. 5 nor s. 14 of the Indian Limitation Act, 1908, could be applied in favour of the amended application under cl. 20. RAM UGRAH PANDE *v.* ACHRAJ NATH PANDE (1915)

I. L. R. 38 All. 85

——— Sch. II, s. 18 (1882 Code, s. 523)—

See ARBITRATION **I. L. R. 41 Mad. 115**

——— **Suit on Hundi accepted by buyer—**

See ARBITRATION . **I. L. R. 2 Lah. 335**

——— *Agreement to refer disputes arising out of a contract to arbitration—Suit instituted by one of the parties for damages for short supply of goods—Whether suit should be stayed.* Plaintiff sued defendant for a large sum as damages alleging that defendant had contracted to supply 75 cases of longcloth at certain rates, but had given delivery of 38 cases only. The defendant put in pleas and at the same time made an application to the Court under Schedule II, paragraph 18, Civil Procedure Code, praying that the suit should be stayed on the ground that clause 15 of the contract between the parties contained a provision to the following effect:—"Any claim or dispute arising, in connection with this contract, unless an amicable settlement can be arrived at, must be referred to arbitration in Delhi in accordance with the Survey and Arbitration Rules of the Delhi Hindustani Mercantile Association." The Senior Sub-Judge, Delhi, declined to stay the suit on the ground that the arbitration clause did not apply to short delivery of goods, citing *Chhajju Mal & Co.* v. *Gurmukh Singh-Bhagwan Das (72 P. R. 1917). Held,* that when a Court is apprised that a suit has been instituted in contravention of an arbitration agreement the Court has a discretion to stay the suit, and that the burden lies on the plaintiff to show that some sufficient reason exists why the matter should not be so referred and not on the defendant to show that no such reason exists. The reason given by the Lower Court for declining to stay the suit was therefore

CIVIL PROCEDURE CODE (ACT V OF 1908) *—contd.*

———**Scd. II, s. 18 (1882 Code, s. 523)**—*contd.* incorrect and the case must be remanded for a [illegible]

[illegible] *1917) and Dreyfus* v. *Jai Chand (51 P. W. R 1913)*, distinguished. GANESH DAS-ISHAR DAS *v.* DURGA DAT-JAGAN NATH . **I. L. R. 2 Lah. 19**

———**Sch. II, para. 20 (1882 Code, s. 525)**—*F*[illegible] *institu-*[illegible] *ward or value of matter in dispute—Change of law.* When an award has been made on a reference to arbitrators without the intervention of the Court, the amount of the award and not that originally in dispute between the parties determines the forum in which an application to file the award is to be made and the Court to which appeal shall lie from the order passed on the application. *Narsingh Das* v. *Ajodhya Prosad Sukul, I. L. R. 31 Calc. 203*, not followed in view of the change in the law. MOHESH CH. KOONDOO *v.* AMAR CHANDRA KOONDOO (1914) . . **18 C. W. N. 867**

——————— *Whether applicable where the award has been lost. Held,* that when an award has been reduced to writing and has been lost, the special procedure provided by paragraph 20 of Schedule II of the Code of Civil Procedure cannot be resorted to and the parties should be referred to a regular suit. *Gopi Reddi* v. *Mahanandi Redi (I. L. R. 12 Mad. 331)* and *Gowardhan Das* v. *Kesho Ram (66 P. R 1918)*, referred to. *Hill* v. *Townsend (12 R. R. 595)*, and *Banerji's Law of Arbitration, p. 370*, distinguished. MUSSAMMAT KHODEJA *v.* GHULAM NABIO . **I. L. R. 1 Lah. 45**

———**Sch II, paras. 20 and 21**—

See s. 11 . **I. L. R. 45 Bom. 327**

See s. 104 . **I. L. R. 42 All. 185**

——————— *Private arbitration award filed and judgment pronounced and decree following, if can be re-opened in subsequent suit to set aside the award and decree—*Res-judicata. Matters heard and determined in proceedings under cl. 21 of Sch. II of the Civil Procedure Code are *res judicata* and cannot be re-opened in a subsequent suit between the same parties and brought for the purpose of setting aside the award and the decree following upon the judgment pronounced in accordance therewith. A proceeding under cl. 21 of Sch. II, Civil Procedure Code, is a suit within the meaning of s. 11 of the Civil Procedure Code. GURU CHARAN SIRKAR *v.* UMA CHARAN SIRKAR

26 C. W. N. 940

———**Sch. II, para. 21**—

See ARBITRATION . **4 Pat. L. J. 394**

———**Sch. II. para. 21 ; O. XLIII, r. 1**—*Arbitration—Application to file an award made out of Court—Application granted* ex parte*—Refusal to set aside* ex parte order*—Appeal. Held,* that an appeal will lie against an order rejecting an application to set aside an ex parte decree passed under para. 21 of the Second Schedule to the Civil Procedure Code, 1908. NIHAL SINGH *v.* KHUSHHAL SINGH (1916) . . . **I. L. R. 38 All. 297**

CIVIL PROCEDURE CODE (ACT V OF 1908) *—concld.*

———**Sch. III, para. 2 (1882 Code, s, 322)**—

See s. 48 . . **I. L. R. 42 All. 118**

See CIVIL PROCEDURE CODE, 1882, s. 325A . . **I. L. R. 46 Calc. 183**

———**Sch. III, para. 7**—*Held,* that so far as the machinery necessary to satisfy a decree was concerned the Collector is the sole authority and a Civil Court cannot interfere with that discretion but the Court decides whether the decree has been satisfied or not BHURCHAND HANSRAJ *v.* VIRA CHAMPA

I. L. R. 37 Bom. 32

CIVIL SUIT.

——— **pendency of**—

See CRIMINAL, PROCEEDINGS, STAY OF. **I. L. R. 38 Calc. 106**

CIVIL TRESPASS.

See PENAL CODE, s. 441. ***16 C. W. N. 1007***

CLAIM.

——————— *Crops wrongfully attached reaped and sold—Claimant if chargeable with costs of reaping—Indian Contract Act (IX of 1872), ss. 69, 70.* Where perishable things under attachment in respect of which a claim has been preferred are sold the claim is not extinguished but attaches to the sale-proceeds The decree-holder attached some standing crops. Before the crops were reaped the claimant preferred his claim to a portion of the crops and prayed that reaping might be stayed pending the adjudication of his claim, or that the crops on his share of the land be kept separate. This was not done and the crops were sold. The claim was ultimately allowed : [illegible]

and the claimant was not liable to pay those costs either under s. 69 or s 70 of the Indian Contract Act. *Dakhina Mohan* v. *Saroda Mohan, I. L. R. 21 Calc. 142, Tiluck Chand* v. *Soudamini, I. L. R. 4 Calc. 566, Abdul Wahid* v. *Shaduka Bibi, I. L. R. 21 Calc. 496, Goma Mahad* v. *Gokaldas, I. L. R. 3 Bom. 74, Peruvian Guano Co.* v. *Dreyfus Brothers, [1892] A. C. 166*, referred to. RASIK CHANDRA GHOSE *v.* JITENDRA KUMAR GHOSE (1910).

15 C. W. N. 817

CLAIM CASE.

See RES JUDICATA.

I. L. R. 41 Calc. 698

CLAIM PETITIONS.

See PRESIDENCY SMALL CAUSE COURTS ACT (XV OF 1882), s. 19, CL. (s).

I. L. R. 39 Mad. 219

CLAIM PROCEEDINGS.

See LIMITATION . **I. L. R. 45 Calc. 785**

See PRESIDENCY SMALL CAUSE COURTS ACT (XV OF 1882), s. 19, CL. (s).

I. L. R. 39 Mad. 219

CLAIMANT.

See LIMITATION ACT (IX OF 1908), SCH. I, ARTS. 29, 62 AND 120.

I. L. R. 38 Mad. 972

CLEAR RECEIPT.

See CARRIERS . I. L. R. 39 Calc. 311

CLERICAL MISTAKE.

See DECREE . I. L. R. 39 Calc. 265

CLERK.

———— relinquishment by of employment without consent of master—

See MASTER AND SERVANT.
I. L. R. 35 All. 132

CLUB.

See EXCESS PROFITS DUTY.
I. L. R. 48 Calc. 844

CO-ACCUSED.

———— confession of—

See CONFESSION . I. L. R. 38 Calc. 446
I. L. R. 38 Calc. 559

See CONSPIRACY . I. L. R. 41 Calc. 754

See EVIDENCE ACT (I OF 1872), s. 30.
I. L. R. 38 Bom. 156
I. L. R. 43 Bom. 739

———— plea of guilty by—

See CONFESSION . I. L. R. 38 Calc. 446

COAL.

See MINING LEASE I. L. R. 41 Calc. 493

———— wrongful removal of—

See JURISDICTION.
I. L. R. 39 Calc. 739

COAL MINES.

See MINES . I. L. R. 38 Calc. 372

———— grant of—

See DIGWARI TENURE.
I. L. R. 39 Calc. 696

COASTING-VESSELS ACT (XIX OF 1838).

———— ss. 4, 7 and 13—*Registry of vessels—Certificate of registry—Certificate issued in the name of a person who trades in his own name jointly with his son—The son continuing the business in the same name after the person's death—Fresh certificate not obtained—Liability of the son for plying the craft without certificate.* A person owning a craft had taken out a certificate of registry in his own name under s. 7 of the Coasting-Vessels Act (XIX of 1838). He traded in his own name jointly with his sons. On his death, his son carried on the business as before under the same name and did not take out a fresh certificate for the craft. The son was prosecuted under s. 13 of the Act for plying the craft without a certificate; but was acquitted by the Magistrate. The Government having appealed: *Held,* that the craft having been registered in the father's name, and the ownership of it having passed on his death to his son, the latter was bound to obtain a fresh certificate in his own name under s. 4 of the Coasting-Vessels Act (XIX of 1838); and that his failure to do so was punishable under s. 13 of the Act. EMPEROR *v.* HARIDAS LAKHMIDAS (1913) . I. L. R. 38 Bom. 111

COCAINE.

See BOMBAY ABKARI ACT, s. 43.
I. L. R. 34 Bom. 342

See POST OFFICE ACT VI OF 1898, ss. 19, 61, 70 . I. L. R. 37 All. 289

———— importation of—

See EVIDENCE . I. L. R. 41 Calc. 545

———— *Possession of illicit cocaine—Mere possession of bill of lading and invoice relating to illicit cocaine seized in the Custom House—Attempting to import such cocaine into Bengal—Alteration, on the same facts, of conviction of being in possession to one of attempting to import—Bengal Excise Act (Ben. Act V of 1909), ss. 2 (12), 46 (a), 52 and 61—Criminal Procedure Code (Act V of 1898), ss. 236, 237.* The doctrine of constructive possession must be very cautiously applied, especially in the domain of criminal jurisprudence. The mere possession of a bill of lading and an invoice covering goods lying undelivered in the Custom House, by a person who is not the consignee, does not amount to possession of such goods within the meaning of the Bengal Excise Act. *Kashi Nath Bania* v. *Emperor, I. L. R. 32 Calc. 557,* and *Ashruf Ali* v. *Emperor, I. L. R. 36 Calc. 1016,* distinguished. Where the accused was found in possession of a bill of lading and an invoice relating to six bales of old wearing apparel which contained, to his knowledge, a large quantity of contraband cocaine purporting to be consigned to R. P. by a firm in London, and he made over the documents to a firm of shipping agents for clearance from the Custom House and failed to produce the alleged consignee for whom he professed to be acting, or to give any clue about him: *Held,* that the conviction of being in possession of such cocaine, under ss. 46 (*a*) and 52 of the Bengal Excise Act, was not sustainable, but that the accused should, having regard to ss. 236 and 237 of the Criminal Procedure Code, be convicted, on the same facts, of attempting to import the cocaine into Bengal under s. 61 read with ss. 46 (*a*) and s. 2 (*12*) of the Act. KALI CHARAN MUKERJEE *v.* EMPEROR (1913) . I. L. R. 41 Calc. 537

CO-CLAIMANTS.

———— *Litigation expenses paid by, if recoverable from others benefited by the result.* Where some of several claimants take proceedings for recovery for their own benefit, the fact that the result is also to the benefit of the other claimants does not create any implied contract or give the former an equity to be paid a share of the costs of the litigation by the latter. *Abdul Wahid Khan* v. *Shaluka Bibi, I. L. R. 21 Calc. 496,* and *Halima Bee* v. *Roshan Bee, I. L. R. 30 Mad. 526,* followed. RAMDHARI SINGH *v.* PERMANUND SINGH (1913) . 19 C. W. N. 1183

CO-CONSPIRATORS.

———— separate trial of—

See CHARGE . I. L. R. 42 Calc. 957

CO-DEFENDANTS.

See CIVIL PROCEDURE CODE (ACT V OF 1908), s. 11 . I. L. R. 40 Bom. 210

CODICIL.

See WILL . I. L. R. 40 Calc. 192

CODIFICATION.

See CUSTOMARY LAW . 1 Pat. L. J. 325

COERCION.

See CONTRACT ACT (IX OF 1872), s. 72.
I. L. R. 40 Mad. 285

See HINDU LAW ADOPTION
I. L. R. 39 Bom. 441

See LETTERS PATENT . 2 Pat. L. J. 633

See SPECIFIC RELIEF ACT (I OF 1877), s. 39 . . I. L. R. 39 Bom. 149

See UNDUE INFLUENCE

See VOLUNTARY PAYMENT.
I. L. R. 40 Calc. 598

——— evidence of—

See WILL . . I. L. R. 38 Calc. 355

CO-EXECUTANT.

See ATTESTING WITNESS.
14 C. W. N. 1046

CO-EXECUTORS.

——— compromise between—

See HINDU LAW—WILL.
I. L. R. 39 Mad. 365

COGNIZANCE OF OFFENCE.

See COMPLAINT I. L. R. 41 Calc. 1013

See JURISDICTION OF MAGISTRATE.
I. L. R. 37 Calc. 221

See MAGISTRATE . I. L. R. 39 Calc. 119

——— *Police report—Case made over to another Magistrate for enquiry and report—Criminal Procedure Code (Act V of 1898), ss. 173, 190 (1) (b)—Practice.* Where a Magistrate, upon receiving a police report under s. 173, does not take cognizance of the case under s. 190 (1) (b), which he is perfectly competent to do, but makes it over for enquiry and report to an Honorary Magistrate, he acts contrary to the provisions of the law. ABDULLAH MANDAL v. EMPEROR (1913)
I. L. R. 40 Calc. 854

CO-HEIRS.

See TENANTS-IN-COMMON.
I. L. R. 39 Mad. 1049

COLLECTOR.

See BHAGDARI ACT (BOM. ACT V OF 1862), s. 3 . . I. L. R. 38 Bom. 679

See BOMBAY ABKARI ACT (V OF 1878), ss. 32, 67 . . I. L. R. 37 Bom. 101

See BOMBAY LAND REVENUE CODE, 1879.
s. 48 . . I. L. R. 42 Bom. 123
s. 121 . I. L. R. 45 Bom. 67

See CIVIL PROCEDURE CODE, 1882—
ss. 276, 295, 320, 325A.
I. L. R. 35 Bom. 516
ss. 324A, 272, 285.
I. L. R. 36 Bom. 519
s. 325A . I. L. R. 36 Bom. 510

See CIVIL PROCEDURE CODE 1908—
ss. 3, 115 . I. L. R. 37 Bom. 114
s. 47, O. XXI, R. 92.
I. L. R. 41 Bom. 551

COLLECTOR—*contd.*

s. 68, O. XXI, R. 100.
I. L. R. 37 Bom. 488
I. L. R. 38 Bom. 672
s. 70, O. XXI, R. 72.
I. L. R. 42 Bom. 321
s. 93 . . I. L. R. 35 Bom. 243
SCH. III, s. 7 (1) (b), ss. 69, 70.
I. L. R. 37 Bom. 32

See COURT OF WARDS ACT (BOM. ACT I OF 1905), s. 3 (c).
I. L. R. 37 Bom. 318

See HEREDITARY OFFICES ACT, BOMBAY—
ss. 10 AND 13 I. L. R. 35 Bom. 146
s. 11 . . I. L. R. 37 Bom. 37
s. 67 . . I. L. R. 36 Bom. 420

See INCOME TAX I. L. R. 42 Calc. 151

See INCOME TAX ACT, 1886, ss. 14 AND 50.
I. L. R. 44 Bom. 234

See LAND ACQUISITION.
I. L. R. 38 Calc. 230
I. L. R. 44 Bom. 797

See LIMITATION ACT.
I. L. R. 38 Bom. 325

See MAMLATDARS' COURTS ACT, BOMBAY, s. 23 . . I. L. R. 38 Bom. 123

See PENSIONS ACT (XXIII OF 1871)—
s. 4 . . I. L. R. 37 Bom. 91
s. 6 . . I. L. R. 39 Bom. 352

See REVENUE JURISDICTION ACT (BOM. ACT X OF 1876).
I. L. R. 37 Bom. 542

——— award by—

See LAND ACQUISITION ACT.
I. L. R. 36 Bom 529

——— Boundary dispute—

See BOMBAY LAND REVENUE CODE, 1879, s. 121 . . . L. R. 45 Bom. 67

——— Certificate of—

See HEREDITARY OFFICES ACT (BOM. III OF 1874), ss. 10 AND 13.
I. L. R. 35 Bom. 146

See PENSIONS ACT (XXIII OF 1871), s. 6.—
I. L. R. 39 Bom. 352

——— execution sale (setting aside of)—

See BOMBAY HIGH COURT CIVIL CIRCULAR, P. 106, R. 17 I. L. R. 45 Bom. 1132

——— partition effected by—

See CIVIL PROCEDURE CODE (ACT V OF 1908), s. 54 . I. L. R. 42 Bom. 689

See DECREE . I. L. R. 40 Bom. 118

——— powers of—

See LAND REVENUE CODE (BOM. ACT V OF 1879)—
s. 56 . . I. L. R. 36 Bom. 81
s. 79A . . I. L. R. 35 Bom. 72

——— sale by—

See ADVERSE POSSESSION.
I. L. R. 40 Calc. 173

See CERTIFICATE OF SALE.
I. L. R. 37 Calc. 167

COLLECTOR—*contd.*

———— suit against, without notice—

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), s. 424. I. L. R. 35 Bom. 42

———— *Jurisdiction—Complaint to Collector of the District under s. 58 (3) of the Bengal Tenancy Act (VIII of 1885)—Transfer of inquiry to Subdivisional Officer for disposal—Deputy Collector—Jurisdiction of Subdivisional Officer to hold such inquiry and to direct a prosecution for fabrication of false evidence—Bengal Tenancy Act, ss. 3 (16), 58 (3)—Government Notification of 19th September 1910—Reg. IX of 1833, ss. 20 and 21—Criminal Procedure Code (Act V of 1898), s. 476.* Under s. 3 (16) of the Bengal Tenancy Act and Government Notification of the 19th September 1910, a Subdivisional Officer is a "Collector" and is authorized to hold an inquiry under s. 58 (3) of the Bengal Tenancy Act. A Collector of the District has power, on complaint made to him, to transfer such inquiry for disposal to a Subdivisional Officer who is, under ss. 20 and 21 of Reg. IX of 1833, subordinate to the Collector, and is required to perform all the duties assigned to him by that functionary. Where, therefore, a complaint under s. 58 (3) of the Bengal Tenancy Act was made to the Collector of the District and transferred by him for disposal to the Subdivisional Officer who found that certain rent-receipt books, filed in the course of the inquiry, had been fabricated: *Held*, that the latter had jurisdiction, under s. 476 of the Criminal Procedure Code, to direct a prosecution of the offenders for offences under ss. 193 and 196 of the Penal Code. PHANINDAR SINGH v. EMPEROR (1913)

I. L. R. 40 Calc. 465

COLLECTOR OF BOMBAY.

————, office of—

See BOMBAY CITY LAND REVENUE ACT (BOM. II OF 1876), ss. 30, 35, 39, 40. I. L. R. 39 Bom. 664

COLLECTOR OF CUSTOMS.

See SEA CUSTOMS ACT (VIII OF 1878), ss. 167 (3), 182, 188, 191. I. L. R. 43 Bom. 221

COLLECTOR OF RANGOON.

———— reference by—

See APPEAL TO PRIVY COUNCIL. I. L. R. 40 Calc. 21

COLLECTORATE REGISTER.

———— Collectorate Registers giving details as to the areas of the different villages and the Government Revenue chargeable thereon at the time of the settlement were admissible in evidence as public documents, although it might not be possible to specify with absolute certainty for what purpose the measurements had been made and the registers prepared. LAL MOHAR THAKUR v. SHEW GOLAM LAL (1911)

16 C. W. N. 590

COLLISION.

See APPELLATE COURT. 25 C. W. N. 519

See CONTRIBUTORY NEGLIGENCE. I. L. R. 41 Calc. 308
I. L. R. 37 Bom. 575

COLLISION—*contd.*

See RAILWAYS ACT (IX OF 1890), s. 101. I. L. R. 37 Bom. 685

———— at sea—

See ADMIRALTY JURISDICTION. 20 C. W. N. 1022

COLLUSION.

See ASSIGNEE OF A MONEY-DECREE. I. L. R. 38 Mad. 36

See CIVIL PROCEDURE CODE (ACT V OF 1908), s. 73 . I. L. R. 40 Mad. 811

See DIVORCE . I. L. R. 44 Calc. 1091

See EX PARTE DECREE. I. L. R. 45 Calc. 920

COLONIAL COURTS OF ADMIRALTY ACT, 1890 (53 & 54 VICT., C. 27).

———— ss. 2 (3) (a), 35—

See ARREST OF SHIP. I. L. R. 42 Calc. 85

COLONIAL PROBATES ACT (55 & 56 VICT., c. 6).

See LETTERS OF ADMINISTRATION. I. L. R. 40 Calc. 74

COLONISATION OF GOVERNMENT LANDS (PUNJAB) ACT, 1912.

———— s. 19—*Devise of his square by a tenant who became proprietor subsequently—Whether rendered void by the Act and whether the devise passes the proprietary right.* One Sham Singh held a square of land in Chak No. 157 in the Lyallpur District as a tenant. On 5th July 1909 he made a will bequeathing "my square in Chak No. 157" to his son by a second wife. After Act V of 1912 came into force he acquired proprietary rights in the said square, and in 1913 he died. The plaintiff, the son of Sham Singh by his first wife, then brought the present suit claiming ½ of the said square and contended, *inter alia*, that the will was rendered void and inoperative by Act V of 1912, and that a devise of occupancy rights could not pass proprietary rights. Both the Lower Courts dismissed plaintiff's suit. Plaintiff appealed to this Court. *Held*, that, as the testator was a proprietor at the time the succession fell in, the will was in no way rendered void or inoperative by s. 19 of Act V of 1912. *Held*, also, that as the occupancy rights had ripened into proprietary ownership before the will became operative the square passed to the devisee under the will. *Saxton* v. *Saxton (13 Ch. D. 359)*, followed. DALIP SINGH v. BALWANT SINGH

I. L. R. 1 Lah. 590

COMMERCIAL CONTRACT.

———— Indentor who has accepted shipping documents and draft—

See VENDOR AND PURCHASER. I. L. R. 1 Lah. 368

COMMERCIAL INTERCOURSE WITH ENEMIES ORDINANCE (VI OF 1914).

———— s. 3—

See TRADING WITH THE ENEMY. I. L. R. 42 Calc. 1094
I. L. R. 40 Mad. 34

COMMISSION.

See ADMINISTRATOR GENERAL'S ACT (II OF 1874), ss. 20, 52, 54.
I. L. R. 38 Mad. 1134

See ADMINISTRATOR PENDENTE LITE.
I. L. R. 41 Calc. 771

——— Secret—

See PRINCIPAL AND AGENT
I. L. R. 37 Calc. 81

——— to examine witnesses—

See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXVI, R. 1
I. L. R. 42 Bom. 136

See PARDANASHIN, EXAMINATION OF.
I. L. R. 42 Calc. 19

COMMISSION AGENT.

——— selling adulterated food—

See ADULTERATIONS.
I. L. R. 39 Calc. 682

See UNITED PROVINCES PREVENTION OF ADULTERATION ACT (VI OF 1912), ss. 4, 6 . . **I. L. R. 40 All. 661**

——— Commission agency—*Practice and Procedure—Adjustment of accounts—Part of claim*

Procedure Code (Act V of 1908), O. XII, r. 6. Under XII, O. r. 6 of the Civil Procedure Code, the Court has jurisdiction to enter judgment for the amount admitted to be due from the defendants to the plaintiffs and it is in the Judge's discretion, having regard to the nature of the case

PREMSUK DAS ASSARAM *v.* UDAIRAM GUNGABUX (1917) . . . **I. L. R. 45 Calc. 138**

COMMISSIONER.

——— *Revenue Commissioner, power to review order made by, annulling sale for*

Act XI of 1859, as amended by Bengal Act VII of 1868, had, under the circumstances, no power to review his order setting aside a sale held for arrears of revenue. BAIJNATH RAM GOENKA *v.* NAND KUMAR SINGH (1913) . . . **I. L. R. 40 Calc. 552**

COMMISSIONER FOR LOCAL INVESTIGATION.

See CIVIL PROCEDURE CODE O. XXVI. R. 9
I. L. R. 44 Mad. 640

——— *Court appointing Commissioner only proper Court to settle remuneration.* The Court which appoints a Commissioner for local investigation is the only Court having jurisdiction to settle all bills in respect of remuneration submitted by such Commissioner. PANCHANAN SEN *v.* MADHUSUDAN MULLIK (1918)
[23 C. W. N. 295

COMMISSIONER FOR TAKING ACCOUNTS.

See CIVIL PROCEDURE CODE, 1908, SCH. II, PARA. 12 . **I. L. R. 45 Bom. 512**

——— *Accounts—Power of the Commissioner to decide questions of law in the taking of accounts—High Court Rules (Original Side) Rr. 397, 399,—Rules of the Supreme Court in England, O. LV, r. 69—Redemption suit—Motion for directions to the Commissioner.* The Commissioner to

It is a different matter to ask the Court to resume the hearing merely for the purpose of deciding certain questions which come within the powers of the Commissioner LAXMIBAI *v.* HUSSAINBHAI (1916) . . . **I. L. R. 41 Bom. 719**

COMMISSIONER OF PARTITION.

——— sale by—

See REVIEW . **I. L. R. 40 Calc. 140**

——— Commissioner's fees—*How realised—If to be made part of decree—Partition suit.* Where a decree in a partition suit entitled the Commissioner to realise by execution the sum awarded to him on account of his fees and expenses: *Held*, that the Commissioner, who was an officer of the Court, ought not to have been placed in this position. The proper course for the Court would have been to call upon the decree-holder to deposit in Court the full amount determined to be payable to the Commissioner and the decree ought not to have been drawn up till such sum had been deposited. NANDA LAL SIRKAR *v.* BENODE BEHARY ROY (1910). **15 C. W. N. 221**

COMMISSIONER OF POLICE.

——— power of—

See PROCESSION . **I. L. R. 40 Calc. 470**

COMMITMENT.

See APPROVER . **I. L. R. 42 Calc. 856**

See CRIMINAL PROCEDURE CODE (ACT V OF 1898)—

ss. 197, 210, 215.
I. L. R. 42 Bom. 172

ss. 197, 239, AND 532.
I. L. R. 43 Bom. 147

s. 209 . . **I. L. R. 35 Bom. 163**

s. 254 . . **I. L. R. 41 All. 454**

COMMITMENT—*contd*

s. 213 . . I. L. R. 38 Bom. 114

ss. 476 AND 478 I. L. R. 40 All. 116

s. 478 . . I. L. R. 40 All. 32

See JURY.

I. L. R. 37 Calc. 467

———— to Sessions—

See JURISDICTION OF CRIMINAL COURT.
I. L. R. 40 Calc. 360

———— while suit pending—

See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XLIII, R. 1 (*r*) AND O. XXXIX, R. 2, CL. (3).
I. L. R. 39 Mad. 907

———— *Duty of Magistrate to examine witnesses not produced but whom the accused is prepared to produce after process—Application to summon witnesses and for time to file documents made after the commitment order—Criminal Procedure Code (Act V of 1898), s. 208—Practice.* A Magistrate is bound, before passing an order of commitment, to examine all the witnesses produced by the accused but not those whom he is prepared to produce after process obtained for their appearance. *Queen-Empress* v. *Ahmadi, I. L. R. 20 All. 264,* referred to. *Emperor* v. *Muhammad Hadi, I. L. R. 26 All. 177,* dissented from. A Magistrate does not act illegally, under s. 208 of the Criminal Procedure Code, in refusing an application for summons on witnesses and for time to file documents, made after the order of commitment has been passed. EMPEROR *v.* SURATH (1914) . . I. L. R. 42 Calc. 608

———— *Charge exclusively triable by a Court of Sessions—Magistrate's duty, when there is evidence which if believed would support the charge.* Where the charge against the accused was one of rape which is exclusively triable by a Court of Sessions and other minor offences and the Magistrate holding that the story of rape was probably an exaggeration tried the accused for the other offences and convicted him: *Held,* that as there was evidence which if believed would support the charge of rape the Magistrate should have committed the case to the Court of Sessions. *Per* SHAMSUL HUDA, J. That in revision the High Court should not take the responsibility of coming to a conclusion even incidentally regarding a charge on which the accused has not been tried. MOZE ALI *v.* KING-EMPEROR (1919)
23 C. W. N. 1031

COMMITTEE.

See PARTIES—RELIGIOUS ENDOWMENT.
I. L. R. 40 Calc. 323

COMMON CARRIERS.

See CARRIERS.

See CONTRACT ACT (IX OF 1872), SS. 56, 65 . . I. L. R. 40 Bom. 529

———— by sea—

See BILL OF LADING.
I. L. R. 38 Mad. 941

———— liability of—

See CARRIERS ACT, S. 6. 15 C. W. N. 226

1. ———— *Contract of carriage—Excepted risk—Construction—Negligence, indemnity against—Carriers Act (III of 1865), ss. 6, 8, 9—Insurance policy "warranted no recourse against carriers"—Subrogation—Right to recover—Misjoinder—Damages.* Goods were shipped on a flat belonging to the carriers under a bill of lading endorsed to the Manufacturing Company, by clause 5 whereof "the carriers were exempt from loss of the goods, unless such loss should have arisen from the negligence or criminal acts of their servants or agents." There was an existing agreement between the Manufacturing Company and the carriers, by clause 10 whereof "the Manufacturing Company undertook and agreed to hold the carriers harmless and indemnified from and against all claims which could be insured against or covered by an ordinary F. P. A. policy." An ordinary F. P. A. policy was issued by the Insurance Company in favour of the Manufacturing Company in respect of the goods, having the clause "warranted no recourse against carriers." The goods were lost by the negligence of the carriers, and the Insurance Company paid the Manufacturing Company the amount of the policy. In an action for the loss of the goods, brought by the Insurance Company and the Manufacturing Company against the Carrying Company, as common carriers:—*Held,* that the action lay. The rights and liabilities of the common carrier in India are outside the Indian Contract Act, and are governed by the principles of the English Common Law as modified by the Carriers Act. A common carrier is subjected to two distinct classes of liability, (i) insurable risks from which the element of default is absent, and (ii) carrying risks, in which that element is present. English Courts in dealing with exemption clauses recognise this distinction and construe them as not extending to carrying risks in the absence of clear words to that effect. *Price & Co.* v. *Union Lighterage Company,* [1904] *1 K. B. 412 ; James Nelson & Sons, Limited* v. *Nelson Line (Liverpool), Limited (No. 2),* [1907] *1. K. B. 769 ; Wyld* v. *Pickford, 8 M. & W. 443 ; D'Arc* v. *London and North-western Railway Company, I. L. R. 9 C. P. 325 ; Martin* v. *The Great Indian Peninsula Railway Company, L. R. 3 Ex. 9 ; Czech* v. *General Steam Navigation Company, L. R. 3 C. P. 14 ; and Crouch* v *The London and North-Western Railway Company, 23 L. J. C. P. 73,* referred to. *Baxter's Leather Company* v. *Royal Mail Steam Packet Company,* [1908] *2 K. B. 626,* distinguished. *A fortiori,* in India where there is statutory prohibition against exempting a carrier from loss arising from negligence and criminal acts, this canon of construction should be adopted, at any rate within the limits implied in the prohibition. Clause 10 of the Agreement must be construed as an integral part of the contract of carriage: it did not extend to loss arising from negligence or criminal acts. The stipulation in the policy "warranted no recourse against carriers" did not amount to a relinquishment by the Insurance Company in respect of risks not exempted, *i.e.,* where the loss had arisen from the negligence of the carriers. *Thomas & Co.* v. *Brown, 4 Com. Cas. 186,* distinguished. Inasmuch as the Insurance Company claimed by way of suborgation, and not assignment, the suit should have been brought only in the name of the Manufacturing Company. *Burnand* v. *Rodocarnachi, L. R. 7 A. C. 333,* and *Simpson* v. *Thompson, L. R. 3 A. C. 279,* referred to. BRITISH AND FOREIGN MARINE INSURANCE CO., LD. *v.* INDIA GENERAL NAVIGATION AND RAILWAY CO., LD. (1910) . I. L. R. 38 Calc. 28
15 C. W. N. 226

COMMON CARRIERS—*contd.*

2. ———— Notice of loss—*Carriers Act (III of 1865), s. 10—Waiver of Notice.* Under s. 10 of the Carriers Act, before suit, notice of loss must be given to the carrier by the plaintiff. Knowledge of the loss derived *aliunde* by the carrier is not sufficient. BRITISH AND FOREIGN MARINE INSURANCE CO., LD. *v.* INDIA GENERAL STEAM NAVIGATION AND RAILWAY CO, LD. (1910)

I. L. R. 38 Calc. 50

3. ———— *Right of consignee to insist on carrier weighing goods before delivery—Refusal to re-weigh, if refusal to deliver—Right of consignee to weigh and charge for shortage.* Defendant Steamer Company who were common carriers used to allow consignees of goods by their boats to inspect them before granting receipt in the delivery book and have them re-weighed (if so demanded) in case of suspicion of short weight and enter the short weight in the delivery book. The plaintiff's agent without making any such inspection paid the freight, signed the bill of lading and gave a clear receipt in the delivery book of the Company, but did not take actual delivery as he found some of the bags damaged. He then asked the Company's servant to re-weigh the goods and this being refused, did not take delivery. The plaintiff thereupon sued the Company for the price of the goods. *Held,* that the suit must fail

refusal

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a clear

ight to

compensation for proved loss of any portion of the

RAMJASH AGARWALA *v.* INDIA GENERAL NAVIGATION AND RAILWAY CO, LD. (1917)

22 C. W. N. 310

4 ———— *Liability for injuries to goods—Through-booking of goods—Through booking by one company and injury while the goods were in the custody of another Company—Indian Carriers Act (III of 1865), ss. 5, 8, 9—Negligence—Onus of proof—Non-feasance and mis-feasance—Indian Evidence Act (I of 1872), s. 106.* The plaintiff delivered 343 chests of tea to the first

railway, goods delivered for transport from Assam

notified. Accordingly the said chests of tea were put upon one of the flats of the second defendant at Gauhati for carriage to Chandpur and while the chests were in the said flat a fire broke out and destroyed 96 of the chests. The plaintiff brought this action against both the defendants for recovery of Rs. 7,185 representing the value of the 96 chests so destroyed. The action against the first defendant was dismissed under s. 77 of the Indian Railways Act, 1890, as the requisite notice was not served on them within the period of six months: *Held,* that there was no contract between the plaintiff and the second defendant

COMMON CARRIERS—*contd.*

and that under the arrangement there was a general contract between the defendants whereby one became a sub-contractor to the other. *Held,* further, that under the circumstances the first defendant had no authority to act as agent of the second defendant to enter into contract for carriage on the latter's behalf. *Held,* also, that the second defendant was a common carrier within the definition of the Indian Carriers Act, 1865, and as such, was liable to the plaintiff who was the owner of the goods. The Indian Carriers Act, 1865, makes a common carrier liable to the owner of the goods as such though not as insurer. *Held,* also, that the plaintiff was entitled to succeed inasmuch as he had established negligence on the part of the second defendant. THE DEKHARIA TEA CO. *v* THE ASSAM BENGAL RAILWAY CO. (1919) . . . . 23 C. W. N. 998

COMMON GAMING HOUSE.

See COTTON-GAMBLING.

I. L. R. 39 Calc. 968

See PUBLIC GAMBLING ACT (III OF 1867), ss 3 AND 4 . I. L. R. 41 All. 366

ss 4 AND 8 . I. L. R. 41 All. 272

COMMON LAND.

———— Abadi—*Occupied by some of the proprietors asserting their exclusive title and denying that of the other proprietors—Whether a suit by other proprietors for joint possession is competent—Partition of* abadi *land.* Where a plot of *abadi* land was taken exclusive possession of by the defendants, two of the proprietors of the village who asserted their exclusive title and denied the title of the other proprietors: *Held,* that a suit for joint possession by other proprietors was competent. *Watson and Co* v. *Ramchand Dutt (I L. R. 18 Calc. 10 P C.)* and *Maju* v. *Teja Singh (29 P. R. 1918),* distinguished. A Civil Court, but not a Revenue Officer or Revenue Court, has jurisdiction to partition the *abadi* land, but the *onus* of proving that there was *shamilat* in the *abadi* which could be partitioned, and that partition thereof was feasible rests upon the person claiming partition *Ishwar Singh* v. *Atma Singh (117 P. R. 1894),* followed MANJI v. GHULAM MUHAMMAD . . . I. L. R. 2 Lah. 73

———— Abadi—*encroachment by one of the co-sharers—Suit for ejectment by some of the other co-sharers without proof of material or substantial injury and without asking for partition.* The plaintiffs and some other persons are the owners of 9-16th share of Pana Opra, one of the Panas of the town Toshan, the remaining co-sharers (butchers by trade) own the rest of the Pana. The plot in dispute is a vacant site in the Pana which was alleged to have been in long occupation of defendants Nos 3 and 4 who sold it to defendants 1 and 2, two of the co-sharers in the rest of the Pana, under two deeds of sale, dated 6th August 1916. The plaintiffs alleged that the plot in dispute was part of the common land in Pana Opra, that defendants 1 and 2 under the deeds of sales had taken exclusive possession of it on 11th December 1917, and begun to make constructions upon it and the plaintiffs had taken proceedings against them in the Criminal Courts which were dismissed on 4th March 1918, owing to defendants producing the deeds of sale. They

COMMON LAND—*contd.*

alleged that the deeds of sale were fictitious and invalid and prayed for possession of the plot and a perpetual injunction. The suit was instituted on the 9th March 1918. The defendants 1 and 2 pleaded that although the site appertained to the *abadi* Pana Opra, Toshan being a town, according to the *Wajib-ul-arz* every occupier of the *abadi* land was its proprietor and possessed the right of making transfers, and that they had consequently acquired a good title under the sale deeds. They also pleaded that plaintiffs had no right to institute the suit against the defendants without having a partition made. The first Court held that defendants 3 and 4 had been in occupation of the plot, and according to the *Wajib-ul-arz* they had a right to transfer it to defendants 1 and 2 and dismissed the suit. The plaintiffs appealed and the Lower Appellate Court agreed in the finding of the first Court that according to the *Wajib-ul-arz* every inhabitant of the *abadi*, whether a proprietor or not, was entitled to alienate the *abadi* land exclusively in his occupation. But it found that the vendees defendants 1 and 2 had not succeeded in proving the exclusive possession of defendants 2 and 3, their vendors, and could not therefore transfer an exclusive title to the latter. It accordingly passed a decree for joint possession in favour of the entire proprietary body of Pana Opra. The defendants thereon presented the present appeal to the High Court. It was urged that even if the land belonged to all co-sharers in the Pana the plaintiffs had no right to eject the defendants without proving special damage or injury and that the only remedy the plaintiffs had was to have a partition effected. *Held*, that it is a well established custom that no individual proprietor can appropriate to himself a portion of the common land and use it in such a way as to affect the rights of all the co-sharers at the time of partition. *Held*, also, that the plaintiffs having come into Court without any delay were not obliged to show material and substantial injury, and that the decree of the Lower Appellate Court was correct. Civil Appeal No. 2788 of 1917, per Scott-Smith J. (unpublished), followed. *Chuhar Singh* v. *Dhaunkal Singh* (*77 P. R. 1885*), *Ghasita Mal* v. *Goga* (*121 P. R. 1885*), *Ghan Singh* v. *Sadda Singh* (*73 P. R. 1882*) and *Hidayat Ali* v. *Akbar Ali 76 P. R. 1873*), referred to. *Ghulam Muhammad Khan* v. *Buta* (*187 P. R. 1889*), *Hidayat Ali Khan* v. *Basit Ali Khan* (*54 P. R. 1892*), *Majju* v. *Teja Singh* (*29 P. R. 1918*) and *Nocury Lal* v. *Bindaban Chandar* (*I. L. R. 8 Cal. 708*), distinguished. MANJI *v.* GHULAM MUHAMMAD

I. L. R. 1 Lah. 249

COMMON LAW.

See CONTEMPT OF COURT.

I. L. R. 41 Calc. 173

See HINDU LAW—WIDOW.

I. L. R. 36 Bom. 383

COMMON MANAGER.

See ACCOUNT . **I. L. R. 40 Calc. 108**

———— suit against—

See BENGAL TENANCY ACT, s. 95.

24 C. W. N. 138

———— *Bengal Tenancy Act* (*VIII of 1885*), *ss. 95—98—Suit against a Common Manager for general accounts, after accounts passed*

COMMON MANAGER—*contd.*

by the District Judge, whether maintainable—Position of a Common Manager. A Common Manager appointed under s. 95 of the Bengal Tenancy Act by the District Judge, is an officer of the Court created by the statute, and in so far he holds his office and performs his duties under the provisions of the Act, is in a position analogous to that of a Receiver appointed by the Court, and is entitled to the same protection, for the period during which he exercises his duties within the powers given to him by the Act, as a Receiver appointed by the Civil Court. No suit by a co-owner to render a general account for the whole period of his management could lie against a Common Manager who has, in accordance with the provisions of the law which defines his duties, regularly submitted accounts for the period of his management to the District Judge and which accounts have been duly audited and passed by the District Judge. A suit is also not maintainable by a co-owner against a Common Manager for recovery of specific sums of money, which in the ordinary course of the management ought to have appeared in the account and which the co-owner was aware at the time, were not included in the account, or with due enquiry might have discovered were not included in the account, except with the previous sanction of the District Judge. *Khitish Chandra Acharjya Chowdhury* v. *Osmond Beeby*, *I. L. R. 39 Calc. 587*; *16 C. W. N. 516*, and *Mahomed Faiz Chowdhury* v. *Upendra Lal Singh Roy*, *2 Ind. Cas. 597*, distinguished. NABA KISHORE MANDAL *v.* ATUL CHANDRA CHATTERJI, (1912)

I. L. R. 40 Calc. 150

———— *Application for the appointment of a Common Manager—Appointment of a receiver pending disposal of the application—Bengal Tenancy Act* (*VIII of 1885*), *s. 93—Civil Procedure Code* (*Act V of 1908*) *s. 141 and O. XL, r. 1.* The terms of O. XL, r. 1 of the Civil Procedure Code of 1908 are wider than the corresponding s. 502 of the Civil Procedure Code of 1882 and do not provide that the appointment of a receiver should be confined to a suit. An application for the appointment of a Common Manager under s. 93 of the Bengal Tenancy Act is an original proceeding contemplated in s. 141 of the Civil Procedure Code to which the procedure under O. XL, r. 1, seems to be applicable. *Thakur Prasad* v. *Fakirulla*, *I. L. R. 17 All. 106*, followed. The relief of an aggrieved party to such an order is by way of an appeal and not by an application for revision. ASADALI CHOWDHURY *v.* MAHOMED HOSSAIN CHOWDHURY (1916) . . **I. L. R. 43 Calc. 986**

———— *Bengal Tenancy Act* (*VIII of 1885*), *s. 95—Suit for general account after release of estate.* Where a common manager appointed under s. 95 of the Bengal Tenancy Act resigned and the estate was released, and where it was found that his account had not been properly rendered and passed by the District Judge: *Held*, that he could be sued for account with the permission of the District Judge. *Naba Kishore Mandal* v. *Atul Chandra Chatterji*, *I. L. R. 40 Calc. 150*, distinguished. DURGA PRASANNA ROY *v.* ISHAN CHANDRA SHAHA (1916)

I. L. R. 44 Calc. 860

COMMON OBJECT.

See RIOTING . **I. L. R. 30 Calc. 781**

———— not unlawful—

See RIOTING . **I. L. R. 30 Calc. 806**

COMMON OBJECT—*contd*

———— *Rioting—charge, omission to state common object in, whether invalidates conviction* The mere fact that in a charge of rioting the common object is not stated does not invalidate the conviction if the evidence clearly shows what the common object of the assembly was. If two common objects are alleged and one is proved then the fact that the other common object is not proved will not exonerate the accused from liability HARINDER SINGH *v.* KING-EMPEROR
2 Pat. L. J. 541

COMMUTATION OF RENT.

See BENGAL TENANCY ACT, 1885, s. 69.
5 Pat. L. J. 76

See RENT . **I. L. R. 45 Calc. 769**

CO-MORTGAGEES.

See MORTGAGE . **I. L. R. 38 Calc. 342**
L. R. 46 I. A. 372
5 Pat. L. J. 376

COMPANIES ACT (VI OF 1882).

See COMPANY.

———— **ss. 6, 40, 41**—*Certificate of Incorporation of Company, effect of—Objection to formation of Company, the Memorandum of Association not being signed by seven persons as required—Matter in issue not made ground of attack in former suit—*Res judicata—*Civil Procedure Code, 1882, s 13.* The provisions of the Indian Companies Act (VI of 1882) as regards the incorporation of Companies are the same as those contained in the Imperial Act of 1862, except that it is specially provided in s. 40 of the Indian Act that it is not the duty of the Registrar to require evidence as to whether the subscribers to the Memorandum of Association are competent to contract. S 6 of the Act provides that "any seven or more persons . . . . may
Memorandum
plying with
of registration, form an incorporated Company, etc." And s. 41 enacts that "a certificate of the incorporation of any Company given by the Registrar shall be conclusive evidence that all the requisitions of this Act in respect of registration have been complied with." The Memorandum of Association of a proposed Company was signed before the Registrar by two adult persons, and also by a person who under the Guardians and Wards Act (VIII of 1890), had been duly appointed by the Court guardian of five minors, the guardian making a separate signature for each minor; and the Registrar issued a certificate of the due incorporation of the Company. In a suit in which it was objected, *inter alia,* that the Company was not properly constituted, the Memorandum of Association not having been signed by the required number of seven *subscribers*: *Held* (reversing the decision of the Chief Court of Lower Burma on its Appellate Side), *that* assuming the conditions of registration were not duly complied with the certificate of incorporation was conclusive for all purposes, and the Court could not go behind it and consider any alleged defects in the formation or constitution of the Company. *In re Barned's Banking Company. Peel's Case, L. R. 2 Ch. App. 674. per* Lord Cairns L. J.; and *Oakes* v. *Turquand, L. R. 2 E. & Ir. App. 325, per* Lord Chelmsford L C., followed.

COMPANIES ACT (VI OF 1882)—*contd.*

But apart from the English decisions, the use of the word "otherwise" in s 6 of Act VI of 1882 showed that the statutory condition that the Memorandum of Association must be signed by seven or more persons was as much a condition of registration as any other to be found in the Act which was preliminary to registration and apparently essential *Held,* also, that the issue as to the invalidity of the Company might and ought to have been made a ground of attack in a former suit brought by the same plaintiff against the same defendants in 1902 which had been dismissed. All the facts on which the present suit was based were known to the plaintiff, and were stated at length in the proceedings in the former suit. No further evidence would have been needed. Nothing was wanting but the addition of an issue on the point The present suit as regards that question was therefore barred as res judicata under s 13, Explanation 2, of the Civil Procedure Code, 1882 *Kameswar Pershad* v. *Rajkumari Ruttan Koer, I. L. R. 20 Calc. 79; L. R. 19 I. A. 231,* followed. MOOSA GOOLAM ARIFF *v.* EBRAHIM GOOLAM ARIFF (1912)
I. L. R. 40 Calc. 1

———— **ss. 28, 45, 61**—*Indian Contract Act (IX of 1872), ss. 2 (a), (b), 3, 10—Company—Shareholder—Inducement by the agent of the Company to take shares—Winding up—Recovery of calls on shares—Agreement that shares were not to be paid unless divident was given—Agreement not registered—Payment of shares in cash—Condition precedent—Condition subsequent—"Bogus" shareholder.* The question as to whether a particular person became a member of a Company is a question of fact. Where the Agent of a Company induces a person to sign an application for the shares of the Company and that person's name is accordingly entered in the register of members as a shareholder, there is a complete contract between that person and the Company's agent under ss 2 (a), (b), 3 and 10 of the Indian Contract Act (IX of 1872). No contract by which shares are to be considered as duly paid when they are not in fact paid up is valid unless it is registered and when there is no such registered contract the shares are payable in cash. Where in the event of a company not making a profit the shares were not to be paid for at all, the shareholder was a "bogus" shareholder, and this is opposed to the whole object of the Companies' Acts in England and in India

applicant rendered liable as a shareholder, *notice of allotment being immaterial.* MOTILAL CHUNILAL *v.* THAKORLAL CHIMANLAL (1912)
I. L. R 36 Bom. 5[illegible]

———— **ss. 40 and 41**—

See s. 6 . . **I. L. R. 40 Calc. 1**

COMPANIES ACT (VI OF 1882)—*contd.*

———— s. 45—

See s. 28 . I. L. R. 33 Bom. 557

See COMPANY . I. L. R. 39 Bom. 331

———— ss. 45, 58—*Rectification of register of shareholders—Winding up—Contributory—Application for shares—Condition attached—Applicant unable to fulfil the condition—Applicant's liability as a contributory—Intention to become a member in præsenti or in futuro.* A manager of a Banking Company represented to the petitioner that if the petitioner took 400 preference shares he would be appointed a cashier in a new branch of the company. In pursuance of this contract, the petitioner applied for 100 only of preference shares. He paid the deposit money and was entered on the register of shareholders. Subsequently he found himself unable to take up the remaining 300 shares, he was not appointed a cashier in the branch office and the contract was treated as cancelled by the Directors. The petitioner having applied to have his name removed from the list of contributories in respect of preference shares: *Held,* that the petitioner's application for 100 preference shares was conditional and that he had no intention to become a member of the company when he applied for the shares until he was appointed a cashier in the branch office. He was, therefore, entitled to be struck off the register of preference shareholders and could not be called upon as a contributory on that account. *Roger's Case—In re Universal Banking Company, L. R. 3 Ch. 633,* followed. RAMANBHAI *v.* GHASHIRAM (1918)

I. L. R. 42 Bom. 595

———— s. 58—

See s. 45 . I. L. R. 42 Bom. 595

———— *Liquidation—List of contributories—Rectification of register of shareholders—Transfers signed by transferor and transferee and lodged before winding up of the Company—Practice of the Company in approving of the transfer—Transferee's name not registered, effect of —No default, or unnecessary delay, or absence of sufficient cause in dealing with shares—Liability of transferee as contributory.* The applicant, a shareholder in the Indian Specie Bank, Ltd., sold some of his shares to the respondents by various transfers which were lodged with the Company for registration. The Company, however, went into liquidation before the transfers were in due course approved of by the Board of Directors. According to the practice observed by the Company, transfers lodged up to the end of the previous week were placed before the Board of Directors at their meeting in the following week. The Company went into liquidation on the 29th of November 1913. At a meeting of the Board of Directors held on the previous day, the transfers lodged in the previous week up to the 22nd of November only were considered. The transfers in dispute were lodged with the Company between the 25th and 28th of November 1913. The applicant was accordingly placed by the liquidator on the list of contributories in Schedule A for the shares which stood in his name on the 29th of November 1913. The applicant contended that the register of shareholders should be rectified by the Court under ss. 58 and 147 of the Indian Companies Act (VI of 1882) by substituting the names of the respondents as transferees in place of his own name. *Held,* that as the applicant had not proved that there was either absence of sufficient cause, or default, or unnecessary delay on the part of the Company in dealing with the transfers, the register of shareholders could not be rectified. SORABJI NUSSERWANJI *v.* C. A. PATWARDHAN (1915)

I. L. R. 40 Bom. 134

———— s. 61—

See s. 28 . . I. L. R. 33 Bom. 557

See COMPANY . I. L. R. 42 Bom. 284

———— ss. 61, 125, 151—*Company—Winding up—Contributory—Liability of contributory for calls.* Once a member of a Company is upon the list of contributories, unless he succeeds in showing as against the liquidator that he should not have been put on the list of contributories, he is liable for all those matters in respect of which he may be charged in the event of the company being wound-up, that is to say, to the extent of his original share held in the company which remains unpaid he is liable to contribute to the assests of the company, for payment of the debts due to creditors and the expenses of the winding-up under s. 61 of the Indian Companies Act, 1882. He is therefore liable in respect of unpaid calls, even though, as against the company the realization of such calls may have become barred by limitation. *Sorabji Jamsetji* v. *Ishwardas Jugjiwandas, I. L. R. 20 Bom. 534,* and *Vaidiswara Ayyar* v. *Siva Subramania Mudaliar I. L. R. 31 Mad. 66,* followed. JAGANNATH PRASAD *v.* U. P. FLOUR AND OIL MILLS COMPANY, LIMITED (1916) . . . . I. L. R. 38 All. 347

———— ss. 67, 96, 123—*Contracts entered into by companies—Agreement to refer to arbitration—Whether seal of the Company necessary. Held,* that s. 96 of the Indian Companies Act, 1882, did not require that an agreement entered into by a company with a person who held a contract for the working of a certain portion of the company's business, to refer dispute which might arise between the parties to arbitration, should be made under the seal of the company. GANGES SUGAR WORKS, LD. *v.* NURI MIAH (1915) . I. L. R. 37 All. 273

———— s. 68—

See COMPANY . I. L. R. 43 Mad. 550

———— s. 74—*Penalty—Criminal Procedure Code, s. 260—Summary jurisdiction—Power to try summarily offences under the Indian Companies Act.* There is nothing in law to prevent a Magistrate from trying summarily offences under the Indian Companies Act, 1882. *Held,* also, that the penalty provided by s. 74 of the Indian Companies Act, 1882, is a fixed and not a maximum penalty. *Queen-Empress* v. *Moore, I. L. R. 20 Calc. 696,* referred to. EMPEROR *v.* DINA NATH (1913) . . . . I. L. R. 35 All. 173

———— s. 76—*Alteration of memorandum of association by articles—To what extent a company can by resolution alter articles.* Under s. 76 of the Indian Companies Act anything which appears in the articles of association but is not provided for in the memorandum of association may be altered by a special resolution. Where the articles of association provide for matters which need not, under s. 8 of the Companies Act, be contained in the memorandum of association and which are not either expressly or impliedly dealt with by such memorandum, the portions of the articles dealing with such matters cannot be

COMPANIES ACT (VI OF 1882)—*contd.*

——— s. 76—*contd.*

treated as part of the memorandum and can be altered by a special resolution of the company. Rights which have their origin in a contract outside the articles, the terms of which contract are found in or referred to in such articles, can be altered by such alteration of the articles unless it is proved that one of the terms of such contract was that such rights should not be affected by an alteration of the articles CHITHAMBARAM CHETTIER *v.* KRISHNA AIYANGAR (1909)

I. L. R. 33 Mad. 36

——— ss. 76, 77—*Articles of association—Agent—Borrowing powers—Contract Act (IX of 1872), s. 237—Estoppel.* The agents of a joint stock company—a joint Hindu family firm—borrowed a considerable sum of money on hundis executed by the managing member of the firm in the name of the company. These hundis were signed with the name of the managing member simply, having nothing on the face of them to indicate that the person who signed them was signing as an agent and not in his personal capacity. The company had no valid articles of association, and neither the memorandum of association nor table *A* of the Indian Companies Act, 1882, empowered the agents to borrow money. There were, however, what purported to be articles of association, which though legally invalid (they had never been registered), were treated by the company and submitted to the public as being the genuine and legally adopted articles of association of the company. These

valid, yet the company was in the circumstances estopped from raising the plea of their invalidity against holders in due course of these hundis. KUNJ KISHORE *v.* THE OFFICIAL LIQUIDATOR, SHRI BALDEO MILLS, LD. (1914)

I. L. R. 36 All. 416

——— s. 77—

See s. 76 . . I. L. R. 36 All. 416

——— ss. 77, 173—*Voluntary winding up—Special resolution—Notice of extraordinary meeting for passing special resolution for voluntarily winding up and its confirmation—If waiver by shareholders of defects of notice would make appointment of liquidator valid—If creditors may question legality of voluntary winding up and appointment of liquidator.* Notice was given calling an extraordinary general meeting of the shareholders to consider the position of the Company, and, if necessary to pass a special resolution that the Company be voluntarily wound up and liquidators appointed and the notice stated further that in the event of the resolution being passed a special meeting would be held immediately after for confirming the resolution · *Held*, that the notice was bad as under ss. 77 and 173 (*b*) of the Indian Companies Act, at least 14 days' further notice should have been given for confirmation of a special resolution for voluntarily winding up the Company Nor could it be treated as a proper notice calling a meeting to pass an extraordinary resolution for the voluntary winding up of the Company within s 173 (*c*) of the Act. *In re Silkstone Fall Colliery Co., 1 Ch D. 38,* followed. That whether or not the subsequent meeting of the shareholders for fixing the remuneration of the liquidator cured the legal defect of the notice and validated the appointment, it was open to the creditors of a Company to question whether the liquidators were appointed in accordance with the law *In the matter of* INDIAN TRADING & ENGINEERING CO , LD (1911)

15 C. W. N. 1047

——— s. 96—

See s. 67 . . I. L. R. 37 All. 273

——— s. 123—

See s 67 . . I. L. R. 37 All. 273

——— s. 125—

See s 61 . . I. L. R. 38 All. 347

——— ss. 128, 129, 130 and 131—Winding up petition—*Petitioner a creditor for amount not immediately payable—General financial position of company—Scheme of arrangement—Practice.* The definition of "debt" in s. 130 of the Indian Companies Act (VI of 1882) is quite distinct from the meaning of the word "creditor." A creditor is a person to whom money is owed by the Company. Whether he can claim immediate payment of that debt or his right to demand payment is deferred by his agreement with the Company to a future time, he still remains a creditor. If the petitioners can satisfy the Court that the Company on a general perusal of its balance sheet cannot pay its debts, in other words, that its assets are not sufficient to satisfy its liabilities, that will enable the Court to order its winding up. If an arrangement can be arrived at between the Company and its creditors, it would be desirable that an attempt should be made to give effect to that arrangement . . . . . But any scheme or proposal by the Company to keep itself afloat cannot be discussed with any chance of success unless the winding up order is made. It is only after the winding up order is made that a three-fourths majority of the creditors is able to bind the minority Otherwise, any one creditor can come in and upset any arrangement which has appeared satisfactory to the rest of his co-creditors. *In the matter of* INDIAN COMPANIES ACT *in the matter of the* BOMBAY MANUFACTURING COMPANY AND *in the matter of* RATILAL KARSONDAS (1909)

I. L. R 34 Bom. 533

——— ss. 128, to 131—

See COMPANY I. L. R. 39 Bom. 16 and 47

See WINDING UP I. L. R. 34 Bom. 533

——— ss. 137, 141—*Appointment of official liquidator, after order for winding up company—Appeal by the managing director against order appointing official liquidator, competency of.* A winding up order terminates the appointment of directors, except for certain special purposes and a managing director is, therefore, not a competent person to file an appeal against subsequent order appointing an official liquidator THE SOUTH INDIAN MILLS COMPANY, LTD. *v* RAJA BAHADUR MOTILAL (1916) . . I. L. R. 40 Mad. 706

——— s. 147—

See s. 58 . I. L. R. 40 Bom 134

——— ss. 147, 169—

See COMPANIES . I. L. R. 1 Lah. 388

COMPANIES ACT (VI OF 1882)—*contd.*

———— ss. 150 and 169—*Payment-order made* ex parte—*Application to have it set aside—Limitation—Indian Limitation Act, IX of 1908, arts. 164 and 181—Civil Procedure Code, Act V of 1908, ss. 2 (2) proviso (a), 141 and 151 and O. IX, r. 13.* The respondent was a shareholder of the Hindustan Bank. When that Bank went into liquidation the name of the respondent was duly placed on the list of contributories. Upon an application made by the Liquidator under s. 150 of the Indian Companies Act (VI of 1882) the District Judge after issuing notice to the respondent Mehraj Din passed, on the 20th June 1916, an *ex parte* order of the payment of a certain sum of money due by him to the Bank on a Pro-note. On the 5th October 1918 Mehraj Din made an application to the District Judge for setting aside the *ex parte* order. This application was dismissed by the District Judge as barred by time apparently under article 164 of the Limitation Act. From this order the respondent lodged an appeal in the High Court. The learned Judge held that a payment order under s. 150 of the Companies Act of 1882 was not a decree and therefore article 164 of the Limitation Act had no application; also that the application was not governed by s. 169 of the Companies Act, 1882, and referred to *Paravati Shankar* v. *Ishvardas Jagjivandas* (*I. L. R. 19 Bom. 208*) but held that article 181 of the Limitation Act might be applicable, and that the application of 5th October 1918 was certainly not barred by time. Against this decision the present appeal was lodged under cl. 10 of the Letters Patent. *Held,* that s. 169 of the Companies Act of 1882 has no application to petitions for setting aside *ex parte* payment orders, but that such petitions are governed by O. IX, r. 13 of the Code of Civil Procedure, *mutatis mutandis. Parvati Shankar* v. *Ishvardas Jagjivandas* (*I. L. R. 19 Bom. 208*) and *Sudevi Devi* v. *Sovaram* (*10 Calc. W. N. 306*), referred to, also Lindley on Companies, VI, Edition, pages 895 and 950. *Held,* also, that the *ex parte* payment order being appealable and therefore not a decree [*vide* s. 2 (2) proviso (*a*) of the Code], art. 164 of the Limitation Act is not applicable to an application for setting it aside. *Venkatta Chandrappa* v. *Venkatarama Reddi* (*I. L. R. 22 Mad. 256, 257*) and *Bhopendra Narain* v. *Baroda Prosad* (*I. L. R. 18 Cal. 500, 504*), referred to. *Semble:* That art. 181 of the Limitation Act is probably applicable to all applications for the making of which the Civil Procedure Code gives authority. HINDUSTAN BANK LTD. IN LIQUIDATION *v.* MEHRAJ DIN

I. L. R 1 Lah. 187

———— s. 151—

See s. 61 . . I. L. R. 38 All. 347

———— s. 169—

———— *Company—Winding up—Appeal—Notice of appeal—Limitation.* On the 3rd of December, 1910, the District Judge of Aligarh made an order for the winding up under the supervision of the Court of a company called the Shri Baldeo Mills Company, Limited.

COMPANIES ACT (VI OF 1882)—*contd.*

———— s. 169—*contd.*

On the 7th of February, 1911, an application by some of the shareholders to reconsider the winding up order was dismissed. On the 25th of February, 1911, the applicants appealed to the High Court, ostensibly against the order of the 7th of February, 1911, but in effect against the winding up order of the 3rd of December, 1910. No notice of this appeal was served on the respondents until at the earliest the 25th of March, 1911. *Held,* that the appeal was time-barred in view of s. 169 of the Indian Companies Act, 1882. *Ramanappa* v. *The Official Liquidator, Bellary Bruceptta Stock and Loan Transacting Company, Limited, I. L. R. 22 Mad. 291 ; Lakshminarasayya Setti* v. *Venkanna Setti, I. L. R. 22 Mad. 576 ; Wall* v. *Howard, I. L. R. 18 All. 215,* and *In re Sarawak and Hindustan Banking and Trading Company, Limited, I. L. R. 4 Calc. 704,* referred to. GHISU MAL *v.* THE OFFICIAL LIQUIDATOR, SHRI BALDEO MILLS COMPANY, LIMITED (1911)

I. L. R. 33 All. 641

———— *Company—Winding up—Appeal—Limitation—Notice.* The provisions of s. 169 of the Indian Companies Act, 1882, as to service of notice of appeal are imperative, and if the requisite notice has not been served within three weeks from the date of the order complained of and the time for service has not been extended by the Appellate Court, the appeal cannot be heard. G. J. BOWER *v.* IMPERIAL BANK, LIMITED (1913) . I. L. R. 33 All. 177

———— *Civil Procedure Code, 1908, O. XXI, r. 58 and 63—Appeal.* The right of appeal under the provisions of s. 169 of the Companies Act (VI of 1882) is co-extensive with the right of appeal conferred by the Code of Civil Procedure. In the liquidation proceeding of the Indian Exchange Bank a certain person described as the proprietor of a certain firm was directed by the Additional Judge of Lahore to pay a certain sum as a contributory. This order was sent to the District Judge of Agra for execution, when another person put in an objection to the effect that he was the sole proprietor of the firm. The District Judge declined to consider this objection. *Held,* that no appeal lay from the Judge's order, inasmuch as it was under O. XXI, r. 36, the objection being under O. XXI, r. 58. SANTI LAL *v.* THE INDIAN EXCHANGE BANK (1916)

I. L. R. 38 All. 537

———— *Order of liquidation-Judge reducing the remuneration of an employee of the official liquidators fixed by the predecessor of the Judge—Whether open to appeal. Held,* that s. 169 of the Companies Act of 1882 is not applicable to an order of the liquidating Judge reducing the remuneration of an employee of the official Liquidators sanctioned by the predecessor of the Judge, and consequently no appeal from such an order can be entertained. GHANSHAM DAS *v.* HINDUSTAN BANK LTD. . I. L. R. 1 Lah. 173

———— s. 254—

See COSTS . I. L. R. 39 Bom. 383

COMPARATIVE TABLE OF THE COMPANIES ACTS OF 1882 AND 1913.

Section of Act VI of 1882.	Corresponding section of Act VII of 1913
1	1.
2	290.
3	2 (3), (6), (8)
4	4.
5	6. 7
6	5.
7	5.
8	6.
9	7.
10	8.
11	9, 21.
12	10, 50.
13	55.
14	57.
15	56, 57, 60.
16	58.
17	59.
18	61.
19	62, 63.
20	63.
21	62, 63.
22	64
23	50.
24	50
25	50
26	26.
27	49
28	104
29	34.
30	43.
31	44.
32	45.
33	46.
34	47.
35	..
36	11 (1), (2), (4), (5), (6)
37	17.
37, Para. 2	19.
38	18.
39, Para. 1	19.
39, Paras. 2 and 3	21.
40	22, 249.
41	23
41, Para. 2	24.
42	25.
43	11 (1), (2), (4), (5), (6).
44	28.
45	30.
46	35.
47	31, 48.
48	32.
49	32.
50	32.
51	51.
52	52.
53	33.
54	29.
55	36.
56	37.
57	53
58	33.
59	39.
60	40
61	156.
62	157.
63	72.
64	[illegible]
65	[illegible]

COMPARATIVE TABLE OF THE COMPANIES ACTS OF 1882 AND 1913—*contd*

Section of Act VI of 1882.	Corresponding section of Act VII of 1913.
66	74.
67	88.
68	120, 123, 124, 125
69	136, Sub-ss. 1 to 4.
70	87
71	87.
72	89
73	147
74	76, 131, (1), (2), (4), 132 134.
75	77.
76	20, 71.
77	81.
78	79.
79	82
80	82.
81	90
82	138.
83	139.
84	140.
85	141
86	142.
87	143.
88	93, 94, 95, 96. 97.
89	148.
90	149.
91	150.
92	83, 86.
93	280.
94	..
95	151.
96	152.
97	—
98	—
99	—
100	—
101	—
102	—
103	—
104	—
105	—
106	—
107	—
108	—
109	—
110	—
111	[illegible]
112	[illegible]
113	[illegible]
114	[illegible]
115	[illegible]
116	[illegible]
117	[illegible]
118	[illegible]
119	[illegible]
120	[illegible]
121	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]
[illegible]	[illegible]

COMPARATIVE TABLE OF THE COMPANIES ACTS OF 1882 AND 1913—*contd.*

Section of Act VI of 1882.	Corresponding section of Act VII of 1913.
133	168.
134	169, 175.
135	170.
136	171.
137	172.
138	173.
139	156.
140	174, 239.
141	175, 178.
142	176.
143	177, 178.
144	179.
145	180.
146	181.
147	184.
148	184.
149	185.
150	186.
151	187.
152	188.
153	189
154	160.
155	190.
156	191.
157	192.
158	192.
159	194.
160	194.
161	194.
162	195.
163	195.
164	197.
165	198.
166	199.
167	200.
168	201.
169	202.
170	...
171	...
172	245.
173	203.
174	204.
175	205, 227.
176	206.
177	207.
178	156, 158, 159, 207.
179	211.
180	212.
181	212.
182	215.
183	216.
184	210.
185	...
186	217.
187	217.
188	218.
189	219.
190	220.
191	221.
192	222.
193	223, 239.
194	224.
195	225.
196	226.
197	227.
198	240.
199	242.
200	41.

COMPARATIVE TABLE OF THE COMPANIES ACTS OF 1882 AND 1913—*contd.*

Section of Act VI of 1882.	Corresponding section of Act VII of 1913.
201	234.
202	234.
203	153.
204	213.
205	214.
206	...
207	...
208	...
209	...
210	...
211	...
212	232.
213	231.
214	235.
215	236.
216	237.
217	238.
218	164.
219	165.
220	248.
221	20, 250.
222	251.
223	252.
224	253.
225	253.
226	254.
227	255.
228	256.
229	...
230	257.
231	258.
232	259.
233	260.
234	261.
235	262.
236	...
237	263.
238	264.
239	265.
240	266.
241	268.
242	269.
243	270, 271.
244	272.
245	273.
246	274.
247	275.
248	276.
249	55.
250	284.
251	285.
252	278.
253	...
254	246.
255	268.
256	289.
37, Para. 2	19.
39, Para. 1	19.
39, Paras. 2 and 3	21.
41, Para. 2	24.
73A	167.
73B	127.
131, Para. 2	167.
114, Para. 1	169.
233, Clause 2	...
200A	159.
420 (f)	286.

COMPARATIVE TABLE OF THE COMPANIES ACTS OF 1882 AND 1913—*contd.*

Section of Act VII of 1913.	Corresponding section of Act VI of 1882, etc.
1	1.
2 (3), (6), (8)	3.
2 (1), (2), (4), (5), (7), (9), (16).	
3	
4	4.
5	6, 7.
6	8.
7	9.
8	10.
9	11.
10	12.
11 (1), (2)	43.
11 (4), (5), (6)	36.
11 (3)	..
12	4 to 10.
13	4 to 10.
14	4 to 10.
15	4 to 10.
16	4 to 10.
17	37.
18	38.
19	39.
19B	37.
20	76, 221.
21	11, 39.
22	40.
23	41.
24	41.
25	42.
26	26.
27	
28	44.
29	54.
30	45.
31	47.
32	48, 50.
33	53.
34	29.
35	46.
36	55.
37	56.
38	58.
39	59.
40	60.
41	(3 IV of 1900.)
42	(3 IV of 1900.)
43	30.
44	31.
45	32.
46	33.
47	34.
48	47.
49	27.
50	12, 23, 24, 25.
51	51.
52	52.
53	57.

COMPARATIVE TABLE OF THE COMPANIES ACTS OF 1882 AND 1913—*contd.*

Section of Act VII of 1913.	Corresponding section of Act VI of 1882, etc.
54	..
55	13, 249.
56	15.
57	14, 15.
58	16.
59	17.
60	15.
61	18
62	19, 21.
63	19, 20.
64	22.
65	15.
66	...
67	...
68	...
69	...
70	7.
71	76.
72	63, 64.
73	65.
74	66.
75	..
76	74.
77	75.
78	..
79	78.
80	..
81	77.
82	79, 80.
83	92.
83A	..
83B	..
84	..
85	..
86	92.
87	70, 71
88	67.
89	72.
90	81.
91	...
91A	...
91B	...
91C	...
91D	...
92	...
93	83.
94	
95	...
96	

COMPARATIVE TABLE OF THE COMPANIES ACTS OF 1882 AND 1913—*contd.*

Section of Act VII of 1913.	Corresponding section of Act VI of 1882, etc.
97 . . .	
98 . . .	
99 . . .	
100 . . .	
101 . . .	...
102 . . .	
103 . . .	
104 .	...
105 . . .	...
106 . . .	...
107 . . .	73A.
108 . . .	...
109 . . .	...
110 . . .	...
111 . . .	...
112 . . .	...
113 . . .	...
114 . .	...
115 . .	...
116 . . .	...
117 . . .	...
118 . . .	...
119 . . .	...
120 . . .	...
121 . . .	...
122 . . .	...
123 . . .	68.
124 . . .	68.
125 . . .	68.
126 . . .	...
127 . . .	73B.
128 . . .	...
129 . . .	...
130 . . .	...
131 (1), (2), (4) .	74.
131 (3) . . .	...
132 . . .	74.
133 . . .	...
134 . . .	74.
135 . . .	...
136 (1)—(4) . .	69.
136 (5) . . .	...
137 . . .	...
138 . . .	82.
139 . . .	83.
140 . . .	84.
141 . . .	85.
142 . . .	86.
143 .	87.

COMPARATIVE TABLE OF THE COMPANIES ACTS OF 1882 AND 1913—*contd.*

Section of Act VII of 1913.	Corresponding section of Act VI of 1882, etc.
144 . . .	...
145 . . .	...
146 . . .	...
147 . . .	73.
148 . . .	89.
149 . . .	90.
150 . . .	91.
151 . . .	95.
152 . . .	96.
153 . . .	203.
154 . . .	...
155 . . .	...
156 . . .	61, 139, 178.
157 . . .	62,
158 . . .	124.
159 . . .	125, 178.
160 . . .	126, 154.
161 . . .	125, 127.
162 (1), (3), (4), (5), (6),	128.
162 (2) . . .	...
163 . . .	129.
164 . . .	218.
165 . . .	219.
166 . . .	131, 132.
167 . . .	131 para. 2.
168 . . .	133.
169 . . .	134 para. 1.
170 . . .	135.
171 . . .	136.
172 . . .	137.
173 . . .	138.
174 . . .	140.
175 . . .	92, 141, 134.
176 . . .	142.
177 . . .	143.
178 . . .	141, 143.
179 . . .	144.
180 . . .	145.
181 . . .	146.
182 . . .	...
183 . . .	...
184 . . .	147, 148.
185 . . .	149.
186 . . .	150.
187 . . .	151.
188 . . .	152.
189 . . .	153.
190 . . .	155.

COMPARATIVE TABLE OF THE COMPANIES ACTS OF 1882 AND 1913—*contd.*

Section of Act VII of 1913.	Corresponding section of Act VI of 1882, etc.
191	156.
192	157.
193	158.
194	159, 160, 161.
195	162, 163.
196	...
197	164.
198	165.
199	166.
200	167.
201	168.
202	169.
203	173.
204	174.
205	175.
206	176.
207	177, 178, 185.
208	...
209	...
210	184.
211	179.
212	180, 181.
213	204.
214	205.
215	182.
216	183.
217	186, 187.
218	188.
219	189.
220	190.
221	191.
222	192.
223	193.
224	194.
225	195.
226	196.
227	175, 197.
228	130.
229	...
230	200-A.
231	213.
232	212.
233	...
234	201, 202.
235	214.
236	215.
237	216.
238	217.
239	140, 193.
240	198.

COMPARATIVE TABLE OF THE COMPANIES ACTS OF 1882 AND 1913—*concld.*

Section of Act VII of 1913.	Corresponding section of Act VII of 1882, etc.
241	200.
242	199.
243	...
244	...
245	172.
246	254.
247	...
248	220.
249	40.
250	221.
251	222.
252	223.
253	224, 225.
254	226.
255	227.
256	228.
257	230.
258	231.
259	232.
260	233.
261	234.
262	235.
263	237.
264	238.
265	[illegible]
266	[illegible]
267	[illegible]
268	[illegible]
269	[illegible]
270	[illegible]
271	[illegible]
272	[illegible]
273	[illegible]
274	[illegible]
275	[illegible]
[illegible]	[illegible]
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[illegible]	[illegible]
[illegible]	[illegible]

COMPANIES ACT (VII OF 1913)—*contd.*

——— s. 207—*Voluntary liquidation—Decree passed against company prior to liquidation—Stay of execution—Jurisdiction.* A decree had been obtained against a company which subsequent to the passing of the decree went into voluntary liquidation. The decree-holder applied for execution of the decree which was granted by the Court of first instance. On appeal, the District Judge ordered stay of execution. *Held*, that the District Judge had no jurisdiction to stay execution. Under the Indian Companies Act the only Court that could stay execution was the High Court. *Held*, further, that s. 207 of the Indian Companies Act is no bar by itself to the progress of execution unless and until an order has been obtained from a Court having jurisdiction under the Companies Act, either for winding up or for stay of proceedings. SURAJ BHAN *v.* BOOT AND EQUIPMENT FACTORY, AGRA (1916) . **I. L. R. 38 All. 407**

——— ss. 207 (ii), 208—*Voluntary winding up—Appointment of liquidator—Liability of liquidator acting under irregular appointment.* A person who accepts an appointment as liquidator of a company which is being voluntarily wound up, and who acts as such, must, whether his appointment is regular or not, carry out the duties, as well as exercise the rights, of a liquidator and must make a return of his appointment to the Registrar of Joint Stock Companies as provided by s. 203 of the Indian Companies Act, 1913, and obtain his retirement in a proper manner, giving notice of that also. *Semble:* that it is competent to a company in general meeting assembled, under s. 207 (ii) of the Indian Companies Act, 1913, to delegate to the directors of the company the appointment of a liquidator. EMPEROR *v.* SATISH CHANDRA GHOSH (1917).
I. L. R. 39 All. 412

——— s. 215—

See LIQUIDATOR . **I. L. R. 43 Calc. 586**

——— *Winding up—Voluntary liquidation—Examination of Directors and Managers—Discretion of Court.* Under s. 215 of the Indian Companies Act, 1913, a voluntary liquidator can apply to the Court for examination of persons connected with the management of the Company. NOWROJI PUDUMJI *v.* LAXMAN MORESHWAR (1919) . . **I. L R. 44 Bom. 459**

——— s. 229—

See SET-OFF . **I. L. R. 45 Bom. 1219**

——— s. 231—*Provincial Insolvency Act III of 1907, s. 37—Transfer by a Bank of a customer's pro-notes to one of its creditors within three months of going into liquidation—Whether the maker of the pro-notes can, when sued by the transferee, object to the transfer to the plaintiff as a fraudulent preference by the Bank in favour of one of its creditors.* The defendant had dealings with the Industrial Bank of Ludhiana, and in 1913 executed two promissory-notes in their favour. The Bank got into financial difficulties and sold these two pro-notes to the present plaintiff, a creditor of theirs, in part payment of his claim. The Bank went into liquidation within three months of the transfer of the pro-notes. Plaintiff now sued defendant for principal and interest due on the pro-notes. It was urged for defendant that the transfer of the pro-notes to plaintiff was invalid as a fraudulent preference by the Bank in favour of one

COMPANIES ACT (VII OF 1913)—*concld.*

——— s. 231—*concld.*

of its creditors. *Held*, that a disposition of a Company's property cannot be impeached on the ground of fraudulent preference except on behalf of the general body of the creditors. *Willmott* v *London Celluloid Company* (*31 Ch. D. 425* and *34 Ch. D. 147*) and *Lindley on Companies, 6th edition, Volume II, page 90*, followed; also *Mohandas Thakardas* v. *Tikamdas Hotchand* (*37 Indian Cases 259*). *And* that consequently the defendant could not invoke the aid of s. 231 of the Companies Act to impeach the transfer of his pro-notes to plaintiff; s. 37 of the Insolvency Act, referred to. RAM SARUP *v.* JAGAT RAM
I. L. R. 2 Lah. 102

——— s. 232—

See LIQUIDATOR . **I. L. R. 43 Calc. 586**

——— s. 254—

See COSTS . . **I. L. R. 39 Bom. 383**

——— s. 269—

See s. 158 . . **I. L. R. 1 Lah. 237**

COMPANY.

See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXXIII.
I. L. R. 41 Mad. 624

See COMPANIES ACT (VII OF 1913)—

See COSTS . **I. L. R. 39 Bom. 383**

See EXCESS PROFITS DUTY ACT, 1919, s. 6 . . **I. L. R. 45 Bom. 881**

See INSURANCE . **I. L. R. 34 Bom. 1**

See LAND ACQUISITION.
I. L. R. 44 Bom. 797

See LIMITATION ACT (IX OF 1908), SCH. I, ART. 116 . **I. L. R. 42 Mad. 33**

See MORTGAGE . **I. L. R. 39 Calc. 810**

See PROVIDENT INSURANCE.
I. L. R. 42 Calc. 300

See SALE . . **I. L. R. 43 Calc. 790**

See SET-OFF . **I. L. R. 40 Mad. 1004**

See WINDING UP . **I. L. R. 34 Bom. 533**

——— borrowing powers of—

See COMPANIES ACT (VI OF 1882), ss. 76, 77 . . . **I. L. R. 36 All. 416**

——— formation of—

See COMPANIES ACT, 1882, ss. 6, 40, 41.
I. L. R. 40 Calc. 1

——— contracts by—

See COMPANIES ACT (VI OF 1882) ss. 67, 96, 123 . **I. L. R. 37 All. 273**

——— Contributory—

See COMPANIES ACT, 1913, ss. 158, 269
I. L. R. 1 Lah. 237

——— Order reducing remuneration of an employee—

See COMPANIES ACT, 1882, s. 169.
I. L. R. 1 Lah. 173

——— winding up of—

See COMPANIES ACT (VII OF 1913) ss, 153 to 232.

COMPANY—*contd.*

———— **Registered and controlled in India but manufacturing outside—**

See INCOME TAX ACT, 1918, ss. 3, 17, 51.

I. L. R. 45 Bom. 1286

———— **Underwriting new Capital—**

See INCOME TAX ACT, 1918, s. 9

I. L. R. 45 Bom. 1306

1. ———— **Proprietors of zemindari—** *Forming into a, if opposed to public policy.* Where the proprietors of a zemindari having grown too numerous formed themselves into a limited liability company and the company was duly registered under the provisions of the Indian Companies Act: *Held,* that such a course was likely to be beneficial not merely to the proprietors themselves but to all who may be compelled to have dealings with them, and there was nothing in the constitution of the company which was opposed to public policy. LAL GOPAL DUTT CHOUDHURY *v.* THE KHORORIAH MAJOZILLA ZEMINDARY SYNDICATE, LTD. (1911).

16 C. W. N. 297

2. ———— **Two claimants to shares standing in name of third party—***Priority of title—When it prevails.* The rule laid down in *Moor* v. *North-Western-Bank [1891] 2 Ch. 599,* followed: namely, that, as between two persons claiming title to shares in a company which are registered in the name of a third person, priority of title prevails unless the claimant second in point of time can show that as between himself and the company before the company received notice of the claim of the first claimant he, the second claimant, has acquired the full *status* of a shareholder: or at any rate that all formalities have been complied with and that nothing more than some purely ministerial act remains to be done by the company which, as between the company and the second claimant, the company could not have refused to do forthwith. So that, as between himself and the company, he may be said to have acquired a present absolute unconditional right to have the transfer registered before the company was informed of the existence of a better title. SETHNA, R. D *v.* NATIONAL BANK OF INDIA (1911). . . **I. L. R. 33 Bom. 331**

3. ———— **Internal defects in management of—***Innocent party not affected thereby—Principal and agent—Fraud of agent in withholding information from principal—Principal not affected by notice to agent in such case—Absolute undertaking to execute a mortgage on specified property on the happening of a particular contingency—Effect of such undertaking as giving a charge over the property on the occurrence of the contingency.* By a mortgage of the 15th April 1905 the defendants mortgaged to the plaintiff certain property to secure a loan of six lacs. Under the mortgage the plaintiff had the right to appoint a nominee to be a director of the defendants and he

the property previously mortgaged to the plaintiff and a resolution to that effect was passed at a meeting of the defendants' directors at which Dani was

COMPANY—*contd.*

present. No letter of undertaking was in fact given. The loan from the Bank of India was renewed at the end of the year for another year. The Bank made some attempt to obtain a higher rate of interest but in the end the loan was renewed at the same rate as before. In 1909 the defendants failed to pay the said loan to the Bank of India when due Finally, the said loan was renewed for three months on further security being given on June 30th, 1909. On August 5th, 1909, the defendants applied to the plaintiff for a further advance of five lacs, of which two lacs were required urgently on the security of the said property mortgaged to the plaintiff. The plaintiff consulted Dani who approved of the transaction. The plaintiff thereon advanced two lacs and received a receipt for the sum in which it was stated that the said two lacs formed part of a sum of five lacs intended to be advanced by the plaintiff, that the plaintiff should have time to consider whether he would advance the said sum of five lacs as a further charge and that in the event of the plaintiff deciding to advance such sum the defendants would execute a proper legal deed

said receipt there were only three directors of the defendants and not four, the minimum number under the Articles of Association of the defendants. Thereafter the plaintiff decided to make the proposed advance and signified his intention to the

defendants were declared insolvent and Mr R. D. Sethna was appointed liquidator. As such liquidator he was ordered to sell the mortgaged property and hold the sale-proceeds subject to the amount due to the plaintiff. The liquidator sold the mortgaged property and paid the plaintiff's claim on the mortgage of six lacs. The plaintiff sued the defendants for a declaration that he was entitled to a charge on the balance of the sale-proceeds for two lacs and interest and for payment of that sum. *Held,* that there was no properly constituted Board of Directors of the defendants at the date of the said receipt, but held that the resolution of the defendants' directors in favour of the Bank of India was exhausted after one year and was not renewed on the renewal of the loan by the Bank of India. *Held,* further, that Dani had withheld information from the plaintiff as to the said resolution in favour of the Bank of India fraudulently and that the plaintiff could not be imputed to have received notice of the resolution, that in any case the defendants would not be allowed to take advantage of their breach of resolution, and that the plaintiff's rights were in no way prejudiced by irregularities in the internal management of the defendants, such as the absence of a Board at the date of the receipt in favour of the plaintiff, of which the plaintiff had no notice. *Held,* further, that the receipt given by the defendants to the plaintiff [illegible] tional.

COMPANY—*contd.*

undertaking to execute a deed of further charge in favour of the plaintiff on the happening of a future event, namely, on the plaintiff tendering the sum of three lacs, the balance of the proposed loan of five lacs, on the property specified therein, for the whole amount of five lacs, of which the two lacs already advanced was a part, and that the said receipt consequently gave the plaintiff a valid charge over the defendants' property for the two lacs advanced and interest. SHIVLAL MOTILAL *v.* THE TRICUMDAS MILLS COMPANY, LD. (1912).

I. L. R. 36 Bom. 564

4. ———— Contract with company—*Terms of, in correspondence, and company's minutes, conflict between—Right of heir to enforce terms of sale. R* by letter offered to sell to the appellant company a patent for Rs. 10,000 paid in cash and Rs. 20,000 in paid-up shares of the company. The letter contained a provision that the company would be entitled to retain and cancel those shares in the event of *R*, who was to serve as the company's manager, by reason of death, resignation, etc., failing to complete 4 years' service. The company in their minutes recorded resolutions which did not embody this condition and in express terms spoke of the transaction as a sale of the patent for Rs. 30,000. *Held*, that the only contract between *R* and the company was that contained in the minute and that if this minute incorporated the terms of the letter, it did so in so far only as the letter was not inconsistent with the express terms of the minute. That on *R*'s death within 4 years, *R*'s widow was entitled to have fully paid-up shares to the amount of Rs. 20,000 allotted to her. PERFECT POTTERY COMPANY *v.* IDA L. ROSE (1914).

18 C. W. N. 1185

5. ———————— *Sale of shares—Bond given for price—Unauthorized refusal of manager to register transfer—Suit on bond—Plea of non-registration of transfer not open to defendant. A* sold to *B* certain shares in a company, and *B*, instead of paying the price in cash, executed a bond therefor in favour of *A*. Registration of the transfer was refused by a person describing himself as the chief manager of the company, who, however, did not appear to have any authority under the articles of association to refuse to register a transfer of shares. *Held*, on suit by *A* on the bond, that it was not competent to *B* to plead as a defence that the transfer of the shares purchased by him had not been registered, as there had in fact been no refusal to register by the company. BAHADUR SINGH *v.* SHIAM SUNDAR TUG (1914) . . . **I. L. R. 36 All. 365**

6. ———— Allotment of shares by an irregularly constituted board—*Notice of allotment not given to applicant—Limitation—Contributory. Held*, that an allotment of shares in a joint stock company made by an irregularly constituted board of directors was *primâ facie* invalid. *British Empire Match Company, Limited*, Ex-parte *Ross, 49 Law Times, 291*, referred to. But this defect may sometimes be cured if the articles of association of the company provide for the validation of an act done by a *de facto* director in a *bonâ fide* manner. *Held*, also, that if no notice of allotment of shares in a company is given to an applicant before the company goes into liquidation, such applicant is not liable to be placed on the list of contributories. *In re Scottish Petroleum Company, 23 Ch. D. 413, Dawson* v. *African Consolidated Land and Trading Company [1898] 1 Ch. 6*, and *British Asbestos Company* v. *Boyd, [1903] 2 Ch. 439* referred to. CHANGA MAL *v.* THE PROVINCIAL BANK LD. (1914)

I. L. R. 36 All. 412

7. ———— Directors—Appointment of as officer under the company—*Personal interest of a director clashing with his duty to shareholders—Meeting of directors—No right for such director to vote on his appointment—Invalidity of appointment if no quorum of directors without counting him—Duties of an editor of a newspaper—Incapacity to perform—Propriety of dismissal for incapacity.* The directors of a company are agents of the company and trustees for the shareholders of the powers committed to them. A director who has an interest in the subject of discussion of a meeting of the directors in which his interests conflict with his duty to the shareholders in incompetent to vote. Hence even when the articles of association of a company may permit a director to hold any other office under the company in conjunction with his directorship and on such remuneration as the directors may fix, yet the appointment of a director to any other office at a meeting of the directors at which the quorum was made up only by counting him also as one present is not a valid appointment as the company did not have the unbiased and independent advice of at least such a number of the directors as would without him have made a quorum. A person appointed as co-editor of a newspaper should put forth or publish the paper and exercise a general supervision over the matter which is written for the paper or extracted as news. For this, certain literary and business qualifications are necessary. If he is absolutely incapable of performing these duties which the company has a right to expect of him, his dismissal on that account from co-editorship is right. RAMASWAMI IYER *v.* THE MADRAS TIMES PRINTING AND PUBLISHING CO., LTD. (1915)

I. L. R. 38 Mad. 991

8. ———— Managing agent's authority to buy—*Liability of stranger or manager or manager's partner—Express and implied authority.* The manager or managing director of a Mill Company has no implied authority to purchase, on behalf of his mill, the liability of a stranger still less of their own manager or manager's partner in a private transaction of his own. MOTILAL SHIVLAL *v.* THE BOMBAY COTTON MANUFACTURING COMPANY, LD. (1915) . . . **19 C. W. N. 621**

9. ———— Dismissing its Managing Agents—*Shareholders of Co., if may be restrained from considering proposal of removal of Managing Agents—Injunction—Contract of service—Specific Relief Act (I of 1877), ss. 21 and 57.* Under ss. 21 and 57 of the Specific Relief Act a Limited Liability Company cannot be restrained by injunction from dispensing with the services of Managing Agents even when the contract of service provides that the Managing Agents are only to be removed in a specified manner and after a specified period. Nor can the shareholders be restrained by injunction from considering the question of such removal at an Extraordinary General Meeting. The remedy of the Managing Agents for dismissal, if wrongful, lies in a suit for damages. *Isle of*

COMPANY—*contd.*

Wight Railway Co. v. *Tahourdin, 25 Ch. D. 820*, relied upon. N. C. SIRCAR AND SONS *v.* THE BARABONI COAL CONCERN, LD. (1911)
16 C. W. N. 289

10. ———— Annual list of members—*And summary—Omission of director to file same with Registrar—Liability of director under Indian Companies Act (VII of 1913), s. 32 (4)—Place where default committed—Jurisdiction of Presidency Magistrate to try offence—Criminal Procedure Code (Act V of 1898), ss. 182, 531.* The director of a company is liable, under s. 32 (4) of the Indian Companies Act (VII of 1913) for default in filing a copy of the annual list of members and the summary prescribed therein, in the office of the Registrar of Joint Stock Companies at Calcutta. A Presidency Magistrate has jurisdiction to try such offence under s. 182 of the Criminal Procedure Code, and even if not, s. 531 cures the defect. DEBENDRA NATH DAS GUPTA *v.* REGISTRAR OF JOINT STOCK COMPANIES (1917)
I. L. R. 45 Calc. 490

11. ———— Balance sheet—*Of a company—Omission of director to call annual general meeting and to place before it a properly audited balance sheet—Liability of director for default in filing copy of the same—Indian Companies Act (VII of 1913), ss. 76, 131, 134—Jurisdiction.* The director of a company is liable, under s. 134(4) of the Indian Companies Act (VII of 1913), for default in filing a copy of the annual balance sheet duly prepared and audited, in the office of the Registrar of Joint Stock Companies at Calcutta, and cannot plead, in answer to a charge under s. 134, his own omission to call the annual general meeting of the company required by s. 76, and to place before it such balance sheet. *Park* v. *Lawton [1911] 1 K. B. 588*, referred to. The offence under s. 134 (4) is triable in Calcutta, whether or not, *if the prosecution had been laid under s. 76 or* 131 of the Act, the Presidency Magistrate might have had jurisdiction to try the offences committed under the latter sections. DEBENDRA NATH DAS GUPTA *v.* REGISTRAR OF JOINT STOCK COMPANY (1917) . . . . I. L. R. 45 Calc. 483

12. ———— Banking—*Company—Sale of shares through Company—Shares unsold through the misconduct of the Managing Director of the Company—Misrepresentation by the Managing Director that the shares were sold —Money paid to the shareholder as the price of the shares—Company going into liquidation—Shareholder as the registered owner of shares, placed on list A of contributories—Payment of calls in liquidation by the shareholder—Suit by the shareholder to recover back the amount of calls paid—The Indian Companies Act (VI of 1882), s. 61, cl. (g).* Plaintiff No. 1, through his nominees, plaintiffs Nos. 2 to 4, was the owner of 161 shares in the Indian Specie Bank, Limited. In April 1913 upon instructions from the plaintiff No. 1, the share certificates and blank transfers executed by the nominal registered holders of the shares were handed to the Managing Director of the Specie Bank who undertook to sell the shares on commission. In May 1913, the Managing Director without selling the shares paid in respect of them a sum of Rs. 10,500, being approximately the equivalent of the net sale-proceeds of the shares at Rs. 66 per share, and he falsely represented to the plaintiffs that the shares had been sold at that figure. In December 1913, the Specie Bank went into liquidation. Plaintiffs Nos. 2 to 4 were thereafter placed upon list A of contributories in respect of the shares standing in their name on behalf of plaintiff No. 1 on the ground that they remained registered shareholders. In the liquidation proceedings, plaintiff No. 1 was obliged to pay the amount of calls made agregating in all Rs 8,050 with interest up to payment amounting to Rs. 219. Plaintiff No. 1 subsequently filed this suit to recover back the sums paid by him on the ground that the Managing Director in the course of his employment was guilty of neglect and misconduct towards the plaintiffs in not selling the said shares, and that the direct consequence of such neglect and misconduct had been that plaintiffs Nos. 2 to 4 were placed upon list A instead of list B with the result that plaintiff No. 1 had to pay the calls on the shares. *Held*, that the plaintiffs had no cause of action, inasmuch as shareholders of a company contract to contribute a certain amount to be applied in payment of the debts and liabilities of the Company and it is inconsistent with their position as shareholders, where they remain as such, to claim back any of that money. *Houldsworth* v. *City of Glasgow Bank, 5 App Cas. 317*, and In re *Addlestone Linoleum Company, 37, Ch D. 191, 198*, referred to. NAROTTAM MORARJI *v* THE INDIAN SPECIE BANK, LIMITED, IN LIQUIDATION (1917) . . I. L. R. 42 Bom. 264

13. ———— Income Tax—*Fixed preference and ordinary shareholders—Preference shareholders liable to pay income-tax on their dividends unless otherwise provided—The Income-Tax Act (II of 1886), sections 4, 11, 12, 49, Schedule II, Part II —The Income-Tax Amendment Act (V of 1916) —The English Income-Tax Act of 1842, ss. 49, 51, 100.* As between fixed preference and ordinary shareholders in a joint stock company the former are not entitled to have their preference dividends paid free of income-tax in a case where there are no express words to that effect in the contract regulating the rights of parties. Under the Indian Acts as well as the English Acts the income-tax is in effect paid on behalf of the shareholder by the company. In a narrow technical sense it may be said that the company being a separate legal entity the net profits belong to the company and not to the shareholders, at any rate until a dividend has been actually declared. But in effect these net profits do belong to the shareholders. If therefore any sum has to be paid out of these net profits to the Crown for tax, in effect it is the shareholders who have to pay. The provisions of the Income-Tax Act as to assessment on and payment by the company are in effect mere machinery for the collection of the tax, and the [illegible]

INDIA SPINNING, WEAVING AND MANUFACTURING COMPANY, LIMITED (1917)
I. L. R. 42 Bom. 579

14. ———— Mortgages by—*Second mortgage by a Company—Suit on first mortgage against Company and second mortgagee—Company compulsorily wound up pending the mortgage suit— Liquidators' obtaining sanction to create charges over assets to meet costs of litigation—Liquidators' application opposed by first and second mortgagee*

COMPANY—*contd.*

—*Charge created by the liquidators in favour of the first mortgagee—Sale of mortgaged property in the mortgage suit—Holder of charge claiming priority over the second mortgagee for moneys charged —Holder of charge postponed until the claims of second mortgagee satisfied—Transfer of Property Act (IV of 1882), ss. 2 (d) and 52—Lis pendens —Transfer effected under another Court's order pending suit—Sanction not an order capable of execution—Estoppel.* The plaintiff, the first mortgagee of a limited liability company, instituted a suit in the High Court at Bombay to enforce his mortgage against the mortgagor, defendant No. 1 and second mortgagees of the company, defendant No. 2. During the prosecution of the suit the affairs of the first defendant company were ordered to be wound up at the instance of one of its creditors and the liquidation proceedings were transferred to the District Court at Poona where the company had its registered office. The plaintiff, however, obtained leave from the High Court to proceed with his mortgage suit in Bombay against the company in liquidation. Subsequently, the liquidators of the company applied to the Poona District Court in which the liquidation proceedings were going on for sanction to raise Rs. 25,000 for costs of litigation on the security of the assets of the company except the goods pledged to the plaintiff. The plaintiff and the second mortgagees contended that the sanction should not be given so as to affect their security as the assets would not include the interests in the property held by the mortgagees. The sanction was, however, given by the District Judge to the liquidators who, thereupon, executed two documents of charge for Rs. 10,000, each in favour of the plaintiff reciting the decision of the District Judge and agreeing that upon the sale of the mortgaged premises the sums so charged and all interest due thereon should be payable out of the sale-proceeds in priority to all other payments. In the mortgage suit an order by consent was passed for sale of the mortgaged properties by the liquidators reserving the contention of all the parties. The surplus sale-proceeds in the hands of the liquidators after satisfaction of the plaintiff's mortgage claim in the suit amounted to Rs. 81,000 or thereabouts. The plaintiff claimed by virtue of the documents of charge to be paid the amount of Rs. 20,000 secured thereby in priority to the claim of the second mortgagees, contending further that as the latter failed to appeal against the decision of the District Judge they were estopped from disputing the same. *Held*, overruling the plaintiff's contention, (i) that the second mortgagees were as parties to the pending mortgage suit protected by s. 52 of the Transfer of Property Act against any postponement of their security by the charges created *pendente lite* by the liquidators, for the authority of the District Court in Poona could not affect orders in a pending suit in the Bombay High Court. (ii) that the charges created by the liquidators were not transfers *in execution of* an order of a Court within the scope of s. 2 (*d*) of the Transfer of Property Act, inasmuch as the Poona Court's sanction was not an order capable of execution but merely an authority to the liquidators to act in a certain manner if occasion should arise. MOTILAL SHIVLAL *v.* THE POONA COTTON AND SILK MANUFACTURING CO., LIMITED (1917) . . I. L. R. 42 Bom. 215

15. ——— Pledge of partly paid up shares—*In a Company—Shares transferred to the name of the pledgee in the register of the Company—Shares not fully paid up—Compulsory liquidation of the Company—Payment of calls as contributory by pledgee of shares—Pledgee not entitled to recover calls paid on the footing of an indemnity—Pledgee paying calls not a trustee for the pledgor—Contract—Agent and Principal.* From March to October 1913, the plaintiff Bank advanced to B, the agent of the undisclosed principal defendant No. 1, various sums aggregating Rs. 1,74,200 on the security of 3,605 shares, of the Indian Specie Bank, B undertaking to maintain a margin of Rs. 15 per share. The shares deposited by B were transferred to the plaintiff Bank's name on the share register of the Indian Specie Bank, and the dividends when received by the plaintiff Bank were credited to the loan account of B. In September 1913, the Indian Specie Bank shares began to fall. On 7th October 1913, B provided further securities as margin which realised about Rs. 20,000, but thereafter failed to provide any further margin and eventually 181 shares were sold by the plaintiff Bank of which 161 had been transferred to the purchaser's name before December 1913, when a winding-up order was made for the compulsory liquidation of the Indian Specie Bank. In the liquidation the plaintiff Bank had been placed on the A list of contributories for 3,444 shares and on the B list for 161 shares for the shares deposited by B. On the 20th February 1914 B was adjudicated insolvent. Subsequently in pursuance of the call made by the Official Liquidator of the Indian Specie Bank, the plaintiff Bank paid Rs. 50 per share in respect of 3,444 shares standing in its name. The plaintiffs sued to recover from the 1st defendant (1) Rs. 1,57,665-13-7, and interest thereon in respect of the advances made by them, (2) Rs. 1,72,200 being the amount of calls paid by them as contributories, and interest thereon and (3) an indemnity for any claim which might be made against them in respect of 161 shares. The Official Assignee as the assignee of the estate and effects of B was made a formal party, being defendant No. 2. The trial Court decreed the entire claim of the plaintiffs. *Held* on appeal: (i) That the plaintiff's claim must be limited to a decree for the sums advanced by them, interest and costs. (ii) That the plaintiffs were not entitled to be indemnified for the amount of calls paid or to be paid by them as contributories inasmuch as the forced payment of calls by them as the registered holder of the shares upon a compulsory liquidation could not be regarded as an expenditure for the preservation of the security, nor were the plaintiffs as mortgagees the trustees for the mortgagor at the time of paying such calls. *Phene* v. *Gillan*, *5 Hare 1, 10*, referred to. BIRDICHAND JIVRAJ *v.* THE STANDARD BANK, LIMITED (1916)

I. L. R. 42 Bom. 159

16. ——— Unregistered charge—*Charge given by resolution of Company to its Secretary on unpaid calls for special services rendered to the Company—Failure to register charge—Duty of officers to register neglected—Indian Companies Act (VI of 1882), s. 68—Explanation—Mode of construction—Proceedings in Legislative Council cannot be referred to to aid construction.* The question in this appeal was whether a charge given to the appellant, the Secretary of a Limited Company upon unpaid calls, could be enforced by him although not registered as required by s. 68 of Act VI of 1882 (Indian Companies Act), which section required registration of all mortgages

COMPANY—*contd.*

and charges specifically affecting property of the company, and imposed a penalty upon any official of the company who knowingly and wilfully authorizes of permits the omission of such entry in the register. The decision of this question depended on the proper interpretation of the explanation to the section which was as follows :—"Omission to register under this section a mortgage or charge does not render the same invalid. But the officers of the Company cannot avail themselves 'as such' of a mortgage or charge specifically affecting property of the company and not so registered." *Held*, that the construction of the explanation must depend upon its terms, and no theory of its purpose can be entertained unless it is to be inferred from the language used. No statement made on the introduction of the measure or its discussion in the Legislative Council can be looked at as affording any guidance as to the meaning of the words. *Held*, that the words 'as such' in their proper construction should not be read as denoting the capacity in which the

by the respondents. They are introduced simply as giving the reason for the inability to take advantage of the securities which is that officers entrusted with a duty as to registration could not take advantage of a security to them as to which they had neglected this duty. In the circumstances of the case, therefore, it was held that the appellant could not avail himself of the charge even though he had ceased to be an officer. KRISHNA AYYANGAR *v.* NALLAPERUMAL PILLAI (1920) . . . . I. L. R. 43 Mad. 550

17. ———— Winding up—*List of contributories—Minor—Estoppel by conduct after attaining majority—Indian Companies Act (VI of 1882).* *F*, a minor, applied for and was allotted certain shares in a limited company. He received dividends, and continued to do so after attaining majority. On the winding up of the company he was included in the list of contributories. *Held*, that, having intentionally permitted the company to believe him to be a shareholder and in that belief to pay him dividends since *he attained majority, he was estopped by his* conduct while a person *sui juris* from denying as between himself and the Company that he was a shareholder. View of Stirling *J.* in *Re Yeoland Consols, Limited (No 2), 58 L. T. 922*, adopted. A minor may be a member of a company under the Indian Companies Act (VI of 1882) FAZULBHOY JAFFER *v.* THE CREDIT BANK OF INDIA, LD. (1914) I. L. R. 39 Bom. 331

18. ———— *Companies Act (VI of 1882), ss. 128, 129—Compulsory winding up—Creditor's petition—Company's inability to pay its debts.* The petitioner who was an assignee of certain debts due by the defendant Company to its late Secretary and Manager, demanded payment from the Company. The Company refused to pay on the ground that the demand was in respect of a claim which the Company honestly believed to be a fraudulent claim and unsustainable at law. The petitioner thereupon applied to the Court to compulsorily wind up the affairs of the Company. It was not shown that the Company

lower Court

e petitioner

was rightly rejected, for the petitioner's object, in making the application, was to bring the pressure of insolvency proceedings to bear upon the Company in order to make it pay cheaply and expeditiously a heavy debt which it desired to dispute in the Civil Courts The principle upon which a Company can be wound up on a creditor's application is simply its inability to pay its just debts. The inability is indicated by its neglect to pay after proper demand made and the lapse of three weeks. Such neglect must be judged by reference to the facts of each particular case. Where the defence is that the debt is disputed all that the Court has first to see is whether that dispute is on the face of it genuine or merely a cloak of the Company's real inability to pay just debts. TULSIDAS LALLUBHAI *v.* THE BHARAT KHAND COTTON MILL COMPANY, LTD. (1914) . . I. L. R. 39 Bom. 47

19. ———— *Indian Companies Act (VI of 1882), ss. 128 and 131—Winding up—Petition for compulsory winding-up of company by the Court—Grounds to be alleged in petition—Internal mismanagement of the company not such grounds—Admission of petition, discretion of Court as to—Shareholder, petition by* Any ground alleged under s. 128 (*e*) of the Indian Companies Act in a petition for the winding-up of a company presented under s. 131 of that Act must be of a like nature to the specific grounds given under cls. (*a*), (*b*), (*c*) and (*d*) of s 128. If any other grounds are alleged they do not fulfil the requirements of the Act. Allegations as to the internal management or mismanagement of a company are matters for the shareholders to deal with and do not call for the interference of the Court. A petition by a shareholder stands in a different footing to a petition by a creditor and should be more closely scrutinized on presentation. There is no obligation on the Court to admit a petition merely because it is presented. Not only must a petition allege facts which, if proved, would justify an order for winding up a company but even if it alleges such facts the Judge has a discretion to consider whether it is really *bonâ fide*. The Court may, if it thinks fit, refuse to admit a petition, or, as an alternative course, give the company [illegible]

presented, [illegible]

restrain t[illegible]

petition. [illegible]

of the (191[illegible]

20. ———— *Winding up—Shares applied for subject to a condition, and partly paid for—Condition not fulfilled—Resolution of company to refund part payment—Position of applicant as regards winding up proceedings.* A company started in Meerut in 1904, with objects of a very general nature, proposed in 1906 to erect a mill at Fyzabad, and accordingly issued a prospectus and invited the public to subscribe the necessary capital. On the faith of this prospectus one *M* applied for shares, but added to his application a condition to the following effect :—"These shares are only subscribed on the condition that any mill is started in the suburbs of Fyzabad." The company, however, found that they could not raise the necessary funds to start a mill at Fyzabad, and therefore passed a resolution that the money already subscribed for that purpose should be refunded. But before this was done the company went into liquidation. *Held*, that *M* was in the circumstances not a

COMPANY—*contd.*

member of the company, but a creditor and entitled to get back what he had already paid. MAHENDRA GOPAL MUKERJI *v.* LACHMAN PRASAD (1913) . . . . **I. L. R. 35 All. 538**

21. ——————— *Contributory—Applications for allotment of shares made by alleged contributory under conditions which were not carried out by the Company.* A, who was the holder of fifty shares in a limited liability Company, entered into an agreement with the Company through its managing director to take 150 more shares, on the conditions (*a*) that he was to be appointed a "terminal director" of the Company and (*b*) that the business of the company was to be transferred from Meerut, where it had been formed, to Saharanpur. The 150 shares were allotted to A, but he never paid the allotment money, and, though the business of the Company was, nominally at least, transferred to Saharanpur, A was never appointed a director. Shortly after this allotment the Company went into liquidation. *Held*, that A could not be made a contributory in respect of the 150 shares which he had offered conditionally to take. *The London and Provincial Provident Association, Ld., In re Mogridge, 57 L. J. Ch. 932*, referred to. POWELL *v.* SEN (1917).
I. L. R. 40 All. 45

22. ——————— When there has been a suspension of business of a Company the power of the Court to wind up the Company will be exercised when there is a fair indication that there is no intention to carry on business. MURALIDHAR ROY *v.* THE BENGAL STEAMSHIP CO., LD.
I. L. R. 47 Calc. 654

23. ——————— Form of order under the Indian Companies Act, 1913 for the dissolution of a Company in compulsory liquidation undistributed assets remaining in the hands of the Liquidator. IN *re* SHRAGERS LD. (IN LIQUIDATION) . . . **I. L. R. 47 Calc. 620**

24. ——————— A shareholder applied to have his name removed from the Register of the Company under s. 38 of the Companies Act, 1913—*R* a mortgagee of the uncalled capital of the shares came to Court and opposed. *Held*, that *R* was entitled to intervene and oppose being vitally interested in the proceedings and might be seriously prejudiced by and order of Rectification made behind his back. *Held*, also that the jurisdiction under s. 39 of the Act is unlimited. RAMESH CHANDRA MITTER *v.* JOGIN MOHAN CHATTERJI . . . **I. L. R. 47 Calc. 901**

25. ——————— *Whether interest is payable to creditors, entitled thereto, after commencement of winding up, if Company turns out to be solvent—where interest is not mentioned in the order adjudicating upon the claim—"Solvency" explained—Indian Companies Act, VII of 1913.* *Held*, that if a Company is, or ultimately turns out to be, solvent, interest is payable upon any debts, which carry interest or upon which a right to interest has been acquired, out of the surplus assets remaining after payment of principal and interest up to the date of the winding-up order. *Buckley on Companies, 9th edition, page 474*, referred to. *Held also*, that the solvency of a company is established if after payment of the principal and interest up to date of winding up there are some assets which may be realized and will be available to meet the liability on account of interest which accrued due after the commencement of the liquidation. *Held further*, that the creditor is not debarred from claiming the interest merely because he did not ask for it when proving his claim originally. In re *Duncan and Co. (1 Ch. D. 307) per Buckley, J.*, referred to—also Stiebel's Company Law, page 1222. GHANSHAM DAS *v.* PUBLIC BANKING AND INSURANCE COMPANY IN LIQUIDATION . . **I. L. R. 1 Lah. 154**

COMPANY—*concld.*

26. ——————— *Solvent Company—surplus funds after paying creditors in full whether payable to creditors in payment of interest due subsequent to date of winding-up order—Indian Companies Act, VI of 1882, ss. 147 and 169—Joint appeal from order dealing with two separate cases—notice of appeal not served within three weeks.* The Official Liquidators of the Peoples and Amritsar Banks in liquidation paid up 16 annas in the rupee to the creditors, and there remained still a substantial surplus in their hands. The creditors claimed that they were entitled to the surplus in payment of interest accured due since the dates of the winding up orders while the contributories claimed that the surplus funds should go to them. *Held*, that the Banks under liquidation having turned out to be solvent the creditors whose debts carried interest were entitled to claim out of surplus assets interest subsequent to the date of the winidng-up order. In re *Humber Ironworks and Shipbuilding Co. (Warrant Finance Co.'s Case) (L. R. 4 Ch. Ap. 643)*, In re *Duncan and Co. (1 Ch. D. 307)*, In re *Whitaker (1 Ch. D. 299)*, *Ram Saran Das* v. *Basheshar Nath (55 P. W. R. 1907)*, In re *Pereira (1 Mad. H. C. R. 217)*, In re *Muhammad Mahmud Shah (I. L. R. 13 Calc. 66)* and In re *General Rolling Stock Co. (L. R. 7 Ch. Ap. 646, 649)*, Halsbury's Laws of England, Volume 5, page 512, Lindley on Companies, page 1009, Buckley's Company Law, page 474 (9th Edition), and Stiebel's Company Law, page 1222, followed. *Held also*, that, although a joint appeal against an order dealing with two separate cases is not sufficient, as in this case all the parties concerned in both cases were served with notice and the mistake was merely one of form it could be rectified by putting in a properly-stamped appeal with the second case. *Held further*, that though the respondents did not receive notice of the appeal within three weeks, as provided for by s. 169, as the present case did not show any marked want of diligence on the appellants' part, the appeal was properly instituted. *Daulat Ram* v. *The Woollen Mills Co., Limited, Delhi (95 P. R. 1908)*, *Tara Chand Jeramdas* v. *Official Liquidators, Peoples Bank of India, Limited (46 P. R. 1915)*, *Hira Lal* v. *Himalaya Glass Works Co. (176 P. L. R. 1911) and Bishen Das* v. *Liquidator, Doaba Bank, Limited, Amritsar (42 P. L. R. 1916)*, distinguished. DEVI DITTA MAL *v.* OFFICIAL LIQUIDATOR, AMRITSAR BANK, ETC. . . **I. L. R. 1 Lah. 368**

COMPENSATION.

See BOMBAY CITY IMPROVEMENT ACT, 1898.
I. L. R. 36 Bom. 203

See CIVIL PROCEDURE CODE, 1908—

ss. 96, 100 . **I. L. R. 36 Bom. 360**

s. 250 . . **I. L. R. 40 All. 79**
I. L. R. 44 Bom. 463

O. XXIII, R. 3 **I. L. R. 38 Mad. 959**

COMPENSATION—*contd.*

See Compensation to Accused.
I. L. R. 38 Calc. 302

See Contract Act (IX of 1872), s. 65.
I. L. R. 38 Bom. 249

See Criminal Procedure Code, s. 250.
I. L. R. 37 Bom. 376
I. L. R. 36 All. 132
I. L. R. 44 Bom. 463
I. L. R. 40 All. 610

See District Municipal Act (Bombay), s. 160 . . **I. L. R. 36 Bom. 47**

See Ejectment Suit, in.
I. L. R. 41 Mad. 641

See Electricity Act (IX of 1910), ss. 14, 19 . **I. L. R. 39 Bom. 124**

See Information . **14 C. W. N. 326**

See Interest . **I. L. R. 35 Bom. 255**

See Land Acquisition.

See Land Acquisition Act (I of 1894)

See Madras Estates Land Act (I of 1908), s. 6 and Sub-ss *(6)* and *(8)*.
I. L. R. 39 Mad. 944

See Malabar Compensation for Tenant's Improvements Act (Mad. I of 1900), ss. 5, 19 **I. L. R. 38 Mad. 589**

See Municipal Law **L. R. 43 I. A. 243**

See Penal Code (Act XLV of 1860), s. 494 . . **I. L. R. 40 All. 615**

See Railways Act (IX of 1890), ss. 75, 80. . . **I. L. R. 34 All. 422**

See Shebait . **I. L. R. 39 Calc. 33**

See Specific Moveable Property.
I. L. R. 39 Mad. 1

See Transfer of Property (Act IV of 1882), s. 83 . **I. L. R. 39 Mad. 579**

———— **apportionment of—**

See Bombay Improvement Act, 1898.
I. L. R. 36 Bom. 203

See Land Acquisition Act (I of 1894)
I. L. R. 36 Mad. 395

———— **for breach of contract—**

See Contract . **I. L. R. 34 All. 429**

———— **for improvements—**

See Hindu Widow.
I. L. R. 40 Calc. 555

———— **for loss of crops by theft or cattle—**

See Estates Land Act (Mad. I of 1908), ss. 4, 27, 73, 143.
I. L. R. 40 Mad. 640

———— **for vexatious accusations—**

See Criminal Procedure Code, s. 250.
I. L. R. 34 All. 354

———— **for wrong to land—**

See Jurisdiction.
I. L. R. 42 Calc. 942

COMPENSATION—*contd.*

———— **order for—**

See Criminal Procedure Code (Act V of 1898), ss. 250, 423.
I. L. R. 33 Mad. 1091

———— **principles of apportionment of—**

See Land Acquisition Act (I of 1894).
I. L. R. 36 Mad. 395

———— **right to—**

See Malabar Tenants' Improvements Act (Mad. Act I of 1900)
I. L. R. 36 Mad. 416

———— **withdrawal of—**

See Shebait . **I. L. R. 40 Calc. 895**

———— **Appellate Court, powers**—*Criminal Procedure Code (V of 1898), s. 250—Consequential or incidental order.* An Appellate Court has no power to order compensation under s. 250 of the Criminal Procedure Code Mehi Singh *v.* Mangal Khandu (1911) **I. L. R. 39 Calc. 157**

———— **Fixtures, removal of**—*Calcutta Municipal Act (Beng III of 1899), ss 341, 617—Fixtures erected on buildings before 1st June, 1863—Assessment of compensation not a condition precedent to demolition of fixtures—Small Causes Court as Special Tribunal for determination of compensation—Amount of claim exceeding ordinary jurisdiction of Small Cause Court—Suit not cognizable by Subordinate Judge—Decree correct in substance, but not in form—Costs.* In s. 341 of the Calcutta Municipal Act (Beng. III of 1899 which in respect to fixtures erected on buildings "before 1st June, 1863," enacts that "the Corporation shall make reasonable compensation to every person who suffers damage by the removal or alteration of the fixtures," there is nothing that renders the assessment of compensation a condition precedent to the demolition of the fixtures. Until the removal is effected no damage at all is, in fact, suffered. S. 617, "where . . . . any municipal authority . . is required by . . . this Act to pay . . . . compensation, the amount to be so paid, and, if necessary, the apportionment of the same shall in case of dispute be determined. . . by the Court of Small Causes," includes a claim for compensation by a person against the Corporation for removal of fixtures, although the amount exceeds the ordinary jurisdi[illegible] In a suit in the C[illegible] the appellants ag[illegible]pensation for re[illegible] (*a*) a declaration that the fixtures in dispute had been erected before 1st June, 1863; (*b*) that they were entitled to compensation for the loss they would suffer by their compulsory removal; (*c*) that the Corporation could not remove the fixtures until reasonable compensation had been paid; (*d*) asked the Court to fix the amount of compensation; and (*e*) for an injunction restraining the Corporation from interfering with the fixtures until compensation was paid The Subordinate Judge decreed the suit, giving compensation. It was dismissed, [illegible]

before 1st June, 1863. *Held,* by the Judicial Com-

COMPENSATION—*concld.*

mittee, that the decree of the High Court though correct in substance was incorrect in form and their Lordships amended it by adding to it declarations that the appellants were entitled to relief in terms of (*a*) and (*b*) of the prayer of their plaint, the rest of the suit remaining dismissed. JOSEPH *v.* CORPORATION OF CALCUTTA (1916).
I. L. R. 44 Calc. 87

———— **To accused**—*Order of compensation made in a separate proceeding after and not in the order of discharge—Legality of the proceeding—Criminal Procedure Code (Act V of 1898), s. 250, prov. (b).* S. 450 of the Criminal Procedure Code requires that before a Magistrate makes it a ground for discharging an accused that the complaint was frivolous and vexatious he shall hear the complainant on that aspect of the case, and unless he does so the order of compensation is without jurisdiction. The order awarding compensation must be contained in the order of discharge or acquittal and not passed in a separate proceeding after the accused has been discharged or acquitted. *In the matter of the complaint of Safdar Hussain, I. L. R. 25 All. 315*, followed. HARU TANTI *v.* SATISH ROY (1910).
I. L. R. 38 Calc. 302

COMPETENCY.

See WITNESS . **I. L. R. 46 Calc. 700**

COMPLAINT.

See COLLECTOR **I. L. R. 40 Calc. 465**

See CRIMINAL PROCEDURE CODE, 1898—

s. 4 . **I. L. R. 40 All. 641**
ss. 4 AND 190 . **1 Pat. L. J. 592**
ss. 4 AND 195 . **I. L. R. 35 All. 8**
ss. 145, 522 . **I. L. R. 37 All. 654**
s. 190 . . . **2 Pat. L. J. 34**
ss. 200, 203 . . **3 Pat. L. J. 346**
ss. 203, 437 . **I. L. R. 35 All. 78**
ss. 248, 258, 345. **I. L. R. 37 Bom. 369**
ss. 303, 437 . **I. L. R. 36 All. 74**

See FALSE AND VEXATIOUS COMPLAINT.

See FALSE INFORMATION.
I. L. R. 43 Calc. 173

See JURISDICTION OF CRIMINAL COURT.
I. L. R. 40 Calc. 360

See MAGISTRATE . **I. L. R. 39 Calc. 119**

See PENAL CODE—

s. 120B . . **I. L. R. 40 All. 41**
ss. 182, 193 . **I. L. R. 35 All. 102**
s. 498 . . **I. L. R. 38 All. 276**

———— **absence of**—

See ACQUITTAL **I. L. R. 46 Calc. 867**

———— **compensation for frivolous and vexatious**—

See CRIMINAL PROCEDURE CODE, 1898, s. 250 . . **I. L. R. 44 Bom. 463**

———— **non-examination of**—

See FALSE INFORMATION.
I. L. R. 46 Calc. 807

COMPLAINT—*contd.*

———— **resiling before hearing effect of**—

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), s. 345 **I. L. R. 39 Mad. 946**

———— **dismissal of**—

See CRIMINAL REVISIONAL JURISDICTION.
I. L. R. 40 Calc. 41

———— **dismissal of, without issue of process**—

See MALICIOUS PROSECUTION.
15 C. W. N. 917
I. L. R. 38 Calc. 880

———— **frivolous or vexatious**—

See CRIMINAL PROCEDURE CODE, ss. 250, 537 . . **I. L. R. 36 All. 132**

———— **petition asking police warning, if**—

See CRIMINAL PROCEDURE CODE, s. 4 (*m*).
15 C. W. N. 1051

———— **Statement in—whether priveleged**—

See PENAL CODE, s. 498
I. L. R. 37 Mad. 110

———— **to Magistrate**—

See SANCTION FOR PROSECUTION.
I. L. R. 44 Calc. 650

———— **without any process being issued**—

See MALICIOUS PROSECUTION.
I. L. R. 37 Calc. 358

1. ———— *Jurisdiction to direct a prosecution in the absence of any judicial proceeding—Penal Code (Act XLV of 1860), s. 211—Criminal Procedure Code (Act V of 1898), ss. 202 and 476—Practice.* Where the petitioner's case was disposed of by the acquittal of the accused, on the 1st August, by a Magistrate who did not then take action under s. 476 of the Criminal Procedure Code, but proceedings thereunder were taken, on the 9th August, and an order made, on the 23rd, by another Magistrate, who had then no seisin of the case, and the District Magistrate having expressed a doubt as to the jurisdiction of the latter and having considered that such order should be passed by the Magistrate who tried the original case, such Magistrate thereupon, purporting to act under s. 476, directed the prosecution of the petitioner, under s. 211 of the Penal Code, on the 16th September: *Held*, (i) that the order of the 23rd August was without jurisdiction, as there was no judicial proceeding of any kind before the Magistrate who passed it; (ii) that the order of the 16th September was bad in law, as the trying Magistrate had not considered it necessary to take action under s. 476, when he acquitted the accused in the original case, and did not exercise an independent judicial opinion in passing it a month-and-a-half later at the instance of the District Magistrate. There may be cases in which a Court does not think it necessary in the public interest to take action under s. 476 of the Code, and allows the injured person to seek redress by granting sanction, and in such a case it is not necessary that the order should be passed at or near the time of the disposal of the original case. When a complainant prefers a complaint a Magistrate has no right to act under s. 220. The person complained against should ordinarily be brought to trial. The accused should not be made party under s. 202 nor allowed to cross-examine. BHIM LAL *v.* EMPEROR
I. L. R. Calc. 444

COMPLAINT—*contd.*

2. ——————— *Complaint by husband of minor wife against certain persons of offences against her—Preliminary inquiry by Magistrate—Withdrawal of complaint by husband—Refusal by Magistrate to dismiss complaint—Examination of wife and other prosecution witnesses at inquiry—Cognizance against persons not named in the complaint on evidence taken at such inquiry—Cognizance on complaint or information—Criminal Procedure Code (Act V of 1898), ss. 190 (1) (a), (c), 202, 203—Practice.* A Magistrate taking cognizance of an offence upon a complaint against certain specified persons, is competent to proceed against others not named therein but who are disclosed by the prosecution evidence, taken on a preliminary inquiry under s 202 of the Criminal Procedure Code, to have been concerned in the offence. *Charu Chandra Das v. Narendra Krishna Chakravarti, 4 C. W. N. 367, Raghab Acharjee v. Empress, 3 C. W. N. cclxxxiv,* followed. *Khudiram Mookerjee v. Empress, 1 C. W. N. 105,* not followed. *Jagat Chandra Mozumdar v. Queen-Empress, I. L. R. 26 Calc. 786,* distinguished. Where a complaint was made under ss. 342 and 363 of the Penal Code, against four persons, by the husband of a girl aged 11, whereupon the Magistrate, after examining him on oath, ordered him to prove his case, and two days later he presented a petition for the withdrawal of the complaint and its dismissal as untrue, but the Magistrate proceeded, on the date fixed for the preliminary inquiry, to summon the witnesses, and thereafter examined the girl and some other prosecution witnesses and found that, though there was no satisfactory evidence against the original accused, there was sufficient evidence against other persons, and, treating the girl as the real complainant, issued processes against them for offences under ss. 342, 352 and 363 of the Penal Code: *Held,* that the Magistrate was right in ordering the examination of the witnesses to ascertain if there was any substance in the petition of withdrawal and in the complaint *Held,* further, that he took cognizance against the persons not named in the complaint under cl. (*a*) and not cl. (*c*) of s. 190 (*1*) of the Criminal Procedure Code. DEDAR BUKSH *v.* SYAMAPADA DAS MALAKAR (1914).

I. L R. 41 Calc. 1013

3. ——————— *Personal presentation of complaint—Complaint of defamation presented by alleged agent of* pardanashin *but not signed by her—Power of attorney not filed in Court—*

be presented in person, otherwise a Magistrate should be very loath to take cognisance, and should not accept a complaint, not signed by the alleged complainant and not preferred by a person duly authorized to institute the specific complaint. No process can be issued against the accused, either by the Magistrate first taking cognisance, or by the Magistrate to whom the case is transferred, unless and until the Magistrate issuing it has first examined the complainant, and this course is the more necessary in the case of a *pardanashin* to enable the Magistrate to satisfy himself that the complaint is really her action. When a *pardanashin* makes a complaint, the Magistrate may take cognisance, if satisfied that it is really her complaint, by whatever means it reaches him. When it is presented on her behalf the Magistrate may, under s. 503 of the Code, issue a commission for the examination required by s. 200. S. 503 is very wide in its terms, and refers not only to an inquiry or trial but to any other proceeding, and authorises the examination of any "witness," which includes a complainant. Where a written complaint of defamation was presented by an alleged agent on behalf of a *pardanashin,* but it was not signed by her, nor was any power of attorney filed before the Magistrate, and he issued process without examining the complaint: *Held,* that he had no power to issue process in such a case. ABHAYESWARI DEBI *v.* KISHORI MOHAN BANERJEE (1914).

I. L. R. 42 Calc. 19

4. ——————— *Absence of complainant—Cause called on by mistake on date not fixed for hearing—Order of acquittal—Effect of such order—Jurisdiction of Magistrate to proceed with trial thereafter—Criminal Procedure Code (Act V of 1898), s. 247.* An order of acquittal under s 247 of the Criminal Procedure Code passed by mistake on a date not fixed for the hearing of the case, for absence of the complainant, is a mere nullity, and does not debar the Magistrate from proceeding with the trial on the discovery of the error. *H. C. Proceedings, 17 Aug. 1875, 2 Weir 307,* followed. *Suresh Chandra Sinha v. Banku Sadhukhan, 2 C. L. J. 622,* distinguished. ACHAMBIT MANDAL *v.* MAHATAB SINGH (1914).

I. L. R. 42 Calc. 365

5. ——————— *Reference of complaint to subordinate Magistrate for local inquiry and report—Legality of the procedure—Withdrawal of case by District Magistrate to inform himself of the nature of the dispute between the parties—Sufficiency of ground—Disqualification of such Magistrate, as Collector and representative of Court of Wards, when not connected with the initiation of the prosecution—Quashing pending proceedings—Civil dispute—Practice of taking disputed claims to Criminal Courts—Criminal Procedure Code (Act V of 1898), ss. 202, 528, 556, Explanation.* There has been a long practice to refer complaints to subordinate Magistrates for local inquiry and report, and the language of s. 202 of the Criminal Procedure Code is capable of an interpretation consistent with the practice. The words "*direct a previous local investigation by any officer subordinate*" include a local investigation by a subordinate Magistrate. The definitions of "*inquiry*" and "*investigation*" in s. 4 are not exhaustive, and are expressed to be subject to the context. *Hari Charan [illegible] v. Girish Chandra Sadhukhan, I. L. R. [illegible] Calc. [illegible], Gangadhar Pradhan v. King-Emperor, I. L. R. 43 Calc. 173,* discussed. A desire to inform himself as to the nature of the dispute between a landlord and his tenants in a particular estate is not a sufficient reason for the withdrawal of a case, under s. 528 of the Code, by the District Magistrate to his own file for trial. The District Magistrate is not, merely as Collector and representative of the Court of Wards disqualified under s. 556 of the Code, from trying a case in which the Court of Wards is interested when he has had nothing to do with the [illegible] of the prosecution. Pending [illegible] quashed where there was little [illegible] that the offence complained of [illegible] stantiated, and the dispute [illegible]

COMPLAINT—*concld.*

for determination by the Civil Courts. The practice of taking to the Criminal Courts disputed claims involving questions of right and title about which parties may intelligibly and with perfect good faith differ in view, deprecated. AMRIT MAJHI *v.* EMPEROR (1919) **I. L. R. 46 Calc. 854**

COMPOSITION-DEED.

See STAMP ACT (II OF 1899), SCH. 1, ART. 22 . **I. L. R. 38 Bom. 576**

COMPOSITION OF OFFENCE.

See COMPOUNDING OF OFFENCE.

See CRIMINAL PROCEDURE CODE, s. 345. **I. L. R. 37 All. 127**

See CRIMINAL TRESPASS. **I. L. R. 43 Calc. 1143**

——— in revision—

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), s. 439 **I. L. R. 39 Mad. 604**

COMPOSITOR.

See WORKMAN'S BREACH OF CONTRACT ACT, 1859 . **I. L. R. 44 Mad. 53**

COMPOUNDABLE OFFENCE.

See CRIMINAL PROCEDURE CODE, ss. 345, 438 and 439 (*d*). **I. L. R. 42 All. 474**

See EVIDENCE ACT, 1871, s. 24. **I. L. R. 42 All. 202**

COMPOUND INTEREST.

See TRANSFER OF PROPERTY ACT (IV OF 1882), s. 83 . **I. L. R. 39 Mad. 579**

COMPOUNDING OFFENCE.

See AGREEMENT AGAINST PUBLIC POLICY. **20 C. W. N. 946**

See COMPOSITION OF OFFENCE.

See CRIMINAL PROCEDURE CODE—

s. 345 . . **I. L. R. 45 Bom. 346**
I. L. R. 39 Mad. 946
I. L. R. 1 Lah. 169
I. L. R. 43 All. 483

ss. 345 AND 439 **I. L. R. 32 All. 153**

s. 439 . . **I. L. R. 39 Mad. 604**

See MADRAS FORESTS ACT (V OF 1882), ss. 26, 53, 55 **I. L. R. 37 Mad. 280**

——— grievous hurt—

See CONTRACT . **I. L. R. 37 Mad. 385**

COMPROMISE.

See AGREEMENT **I. L. R. 37 Mad. 408**

See ARBITRATION **I. L. R. 33 All. 743**

See CHOTA NAGPUR ENCUMBERED ESTATES ACT, 1876 . . **4 Pat. L. J. 580**

See CIVIL PROCEDURE CODE, 1882—

s. 462 . **I. L. R. 35 Bom. 322**
I. L. R. 36 Bom. 52
I. L. R. 36 Mad. 295

See CIVIL PROCEDURE CODE (ACT V OF 1908)—

s. 47 . . **I. L. R. 41 All. 443**

COMPROMISE—*contd.*

s. 48 . . **I. L. R. 39 Bom. 256**

O. XXXII, R. 7 **I. L. R. 41 All. 553**

O. XXIII, R. 3.
I. L. R. 38 Mad. 850, 959
I. L. R. 38 All. 75
I. L. R. 45 Bom. 245

See CONTRIBUTION **I. L. R. 38 All. 237**

See CRIMINAL PROCEDURE CODE—

s. 145 . . **15 C. W. N. 568**

s. 345 . . **I. L. R. 37 All. 419**

See DEKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879).

s. 12 . **I. L. R. 34 Bom. 502**

s. 15 (B) . **I. L. R. 35 Bom. 199**
I. L. R. 37 Bom. 614

s. 70 . . **I. L. R. 45 Bom. 1128**

See EVIDENCE ACT (I OF 1872), s. 44. **I. L. R. 34 All. 143**

See HINDU LAW—CONVERSION. **I. L. R. 33 All. 356**

See HINDU LAW—INHERITANCE **I. L. R. 34 All. 64**

See HINDU LAW—JOINT FAMILY **I. L. R. 35 All. 428**

See HINDU LAW—LIMITED OWNER **3 Pat. L. J. 83**

See HINDU LAW—REVERSIONER. **2 Pat. L. J. 370**

See HINDU LAW—WIDOW. **I. L. R. 35 All. 240**
2 Pat. L. J. 578

See HINDU WIDOW. **I. L. R. 38 All. 679**

See LETTERS OF ADMINISTRATION. **3 Pat. L. J. 415**

See MAHOMEDAN LAW—DOWER. **I. L. R. 33 All. 457**

See MISTAKE . **I. L. R. 43 Calc. 217**

See MORTGAGE DECREE **4 Pat. L. J. 306**

See PARDANASHIN LADY. **L. R. 46 I. A. 272**

See PRACTICE . **I. L. R. 34 Bom. 408**

See PROBATE . . **2 Pat. L. J. 535**

See RECEIVER . . **6 Pat. L. J. 208**

See REGISTRATION ACT, 1877, s. 17. **I. L. R. 32 All. 206**

See REGISTRATION ACT (XVI OF 1908)— **I. L. R. 38 All. 366**

ss. 17 AND 49 . **I. L. R. 43 All. 1**

s. 49. . . **I. L. R. 33 All. 728**

See SALE . . **I. L. R. 35 All. 168**

See STAMP ACT (II OF 1899), s. 62, SCH. I, ART. 5 . **I. L. R. 40 All. 19**

See TRANSFER OF PROPERTY ACT (IV OF 1882), s. 6 . **I. L. R. 33 All. 414**
I. L. R. 38 All. 107
I. L. R. 41 All. 611

s. 54 . . **I. L. R. 34 Bom. 139**

COMPROMISE—*contd.*

———— **arbitration award amounts to—**

See Civil Procedure Code, 1908, O. XXIII, r. 3, O. VIII, r. 8.
I. L. R. 45 Bom. 245

———— **between co-executors, validity of—**

See Hindu Law—Will.
I. L. R. 39 Mad. 365

———— **by female owner—**

See Hindu Law—Reversioner.
I. L. R. 45 Calc. 590

———— **by pardanashin guardian—**

See Hindu Law—Partition.
L. R. 44 I. A. 229

———— **by reversioners—**

See Hindu Law—(Widow).
I. L. R. 48 Calc. 100

———— **decree on—**

See Civil Procedure Code (Act V of 1908), O. XXXII, r. 7
I. L. R. 39 Mad. 853

———— **forbidden by law—**

See Agreement against Public Policy.
I. L. R. 40 Calc. 113

———— **joint bond, as part of—**

See Civil Procedure Code (Act XIV of 1882), s. 462 . **I. L. R. 39 Mad. 409**

———— **on behalf of minor, without leave of Court—**

See Civil Procedure Code, 1882, s. 462.
I. L. R. 39 Mad. 409

ss. 375 and 462 . **25 C. W. N. 797**

See Civil Procedure Code, 1908, O. XXXII, r. 7 . **I. L. R. 2 Lah. 164**

See Dekkhan Agricultural Relief Act, 1879, s. 71
I. L. R. 45 Bom. 1128

———— **power of vakil to enter into—**

See Civil Procedure Code (Act V of 1908), O. XXIII, r. 3, s. 96, cl. (5)
I. L. R. 41 Mad. 233

———— **recording of—**

See Civil Procedure Code (Act V of 1908), O. XXIII, r. 3; s. 96, cl. (5).
I. L. R. 41 Mad. 233

1. ———— *Compromise of suit relating to mortgages—Agreement of compromise not registered and not incorporated in decree—Suit for redemption of mortgages—Agreement for extinction of equity of redemption and for division of properties amongst the parties to mortgage deeds—Agreement of compromise given effect and carried out by acts and conduct of parties though document is ineffective to prove contract—Principle that Court will uphold a contract carried into effect by acts and conduct of parties.* In this case the Judicial Committee (affirming the decision of the High Court) *held*, in a suit for the redemption of two mortgages executed in 1848 and 1871 respectively between the predecessors in title of the parties, that the equity of redemption had under the circumstances been extinguished. In 1870 an agreement was come to by the then representatives of the mortgagor and mortgagee in reference to the mortgage of 1848. Sums were fixed as being the principal and the interest due and arrangements were made for payment by yearly instalments, and for the management of the property. In 1873 differences arose between the parties to that agreement, and the mortgagee brought a suit to enforce it which was compromised, the terms of the agreement being in effect to pay off the mortgage debts and to divide the properties into specific shares which were to be legally conveyed by the mortgagor to the parties respectively entitled to them, and a decree was made by the Court that "the suit be decided in pursuance of the terms of the compromise, and the suit be struck off from the list of cases." No conveyances were executed by the mortgagor in completion of the contract to that effect in the compromise, nor was the agreement of compromise registered nor its terms incorporated into the decree: but it was acted upon and carried out by all the parties to it, and by their successors in title, and for a period of 30 or 40 years prior to the present suit the rights of all the parties had been dealt with upon the same footing as if the mortgagor had made an express conveyance parting with the equity of redemption, and transferring allotted shares of the property itself to the mortgagees and reserving one share for herse[illegible]
was
had
that
their
promise. And even though the compromise and the decree taken together were considered to be defective or inchoate as elements making up a final and validly concluded agreement for the extinction of the equity of redemption, the acts of the parties had been such as to supply all defects. When the acting and conduct of the parties are founded upon, as in the performance or part-performance of an agreement, the *locus penteintiæ* which exists in a situation where the parties stand upon nothing but an engagement which is not final or complete, is excluded. For equity will support a transaction clothed imperfectly in those legal forms to which finality attaches after the bargain has been acted upon. The principles laid down in *Maddison* v. *Alderson, L. R. 8 A. C. 467*, Bell's Commentaries, 10th Ed., s. 26, and *Potter* v. *Potter, 1 Ves. Sen. 437*, followed. There was nothing in the laws of India inconsistent with these principles; on the contrary those laws followed the same rule. Mahomed Musa v. Aghore Kumar Ganguli (1914)
I. L. R. 42 Calc. 801

2. ———— *Compromise, if not recorded, effect of—Consent decree—Appeal—Civil Procedure Code (Act V of 1908), s. 96, cl. (3); O. XXIII, r. 3; O. XLIII, r. 1, cl. (m).* A (consent) decree under r. 3 of O. XXIII of the Civil Procedure Code can be passed only after there has been an order that the compromise be recorded. This is not a mere matter of form, as the aggrieved party has a right of appeal against this order, and s. 96, cl. (3) of the Code is not otherwise a bar to an appeal from such a decree. Padan Sardar v. Bhupendra Nath Nag (1915)
I. L. R. 43 Calc. 85

3. ———— *Minor—Court of Wards, compromise by, on behalf of minor ward, whether subject to sanction of Civil Court—Court of Wards Act (Beng. IX of 1879), ss. 18, 51—C*[illegible]

COMPROMISE—*contd.*

Procedure Code (Act XIV of 1882), ss. 462, 464. The sanction of the Civil Court (required by s. 462 of the Civil Procedure Code of 1882) is not necessary for a compromise entered into under the authority and by the direction of the Court of Wards on behalf of a minor under their charge. NAKIMO DEWANI *v.* PEMBA DITCHEN (1917)

I. L R. 44 Calc. 829

4. ———————— *Petition of compromise reciting a verbal mortgage in a proceeding prior to Transfer of Property Act (IV of 1882)—Destruction of record, suit to redeem mortgage after—Certified copy of petition, if admissible and if constitutes mortgage document—Petition, if should be stamped—Copy bearing one rupee stamp—Original petition, it must have been stamped with one-rupee stamp—Court fees Act (VII of 1870).* On April 1st, 1857, the parties to a suit filed a petition of compromise reciting the terms on which the dispute was settled, among them being an agreement by one party who was recognized as owner to grant a usufructurary mortgage to the other. The Judge ordered the compromise to be placed on the record and the case to be put for final disposal on the following day. The record of the proceedings having been destroyed, in the present suit for redemption of the mortgage a certified copy of the petition bearing a stamp of Re. 1 only was produced as evidence of the agreement: *Held*, that the certified copy was rightly admitted in evidence relative to the facts recited therein. That the suit was not brought on the petition, but on an antecedent verbal mortgage, valid according to the law in force before the Transfer of Property Act; and did not depend upon whether the petition was fully stamped or not. That if the Judge did pass his formal order as he proposed to do, no objection could be taken on the ground of the stamp on the petition being insufficient. That no inference could be drawn from the copy bearing a one-rupee stamp (which was the proper stamp for issuing a copy under the Court-fees Act of 1870) that the original petition (if it be treated as the document creating the mortgage) was not properly stamped. AHMAD RAZA *v.* SAIYAD ABID HUSAIN (1916)

21 C. W. N. 265

3. ———————— *Petition of compromise presented to the Magistrate while writing judgment—Duty of Magistrate to accept, and give effect to, the petition—Criminal Procedure Code (Act V of 1898), s. 345.* Under s. 345 of the Criminal Procedure Code, a case may be compounded at any time before sentence is pronounced. A Magistrate, therefore, cannot refuse to accept a petition of compromise presented to him whilst he is writing the judgment. ASLAM MEAH *v.* EMPEROR (1917)

I. L. R. 45 Calc. 816

4. ———————— *Compromise of a claim—Consideration—Claim must be bonâ fide—Mimanshapatra obtained from guardian of infant by setting up a false will.* A died in 1902 leaving an adopted son B and a daughter P who was married to one G. B died in 1906, leaving as his heir P's son K then an infant, only two or three months old. About this time certain agnates of A set up a will by A under which they claimed A's estate as from the death of B, and G and they purported to settle the dispute by *mimanshapatra* whereby G, on his son's behalf, gave up certain portions of the estate left by D to the other party. On the validity of the *mimanshapatra* being challenged by B on behalf of her son K in a suit for partition, brought by her against the other party to the deed. *Held*, that though the latter could be expected and were not obliged to prove the will in solemn form in the present litigation, it was necessary for them to show that there was a will and that upon that will they had a claim which was made honestly and in good faith. *Held*, on the evidence that there was no will, and the claim put forward on its basis was not honest or *bonâ fide* but merely a sham claim with a view to inducing G to give up some of the infant's property in their favour. That upon the question of the validity of the *mimanshapatra*, the position of the infant was different from what would have been G's position had he executed the deed for himself. KRISHNA CHANDRA DATTA ROY *v.* HEMAJA SANKAR NANDI MAZUMDAR (1917) . . **22 C. W. N. 463**

5. ———————— *Construction of—Whether benefit of annuity under it was confined to lineal heirs of grantee—No illegal perpetuity where annuity was a charge on the zamindari as long as heirs of grantee existed—Right to arrears of annuity by assignee of a reversioner—Objection not taken in early stage of case and no issue on it settled, not allowed to be raised in appeal to Privy Council.* In a suit between an ancestor of the appellant (third defendant) and an ancestor of the respondent (third plaintiff) for an impartible zamindari, a compromise was come to in 1861 by the parties, by which the ancestor of the appellant retained the zamindari subject to his giving up one village and paying an annual sum of Rs. 700 a month in perpetuity to the ancestor of the respondent. The terms of the compromise were contained in two petitions, dated 8th January 1861, one being in Tamil and the other in English, the only difference between them being that in the former the annuity was to be paid to the grantee "and his descendants from generation to generation," and in the latter to the grantee, "and his heirs." In a suit for the annuity by a collateral defendant of the respondent's ancestor. *Held*, on the construction of the compromise, that the right to it was not confined to lineal heirs. *Held*, also, that the agreement lay not in covenant, but in charge, and that the annuity being a charge on the estate, it was not illegal as there was no difficulty in making it perpetual as long as there were lineal or collateral heirs of the grantee. Where an objection which might and ought to have been but was not, taken by the appellant at a stage of the case when an issue could have been raised on it, and the matter was subsequently decided by the High Court against the appellant the objection by him was not allowed to be raised on an appeal to the Privy Council. RAJAH OF RAMNAD *v.* SUNDARA PANDIYASAMI TEVAR (1918)

I. L. R. 42 Mad. 581

6. ———————— *Compromise forbidden by law—Agreement to compromise non-compoundable offence, in suit for cancellation of or declaration of nullity of the agreement.* Defendant instituted criminal proceedings against the plaintiff under the Indian Penal Code, ss. 408 and 477, both of which are non-compoundable offences. In consideration of his withdrawing both criminal proceedings and a civil suit pending between the parties, plaintiff executed a deed conveying to the defendant his share of a certain village. There was a proviso in the deed that the conveyance should only come into operation if, and when all the above mentioned proceedings were withdrawn.

COMPROMISE—*contd.*

The criminal proceedings were withdrawn and the plaintiff was acquitted, the order of the Magistrate being made with the consent of the parties. When the defendant took steps to fulfil the rest of his agreement, namely, to withdraw his civil suit against the plaintiff, the latter declined to give his consent to the withdrawal. Plaintiff

for the agreement being illegal, the agreement was void. But that the plaintiff being in *pari delicto* with the defendant, the Court, acting on principles of equity, would refuse the prayer for relief by way of a declaration that the deed was null and void. The Court will not exercise its discretionary power under the Specific Relief Act, 1877, s. 39, in favour of a party who is in *pari delicto* with his opponent BINDESHARI PRASAD v. LEKHRAJ SAHU . . . **1 Pat. L. J. 48**

6(a). ——————— So far as it relates to properties within the scope of the suit a compromise decree operates as res judicata but so far as it relates to properties outside the scope of the suit such a decree if the terms of the compromise are embodied within the decree is evidence of an agreement to transfer an interest in the property. It is not necessary in such a case to register the compromise petition. BISSESWAR RAM v. MUHADEO PAHAN

1 Pat. L. J. 208

6(b). ——————— This appeal related to the Taluka of Taringa in the Central Provinces which originated in a grant by Government early in the 19th Century of a large tract of waste land to the ancestor from whom both the contending parties derived their descent. In 1860 the subject of the grant had been reclaimed and covered with villages. The family of the grantee were then the Taluqdar (Badrinath), his

to a half share of the rents of the Taluka on the ground that it was joint family property subject to the ordinary incidents of Hindu Law and that he was entitled to a moiety of the estate. He obtained a decree which was put into execution. In the course of the subsequent proceedings a compromise was come to and the dispute was referred to arbitration. An award was given

the plaintiff (claimant) was to possess "and enjoy them. The defendant (Taluqdar) has no power over these villages. The plaintiff is at liberty to possess, occupy, and manage them just as he pleases. But the defendant is to pay out of his own pocket the Government revenue in respect of these villages. The plaintiff has no concern with the payment of the revenue, and will not have to pay it. The defendant shall have power over the rest of the villages in the Taluq. The plaintiff shall have no power over them......The defendant shall be responsible to pay (revenue) to Government. Plaintiffs shall have no concern.

COMPROMISE—*contd.*

given by the judgment of the Settlement officer dated 31st October, 1867, which was affirmed on appeal, by the *Wazib-ul-arz* of 24th May, 1867; by a letter from the Government of India to the Chief Commissioner in 1890, regarding the liability of the claimant (Lokenath) to re-imburse the taluqdar in respect of the enhanced revenue: by the decision of the Board in 1899 [Lokenath v. Bisseswarnath (1899) I. L. R 27 Calc. 103; L. R. 26 I. A. 268] and by other documentary evidence in the case. In the present suit brought on 16th July, 1916, against the then taluqdar by the grandson of the claimant (Lokenath) the main question was whether the revenue assessed on the villages in possession of the plaintiffs was a charge, as they claimed on the rest of villages of the taluqua, and the plaintiffs prayed for a declaration that it was. *Held* (reversing the decision of the Court of the Judicial Commissioner), that the liability to pay the revenue on the 11 villages *granted to the claimant, without the right* to reimbursement was not a charge on the estate. There was nothing to support the charge; and it could not be inferred "from the surrounding circumstances." *Raja of Ramnad* v. *Sundarapandiyasami Tevar* [*(1918), I L. R. 42 Mad. 581; L.R.46 I. A. 64*] distinguished. SUNDERLAL v. RAMJILAL (P.C. 1920)

I. L. R. 47 Cal. 932

7. ——————— *Certain properties not included in suit—Registration—Compromise incorporated in decree—Registration Act (16 of 1908), s. 17 (1)—Code of Civil Procedure (Act 5 of 1908), O. XXIII, r. 3.* Where a suit for partition is compromised on the understanding that each defendant admits the plaintiff's right to certain portions of the claim made by him, in consideration of the plaintiffs admitting the claim of each of the defendants for certain property which each such defendant desires to retain, and the compromise is incorporated in the decree, then such compromise does not require to be registered even though it deals with property not included in the suit such a decree, although not registered, is evidence of an agreement between the parties under which certain lands have been allotted to each. Per *Jwala Prasad*, J.—The words "so far as it relates to the suit" in O. XXIII, r. 3, of the Code of Civil Procedure, 1908, show that all the terms which form the consideration for the adjustment of the matters in dispute, whether they form the subject-matter of the suit or not, become related to the suit and can be embodied in the decree. KARU MIAN v. TEJO MIAN . . . . . **3 Pat. L. J. 43**

8. ——————— *Adjustment of matters outside scope of suit—Alteration of terms of registered lease—whether registration compulsory—Registration Act (XVI of 1908), s. 17 (1) (b) (c), (2) (VI)—Transfer of Property (IV of 1882), ss. 105 and 107—Duty of Court in filing compromise—Code of Civil Procedure (Act V of 1908), O. XXXII, rr 3 and 7—Parties to compromise, whether minors are bound—Construction of Compromise.* Documents in the nature of affidavits, petitions, and pleadings which are filed in the course of a proper judicial proceeding are admissible in evidence without the necessity of registration. *A compromise which is referred to and*

COMPROMISE—*contd.*

incorporated in an order of the Court, or is filed by way of petition in the proceedings is within the protection of sub-s. (2) (*vi*) of s. 17 of the Registration Act, 1908, and does not require registration even where it effects an alteration in a registered document. A lease of certain coal land, executed in 1895, provided for the payment of a commission of 6 annas per ton over and above a certain quantity taken from the mine each year, and that in default the minimum royalty was to be measured at Rs. 1,750 *per annum*. It was stipulated that the commission and royalty should be payable to each of the co-sharer lessors according to their respective shares, and that in respect of the share of each co-sharer he should be entitled to recover the same by suit from the lessee. In 1901 a suit was brought on behalf of all the lessors or the successors of the original lessors for the recovery of commission and royalty on the basis of the agreement of 1895. At the time of the institution of the suit four of the plaintiffs *G,N,H*, and *K*, were minors. The suit was compromised in 1902. The Court did not expressly sanction the compromise on behalf of the minors, but nevertheless the recompromise was recorded. By the compromise the rate of commission and the royalty were reduced and a certain sum was accepted in lieu of the arrears claimed. In his judgment embodying the compromise the Subordinate Judge remarked,—"The terms of the lease have also been changed, but this is no part of the subject-matter of the suit." In 1906 there was another suit between the lessors and the lessee. In that suit *G* who had attained his majority challenged the compromise of 1902 on the ground that he was a minor at that time. *K* had also attained his majority before the institution of the suit but did not challenge the compromise of 1902. Before the institution of the suit *H* had disposed of his entire interest in the leasehold property as follows: one-third was purchased by *S*, one-third was purchased by *J*, and the remaining one-third by *K*, *S* and *J* were co-sharer landlords. In 1906 *N* was still a minor. The suit was compromised. *Held,* in a suit by the lessors for recovery of arrears of commission and royalty at the rates provided in the lease of 1895. (1) That under the terms of the lease the amount payable to the co-sharers by way of commission and royalty was divisible, and therefore, although the compromise of 1902 was not binding on all the minor plaintiffs, it was not void in its entirety, and accordingly those of the lessors who were bound by the compromise were entitled to recover commission and royalty at the compromise rate only.

(2) That *N* was not bound by the compromise of 1902. (3) That *G* was not bound by the compromise of 1902, although he was an adult at the time when the suit of 1906 was compromised, as he had in that suit challenged the compromise of 1902. (4) That *K* was bound by the compromise of 1902, as he did not impeach it in the suit of 1906. (5) *S* and *J* were bound by the compromise of 1902, as they were adults and being themselves bound in respect of their own individual shares, they were also bound in respect of the shares purchased from the minor *H*. (6) The compromise did not *per se* constitute lease and, therefore, did not require to be registered under the provisions of sub-s. 1 (*d*) of s. 17 of the Registration Act, 1908, but that it fell within the terms of sub-s. 1 (*b*) and as it was embodied in the decree of the Court it was exempted from the necessity of registration by sub-s. 2 (*vi*). CHARU CHANDRA MITRA *v.* SAMBHU NATH PANDEY

3 Pat. L. J. 255

9. ———— *Compromise incorporated in decree—interest not claimed in plaint inserted in compromise decree, whether recoverable.* Where the plaintiff sued for the recovery of a certain sum of money with interest at *9 per cent. per annum* and the suit was compromised on the terms that if a specified amount were paid on a particular day interest should be calculated at 12 *per cent.*; while if it was paid after that date interest should run at 24 *per cent.*—*held,* in a suit on the compromise decree, that interest was recoverable at the rate of 9 *per cent.* only. The agreement to pay, after a specified date, a rate of interest not claimed in the suit was outside the scope of the suit, and that portion of the compromise was therefore invalid. GAURI DUTT v. DOHAN THAKUR

2 Pat. L. J. 673

10. ———— *Construction of document—Compromise settling all matters in dispute except one—Agreement therein that on that matter the parties would be bound by the finding of the Court—Finding of the Court not appealable.* The parties to a suit for the recovery of property of various kinds by right of succession agreed in respect of the various classes of property except one. As to this, however, they agreed that they would be bound by the finding of the court in respect of it. *Held,* that the effect of this last term of the compromise was that the finding of the court was final and binding upon the parties and that no appeal would lie against it. *Bahir Das Chakravarti* v. *Nobin Chunder Pal, I. L. R. 29 Calc., 306,* followed. SHAHZADI BEGAM *v.* MUHAMMAD IBRAHIM **I. L. R. 43 All. 266**

11. ———— *Procedure—Minor—Guardian appointed by Court of Wards—Assent of Civil Court—Court of Wards Act (IX of 1879), ss. 14, 18, 51—Civil Procedure Code, 1882, ss. 375, 464.* A guardian appointed under the Court of Wards Act, 1879, on behalf of minors has power to compromise proceedings in a Civil Court, to which these minors are defendants; upon the guardian assenting to an agreement of compromise it is necessarily recorded by the Civil Court under s. 375 of the Civil Procedure Code, 1882, and its validity does not depend upon its terms having been examined and approved by the Civil Court. NAKIMO DEWANI AND OTHERS *v.* PEMBA DICHEN AND OTHERS (1910)

I. L. R. 43 Calc. 469

12. ———— *Not notified to Court—Claim decreed subsequently—Whether decree-holder can bring a fresh suit for recovery of sum on the compromise which he might have got by execution of the decree.* The plaintiffs-appellants brought a suit against the defendant-respondent for the recovery of money due to them by the latter. The evidence in the case had been closed on 25th January 1910 and the Court ordered certain files to be sent for, so the case was adjourned to 10th February, and on that day to the 28th February for the same reason. On the 19th February the defendant by way of compromise, executed a lease in favour of plaintiffs of certain land under which the latter's claim was to be adjusted. The planitiffs, however, did not withdraw their suit, and on the 28th February the Court passed a decree in their favour. The plain-

COMPROMISE—*concld.*

tiffs having failed to recover their claim now sued for the amount due to them under the lease; admittedly their decree had become barred by limitation *Held*, that the decree superseded the compromise, and the plaintiffs could not now sue on the lease to recover the sum which they ... *Moturi* ... *ad. L. J* ... *Kashi-* ... *r. Anant-bhat (I. L. R. 25 Bom. 252) and Kashab Panda* v. *Bholani Panda (21 Indian Cases 538)*, distinguished. HEM RAJ *v.* DOST MUHAMMAD

I. L. R. 1. Lah. 445

13. ———— *Whether relates to subject-matter of suit—Suit by tenant against co-tenant for share of rent paid in respect of tenancy —Compromise by which Defendant tenant gives up land and Plaintiff gives up claim.* One of two joint tenants having paid up the entire rent sued the other for contribution. By a compromise which was embodied in the decree, the Defendant in consideration of the Plaintiff abandoning his claim gave up his share of the land to Plaintiff: *Held*—That the terms of the compromise related to the suit or at all events were covered by its subject-matter. JACHIM MONDAL *v.* CHENINESSA BIBI . . . . . . 24 C. W. N. 328

14. ———— *Suit by a female heir of a joint owner compromised by a solenama —The compromise, if binding upon her sons— "Bonâ fide" compromise in settlement of family disputes, effect of.* After the death of one of the members of a joint Hindu family, his daughter brought a suit for establishment of her title of her father's share in the ancestral estate. The suit was brought against an alleged adopted son of her father and the heirs of her father's brothers. The suit was terminated by a *solenama* entered into by the daughter and the alleged adopted son, who alone was contesting the suit. Under the *solenama* they mutually gave up claims to certain properties in favour of each other and the disputes were settled. Two subsequent suits by the daughter based upon the *solenama* also ended in compromise. On the ... for ... heir ... uld ... of disputes and of the rights of each party and the settlement being also *bonâ fide* was binding upon the reversioners. *Lala Khunni Lal* v. *Kunwar Gobind, L. R. 38 I. A. 87 (102) : s. c. 15 C. W. N. 547 (1911), Lala Oudh Beharee* v. *Ranee Meua Kunwar, 3 Agra H. C. R. 84 (1867), Hiran Bibi* v. *Sohan Bibi 18 C. W. N. 929 (P. C.) (1914), Mahendra Nath* v. *Shamsunnessa, 21 C. L. J. 157 (162, 163), (1914)* and *Shyam Lal* v. *Rameswari 28 C. L. J. 82 (89) (1915)* referred to. RAJENDRA NATH MITRA *v.* NIBARAN CHANDRA ROY

25 C. W. N. 859

COMPROMISE AFTER DECREE.

———— Execution of—*Adjustment of mesne profits after decree enforceable by execution—When decree becomes incapable of execution.* Where, in a suit for land and mesne profits, the decree leaves the amount of mesne profits undetermined, the suit to that extent remains undisposed of and it is open to the parties to adjust that portion of the suit by a lawful compromise; and a decree made in accordance with the terms of such compromise can be enforced by execution. Where such compromise provides that the amount of mesne profits must be ... not be removed. VYTHINADA AIYAR *v.* VYTHINADA AIYAR (1909) . . I. L. R. 33 Mad. 78

COMPROMISE DECREE.

See APPEAL TO PRIVY COUNCIL.

6 Pat. L. J. 171

See CIVIL PROCEDURE CODE, 1908, O. XXXII, R. 7 . 6 Pat. L. J. 190

See COMPROMISE.

See CONSENT DECREE.

See HINDU LAW—WIDOW

I.L.R. 38 All. 679

See MISTAKE.

I.L.R. 43 Cal. 217

See PRACTICE.

I.L.R. 36 Bom. 77

See REGISTRATION OF DOCUMENTS.

L. R. 46 I. A. 240

See RES JUDICATA I. L. R. 35 Mad. 75

See REVIEW, APPLICATION FOR.

I. L. R. 40 Calc. 541

———— against widow—

See HINDU LAW—WIDOW.

I. L. R. 43 Bom. 249

———— by guardian without Court's leave—

See CIVIL PROCEDURE CODE (ACT V, 1908), O. XXII, R. 7.

I. L. R. 2 Lah. 164

———— effect of—

See MUTT . I. L. R. 40 Mad. 177

———— A decree obtained by consent or compromise can be attached in a separate Suit not only on the ground of fraud but also any reason sufficient to avoid an agreement SHAM NATH CHOWDHURY *v.* RAMJAS.

I. L .R. 34 All. 144

———— *Suit to set aside, on the ground that agreement was unlawful—Civil Procedure Code (Act XIV of 1882), s. 375—Administrator agreeing to execute lease for which sanction afterwards refused by Court—Probate and Administration Act (V of 1881), s. 90, cls. (3) and (4)—Test, whether agreement, specifically enforcible—Specific Relief Act (I of 1877), ss. 3, 21 (e)—Administrator if "trustee"—Compromise based on agreement which is unlawful in part—Decree if to be wholly set aside or in part—No universal rule.* Where a person acting for himself and also as administrator of the estate of a deceased person compromised a suit agreeing thereby to execute within a month a *dur-putni* lease of property jointly belonging to himself and

COMPROMISE DECREE—*contd.*

the estate of the deceased and undertook previously to doing that to obtain the permission of the Court which had granted the letters of administration, but such permission was refused on the ground of the proposed lease not being beneficial to the estate: *Held,* that the administrator had acted in excess of his powers under s. 90 of the Probate and Administration Act in entering into the compromise which was therefore not a lawful compromise within the meaning of s. 375 of the Civil Procedure Code (Act XIV of 1882). Where a compromise decree has been made on the basis of an unlawful agreement a suit lies to set it aside. *Golab Koer* v. *Badshah Bahadur, 13 C. W. N. 1197; s.c. 10 C. L. J. 420,* followed. A compromise decree can be set aside on any ground on which the agreement itself could be set aside. *Huddersfield* v. *Leister [1895] 2 Ch. 273,* followed. If the agreement could not be specifically enforced nor should the decree. The agreement by the administrator in this case could not be specifically enforced being one made by a trustee in excess of his powers, within the meaning of s. 21, cl. (c) of the Specific Relief Act. *Held,* that in the circumstances of the case the whole decree should be set aside and not merely the portion affecting the estate of the deceased. Whether in such a case the decree should be set aside in the entirety or only to the extent directly effected by the illegality would depend upon the circumstances of the case, and no universal rule can be laid down with regard to it. SARBESH CHANDRA BASU *v.* HARI DOYAL SINGH (1910) . . . . **14 C. W. N. 451**

——— *Date of payment fixed by agreement of parties—Court's jurisdiction to extend time—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 3.* In a suit upon a mortgage, a compromise decree was made directing that on payment by the defendant into Court of a certain sum on or before the 4th April 1917 the plaintiff shall deliver up to the defendant all documents relating to the mortgaged property and put the defendant into possession of the same. On the 31st March 1917 the defendant paid into Court a portion of the sum and applied for enlargement of time to pay up the balance. The application was refused: the defendant, however, paid into Court the balance on the 12th May, 1917: *Held,* that it would be equitable to extend the time for the payment of the balance up to the 12th May 1917, on which date the money was paid into Court, and the High Court extended the time up till that date and directed the lower Court to make a final decree in terms of O. XXXIV, r. 3 of the Civil Procedure Code. ABKAOH MONDAL *v.* AMINUDDI MULLICK (1918) **23 C. W. N. 439**

——— *Defendant to be ejected from land in suit, unless he executed agreement of lease in favour of Plaintiff within two months—Lease not executed in two months—Time if essence of contract—Executing Court if may relieve against forfeiture—Civil Procedure Code (Act V of 1908), O. XXIII, r. 3.* Government sued the defendant for recovery of possession of a plot of land in the Barrackpore Cantonment. The suit was compromised on terms under which the Defendant admitted the right of the Plaintiff and agreed to hold the land as a separate holding under the Plaintiff but without the payment of any additional tax, and the Defendant and his son undertook within two months to execute an agreement in favour of the Plaintiff in a certain form embodying therein the terms of the compromise, in default whereof, it was provided that the Plaintiff would take *khas* possession of the land in suit by executing the decree that would be passed on the basis of the compromise. A decree was passed in terms of the compromise. The Defendant and his son not having executed the agreement within two months as stipulated, the Plaintiff applied for execution and prayed for recovery of possession. On receipt of notice of the application, the Defendant expressed his willingness to execute the agreement, and before the executing Court urged that there was not the essence of the contract, and the Court had power to relieve him against the forfeiture: *Held,* that it is open to the execution Court to consider what the rights of the parties, equitable or otherwise, are which follow from the contract embodied in a compromise decree. That the relation of landlord and tenant having been created in the case by the compromise decree, the principle of the case of *Krishna Bai* v. *Hari Govind, I. L. R. 31 Bom. 15 (F. B.); 8 Bom. L. R. 813 (1906),* was applicable to the case, and the executing Court had erred in refusing relief to the Defendant on the ground that the contract had "crystallised into a decree." *Lachiram* v. *Jana Yesu, 16 Bom. L. R. 668 (1914),* referred to. In the circumstances of the case, the High Court held that the defendant should not be ejected for failure to execute the agreement within two months from the date of the compromise decree and should be given some time within which to exercise it. SURENDRA NATH BANERJEE *v.* THE SECRETARY OF STATE FOR INDIA.

24 C. W. N. 545

——— Compromise of a suit by a female heir of a joint owner held binding. RAJENDRA NATH MITRA *v.* NIBARAN CHANDRA ROY.

25 C. W. N. 859

——— *Compromise decree dealing with properties other than those in suit, effect of*—Res judicata—*whether registration of compromise is necessary.* So far as it relates to properties within the scope of the suit a compromise decree operates as *res judicata,* but so far as it relates to properties outside the scope of the suit, such a decree, if the terms of the compromise are embodied within the decree, is evidence of an agreement to transfer an interest in the property. It is not necessary in such a case to register the compromise petition. BISSESSWAR RAM *v.* MAHADEO PARAN . . . **1 Pat. L. J. 208**

——— Respondents brought a suit for a declaration that certain property attached by the appellant in execution for money decree against a third party belonged to them. A compromise was arrived at to the effect that the Respondents would execute a mortgage bond for the amount in favour of the appellant. A decree embodying this was passed and the mortgage bond not being executed within the terms of the decree appellant applied for execution of the mortgage bond. *Held,* that the question as to what was the subject matter of the suit must depend upon the facts of each case and that in the present case the mortgage bond was capable of being enforced in execution of the decree under Civil Procedure Code, O. XXXI, r. 34. In the matter of Anshu Prokash Ghose . . **24 C. W N. 68**

COMPROMISE DECREE—*contd.*

——————— *Suit to set it aside—On ground of fraud and of being ex parte quo the minor plaintiffs—where compromise was sanctioned* [illegible]

who remained in the enjoyment of the property for many years, and upon her death Jiwan's collaterals took possession. On 8th February 1914, Jiwan's daughter and sister of B. S. brought a suit against the collaterals for recovery of the property as Jiwan's daughter, and on 29th May 1914, a compromise was arrived at between the parties upon which a decree followed. The present plaintiffs, (two of whom being minors) who were among the defendants in that suit, brought the present action for setting aside the decree based on the compromise They alleged fraud inasmuch as *Mst.* L. claimed as Jiwan's daughter and not as sister of B S, the last male owner, but failed to show that they did not know of this or at any rate had not the means of knowing it. They also pleaded that the decree was *ex parte* as far as they were concerned, and that at all events the minor plaintiffs were not bound by the decree. *Held*, that, as the decree was not tainted with fraud, no suit lay to set it aside as regards parties who were majors at the time SADHO MISSER v. *Golab Singh* (*3 Calc W. N. 375*), followed. *Held also*, that the objection that the decree was *ex parte* could only be taken by an appropriate proceeding in the suit itself, *e.g.*, by an application under O. IX, rule 13 of the Code of Civil Procedure, or an application for review, or an appeal to a superior Court. *Held*, [illegible]

a misapprehension of a material fact, *viz*, the status of *Mst.* L. *qua* the estate, she being represented as the daughter of the last male owner while as a matter of fact she could come in only as a sister. *Bibee Solomon* v. *Abdool Aziz* (*I. L. R. 6 Calc. 687*), followed. JHANDA SINGH v. *Mst.* LACHMI . . . . **I. L. R. 1 Lah. 344**

COMPROMISE PETITION.

See HINDU LAW—PARTITION **I. L. R. 48 Calc. 1059**

COMPULSION OF LAW.

——— payment under—

See DEPOSIT IN COURT. **I. L. R. 43 Calc. 269**

See VOLUNTARY PAYMENT. **I. L. R. 40 Calc. 598**

COMPULSORY ACQUISITION.

See LAND ACQUISITION.

COMPULSORY SALE.

See Pre-emption. **I. L. R. 42 All. 402**

COMPUTATION OF TIME.

See CONTRACT FOR SALE. **I. L. R. 45 Calc. 481**

See LEAVE TO APPEAL TO PRIVY COUNCIL. **I. L. R. 42 Calc. 35**

CONCILIATION.

See DEKKHAN AGRICULTURISTS' RELIEF ACT, ss. 39, 48. **I. L. R. 36 Bom. 183**

See LIMITATION. **I. L. R. 38 Bom. 653**

——— certificate of conciliator—

See DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879), s. 48. **I. L. R. 42 Bom. 367**

——— effect of award—

See CENTRAL PROVINCES TENANCY ACT (XI OF 1898), s. 45. **I. L. R. 43 Calc. 73**

CONCLUSIVE PROOF.

See AGRA TENANCY ACT, 1901, s. 9 **I. L. R. 43 All. 615**

CONCURRENT FINDINGS.

See LIMITATION . **L. R. 46 I. A. 197**

See MAHOMEDAN LAW—LEGITIMACY **I. L. R. 48 Calc. 853**

See REGISTRATION. **I. L. R. 41 Calc. 972**

See SPECIAL OR SECOND APPEAL. **I. L. R. 37 Mad. 443**

See WILL . **I. L. R. 38 Calc. 355**

CONCURRENT JURISDICTION.

See PROBATE . **I. L. R. 37 Calc. 224**

See RESTORATION OF SUIT. **14 C. W. N. 558**

CONCURRENT SENTENCES.

See APPEAL . **I. L. R. 40 Calc. 631**

See CRIMINAL PROCEDURE CODE, s. 413 **15 C. W. N. 734**

See MISJOINDER OF PARTIES. **I. L. R. 38 Calc. 453**

CONDEMNATION OF VESSEL.

See SALE OF GOODS. **I. L. R. 45 Calc. 23**

CONDITION PRECEDENT.

See CHARITABLE TRUST. **I. L. R. 48 Calc. 124**

CONDITIONAL ADOPTION.

See HINDU LAW—ADOPTION. **I. L. R. 37 Bom. 251**
I. L. R. 43 Bom. 542

CONDITIONAL BEQUEST.

See WILL . **I. L. R. 48 Calc. 1109**

CONDITIONAL CONSENT.

——— by Collector—

See CIVIL PROCEDURE CODE (ACT V OF 1908), s. 92. **I. L. R. 39** [illegible]

CONDITIONAL OFFER.

See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXIII, [illegible]

CONDITIONAL ORDER.

See PUBLIC NUISANCE.
I. L. R. 42 Calc. 702

See PUBLIC PATHWAY.
I. L. R. 44 Calc. 61

CONDITIONAL SALE.

See MORTGAGE. I. L. R. 2 Lah. 53

———— foreclosure proceedings—

See MORTGAGE . I. L. R. 1 Lah. 292

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See DIVORCE . I. L. R. 39 Calc. 395
I. L. R. 44 Calc. 1091

CONDUCT.

———— causing injury to health—

See DIVORCE . I. L. R. 39 Calc. 395

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See ZAMINDARI SALE.
I. L. R. 37 Mad. 22

CONFESSION.

See ADMISSIONS.

See ADMISSIONS AND CONFESSIONS TO POLICE OFFICERS.
I. L. R. 41 Calc. 601

See CONSPIRACY TO WAGE WAR.
I. L. R. 38 Calc. 559

See CRIMINAL PROCEDURE CODE, SS. 14, 15, 154.
3 Pat. L. J. 291

s. 164 I. L. R. 2 Lah. 325, 129

ss. 255 AND 342. I. L. R. 38 Mad. 202

EVIDENCE ACT 1872—

s. 24. . I. L. R. 45 Bom. 1086

s. 26. . I. L. R. 42 Bom. 1

s. 30. . . I. L. R. 38 Bom. 156
I. L. R. 37 All. 247
I. L. R. 43 Bom. 739

s. 91. . . I. L. R. 35 All. 260
I. L. R. 36 All. 222

See EXCISE OFFICERS.
I. L. R. 46 Calc. 411

See MISDIRECTION.
I. L. R. 45 Calc. 557

———— admissibility of—

See JURY, RIGHT OF TRIAL BY.
I. L. R. 37 Calc. 467

———— admissibility of, against a co-conspirator—

See CONSPIRACY TO WAGE WAR.
I. L. R. 38 Calc. 169

———— by co-accused—

See BAIL . . I. L. R. 42 Calc. 25

See EVIDENCE ACT (I OF 1872), s. 30.
I. L. R. 38 Bom. 156
I. L. R. 37 All. 247
I. L. R. 43 Bom. 739

See JURY TRIALS I. L. R. 42 Calc. 789

———— effect of retracted—

See CRIMINAL PROCEDURE CODE s. 342.
5 Pat. L. J. 430

CONFESSION—*contd.*

———— to Magistrate after arrest—

See CONSPIRACY TO WAGE WAR.
I. L. R. 38 Calc. 169

———— recorded by Magistrate without enquiring whether voluntary—

See CRIMINAL PROCEDURE CODE, SS. 164 AND 533 . . .
I. L. R. 2 Lah. 325

———— recorded memo. of—

See CRIMINAL PROCEDURE CODE, 1898, ss. 164, 342 . I. L. R. 2 Lah. 129

———— relevancy of—

See CONSPIRACY TO WAGE WAR.
I. L. R. 38 Calc. 559

———— Unrecorded.

See MISDIRECTION.
I. L. R. 45 Calc. 557

1. ———— Purporting to be unvoluntary—*Evidence Act, 1872, s. 24.* A statement in writing by the accused, which contains an allegation from which it is to be inferred that the statement of which it forms a part was not made voluntarily, is inadmissible. EMPEROR *v.* TARANATH ROY CHOWDHURY (1910) . I. L. R. 37 Calc. 735

2. ———— Under Criminal Procedure Code, 1898, ss. 164, 342, 364—*Evidence Act, 1872, s. 29.* A confession under s. 164 of the Criminal Procedure Code must be made either in the course of an investigation under Chapter XIV, or after it has ceased and before the commencement of the inquiry or trial. The condition requiring the confession to be prior to the commencement of the inquiry or trial is only imposed when the investigation has ceased, and not when it is made in the course of the police investigation. Where a number of persons were arrested on the 1st May, and the confessions of some of them were recorded on the 4th and 5th, while others were brought in subsequently and their confessions taken while the police investigation was then actually going on, and on the 17th an order under s. 196 was obtained and the police report sent in, and on the next day the examination of the prosecution witnesses begun :—*Held*, that the Magistrate did not take cognizance under s. 190 of the Code, nor did the inquiry commence on the 4th, and that the confessions were taken in the course of an investigation under Chapter XIV. The fact that the Magistrate who has taken the confessions, afterwards holds the inquiry, does not, under s. 164, constitute the recording of the confessions an examination of the accused in the course of it and at its commencement. *Empress* v. *Anuntram Singh, I. L. R. 5 Calc. 954,* and *Empress* v. *Yakub Khan, I. L. R. 5 All. 253,* declared obsolete. *Sat Narain Tewari* v. *Emperor, I. L. R. 32 Calc. 1085,* distinguished. S. 164 includes confessions taken by a Magistrate who afterwards holds such inquiry or trial. *Empress* v. *Anuntram Singh, I. L. R. 5 Calc. 954,* and *Reg.* v. *Bai Ratan, 10 Bom. H. C. 166,* declared obsolete on the point. Ss. 164, 342 and 364 of the Code are not exhaustive, and do not limit the generality of s. 21 of the Evidence Act as to the relevancy of admissions. *Queen-Empress* v. *Narayen, (1893) Ratan Lal Unrep. Cr. C. 679,* referred to. The mere fact that a statement was elicited by a question does not make it irrelevant as a confession under s. 164 of the Criminal Procedure Code or s. 29 of the

CONFESSION—*contd.*

Evidence Act, though such fact may be material on the question of its voluntariness BARINDRA KUMAR GHOSE *v.* EMPEROR (1909)
I. L. R. 37 Calc. 467

3. ———————— Retracted—*Admissibility of—Recorder of confession, whether examination of, is necessary.* Where the only evidence given during the trial to connect the accused with the act of murder with which they were charged, were their own confessions contained in statements voluntarily made by them under section 164 of the Code of Criminal Procedure 1898, which confessions were retracted before the trial commenced, *held*, that the confessions were admissible in evidence against the accused. It is not necessary that the recorder of a confession should be always examined. GUJA MAJHI *v.* THE KING-EMPEROR
2 Pat. L. J. 80

4. ———— By co-accused—*Acceptances of plea by the Court and removal of co-accused from the dock—Trial of remaining prisoner alone—Admissibility of confession of co accused against prisoner on trial—Evidence Act (I of 1872), s. 30.* Where a co-accused pleads guilty, and the Court has accepted the plea and directed his removal from dock, and the trial proceeds against the remaining prisoner alone, confession by the former is not admissible under s. 30 of the Indian Evidence Act, 1872, against the latter. *Queen-Empress* v. *Pahuji, I. L. R. 19 Bom. 195,* approved EMPEROR *v.* KERAMAT SIRDAR (1911). **I. L. R. 38 Calc. 446**

5. ———— Verification by Magistrate. Where a confession was verified by a Magistrate, the proper course for the prosecution was to examine the Magistrate himself and not the other verification witnesses whose evidence would be inferior to his. KADER SUNDAR *v.* EMPEROR (1911) . . . **16 C. W. N. 69**

6. ———— Retracted—*Confession made after long police custody, admissions in, not retracted, if admissible. N* who was charged with an offence under the Arms Act made a confession in the course of which he stated he was a member of a *Samity*, but subsequently retracted the confession by a statement in which he repeated that he was a member of the *Samity*: *Held*, that the statement [illegible]

[illegible]

457 Barindra Kumar Ghose v. *Emperor, 14 C. W. N. 1114, I. L. R. 37 Calc. 467, King-Emperor* v. *Annya, 3 Bom. L. R. 438,* and *Emperor v. Abani, 15 C. W. N. 25,* referred to. PULIN BEHARI DAS *v.* KING-EMPEROR (1911)
16 C. W. N. 1105

7. ———— Recording of—*Questioning the accused regarding its voluntariness at the end of the statement—Criminal Procedure Code (Act V of 1898), s 164—Confession partly false, evidentiary value of.* Where an enquiry as to the voluntary character of the confession is made by the Magistrate not at the commencement, but at the end of the statement by the accused, the defect is merely one of form If a confession is found to be false in part, *viz.*, as to the justifying motives for an offence, it does not follow that the rest of it, relating to the commission of the offence, must be rejected. Where the entire statement of a prisoner has been given in evidence any part of it may be contradicted by the prosecution, and if sufficient grounds exist, the Court may accept the incriminatory, and reject the exculpatory, portions. *Rex* v. *Higgins, 3 C. & P. 603* ; *Rex* v. *Clewes, 4 C. & P. 221* ; *Rex* v. *Steptoe, 4 C. & P. 397,* referred to. PULIN TANTI *v.* EMPEROR (1913) **I. L. R. 40 Calc. 873**

8. ———— By force—*Allegation of ill-treatment and inducement to extort confession—Onus of proof.* Where an accused when retracting a confession alleged ill-treatment and inducement by the Police to extort the confession, the onus is on him to prove such ill-treatment and inducement. KING-EMPEROR *v.* KABILI KATONI (1918)
22 C. W. N. 809

9 ———————— Evidence Act (*I of 1872*), *s. 24—Circumstances making confession inadmissible.* When a confession was made after police custody for several days and protracted consultation between the accused and the investigating and other police officers and was subsequently retracted: *Held*, that the confession was made under circumstances which excluded its admissibility. MOBARAK ALI *v.* KING-EMPEROR (1919) . . . . . **23 C. W. N. 886**

CONFESSION AND STATEMENT.

———— difference between—

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), s. 164.
I. L. R. 39 Mad. 977

CONFIDENTIAL COMMUNICATIONS.

———— test of—

See EASEMENTS ACT (V OF 1882), s. 15.
I. L. R. 39 Mad. 304

CONFIRMATION OF SALE.

See SALE IN EXECUTION OF DECREE.
I. L. R. 41 Calc. 590

CONFISCATION.

———— of boat—

See OPIUM ACT, s. 11.
15 C. W. N. 296

———————— Cargo—*Enemy ship—Cargo shipped by British subjects before declaration of war—War declared whilst cargo at sea—Cargoes consigned to German merchants (in one instance to British merchant)—Destination (Enemy Port)—Contracts C. I. F—Moneys advanced by British Banks against documents of title—Property in goods at the time of capture.* On August 4th, 1914, war was declared between Great Britain and Germany. Before the declaration of war H. S. N. C. & Co., British subjects, had shipped some bales of jute by a German ship, the S.S. *Rappenfels*, of the Hansa Line, and had consigned the goods to D C. & Co, British merchants. G. & Co. and G. W. & Co. had also shipped goods by the same ship but had consigned the goods to German merchants. The *Rappenfels* was captured at sea after the declaration of war and condemned as good and lawful prize at Colombo. The *Rappenfels* was sent to Calcutta to have the liability of the cargo to condemnation determined by the High Court at Fort William in Bengal. Messrs. H. S. N. C. & Co, G. & Co. and G. W. & Co. submitted claims for the release of their goods. These claims were disputed by the Crown:—*Held*, (i)

CONFISCATION—*contd.*

that in determining the question of liability of the goods to confiscation, regard must be had to the property in the goods and not to the risk except so far as it may assist the Court in determining the answer to the question—"To whom did the goods belong at the time of capture?" (ii) that the sellers did not pass the property in the goods to the buyers at the time of appropriating the goods to the contract; and (iii) that in the circumstances the property in the goods was in the sellers, and they were not liable to be confiscated. RE CARGO *ex* S.S. "RAPPENFELS" (1914)
I. L. R. 42 Calc. 334

CONGENITAL BLINDNESS.

See HINDU LAW—INHERITANCE.
I. L. R. 45 Calc. 17

CONSCIOUS POSSESSION.

See COUNTERFEIT COIN.
I. L. R. 44 Calc. 477

CONSENT.

See ACQUIESCENCE.
I. L. R. 37 All. 412

See CIVIL PROCEDURE CODE (ACT V OF 1908), s. 92 . **I. L. R. 39 Bom. 580**

See CONSENT OF COURT.

See CONSENT OF PARTIES.

See EVIDENCE **I. L. R. 38 Mad. 160**

See LESSOR AND LESSEE.
I. L. R. 48 Calc. 176

See PENAL CODE (ACT XLV OF 1860), ss. 366, 360, 90.
I. L. R. 42 Bom. 391

——— **of landlord**—

See TRANSFERABILITY
I. L. R. 42 Calc. 172

——— **of father-in-law, but not senior widow, to adoption by Junior widow.**

See HINDU LAW—ADOPTION.
I. L. R. 44 Bom. 508

CONSENT DECREE.

See CIVIL PROCEDURE CODE, 1882, ss. 13, 462 .. . **I. L. R. 36 Bom. 53**

See CIVIL PROCEDURE CODE (1908), O. XXXIV. . **I. L. R. 38 Bom. 32**

See COMPROMISE AND COMPROMISE DECREE.

See INSTALMENTS. **I. L. R. 38 Bom. 32**

See JURISDICTION **I. L. R. 38 Calc. 639**

See MORTGAGE **I. L. R. 35 Bom. 371**

See PROCEDURE **I. L. R. 36 Bom. 77**

See WRONGFUL DISMISSAL.
L. R. 46 I. A. 314

——— **effect of**—

See MUTT . . **I. L. R. 40 177**

1. ——— *Parties—Hindu Widow—Reversionary heirs—Confession of judgment.* When in a suit between a Hindu widow, and a claimant to the estate of her husband, a stranger who was not a party to the suit in the Original Court was made a party to the appeal without leave of the Court and a consent-decree made, the decree was not binding upon the reversionary heirs. A Hindu widow, who is a limited or qualified owner, cannot confess Judgment and be party to a consent-decree so as to bind the inheritance in the hands of the reversionary heirs. *Katama Natchier* v. *The Rajah of Shivagunga, 9 Moo. I. A. 539, Stapilton* v. *Stapilton, 1 White & Tud. 8th Ed. 234 ; 1 Atk. 2,* distinguished. *Imrit Konwar* v. *Roop Narain Singh, 6 C. L. R. 76,* explained. *Sheo Narain Singh* v. *Khurgo Koerry, 10 C. L. R. 337 ; Sant Kumar* v. *Deo Saran, I. L. R. 8 All. 365 ; Jaram Laljee* v. *Veerbai, 5 Bom. L. R. 885 ; Gobind Krishna Narain* v. *Khunni Lal, I. L. R. 29 All. 487 ; Mahadei* v. *Baldeo, I. L. R. 30 All. 75 ; Roy Radha Kissen* v. *Nauratan Lall, 6 C. L. J. 490 ; Asharam Sadhani* v. *Chandi Churn Mukerjee, 13 C. W. N. 147,* referred to. A consent-decree does not operate to the prejudice of persons not parties thereto. *Nicholas* v. *Asphar, I. L. R. 24 Calc. 218 ; In re South American and Mexican Company,* [1895] *1 Ch. 37,* and *The Bellcarin, 10 P. D. 161,* distinguished. *Huddersfield Banking Company, Limited* v. *Lister,* [*1895*] *2 Ch. 273,* followed. RAJLAKSHMI DASSEE *v.* KATYAYANI DASEE (1910) . . **I. L. R. 38 Calc. 639**

2. ——— *Res judicata—Consent-decree between predecessors-in-title of parties in suit—Civil Procedure Code (Act V of 1908), s. 11.* A consent-decree has to all intents and purposes the same effect as *res judicata* as a decree passed *per invitum* and this notwithstanding the words in s. 11 of the Civil Procedure Code "has been heard and finally decided." *In re South American and Mexican Company,* [*1895*] *1 Ch. 37,* followed. A consent-decree come to between the predecessors in-interest of the present parties touching matters now substantially and directly in issue between them is *res judicata.* BHAISHANKAR NANABHAI *v.* MORARJI KESHAVJI & Co. (1911) . . **I. L. R. 36 Bom. 283**

3. ——— *Default—Variation—Court's power to vary the terms of consent-decree.* The plaintiff sued for a declaration that an ostensible sale-deed was merely a mortgage deed and that he was entitled to redeem the property. The parties arrived at a compromise and a consent-decree was passed in terms that the plaintiff do pay defendant within one month from the 4th September 1917, a sum of Rs.1,100 and the survey No. 529 at Jamner should be given in plaintiff's possession as owner by defendant in February 1918 after removing that year's crop ; if the above sum was not paid by plaintiff to defendant within one month, defendant should retain possession of the survey number as owner. The plaintiff made default and the defendant claimed that he was entitled to retain the property under the terms of the consent-decree. The plaintiff, thereupon, paid the sum into Court on the 26th November 1917 and presented an application for extension of time mentioned in the consent-decree. The lower appellate Court dismissed the application on the ground that it had no power to vary the terms of the consent-decree. On appeal to the High Court, *held,* that it would be open to the Court to relieve against a default of the plaintiff on proper terms, inasmuch as the plaintiff paid the money still three months before he would get possession under the consent-decree. *Per Macleod, C. J.*:—"In each case the terms of the consent-decree must be considered. The Court cannot

CONSENT DECREE—*contd.*

lay down a general principle that in no case can the terms of the consent-decree be varied." SUPDU DHODU *v.* MADHAVRAO JIVRAM (1919)
I. L. R. 44 Bom. 544

4 ———————— *Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 15 B—Instalments—Entire alteration of terms of consent-decree cannot be allowed.* In a suit for possession of land which the plaintiff alleged had been sold to him but which the defendant contended had been mortgaged, a consent-decree was passed directing the defendant to pay to the plaintiff a certain sum for his right as mortgagee within six months from the date of the decree, failing which his right to redeem the mortgage was to cease. The defendant instead of complying with the terms of the decree made an application that he was an agriculturist and that he should be allowed to pay the sum by annual instalments. The lower Courts allowed the instalments on the ground that the terms of the consent-decree could be altered under s. 15B of the Dekkhan Agriculturists' Relief Act, 1879. *Held*, reversing the order, that the defendant by his application had asked the Court to alter the terms of the consent-decree entirely and this could not be done even under s. 15B of the Dekkhan Agriculturists' Relief Act, 1879. *Shivayagappa* v. *Govindappa, (1913) 37 Bom. 614*, relied on. *Supdu Dhodu* v. *Madhavrao Jivram (1919) 44 Bom. 544*, explained. MADHAV BALKRISHNA *v.* APPAJI VENKATESH (1921)
I. L. R. 45 Bom. 1123

CONSENT OF COURT.

See MAHOMEDAN LAW—MARRIAGE.
I. L. R. 42 Calc. 351

CONSENT OF GOVERNMENT.

See MAGISTRATE. **I. L. R. 39 Calc. 119**

CONSENT OF PARTIES.

See JURISDICTION.
I. L. R. 42 Calc. 116

CONSENT ORDER.

———— Effect of—

See RECEIVER . **6 Pat. L. J. 208**

CONSEQUENTIAL ORDER.

See COMPENSATION .
I. L. R. 39 Calc. 157

CONSEQUENTIAL RELIEF.

See COURT-FEE.
I. L. R. 40 Calc. 245, 615
I. L. R. 44 Calc. 352
3 Pat. L. J. 194

See SPECIFIC RELIEF ACT, ss. 9, 42.
I. L. R. 33 Mad. 452

———— prayer for—

See COURT-FEES ACT, s 7.
I. L. R. 39 Calc. 704

CONSIDERATION.

See CONSTRUCTIONS OF DOCUMENT.
I. L. R. 41 Bom. 5

See C. I. F. CONTRACTS.
I. L. R. 42 Bom. 473

CONSIDERATION—*contd.*

See EVIDENCE . **I. L. R. 33 All. 483**

See EVIDENCE ACT (I OF 1872), s 92.
I. L. R. 35 All. 558
I. L. R. 36 All. 537

See GUARDIANS AND WARDS ACT (VIII OF 1890), ss. 7, (2), 29, 30.
I. L. R. 37 Mad. 38

See MORTGAGE . **I. L. R. 36 All. 478**
I. L. R. 41 All. 250

See PROMISSORY NOTE
I. L. R. 37 All. 99
I. L. R. 38 Mad. 680

See STAMP-DUTY **I. L. R. 37 Calc. 634**

———— effect of non-payment of—

See CONTRACT ACT (IX OF 1872), s. 39.
I. L. R. 34 All. 273

———— failure of—

See BILL OF EXCHANGE.
I. L. R. 41 Bom. 566

See CONTRACT ACT (IX OF 1872), *s.* 18, CL. (3) . **I. L. R. 35 Bom. 29**

ss. 20, 65 . **I. L. R. 40 Bom. 638**

See LIMITATION ACT (IX OF 1908), SCH. I, ARTS. 97, 62 . **I. L. R. 37 Bom. 538**

s. 97 . **I. L. R. 41 Bom. 31**

See MORTGAGE . **I L. R 35 Bom. 395**

———— for Hundi—

See HUNDI SUIT ON.
I. L. R. 40 Bom. 473

———— Interest in advance added to bond—

See INTEREST . **I. L. R. 44 Bom. 775**

———— minor representing as major—

See SPECIFIC RELIEF ACT, 1877, s. 41.
I. L. R. 44 Bom. 175

———— unlawful—

See CONTRACT ACT (IX OF 1872), s. 24.
I. L. R 42 Bom. 339

———————— *Mortgage—Legal consideration—Contract Act (IX of 1872), s. 2, cl. (d).* [illegible]

favour of *X*, and on *X* suing to enforce the later mortgage the Court of first instance dismissed the suit on the ground that there was no legal consideration: *Held*, that the mortgage of 1893, which replaced that of 1884, was for legal consideration. *Held*, further, that it was not necessary that the promisor should benefit by the consideration, it was sufficient if the promisee did some act from which a third person was benefited, and which he would not have done but for the promise. *Hurkissen Dass Serowgee* v. [illegible]

CONSIGNEE.

———— duty of—

See CARRIERS . **I. L. R. 41 Calc. 703**

CONSIGNEE—*contd.*

———— possession of—

See OPIUM . I. L. R. 46 Calc. 820

CONSIGNMENT.

———— loss of—

See RAILWAY COMPANY. I. L. R. 41 Calc. 576

CONSOLIDATED RATE.

See RATES AND TAXES. I. L. R. 42 Calc. 625

CONSOLIDATING STATUTE.

———— construction of—

See EXECUTION I. L. R. 38 Mad. 199

CONSOLIDATION OF APPEALS.

See APPEAL . I. L. R. 43 Calc. 95

See APPEAL TO PRIVY COUNCIL. 3 Pat. L. J. 446

See CIVIL PROCEDURE CODE, 1908, s. 110 O. XLV, R. 4 I. L R. 43 All. 223

CONSOLIDATION OF MORTGAGES.

See MORTGAGE . I. L. R. 32 All. 651
I. L. R. 1 Lah. 105

CONSPIRACY.

See CHARGE . I. L. R. 42 Calc. 957

See CRIMINAL CONSPIRACY.

See DAMAGES I. L. R. 41 Bom. 137

See MARRAIAGE, CONTRACT OF. I. L. R. 39 Bom. 682

See PENAL CODE, ss. 34, 109, 467. I. L. R. 36 Bom. 524

s. 120B . . I. L. R. 40 All. 41

———— as a cause of action—

See LIMITATION . I. L. R. 40 Calc. 898

———— charge of— .

See CONSPIRACY TO WAGE WAR. I. L. R. 38 Calc. 559

See PENAL CODE, s. 121A.

———— to cheat—

See WITNESS . I. L. R. 46 Calc. 709

1. ———— *Suit for damages for—Conspiracy provision relating to, in the Indian Penal Code, if excludes civil action for other conspiracies—Common unlawful object—Arrest of father by Magistrate and Police officers to induce son to confess to a crime—Motive, difference in, amongst persons so conspiring not material—Special damages, to what extent to be proved, in suit for damages for conspiracy—Malicious prosecution by joint tortfeasors and conspiracy, different causes of action for—Limitation—Limitation Act (XV of 1877), Sch. II, Arts. 23, 36, 120—Standard of proof for actionable conspiracy, if same as for criminal offence—Assessment of damages.* The law does not permit of a man being arrested in order to put pressure on his son to confess even if the person causing the arrest believed that by so doing he will get evidence that will lead to the conviction of persons engaged in a huge conspiracy. Where three persons were found to have acted in concert in having a man arrested with that object, the fact that two of

CONSPIRACY—*contd.*

them did not believe the story upon which the charge against the son was based to be true whilst the third believed in its truth was no ground for the exemption of the latter from liability for damages resulting to the father from the conspiracy, for the motive of one conspirator may be different from that of the others. The standard of proof of a conspiracy in a suit for damages resulting therefrom is not in India the same as if the defendants were being tried on a criminal charge. *In the Goods of Gopessur Dutt* (unreported) relied on. A suit for damages resulting from a conspiracy which would be indictable at Common Law lies in British Indian Courts according to the principles of justice, equity and good conscience and the Indian Penal Code by providing for only one form of criminal conspiracy, *viz.*, to wage war against the King, cannot be considered to have taken away this civil remedy either expressly or by necessary implication. *Quinn* v. *Leathem*, *[1901] A. C. 495*, followed. A suit brought on a conspiracy must be kept strictly to the cause of action that has been set out in the plaint. If a conspiracy is, as in this case, indictable at Common Law it gives rise to civil liability if damage has been occasioned by it to the plaintiff. The present suit being based on two causes of action, *viz.*, (i) to recover the damage occasioned to the plaintiff as the result of an actionable conspiracy; and, (ii) to recover damages for malicious prosecution against the defendants as joint tortfeasors: *Held*, that the suit, though instituted beyond the period of limitation provided for suits for compensation for malicious prosecution, was, in regard to the first mentioned cause of action, not barred by limitation, as it was brought within the period provided by Art. 36 or Art. 120 of the Limitation Act, the former article being applicable to the matter, and if it did not apply the latter being applicable. Damage to a substantial amount should be proved by the plaintiff in order to establish a cause of action for conspiracy, though if substantial damage is proved the damages awarded need not be limited to the precise amount proved. *Held*, that the plaintiff should recover the amount he had to spend owing to his arrest, such damage not being too remote. PEARY MOHAN DAS *v.* D. WESTON (1911)

16 C. W. N. 145

2. ———— *Constructive offence in furtherance of an intention common to the accused on trial and another—Abetment by conspiracy—Conspiracy between two persons on trial, three other so named and others unknown—Acquittal by jury, of conspirators on trial, effect of—Verdict not conclusive as to persons not on trial—Distinct evidence against latter—Character of verdicts in England and India—Evidentiary value of the same witness as to the identity of different persons—Opinion of the Judge as to the weakness of evidence of identity of persons under trial—Stay of trial against others—Warrant against one, withdrawn on acquittal of other alleged co-offenders—Re-institution of proceedings by the District Magistrate on the advice of law-officers of the Crown—Legality of proceedings.* Where two persons were charged under ss. 302/34 and 326/34 of the Penal Code, for offences committed in pursuance of an intention common to them and to the petitioner, and also under ss. [illegible] and [illegible] of the Penal Code, for abetment by conspiracy between themselves, the petitioner, two others named and others unknown, and were acquitted by jury: *Held*, that

CONSPIRACY—*contd.*

the acquittal on the conspiracy charges did not conclude the liability of the petitioner for conviction of the same offence, as there were two others named and others unknown who were also alleged to have been members of the conspiracy. *Held,* also, that the acquittal did not affect the question of the petitioner's criminality, as the jury had not, and could not have, formed or expressed an opinion as regards him, as he was not then on trial, and that there was, besides, distinct evidence alleged against him in the case. Technicalities of the English law based on the sacred character of jury-verdicts cannot be imported so as to give such a character to verdicts in India where by the express provisions of the law it does not attach to them. *Ramesh Chandra Banerjee* v. *Emperor, I. L. R. 41 Calc. 350, per* BEACHCROFT, *J.*, approved The evidence of the same witness as to the identification of one person may be quite different to that as regards the identification of others Where the Judge clearly stated that the identification of the two persons under trial was weak, and on that ground he accepted the verdict of acquittal it would be unwarrantable for the High Court to stay the ordinary course of justice in the case of the petitioner. Where, after the acquittal of the two persons on tr [illegible] was withdra [illegible] against him [illegible] station withi [illegible] committed, under the direction of the District Superintendent of Police who could not appear himself but had been instructed by the District Magistrate on the advice of the law officers of the Crown that the case could go on against the petitioner on the evidence: *Held*, that the District Magistrate was competent to take cognizance of the case if on taking legal advice he thought that the evidence brought the accused within the purview of the law. MANINDRA CHANDRA GHOSE *v* EMPEROR (1914) . **I. L. R. 41 Calc. 754**

3. ———— *Procedure—Criminal conspiracy—Separate trial.* A person may be guilty of criminal conspiracy even though the illegal act, which he has agreed to do, has not been done, for "the crime of conspiracy consists only in the agreement or confederacy to do an illegal act by legal means or a legal act by illegal means." *Reg.* v *Hibbert, 13 Cox 82, Quinn* v. *Leathem, [1901] A. C. 495, The Queen* v. *Most, 7 Q. B D. 244 : 14 Cox. 583,* and *O'Connell* v. *The Queen, 11 Cl. & F. 155 ; 1 Cox. 413 ; 5 St. Tr. N. S. 1,* referred to The indictment in all cases of conspiracy must in the first place charge the conspiracy, but in stating the object of the conspiracy the same degree of certainty is not required as in an indictment for the offence conspired to be committed, *The King* v. *Gill, 2 B. & Ald 204, The Queen* v. *Kenrick, 5 Q. B. 49, The Queen* v. *Blake, 6 Q. B 126, Sydserff* v. *The Queen, 11 Q. B. 245, The Queen* v. *Gompertz, 9 Q. B 824 ; 2 Cox. 145, Aspinall* v. The *Queen, 2 Q B D. 48, Taylor* v. *The Queen, [1895] 1. Q. B. 25, Reg.* v. *Parker, 3 Q. B. 292,* referred to. If all the *known* co-conspirators named in the charge are not placed on their trial, the trial of some (separately) without the others is not vitiated. *Emperor* v. *Lalit Mohan Chuckerbutty, I L. R. 38 Calc. 559 ; 15 C. W. N. 593,* explained. AMRITA LAL HAZRA *v.* EMPEROR (1915) . **I. L. R. 42 Calc. 957**

CONSPIRACY TO WAGE WAR.

See JURY RIGHT OF TRIAL BY.
I. L. R. 27 Calc. 167

CONSPIRACY TO WAGE WAR—*contd.*

1. ———— Admissibility of confession against a co-conspirator jointly tried—*Confession of conspirator made to a Magistrate after arrest—Evidentiary value of such confession—Evidence Act (I of 1872), ss. 10, 30—Penal Code (Act XLV of 1860), s. 121A.* A confession by a conspirator made to a Magistrate after arrest disclosing the existence of a conspiracy, its objects and the names of its members, is not admissible, under s. 10 of the Evidence Act, against the co-conspirators jointly tried with him, but only under s. 30 of the Act. S. 10 is intended to make as evidence communications between different conspirators while the conspiracy is going on with reference to the carrying out of the conspiracy. The confession of a co-accused was not intended to be put on the same footing as a communication passing between conspirators or between conspirators and other persons with reference to the conspiracy. The evidentiary value of such a confession, under s. 30, is not higher than that of the statement of an accomplice, and it cannot be acted upon unless corroborated by independent testimony implicating the accused in the design with which they are charged. EMPEROR *v* ABANI BHUSHAN CHUCKERBUTTY (1910) . **I. L. R. 38 Calc. 169**

2 ———— Acquittal, effect of—*Acquittal on charge of conspiracy under s. 121A, Penal Code (Act XLV of 1860)—Subsequent trial of others on identical charge—Evidence in latter trial of what acquitted prisoner had said or done, if admissible.* It would be a dangerous principle to adopt to regard a verdict of not guilty as not fully establishing the innocence of the person to whom it relates. *R* v. *Plummer, [1902] 2 K. B. 339,* relied on. One *I* was charged with conspiracy to wage war against the King under s 121A, Indian Penal Code, and acquitted In a subsequent trial of others on an identical charge, it was *held* that what he said or did cannot be admitted in evidence at such trial in view of his acquittal EMPEROR *v.* NONI GOPAL GUPTA (1910) . **15 C. W. N. 593 & 646**

3. ———— Charge of conspiracy—Acquittal effect of—*Penal Code (Act XLV of 1860), s. 121A—Whether persons charged with one conspiracy, can be found guilty of different conspiracies—Whether person acquitted can be charged with same offence as part of a conspiracy—Discharge, effect of —Accomplice—Corroboration—Verification proceedings, whether corroboration of accomplice or confession—Confession, relevancy of, against co-accused —Evidence Act (I of 1872), s. 30—Retracted confession, unreliability of.* Where the accused were charged with conspiracy with persons "known and unknown".—*Held*, that if the persons were "known," they should be named in the charge. Where a person has been tried for a specific offence and acquitted, and he is subsequently charged with conspiracy of which that offence is alleged to form a part :—*Held*, that an acquittal is conclusive ; and it would be a very dangerous principle to regard a judgment of not guilty as not fully establishing the innocence of the person to whom it relates *Rex.* v. *Plummer, [1902] 2 K. B. 339,* referred to. The course of not making completed offences the subject of a separate trial, but of throwing them into a case of conspiracy, though lawful, is not to be commended. Before the testimony of an accomplice can be acted on, it must be corroborated in material particulars. There must be corroboration not only as to the crime, but also as to the identity of each one of

CONSPIRACY TO WAGE WAR—*concld.*

the accused. This is no technical rule, but one founded on long judicial experience. For a conspiracy to wage war, no act or illegal omission is necessary; the agreement of two or more will suffice. While admissions, which include confessions, are by s. 21 of the Evidence Act, 1872, declared *relevant* and may be proved as against the persons making them, all that s. 30 of the Evidence Act provides is that the Court *may* take them into consideration as against other persons. This distinction of language is significant, and shows that the Court can only treat a confession as lending assurance to other evidence against a co-accused, and a conviction on the confession of a co-accused alone would be bad in law. Moreover, under s. 30, that only can be taken into consideration which is a confession in the true sense of the term, so that to place any reliance on a retracted confession against a co-accused would be most unsafe. *Yasin* v. *Emperor, I. L. R. 28 Calc. 689*, referred to. Verification proceedings do not add any value to an approver's evidence or to confessions, and cannot be regarded as corroboration. A discharge is not binding on the Court for it is not equivalent to an acquittal. Still a discharge means that the Magistrate, after taking the evidence found that there were not sufficient grounds for committing the accused for trial. A retracted confession cannot ordinarily take the place of legal proof. Where several persons are charged with the same conspiracy, it is a legal impossibility that some should be found guilty of one conspiracy and some of another, and any accused not shown to be a member of that conspiracy is entitled to demand an acquittal. EMPEROR *v.* LALIT MOHAN CHUCKERBUTTY AND OTHERS (1911)

I. L. R. 38 Calc. 559

CONSTRUCTION.

See CONSTRUCTION OF DOCUMENTS.

See CONSTRUCTION OF STATUTES.

See CONTRACT . **I. L. R. 37 Calc. 334**

See CONTRACT FOR SALE.
I. L. R. 45 Calc. 481

See DEKKHAN AGRICULTURISTS' RELIEF ACT, S. 2, EXPL. (*b*).
I. L. R. 36 Bom. 151

See DISTRICT MUNICIPAL ACT (BOMBAY), s. 160 . . **I. L. R. 36 Bom. 47**

See HINDU LAW—WILL.
I. L. R. 41 Calc. 642
I. L. R. 42 Calc. 561
I. L. R. 43 Calc. 432

See JAGHIR . **I. L. R. 46 Calc. 683**

See LIMITATION **I. L. R. 38 Mad. 101**

See MORTGAGE . **15 C. W. N. 722**

See POWER-OF-ATTORNEY.
I. L. R. 41 Bom. 40

See TRANSFER OF PROPERTY ACT, 1882 s. 108 . . **I. L. R. 37 All. 144**

See WILL . . **I. L. R. 38 Calc. 327**
I. L. R. 44 Calc. 181
I. L. R. 45 Bom. 711

———— of deed of sale executed by Hindu widow—

See HINDU LAW—ALIENATION.
I. L. R. 37 All. 369

CONSTRUCTION—*contd.*

———— of deeds executed by natives of India—

See HINDU LAW . **I. L. R. 37 All. 369**

CONSTRUCTION OF CONTRACTS.

See CARRIER, LIABILITY OF.
I. L. R. 33 Mad. 120

See CONSTRUCTION.

See CONTRACT ACT (IX OF 1872), s. 56.
I. L. R. 40 Bom. 301

See MAHA-BRAHMAN.
I. L. R. 35 All. 412

See PRINCIPAL AND AGENT.
I. L. R. 34 Bom. 292

CONSTRUCTION OF DEEDS.

See CHARITABLE TRUST.
I. L. R. 48 Calc. 124

See CONSTRUCTION . .

See ESTOPPEL . **2 Pat. L. J. 600**

See HINDU LAW . **1 Pat. L. J. 581**

See MORTGAGE . . **1 Pat. L. J. 563**
2 Pat. L. J. 355

1. ———————— *Simultaneous execution of sale-deed and agreement to reconvey—Transaction amounts to mortgage by conditional sale.* The land in dispute was sold by the defendants to the plaintiff's father on the 7th November 1892 for Rs. 300. On the same day, the latter agreed with the defendants that if they repaid Rs. 300 in five years, he would re-sell the land to them. From 1895 the defendants were in possession of the land as tenants of the plaintiffs and paid Rs. 18 as rent every year. In 1910 the plaintiffs sued to recover possession of the land. The defendants claimed to redeem the lands alleging that the transaction of 1892 amounted to mortgage. The first Court held that the transaction was a mortgage and allowed redemption; but the lower appellate Court held that it was a sale and decreed plaintiff's claim. The defendant having appealed:—*Held,* reversing the decree, that in view of the facts and the contemporaneous nature of the two documents the proper construction would be that they constituted conditional sale, and that the real intention of the parties was to effect a mortgage by conditional sale by the contemporaneous execution of the two documents of sale and re-sale. MADHAVRAO KESHAVRAO *v.* SAHEBRAO GANPATRAO (1914)

I. L. R. 39 Bom. 119

2. ———————— *Deed of sale—Contemporaneous agreement to reconvey on payment of consideration—Lease for a term of years—Sale-deed amounts in effect to a deed of mortgage—Debt treated as continuing—Property treated as security for repayment of debt.* The plaintiffs executed in favour of the defendants a sale-deed of lands for Rs. 2,500, a large part of which consisted of old bond-debts. Contemporaneously with it, two more documents were executed between the parties. One of them was an agreement of reconveyance executed by the defendants to the plaintiffs, agreeing to reconvey the lands, (i) if the sum of Rs. 2,500 was repaid at a certain specified date; and (ii) on repayment with interest of sums, if any, spent by the defendants upon the lands or of any further sums bor-

CONSTRUCTION—*contd.*

rowed from them The other document was a lease executed by the plaintiffs under which they took the lands on lease from the defendants for a period of ten years at an annual rental of Rs. 287, which seemed to have been made up of Rs. 62, the Government assessment on the lands, and Rs. 225 reserved as rent representing nine per cent. on the principal sum of Rs. 2,500. The plaintiffs filed the present suit for a declaration that the sale-deed passed by them was in reality a mortgage and for an order allowing the plaintiffs to redeem the lands on payment to the defendants of any sum that might be found due to them on accounts taken under the Dekkhan Agriculturists' Relief Act. The trial Judge was of opinion that the transaction was a [illegible] appeal held it [illegible] The defendants [illegible] transaction wa[illegible] tional sale ma[illegible] Rs. 2,500, was not the real price of the sale but was treated and regarded as a continuing debt between the parties, the property being made security for the repayment of that debt *Maruti* v *Balaji*, *2 Bom. L. R. 1058*, followed. KASTURCHAND LAKHMAJI v. JAKHIA PADIA (1915)

I. L. R. 40 Bom. 74

3. ———————— In the case of Watan property the distinction between grants of the Royal share of Revenue and grants of soil which is admissible in the case of Inams and Saranjams cannot be conveniently made without detriment to the statutory restriction on the Vatandar's power of alienation and should not be made unless it is clearly justified by the terms of the settlement. AMRIT VAMAN v. HARI GOVIND

I. L. R. 44 Bom. 237

4. ———————— *Intention of parties—Position of the parties and position of affairs at the time of the agreement to be considered—Predeceased son's widow, ekrarnama with, of legal heir—Property given, whether absolute or limited estate—Absolute right or given for maintenance—Hindu Widows' Re-* [illegible]

governed by the Mitakshara law, died leaving a daughter *B*, and two predeceased sons' widows, *C* and *D*. After *A's* death, the daughter *B*, and the two widows, *C* and *D*, to settle family differences, executed an *ekrarnama* and divided the property left by *A* into three equal shares, the property in C's share being a house, which she let out to a tenant. Subsequently, the widow *C* remarried. The present suit was brought by the widow *C* for declaration of title to, and for possession of, the house and for arrears of rent. Plaintiff alleged that by the family arrangement (*viz.*, the *ekrarnama*) she got an absolute estate, whereas defendants pleaded that she had got only a life interest by way of maintenance, which interest, too, was forfeited on her remarriage. *Held, per* SANDERSON, *C. J.*—In construing the deed the Court has to take into consideration the position of the parties who executed the document and the position of affairs at the time the agreement was entered into, as also the real intention of the parties, in ascertaining which the Court has to consider the whole of the document and to consider all its terms one with the other. The intention was that plaintiff should have some property for maintenance and the agreement was entered into upon the basis of the plaintiff's right to maintenance. The word "heir" in the agreement, having regard to the other provisions of it, was not used in the strict legal sense, but rather as a word implying persons interested in the estate The widow by her remarriage forfeited all her interest in the estate. Though the plaintiff belonged to a caste which by custom allowed the remarriage of a widow that in itself would not prevent her from forfeiting her right to maintenance out of the deceased husband's property The deceased husband having had an interest in the ancestral property out of which she would be maintained during his life the obligation to maintain her out of that property continued after his death, when the property passed by survivorship, and the property passed to the defendant No 3 (the daughter), subject to the plaintiff's right to maintenance. It does not much matter whether s. 2 of the Widow Remarriage Act applies or not, because this section is practically a statement of the Hindu Law as it existed apart from the Act, so far as it related to the forfeiture of a widow's interest on her remarriage *Per* CHATTERJEA, *J.*—In construing the document we should bear in mind the position of the party making the grant and of the person taking it. The daughter herself had no absolute right, and she could not confer an absolute right. If expressions used in the deed are capable of both constructions contended for by both the parties then that construction should be adopted which is consistent with the law to which the parties are subject The husband had an interest in the property (which was ancestral property) out of which plaintiff was entitled to be maintained during his life, and the obligation to maintain her out of that property continued after his death, whether it passed by inheritance or by survivorship This being so, there is no doubt that the property that the plaintiff obtained under the document was by way of maintenance out of the property of her deceased husband in the hands of the daughter The question whether s. 2 of the Act is applicable to the case, because the plaintiff, according to the custom of the caste to which she belongs, could have remarried independently of the Act, is of no practical importance, as on the general principles of Hindu law a widow whose remarriage may be legal according to the custom of the caste to which she belongs would forfeit any interest which she had in the husband's estate on her remarriage. The plaintiff, therefore, forfeited her interest in the property to the extent she obtained it by way of maintenance MAHAMMAD UMAR v. MAN KUAR (1917) . . . . **21 C. W. N. 906**

CONSTRUCTION OF DOCUMENTS.

See CIVIL PROCEDURE CODE, 1882—

ss 584, 585 . **I. L. R. 34 All. 579**

O. II R. 2; O. XXXIV, RR. 2, 4.
I. L. R. 39 All. 508

See COMPROMISE . . **I. L. R. 43 All. 265**

See CONSTRUCTION —

See CONTRACT . **I. L. R. 42 Bom. 344**

See CONTRACT ACT . . 1[illegible] 74.
[illegible] 12

CONSTRUCTION OF DOCUMENTS—*contd.*

———— **Lease and Sanad**—

1. ———— Deed of sale followed after an interval by an agreement for repurchase——*Sale—Mortgage by conditional sale.* A document purporting to be an out and out sale-deed was executed on a certain date and seven days later a second document was executed by the vendee whereby he covenanted to reconvey the property, sold if the vendors paid back the purchase-money after the lapse of nine or ten years from the date of that sale-deed. The two deeds were separately stamped and were registered on different dates. *Held*, in view of the delay intervening between the two deeds and other circumstances attending their execution, that the two deeds were not intended to be parts of one and the same transaction so as together to constitute a mortgage by conditional sale, but must be construed separately, and were merely what they purported to be. *Bhagwan Sahai* v. *Bhagwan Din, I.L. R. 12 All. 387,* followed. *Balkishen Das* v. *Legge, I. L. R. 22 All. 149,* distinguished. JHANDA SINGH *v.* WAHID-UD-DIN (1911)
I. L. R. 33 All. 585

2. ———— Mortgage—*Sale subject to agreement executed on the same day reserving right of vendor to repurchase—Documents to be read together.* Two documents were executed by the same parties on the same day. The first purported to be an out and out sale of certain property, but was expressed to be "subject to the terms of the deed of agreement executed by the vendee." The agreement referred to was an agreement under certain conditions to reconvey the property purchased. *Held*, that in the circumstances the two documents must be read together as constituting a mortgage by conditional sale. *Bhagwan Sahai* v. *Bhagwan Din, I. L. R. 12 All. 387,* distinguished. WAJID ALI KHAN *v.* SHAFAKAT HUSAIN (1910)
I. L. R. 33 All. 122

3. ———— Sale—Agreement to repurchase executed on same day—*Mortgage by conditional sale.* When what purported to be an out and out sale was accompanied by a contemporaneous agreement given to the vendor a right of repurchase within five years at the same price, it was *held* that the transaction was what it purported to be, and could not be construed as a mortgage by conditional sale. *Bhagwan Sahai* v. *Bhagwan Din, I. L. R. 12 All. 387,* followed. *Vasudeo* v. *Bhau, I. L. R. 31 Bom. 528,* referred to. GHULAM NABI KHAN *v.* NIAZ-UN-NISSA (1910)
I. L. R. 33 All. 337

4. ———— Will—*Devise of one kind of property accurately described exclusive of other somewhat similar property not mentioned in the will.* By his will a testator devised to his wife shares in certain *pattis*, of which the numbers were given, in the village of Hariah, describing the property as in his separate possession. *Held*, that this description would not pass shares in *shamilat pattis* in the village which were not mentioned or referred to in the will. TULSHA *v.* MATHURA PURI (1910)
I. L. R. 33 All. 66

5. ———— *Will—Gift—Property given to two brothers who were joint—Nature of taken by brothers—Hindu law.* Where property is given or devised, without specification of the individual interests of the recipients, to persons who are members of a joint Hindu family, it does not follow that they take such property as joint property, the principle of joint tenancy being unknown to Hindu law save in connection with the joint Hindu family. *Jageswar Narain Deo* v. *Ram Chandra Dutt, I. L. R. 23 Calc. 670, Bai Diwali* v. *Patel Bechardas, I. L. R. 26 Bom. 445,* and *Gopi* v. *Jaldhara, I. L. R. 33 All. 41,* referred to. *Mankamna Kunwar* v. *Balkishan Das, I. L. R. 28 All. 38,* doubted. KISHORI DUBAIN *v.* MUNDRA DUBAIN (1911) . . . . I. L. R. 33 All. 665

6. ———— *No will when there is no power to revoke.* One of the invariable tests in coming to a conclusion as to the testamentary character of a paper is whether the paper is revocable. If it is not revocable, the document is not a will. The fact that the paper is drawn in the form of an agreement and that it is registered

CONSTRUCTION—*contd.*

an ambulatory character, the presumption will be against the testamentary nature of the document and the fact that such provisions are expressed to operate in the future will not affect the nature of the document. The intention of the party will be given effect to,
priate language
does not of its
testamentary. *In the matter of Reference by the Collector and Superintendent of Stamps, Bombay"* *I. L. R. 20 Bom. 210, 214,* referred to *In the goods of Robinson, L R. 1 P. & D. 384,* referred to. RAJAMMAL *v.* AUTHIAMMAL (1909)
I. L. R. 33 Mad. 304

7. ———————— *Will—Dedication of property for religious purposes—Expenditure on religious objects amounting to only a small portion* ... *the mainten-*
l of a Hindu
idols should
be maintained out of the property dealt with thereby, but the rest of the property was assigned to

monies amounted to only some Rs 500 per annum. *Held,* on a construction of the will, that it created a charge on the estate for the expenses of the idols, and that, subject to that charge, the property was to go to the testator's legal heirs, who were fully entitled to appropriate all the income of the property. *Sonatun Bysack v. Sreemutty Juggutsoondre Dosee, 8 Moo I. A. 66,* and *Ashutosh Dutt v. Doorga Churn Chatterjee, I L. R 5 Calc. 438,* referred to SURJA KUMARI *v.* HAR NARAIN RAM (1917) . . . **I. L. R. 39 All. 311**

8. ———————— *Will—Bequest to person described as the adopted son of the testator—Adoption not proved—Intention of testator.* One

whom he described as his adopted son, the residue of his property. After *N*'s death his reversionary heirs sued *K* to recover the property left to him by *N*'s will, alleging that no adoption had taken place, or, if it had, that it was invalid. The suit was at first contested upon the ground that there was a valid adoption, and a deed of adoption was produced, but at a later stage of the suit that defence was given up. *Held,* that *K*'s right to take under *N*'s will did not in the circumstances rest on the fact of his being the legally adopted son of *N,* but upon *N*'s intention to leave his property to *K,* irrespective altogether of the validity of the adoption. *Lali v. Murlidhar I. L. R. 28 All. 488,* and *Fanindra Deb Raikat v. Rajeswar Das, I. L. R. 11 Calc. 463,* referred to. KHUB SINGH *v.* RAMJI LAL (1919)
I. L. R. 41 All. 666

9. ———————— Sale—*Sale of houses in*

CONSTRUCTION—*contd.*

ment in consideration of her *Mehr.* (dowry). One of the houses sold remained in the occupation of the plaintiff's husband from 1898 till his death in 1911. Soon after his death the defendants took possession of the houses. The plaintiff, having sued to recover possession, the lower Courts dismissed the suit on the grounds that the sale of 1898 was a sham and supported by no consideration and that the claim was barred by limitation. On appeal: *Held,* that the deed of 1898 was on the face of it a document of advancement and needed no consideration *Held, also,* that the possession of the house by the plaintiff's husband up to 1911 being permissive, the plaintiff was in constructive possession of it, and her claim was, therefore, not barred by limitation. IBRAHIM BHURA *v.* ISA RASUL (1916) **I. L. R. 41 Bom. 5**

10 ———————— *Sale or agreement to sell—Intention is the test—Want of registration—Registration Act (III of 1877), s. 17—Admissibility—Evidence.* Whether a document operates by way of a present conveyance of property or only as an agreement to create a future right depends upon the intention of the parties as expressed in the instrument. Even if a present right is created the instrument, though unregistered is admissible in evidence, in a suit for specific performance. *Nagappa v. Deva, I. L. R. 14 Mad. 55,* and *Upendra Nath Banerjee v Umesh Chandra Banerjee, 15 C. W. N 375,* followed. The instrument in this case was construed as an agreement to sell notwithstanding that it contains certain words showing a present transfer MANGAMMA *v* RAMAMMA (1914)
I. L. R. 37 Mad. 480

11. ———————— *Covenant in sale deed that vendee would pay revenue on other land of the vendor—Land subsequently transferred—Regulation No XXXI of 1803, s. 6.* In 1884 one Altaf Husain sold certain land to the predecessor of the defendants and reserved some land for himself. The sale deed contained a covenant to the effect that the vendee would pay the Government revenue not only for the land purchased by him but also for the land reserved by the vendor for himself The vendor subsequently sold the reserved land to the plaintiff, who, when the representatives of the original vendee refused to pay the Government revenue, paid it himself and sued to recover from them the amount so paid which the plaintiff had to pay owing to the defendant's refusal to pay. *Held,* (i) that the agreement was void under Regulation XXXI of 1803, which was in force in 1884; and (ii)

raj, 11 All. L. J. 231, referred to. ALI HUSAIN *v.* HAKIM-ULLAH (1916) . **I. L. R. 38 All. 230**

12. ———————— Mortgage—*Deed of sale followed after an interval by an agreement for repurchase*

the appellant's predecessors in title ... *to be a deed of absolute sale of certain* ...

CONSTRUCTION—*contd.*

and an agreement, dated the 5th of September, 1852, executed by the predecessors in title of the respondents reserving to the vendors a right to repurchase the property sold, on repayment of the original purchase money within nine or ten years, constituted, when taken together, a mortgage by way of conditional sale of the property or an absolute sale of it with an agreement for repurchase. The deeds were separately stamped, and registered on different dates. The vendors never availed themselves of the conditions of repurchase, and the appellant sued in 1907 for redemption. The parties to the suit were Mahomedans. Their Lordships of the Judicial Committee were of opinion that the intention of the parties, which was the test in such a case, must be gathered from the language of the documents themselves viewed in the light of the surrounding circumstances, and came to the conclusion that on this principle the decree of the High Court appealed from, that the transaction was an out-and-out sale, and not mortgage by conditional sale, should be affirmed. *Bhagwan Sahai* v. *Bhagwan Din, I. L. R. 12 All. 387; L. R. 17 I. A. 98*, followed. *Balkishen Das* v. *Legge, I. L. R. 22 All. 149; L. R. 27 I. A. 58*, distinguished. *Alderson* v. *White, 2 DeGex & J. 97*, referred to. The provisions of a bond executed by the parties of even date with the sale-deed refuted the suggestion that any of the parties to the sale-deed held any religious scruples against the payment or receipt of interest on money lent, or that when intending to create a mortgage they would have adopted special methods of conveyancing to conceal the fact that interest for the loan was in fact to be given and received. With reference to a remark of Lord CRANWORTH, L. C., in *Alderson* v. *White*, that "I think a Court after the lapse of 30 years ought to require cogent evidence to induce it to hold that an instrument is not what it purports to be," their Lordships commenting on the facts that the period of 10 years fixed in the present case for repurchase terminated in 1853: that the suit was instituted on the 5th of October, 1907, 44 years after the lapse of that period; that the judgment appealed from was delivered on the 11th of March, 1911; that the record was not received at the Privy Council office till the 25th of February 1915, and the appeal not set down for hearing until June, 1916, said "litigation so prolonged becomes an instrument of oppression, is discreditable to any judicial system, and every effort should be made to correct the abuse." JHANDA SINGH *v.* WAHID-UD-DIN (1916) . . . . **I. L R. 38 All. 570**

13. ——————————*Sale or mortgage—Sale with option of re-purchase—Transfer of Property Act (IV of 1882). s. 58, cl. (c).* The plaintiffs mortgaged in 1899 with the defendants 92 fields for Rs. 8,000, the rate of interest agreed upon being 8 per cent. per annum. In 1904, the parties made up accounts under the mortgage and of other transactions, and the plaintiffs were found indebted to the defendants for Rs. 13,000. To pay the amount the plaintiffs sold to the defendants 20 out of 92 fields mortgaged. The sale-deed contained the provision that if within the period of 20 years the plaintiffs repaid Rs. 13,000 in one lump sum or in instalments the defendants should reconvey the lands to the plantiffs. On the same day the plaintiffs executed to the defendants a permanent lease of the lands sold at a fixed annual rental of Rs. 412-8-0. The plaintiffs alleged that the transaction of 1904 was a mortgage, and sued to redeem the same in 1911, on accounts being taken under the Dekkhan Agriculturists' Relief Act. *Held*, that the transaction in dispute was not a mortgage, but a sale with an option to the plaintiffs to repurchase. NARAYAN RAMKRISHNA *v.* VIGHNESHWAR (1915) . . . **I. L. R. 40 Bom. 378**

14. ——————————*of stock-in-trade of business—Schedule of stock-in-trade forming part of mortgage.* Where the stock-in-trade of a business was mortgaged as security for a loan and a list of the specific articles of which it consisted was attached to the mortgage-deed: *Held*, that the mortgage did not include stock acquired after the date of the mortgage to replace that which had been sold. *Tapfield* v. *Hillman, 6 Man. & Gr. 245*, and *Coltman* v. *Chamberlain, 25 Q. B. D. 328*, referred to. ROBERT WILLIAM ANDERSON *v.* BANK OF UPPER INDIA, LIMITED (1915) . **I. L. R. 37 All. 390**

15. —————————— **Sale or bai-bil-wafa**—*Ostensible sale with collateral agreement for repurchase—Agreement containing terms as to payment of interest and accounting for the profits of the property sold.* Of two documents executed on the same day and between the same parties the first purported to be an absolute sale of a certain village. The second was an agreement on behalf of the vendees, the material terms of which were as follows. After a description of the property purchased, the agreement continued with a recital that the property had been purchased by the executants for Rs. 6,125 "*on this condition* that whenever within five years the vendors shall pay to us the amount of the consideration mentioned in this document we or our heirs shall have no objection in re-conveying the aforesaid share. If we set up any plea, the same shall be invalid and the vendors shall be at liberty to take legal steps and to have the property reconveyed by us. They shall also have to pay interest on the whole consideration at the rate of 10 annas per cent., per month, out of which the actual produce of the village sold shall be deducted, and they shall have to pay the balance along with the consideration money." *Held*, that the terms of the agreement that interest should be paid on the purchase money and that profits of the village should be taken into account in order to ascertain the actual sum which the vendors would have to pay in order to recover the property indicated that the transaction was not merely a sale with a condition for repurchase but a bai-bil-wafa or mortgage by conditional sale. *Alderson* v. *White*, 2 De Gex and J., 97, *Bhagwan Sahai* v. *Bhagwan Din, I. L. R. 12 All. 387*, *Ghulam Nabi Khan* v. *Niaz-un-nissa, I. L. R. 33 All. 337*, and *Jhanda Singh* v. *Wahid-ud-din, I. L. R. 38 All. 570*, referred to. MUHAMMAD HAMID-UD-DIN *v.* FAKIR CHAND **I. L. R. 42 All. 437**

16. —————— **Guarantee**—*letter of, construction of—Conditional or unconditional guarantee—Undertaking by broker to find money on mortgage of debtor's property and pay off sum advanced by creditor—Debtor declining to make the mortgage through broker, if discharges broker's liability to pay off advance.* D being in financial difficulties approached V for an advance of 1½ lac of rupees, representing that he was about to raise a loan of 11 lacs on a first mortgage of certain Mills through broker *B* and would pay off V's advance out of that loan. V advanced the money to *D* upon *B*

CONSTRUCTION—*contd.*

signing a guarantee to this effect: "In consideration of your having at my request acceded to the proposal of *D* to advance to him a sum of Rs. 1½ lacs, I hereby bind myself to you to procure a loan within two weeks of Rs.11 lacs as the first mortgage of the Mills, and to pay you thereout the sum of Rs. 1½ lacs agreed to be advanced by you to the Mills:" *Held*, that by this document, *B* gave a substantial undertaking that a loan should be procured and out of the loan the sum of Rs. 1½ lacs was to be paid to *V*, and not merely a conditional undertaking that *B* would procure the lending of 11 lacs if a first mortgage of the Mills was given and pay thereout Rs. 1½ lacs to V VISSANJI, SONS & COMPANY *v.* SHAPURJI BURJORJI (1912)
I. L. R. 36 Bom. 387
16 C. W. N. 769

18. ———— Bond—*Construction of—Rate of interest—Stipulation to pay interest at Re 1-9 per month and compound interest with six monthly rests—"Per cent." if to be read into the stipulation.* Where the executants of a bond which secured an advance of Rs 2,000 stipulated therein "we shall pay interest on this sum at the rate of Re. 1-9 per month" and "we shall pay the interest every six months from this date. If we fail to do so interest and compound interest shall at the end of every six months be added to the principal and we shall go on paying interest therein at the aforesaid rate until the time of repayment": *Held*, that, upon a true construction of this bond, the stipulation was that interest should be paid at the rate of Re. 1-9 per cent. per month INDRO DEB DAS *v* AZIZUR RAHAMAN SARKAR (1912)
16 C. W. N. 957

19. ———— Agreement—*Broker's commission—Authority "to raise loans" on security of immoveable property—Broker, if entitled to commission on finding capitalist, when latter insists on a margin of security not proposed or agreed to by borrower—Construction of contract—Broker if must find funds or only capitalist—English rules of construction, artificial if to be applied here—Time, when essence of contract—Quantum meruit, for services if may be claimed when no case established under contract as expressed.*

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plaintiffs. "We authorise you to raise a loan of 11 lakhs (or less, if so required) to clear all our present debts on mortgage of our entire estate at an interest of 7 per cent. per annum within the period of one month. We agree to pay you a commission of 5 per cent. on such amount as may be advanced by the capitalist to us . . . ."

. . . the capitalist insisted upon satisfactory proof that there was that margin of security before he would agree to make the advance. The negotiation with the capitalist having for this reason fallen through, the plaintiffs sued for recovery of the stipulated commission: *Held*, that upon a construction of the contract that the stipulation was not merely to find a capitalist ready and willing to advance the money but also to procure funds for the satisfaction of the debts of the defendants. That even assuming that the plaintiffs undertook only to find a person ready and willing to advance the money, they had not done so, as the capitalist whom they found imposed a condition as to the margin of security never proposed or accepted by the borrowers, and at no stage of the negotiations was he ready to accept the estate as it stood as security for the loan, *i.e.*, to advance the funds on the terms prescribed by the principal *Held*, also, that time was, in the circumstances, of the essence of the contract, and no case had been made out of an extension of time by continuation of *bonâ fide* negotiations for completion. *Quære:* Whether an implied contract, to pay the agent a *quantum meruit* for his services could be presumed, when there was an express contract upon which the plaintiff's case failed *Held*, that no such case having been made by the plaintiffs, and no evidence given to show upon what scale remuneration could be calculated *quantum meruit* no relief could be granted on that basis, *Quære:* Whether the technical meaning ascribed to the expression "to raise a loan" in English cases, implying that the agent who is engaged "to raise a loan" discharges his duty

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Held, that where the remuneration of an agent is

he undertook to do, even if the principal acquires no benefit from his services, and, except where there is an express agreement or special custom to the contrary even if the transaction in respect of which the remuneration is claimed falls through, provided it does not fall through in consequence of any act or default of the agent. KISHAN PROSAD SINGHA *v.* PURNENDU NARAIN SINGHA (1911) . . . **16 C. W. N. 753**

20. ———— Lease—*Unilateral mistake, not induced by fraud—More land included in lease than intended by lessor—Rectification, mistake when ground for—Contract, if may be repudiated—Second appeal* Where as a matter of construction a certain plot of land was found to be included in a lease having regard to its terms and the character of the property, but the Court of Appeal below refused to give effect to this construction on the ground that the lessor did not intend to include this plot in the area leased *Held*, on second appeal that in the absence of fraud making the document inoperative as a title to the land in suit, or of failure through a common mistake to give correct expression to the common intention of the parties, such as would be a ground for its rectification, the

21. ———— *Misconstruction of a document does not always confer a right of second appeal* KULDIP NARAYAN RAI *v* BANWARI RAI . . . **5 Pat. L. J. 251**

CONSTRUCTION OF STATUTES.

See ASSAM LABOUR AND EMIGRATION ACT, (VI OF 1901.) **2 Pat. L. J.** [illegible]

See BENGAL TENANCY ACT, 1885 [illegible]
5 Pat. L. [illegible]

See CHOTA NAG. [illegible]

CONSTRUCTION—*contd.*

See CRIMINAL PROCEDURE CODE, 1898—
ss. 14, 15. . . 3 Pat. L. J. 291
ss. 408, 413. . 4 Pat. L. J. 435
s. 524 . . . 5 Pat. L. J. 321

See DEFAMATION . I. L. R. 40 Calc. 433

See DEFENCE OF INDIA ACT.
3 Pat. L. J. 537 & 581.

See INTERPRETATION OF STATUTES

See MUSSALMAN WAKF VALIDATION ACT.
I. L. R. 39 Bom. 563

See NON-OCCUPANCY RIGHT.
3 Pat. L. J. 1

See PENAL CODE, ss. 361, 366.
4 Pat. L. J. 74

See STATUTES, CONSTRUCTION OF.

———— **Consolidating Statutes**—
See EXECUTION.
I. L. R. 38 Mad. 199

1. ———— *Rights if may be conferred by implication from language of statutes.* Rights cannot be conferred by mere implication from the language used in a statute. There must be clear and unequivocal enactment. *Arnold* v. *Mayor of Gravesend, 2 K. & J. 574, 591 : s. c. 110, R. R. 327*, followed. AMULYA RATAN SIRCAR *v.* TARINI NATH DEY (1914) . 18 C. W. N. 1290
I. L. R. 42 Calc. 254

2. ———— Where a later Act of Legislature does not purport or affect to supersede an earlier Act, the Court will endeavour to read the two enactments together and to avoid conflict, if possible. RANGACHARYA *v.* DASACHARYA (1912)
I. L. R. 37 Bom. 231

3. ———— *Bombay Land Revenue Code (Bom. Act V of 1879), s. 48.* The Bombay Land Revenue Code (Bom. Act V of 1879) is a taxing enactment and must be construed strictly in favour of the subject. SECRETARY OF STATE *v.* LALDAS (1909) I. L. R. 34 Bom. 239

4. ———— *City of Bombay Municipal Act (Bom. Act III of 1888), s. 251A, cl. (a)—Building—"Directly over or directly under"—Construction.* Where it is not suggested that a word bears any technical sense in the context in which it occurs, the construction must proceed upon the general rule that statutes are presumed to use words in their popular sense. CURRIMBHOY EBRAHIM *v.* MUNICIPAL COMMISSIONERS (1909)
I. L. R. 34 Bom. 496

5. ———— Interpretation—*Preamble.* Though the preamble of an Act does not control any plain enactment which follows it, it may be a most useful guide when a question of doubt arises upon the construction of a particular provision and considerations relating to the scope of the Act are involved. SITAL CHANDRA CHOWDHURY *v.* DELANNEY (1916) . 20 C. W. N. 1158

6. ———— *Per* MOOKERJEE, *J.* In construing a section of an Indian Act which is professedly based on an English Act and which, in fact, reproduces almost word for word the language of the English enactment, we are in practice, if not in theory, bound by the decision of the English Court of Appeal. RAMENDRA NATH RAY *v.* BROJENDRA NATH DASS (1917)
21 C. W. N. 794
I. L. R 45 Calc. 111

CONSTRUCTION—*contd.*

7. ———— The Court should not interpret the statutory law when it provides for a specific procedure, by reference to decisions pronounced under a different system of procedure. RADHAKISSEN KHETTRY *v.* LUKHMICHAND JHAWAR
24 C. W. N. 454

8. ———— The rule that enactments in a statute are generally to be construed to be prospective and intended to regulate the future conduct of persons is deeply founded in good sense and strict justice and in the absence of clear word to that effect a statute will not be construed so as to take away a vested right of action accrued before it was passed. PROMOTHA NATH PAL CHOUDHURI *v.* SAURAV DASI CHAUDHURANI
24 C. W. N. 1011

CONSTRUCTION OF WILL.

See HINDU LAW—ADOPTION.
I. L. R. 37 Bom. 197

See HINDU LAW—WIDOW'S ESTATE.
L. R. 46 I. A. 259

See NAIKINS. . I. L. R. 37 Bom. 116

See SUCCESSION ACT (X OF 1865).
I. L. R. 37 Bom. 644

See WILL. . I. L. R. 38 Bom. 697
I. L. R. 43 Bom. 88
I. L. R. 41 Bom. 70

CONSTRUCTIVE NOTICE.

See HINDU LAW—JOINT FAMILY PROPERTY . . 2 Pat. L. J. 513

See MORTGAGE I. L. R. 43 Calc. 1052
I. L. R. 48 Calc. 1

See PRINCIPAL AND AGENT.
L. R. 46 I. A. 250

See RATES AND TAXES.
I. L. R. 42 Calc. 625

See TRANSFER OF PROPERTY ACT, 1882, s. 41 . . . 5 Pat. L. J. 521

CONSTRUCTIVE OFFENCE.

See CONSPIRACY I. L. R 41 Calc. 754

CONSTRUCTIVE POSSESSION.

See MINES AND MINERALS
5 Pat. L. J. 273

CONTEMPORANEOUS AGREEMENT.

See EVIDENCE ACT (I OF 1872), s. 92, PROV. I . . I. L R. 35 Bom. 93

CONTEMPORANEA EXPOSITIO.

See SANAD, CONSTRUCTION OF.
I. L. R. 36 Bom. 639

CONTEMPT OF COURT.

See ANONYMOUS COMMUNICATION.
I. L. R. 43 Calc. 685

See CIVIL AND CRIMINAL CONTEMPT.
I. L. R. 45 Calc. 169

See CIVIL PROCEDURE CODE, 1882, s. 170.
I. L. R. 33 All. 68

See CIVIL PROCEDURE CODE 1908, s. 115.
I. L. R. 42 All. 26

CONTEMPT OF COURT—*contd.*

See LEGAL PRACTITIONERS ACT (XVIII OF 1879), s. 14.
I. L. R. 39 Mad. 1045

See PROFESSIONAL MISCONDUCT.
I. L. R. 44 Calc. 639

1. ———————— *Its quasi-criminal character—Comments reflecting on witness and party under cross-examination, if contempt—Contempt* [illegible]

[illegible]

them on application of private party, if to be discharged—Person charged, waiving objection subject to question of costs—When apology accepted by Court, if would allow costs when rule omitted name. An article in a newspaper reflecting on the party to a suit more especially when he is a witness under cross-examination is a contempt of Court. Proceedings in contempt are of a *quasi*-criminal character and all the rules of Court must be observed strictly in respect thereof. Where a private party applied for a rule against the editor, printer and publisher of a newspaper alleging contempt of Court and omitted to name them respectively:—*Held*, that the rule was liable to be discharged. If the persons concerned waive the objection and offer apology which is accepted by Court, the Court would not order any costs against them when the rule omitted to name them. WESTON *v.* EDITOR, PRINTER AND PUBLISHER OF THE "BENGALEE" (1911) . . **15 C. W. N. 771**

2. ———————— *High Courts in India made Courts of Record by Charter, jurisdiction of, to commit for criminal contempt of inferior Magistrate's Court in Mofussil—Common law and inherited powers of Calcutta High Court—Powers inherited by Calcutta High Court from the Supreme Court, the Suddar Dewani and Suddar Nizamat Adawlats—Original Side and its jurisdiction—Calcutta High Court, if possessed power of English King's Bench, as custos morum or guardian and protector of justice throughout the Kingdom—Power as Court of Record and one having superintendence over other Courts, limits of their power—Contempts not in the face of the Court, how punishable—Appellate jurisdiction, contempt of, deterring witnesses from deposing before Magistrate, if contempt of High Court—Pleadings—Criminal contempt, motion for, must proceed on legal evidence—Statement on information and belief, if may be relied on in contempt proceedings—In Civil interlocutary motion, source of information to be stated—Denial when not given by person charged with criminal contempt, if admission.—Admission in affidavit, if may be considered—Supplementary affidavit or evidence in course of contempt proceedings—Superintendent and Remembrancer of Legal Affairs, status of, to move for or instruct Advocate-General for commitment for contempt on Original Side—Governor in Council as party to motion for contempt of lower Criminal Court—Right of person charged with contempt to know who is moving—Costs—Civil and Criminal contempt—Summary proceeding in contempt, drawback of to be sparingly resorted to—Contempt proceedings, to be taken with the greatest caution—Taken only when interferes with course of justice, and not contingent or too remote—Where no real prejudice prima facie tendency of language or reprehensible or objectionable writing, if enough—Commenting on the conduct or method of investigation by Police, if contempt of Court—Criminal Investigation Department, making imputations against, pending trial, if contempt —"Positive evidence," meaning of—Leave to move upon conditions, not fulfilled—Motion, petition of, and party moving, amendment of, when allowable—Indian High Courts Act, 24 & 25 Vict., c. 104, ss. 1, 3, 9, 15—Letters Patent, 1862, cls. 1, 26 and 27, Letters Patent, 1865, cls. 27 and 28—Supreme Court Charter of 1774, cls. 2. 5, and 21—53 Geo. III, c. 155—Sudder Dewani Adawlat, 21 Geo. III, c. 70, s. 21—Sudder Nizamat Adawlat—Reg. IX (Bengal) of 1793—Reg. II (Beng.) of 1901, s. 2—Act XXX of 1841—Indian Penal Code (Act XLV of 1860) if repeals all penal laws pre-existing.* Neither the Supreme Court nor the Sudder Dewani Adawlat nor the Sudder Nizamat Adawlat had jurisdiction to commit a person for contempt of a Criminal Court in the mofussil. The Calcutta High Court, which has inherited all jurisdictions and every power and authority in any manner vested in the Supreme Court, the Sudder Dewani Adawlat [illegible]

[illegible]

summary proceeding which the King's Bench Division of the High Court in England assumed in that case has been inherited by it from the old King's Bench and not from the other Courts of Record which became amalgamated in the English High Court. That jurisdiction rested on the special power of that Court to correct and protect against extra-judicial error and to punish every kind of misdemeanour, on a summary proceeding as well as an indictment or information, as the *custos morum* or the guardian and protector of public justice throughout the Kingdom, a dignity that reverted to it or was revived on the abolition of the Star-Chamber. The Common Law powers as *custos morum* never belonged to the Supreme Court of Calcutta, at least in regard to contempts of inferior Courts outside the Presidency Town, and the Calcutta High Court cannot lay claim to this power by inheritance or by reason of its having been constituted by Charter a Court of Record or by reason of its power of superintendence over the Courts of mofussil Magistrates. Under 13 *Geo. III, c. 63,* and the Charter of the Supreme Court of 1774 thereunder, and subsequent legislation, the criminal jurisdiction of the Supreme Court of Calcutta (apart from crimes maritime), was limited to the local limits of that Court except as to British subjects, and that Court had no general power over mofussil Criminal Courts. The Common Law was similarly limited in its application to the Presidency Town and to British subjects outside its local limits. The Supreme Court possessed no statutory jurisdiction over the mofussil Magistrates or other Courts of the East India Company except as provided in 53, *Geo. III, c. 155, s. 111,* and as regards contempts except in relation to such as were committed on the face of such Magistrates or Courts as provided in *Act XXX of 1841* and not [illegible] against in such [illegible]. The Sudder Nizamat Adawlat was [illegible] a Court of Record nor a King's Court. The High Court, however, has [illegible], as a Court of Record, power to [illegible] for any [illegible] itself in relation to any of those jurisdictions [illegible]

CONTEMPT OF COURT—*contd.*

the Court on its Original Crown Side would have power so to punish any interference with the due administration of justice by a Division Bench in relation to a criminal appeal pending before it amounting to an offence under the Common Law and might possibly have such power even before any appeal was pending, as for instance, where it was shown that witnesses were being deterred from giving evidence or the jury were likely be prejudiced. *Surendra Nath Banerjce* v. *The Chief Justice and Judges of the High Court of Bengal, I. L. R. 10 Calc. 109,* considered. *In re Abdool, 8 W. R. 32.* What may be a contempt of an inferior Court is not necessarily a contempt of the High Court. No person can be punished for criminal contempt unless the offence be proved by legal evidence. A statement made on information and belief is not legal evidence upon which a person may be committed for criminal contempt. A party charged with criminal contempt need not deny that which is not legally proved against him. *The Queen* v. *Stranger, L. R. 6 Q. B. 352; 40 L. J. Q. B. 91.* The absence of denial by such person cannot be taken to amount to an admission. But an admission in his affidavit in answer to a motion for committal for contempt can be taken into consideration by the Court. The power to commit for contempt by summary proceeding being an arbitrary, unlimited and uncontrolled power, should be restored to sparingly and with the greatest caution. It is not enough for its exercise that there should be a technical contempt of Court. It must be shown that it was probable that the publication would substantially interfere with the administration of justice. Notwithstanding the *primâ facie* tendency of the language where it appears that there was in fact no prejudice to any trial or the prejudice was contingent or too remote, the Court would not take summary proceedings in contempt. The fact that any writing is reprehensible or otherwise objectionable does not necessarily make it cognizable for contempt of Court: *Held,* that the articles in question in the present case did not constitute contempt of any Court. The "Superintendent and Remembrancer of Legal Affairs and *ex officio* Public Prosecutor, Bengal," cannot move or instruct counsel to move the High Court in the exercise of it Common Law jurisdiction, on its Original or Crown Side. The proper person to move the Court for contempt in the present case was the Governor-in-Council. The condition on which leave to serve a notice of motion is given must be complied with; otherwise the application would be liable to dismissal. *Per* JENKINS, *C. J. Quære:* Whether contempt of inferior Courts committed out of Court should not be left to be punished by the general law by indictment or otherwise and not by summary procedure, JENKINS, *C. J.* "Positive evidence" means evidence which goes expressly to the very point in question; and that which, if believed, proves the point without aid from inference or reasoning, as the testimony of an eye-witness to an occurrence as distinguished from indirect or circumstantial evidence. MOOKERJEE, *J.*—"Positive evidence" means direct evidence as distinguished from circumstantial evidence. JENKINS, *C. J.*—Where the articles impugned expressed distrust of the police and deprecated its mode of searches, arrests and treatment of prisoners but said nothing which would deter witnesses from giving evidence, they cannot be said to have constituted contempt of any Court. MOOKERJEE, *J.* The C. I. D. by reason of having investigated an offence under inquiry or trial, does not become the prosecutor thereof, and an imputation that the investigation has been carried on in an objectionable manner does not constitute a contempt of Court. MOOKERJEE *J.* It is a matter of vital importance for the party, against whom an order for commitment for contempt is sought, to know the person or persons at whose instance the application is made. If the application is refused, he is entitled to know who is responsible for his costs. If the application is successful he is entitled to know who is the respondent in a possible appeal by him. The motion for commitment for contempt having failed, costs were awarded to the respondent to be assessed as between party and party as on a hearing on the Original Side. *In the matter of the* AMRITA BAZAR PATRIKA (1913)

I. L. R. 41 Calc. 173
17 C. W. N. 1253

3. ———— *Receiver appointed by the Court, interference with, while discharging his duty—Interference by one not a party to the suit if contempt—Strangers to the suit, duty of, when affected by order appointing Receiver—Practice in contempt matter—Affidavit.* The right of a stranger in possession to continue in possession is not affected by the order appointing a Receiver, but the fact of his possession does not give him the privilege to interfere with the Receiver directed to take possession of the property. His proper course is to apply to the Court for the redress of his grievance. If he interferes with the Receiver he does so at his peril. The Court will not permit a Receiver appointed by its authority to be interfered with or dispossessed of the property he is directed to receive by any one, although the order appointing him may be perfectly erroneous. The Court requires and insists that application should be made to the Court for permission to take possession of any property of which the Receiver either has taken possession or is directed to take possession. *Ames* v. *The Trustees of the Birkenhead Docks, 20 Beav. 353,* followed. RAI CHAUDHURI *v.* NOLINI PROKAS SEN (1913) . . **18 C. W. N 289**

4. ———— *Practice—Appeal—Assisting in contempt—Procedure.* Where the prohibitory injunction on the defendant firm made no mention of *M*, an assistant, or of servants and agents, but the notice of motion for committal for breach thereof was upon *M* who did nothing after service on him of the injunction. *Held,* that the notice of motion was erroneous, and the procedure which had been adopted was misconceived: *the* proceedings against *M*, if any, should have been for *assisting* in a contempt of Court. *Held,* also, (on the merits) that there had been no contempt or participation in contempt on *M*'s part, as all that he did, had been done prior to the injunction. MARSHALL *v.* GRANDHI VENCATA RATNAM (1915)

I. L. R. 42 Calc. 1169

5. ———— *What constitutes contempt—Actual impediment of justice, if necessary to complete offence—Jurisdiction of High Court to punish summarily contempt out of Court—Liability of printer and publisher of newspaper, irrespective of knowledge of contents of offending publication—Summary jurisdiction in respect of contempt, when should be exercised—Civil and criminal contempt, distinction between—Contempt by attack on Court, criminal, nature of—Rule of interpretation appli-*

CONTEMPT OF COURT—*contd.*

cable to writing constituting contempt—Evidence Act (I of 1872), s. 74—Returns filed with Registrar of Joint Stock Companies, if public document and secondary evidence thereof is admissible—Onus on party producing certified copy to prove execution of document—Liability for contempt of director of limited company owning newspaper—Proceeding in contempt, if lies against Corporations—Necessity of legislation for the registration of editors of newspapers. In a suit decided in the Original Side of the High Court the trial Judge (GREAVES, J.) held that the Calcutta Improvement Trust had power to acquire land compulsorily for the purpose of recoupment. In an appeal against a decision of the Subordinate Judge of 24-Parganahs two Judges of the Court (MOOKERJEE and CUMING, JJ.) sitting as a Division Bench on the Appellate Side held that the Trust had no such power. When

(i) "There is a mischievous rumour afloat which should be contradicted. It is stated that a vigorous attempt is being made to get up a Bench to consider the appeal on the judgment of Mr. Justice Greaves in connection with the acquisition of surplus land by the Calcutta Improvement Trust according to somebody's choice We do not believe that it is possible for anyone, far less the Chairman of the Trust, to secure a Bench after his own heart as a counterpoise to the Mookerjee and Cuming Bench. We are sure the interest of every

constitution of the Apellate Bench of the Calcutta High Court before which appeals against the awards of the Improvement Trust are to be heard. It is *known to the reader how this Bench was originally* composed of Sir Asutosh Mookerjee and the Hon'ble Justice Cuming, and how, latterly, it has come to be presided over by the Hon'ble the Chief Justice and Mr. Justice Woodroffe. Rumour has it that for purposes of hearing Improvement Trust appeals the Bench is going to be strengthened by the appointment of Mr. Justice Chitty. Now what neither the public n
arranger
contend
Court in
appeal cases in which the Improvement Trust is concerned, a contention, however, which we do not believe the Chief Justice will care to advance, why should there be a Special Bench of three, and not a Full Bench of five, on which at least two Indian Judges could find seats. As a matter of fact, as landowners in Calcutta are mostly Indians

ciate Indian Judges with their European colleagues. The withdrawal of Sir Asutosh has given rise to unsavoury impressions in the public mind since this proposed arrangement is to follow close upon the heels of his judgment in the case of *The Improvement Trust* v. *Chandra Kanta Ghosh, 21 C. W. N. 8.* Be that as it may, we have perfect faith in the present Chief Justice and believe that as soon as Sir Lancelot Sanderson understands the public feeling in the matter his Lordship will rather form

CONTEMPT OF COURT—*contd.*

a Full Bench, or at least associate an experienced Indian Judge with himself, for the hearing of Improvement Trust appeals." Proceedings in contempt were taken against the printer and publisher of the newspaper and the directors and manager and secretary of the company called "The Amrita Bazar Patrika Co., Ltd.," to which the newspaper belonged in respect of the said two articles: *Held*, that the articles constituted a contempt of Court not only on the ground that they scandalized the Court, but also on the ground that they were calculated to prejudice a litigant and interfere with the due course of justice. That the High Court in the Indian Presidencies are Superior Courts of record. The offence of contempt of Court and the power of the High Court to punish it are the same in such Courts as in the Superior Courts in England. It has the power of summarily punishing for contempt out of Court in relation to any of its jurisdictions That the jurisdiction to punish for contempt is not obsolete. That the printer and publisher of a newspaper is liable for contempt even though he was not aware of the

has in respect of a contempt of Court should be exercised with great care, and should only be exercised when the case is beyond all reasonable doubt, and this should especially be the case when the proceedings are at the instance of the Court itself. That the question was not whether the article, in fact, obstructed or interfered with the due course of justice, but whether it was calculated to obstruct and interfere with the due course of justice. *Per* WOODROFFE, *J.*—That all proceedings, whether in respect of civil or criminal contempts, are of a criminal nature when their *object is to punish by fine or imprisonment, but* the procedure in such cases is not in all respects the same as in an ordinary criminal case. Both the offence, as also the jurisdiction and procedure under which it is tried, are *sui generis.* As regards

the terms of that section. *Per* MOOKERJEE, *J.*—That a criminal contempt is conduct that is directed against the dignity and authority of the Court. A civil contempt, on the other hand, is failure to do something ordered to be done by a Court in a civil

at least, when the purpose is merely to secure compliance with a judicial order made for the benefit of a litigant, may be deemed instituted at the instance of the party interested and thus to possess a civil character. But here also refusal to obey the order of the Court may render it necessary for the Court to adopt punitive measures against the person who has defied its authority

CONTEMPT OF COURT—*contd.*

stage, at least, the proceedings may assume a criminal character. Where the contempt consists in an attack upon the Court the proceedings instituted to vindicate its dignity are of a criminal nature, even though the attack has been made in connection with civil suits or appeals either actually decided or pending or about to be taken up for disposal. That in deciding whether there has been a contempt the obvious course to pursue is to read the offending words as they stand and to attach to the words used their natural meaning without the assistance of a laborious commentary. It is incumbent on the Court in all cases to consider the general tone of the writing. The meaning and intent are to be determined by a fair interpretation of the language used and are matters of law for the Court as to whether or not they constitute contempt. Disclaimer on the part of the publisher as to any intentional disrespect to the Court is, consequently, not a sufficient defence when the purpose and meaning of the writing is obviously of a contrary import. If the language is fairly capable of an innocent interpretation the Court will not be astute to read into it a sinister import. But if the intent is fairly clear liability to punish for contempt of Court cannot be successfully evaded by the use of a transparent artifice. That the two articles relating to the same topic and published in the editorial columns of the same newspaper at a brief interval of time between them might legitimately be read together to determine their scope and purpose, even though they were proved not to have been written by the same person. *Per* WOODROFFE and MOOKERJEE, *JJ.*—That the returns in the custody of the Registrar of Joint Stock Companies constitute public records of private documents within the meaning of s. 74 sub-s. (2) of the Evidence Act, and secondary evidence thereof is admissible under s. 65, cl. (*e*). *Per* MOOKERJEE, *J.*—That although secondary evidence may be admissible, the party who produces the evidence is not relieved of his obligation to prove the execution of the document just as if the original had been produced unless the case is covered by s. 90 of the Evidence Act or the legislature has expressly provided that the document or endorsement thereon is receivable in evidence without proof of execution. *Per* MOOKERJEE, *J.*—That the statement in the affidavits of two of the defendants could not be used to the detriment of the other defendants as the proceeding was in the nature of a criminal trial and supplementary evidence could not be given so as to prejudice the defendants. *Per* MOOKERJEE, *J.*—That it cannot be held as a matter of law that the directors of a limited company which owns a newspaper are liable to be committed for contempt of Court on account of a libel published in the paper. *Per* WOODROFFE, *J.*—That the question whether persons in the position of directors are responsible must depend on the facts of each case. *Per* MOOKERJEE, *J.*—That proceedings by way of contempt would lie against Corporations, as well as individuals; in the case of individuals the process is by attachment of the person, followed by fine or imprisonment or both; in the case of Corporations the process is by fine, followed by sequestration or distraint. The Court sentenced the printer and publisher to pay a fine of Rs. 300 and discharged the other defendants in the absence of proof of their complicity with the publication of the offending articles. *In the Matter of the* AMRITA BAZAR PATRIKA (1917) . **21 C. W. N. 1161**

CONTEMPT OF COURT—*contd.*

6. ——————— *Civil and Criminal Contempt—Court of Record—Prosecution by Judges—Trial by the same Judges—Jurisdiction—Standard of proof—Fair comment—Publication—Printer, liability of—Manager and Directors of Newspaper Company, liability of—Evidence Act (I of 1872) ss. 3, 74 (2)—Editor, registration of.* Where a newspaper unlawfully published articles scandalising the High Court and the Chief Justice in his administration thereof, by allegations implying that the Chief Justice had constituted a packed Bench, the articles having a tendency to prejudice the parties and interfere with the administration of justice. *Held per* CURIAM (MOOKERJEE, *J.*, discussing whether contempt proceedings were civil or criminal), that the Judges had jurisdiction to hear the Rule though issued of their own motion that the articles constituted a contempt of Court that the printer of the newspaper was liable therefor: that there was no sufficient evidence of the existence of an editor, that the *primâ facie* case of responsibility for the publication against two of the directors and the managers of the company owning the newspaper had been met, and that in the case of the third director, although the facts raised a case of strong suspicion against him it was just possible he might not be responsible for the publication and that he should be given the benefit of the doubt. The Rule was therefore made absolute against the printer, who was fined, and discharged as regards the other respondents. The Legislature should provide for the registration of the editor or the person really responsible for the contents of a newspaper. *Per* WOODROFFE, *J.* There is only one Standard of Proof applicable alike to civil and criminal trials, *vide* definition of "proved" and "disproved" in s. 3 of the Evidence Act. The word record includes a collection of private documents. *The Queen* v. *Gray,* [*1900*] *2 Q. B. 36, Surendra Nath Banerjee* v. *The Chief Justice and Judges of the High Court at Fort William in Bengal, I. L. R. 10 Calc. 109 : L. R. 10 I. A. 171, Legal Remembrancer* v. *Mati Lal Ghose and Others, I. L. R. 41 Calc. 173, McLeod* v. *St. Aubyn,* [*1899*] *A. C. 549, The American Exchange in Europe Case, 58 L. J. Ch. 706, St. James Evening Post Case, 2 Atk. 469, Daw* v. *Eley, L. R. 7 Eq. 49, In re Banks and Fenwick, 26 C. L. J. 401, Cheshire* v. *Strauss, 12 T. L. R. 291, Reg.* v. *Judd, 37 W. R. (Eng.) 143, Ex parte Green 7 T. L. R. 411, Weston* v. *Peary Mohan Dass, I. L. R. 40 Calc. 898,* referred to. MOTI LAL GHOSE AND OTHERS, *In re* (1917). **I. L. R. 45 Calc. 169**

7. ——————— The petitioner was the plaintiff in a suit in the Court of Small Causes which was decreed. Later, the Munsif on the Defendant's application for retrial or review issued a notice on the petitioner directing him to appear in Court with certain account books on a specified date and give his deposition, failing which the suit was to be decided against him. The petitioner did not appear as directed and the Munsif called upon him to show cause why he should not be fined for disobedience. Cause was shown by a petition but there was no appearance and the petitioner was fined for contempt of Court: *Held,* that the order was without jurisdiction and not covered by s. *151 C. P. C., or 480, Cr. P. C., or 175, I. P. C. S. 151, C. P. C.,* does not give the Court an absolute discretion to make any order it pleases. It does not certainly confer upon any Court a summary jurisdiction

CONTEMPT OF COURT—*concld.*

which it does not otherwise possess to punish contempts by fine or imprisonment. In the case there was no contempt committed in the view and presence of the Court. *In re Rasik Lal Nag, 20 C. W. N. 1284,* referred to. CHAGMAL SERAOGI *v.* KING-EMPEROR (1919) . 23 C. W. N. 389

8. ———— *Publication of proceedings in pending cases—Publication not permissible until the case comes on for hearing—Pleaders, duty of—Practice and procedure.* All proceedings in cases pending before a Court of Justice are privileged: they must not be published until the case comes on for hearing before the Court. *In re* KALIDAS J. JAHAVERI (1919)

I. L. R. 44 Bom. 443

CONTENTIOUS MATTER.

See INSOLVENCY **I. L. R. 42 Calc. 109**

See PARTIES . **I. L. R. 45 Calc. 862**

See TRANSFER OF PROPERTY ACT 1882
See s. 52 . **I. L. R. 42 All. 319**

CONTENTS OF DECREE.

See DECREE . **I. L. R. 38 Calc. 125**

CONTINGENT RIGHT.

See HINDU LAW—WILL.
I. L. R. 40 Calc. 274
I. L. R. 43 Calc. 432
I. L. R. 41 Calc. 642

See WILL . **I. L. R. 45 Bom. 88**

CONTINUING BREACH.

See UNITED PROVINCES MUNICIPALITIES ACT (I OF 1900), s. 147.
I. L. R. 36 All. 430

CONTINUING OFFENCE.

See ENCROACHMENT.
I. L. R. 37 Calc. 671

See PROSECUTION.
I. L. R. 37 Calc. 545

CONTINUOUS ACCOUNT.

See CHEQUE, PAYMENT BY.
I. L. R. 42 Calc. 1043

CONTRACT.

See ABWAB. . **I. L. R. 40 Calc. 806**

See AGRA TENANCY ACT (II OF 1901), ss. 10, 20, 83 **I. L. R. 33 All. 695**

See ARBITRATION.
I. L. R. 42 Calc. 1140

See BURDEN OF PROOF. **4 Pat. L. J. 517**

See CAUSE OF ACTION.
I. L. R. 41 Calc. 825

See COMPROMISE **I. L. R. 42 Calc. 801**
1 Pat. L. J. 48

See CONSTRUCTION OF CONTRACT.
I. L. R. 40 Bom. 301

See CONSTRUCTION OF DOCUMENT.
16 C. W. N. 753

See CONTRACT ACT.

See CONTRACT FOR SALE.

See CONTRACT OF GUARANTEE.

CONTRACT—*contd.*

See CONTRACT OF SERVICE.

See CONTRACT TO LEND OR BORROW.

See CONTRACT ACT (IX OF 1872), s. 39.
I. L. R. 34 All. 273

See EMBANKMENT.
I. L. R. 41 Calc. 130

See FORWARD CONTRACT.
I. L. R. 40 Bom. 517

See GUARDIAN AND MINOR.
I. L. R. 38 All. 433

See HINDU LAW—ADOPTION.
I. L. R. 39 Bom. 528

See HINDU LAW—JOINT FAMILY.
I. L. R. 37 Bom. 340

See HINDU LAW (MITAKSHARA).
3 Pat. L. J. 396

See IJARADAR . **I. L. R. 48 Calc. 1078**

See ILLEGAL CONSIDERATION.
2 Pat. L. J. 630

See INSTALMENTS.
I. L. R. 35 Bom. 511

See MARKET FRANCHISE.
I. L. R. 47 Calc. 1079

See MASTER AND SERVANT.
I. L. R. 35 All. 132

See MINOR . **I. L. R. 34 All. 296**
I. L. R. 1 Lah. 389

See PESHKOSH **I. L. R. 45 Calc. 866**

See PRINCIPAL CONTRACT.

See PRINCIPAL AND AGENT.
I. L. R. 39 Calc. 892

See PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887) s 411, ACT 3.
I. L. R. 37 Mad. 533

See REGISTRATION ACT. 1908, ss. 17, 49.
I. L. R. 45 Bom. 8

See SPECIFIC PERFORMANCE.

See UNDER INFLUENCE.
I. L. R. 42 Calc. 286

See WORKMAN'S BREACH OF CONTRACT ACT (XIII OF 1859), ss. 2 AND 3.
I. L. R. 41 All. 390

———— breach of—

See LIMITATION ACT (IX OF 1908), ARTS. 97 AND 116. **I. L. R. 45 Bom. 955**

See LOSS OF GOODS.
I. L. R. 44 Calc. 16

———— breach of, by labourer or maistry—

See MADRAS PLANTERS LABOUR ACT (I OF 1903), ss. 24, 35.
I. L. R. 39 Mad. 889

———— breach of promise of marriage—

See HINDU LAW **I. L. R. 44 Bom. 446**

———— breach of, to deliver goods at a particular time—

See CONTRACT ACT (IX OF 1872), ss. 39, 55, 63, 73. . **I. L. R. 37 Mad. 412**

———— by bought and sold notes—

See ARBITRATION **I. L. R. 41 Calc. 35**

CONTRACT—*contd.*

——— by members of Hindu joint family—

See Hindu Law—Joint Family.
I. L. R. 39 Bom. 715

——— C. I. F. terms—

See Contract C. I. F.

——— construction of—

See Sale of Goods.
I. L. R. 43 Calc. 305

See Mortgage . I. L. R. 44 Calc. 542

——— Counter proposals do not constitute—

See Registration Act, 1908, ss. 17 and 49 . . I. L. R. 45 Bom. 8

——— for monthly deliveries—

See Sale of Goods.
I. L. R. 43 Calc. 305

——— implied contract to pay compound interest—

See Bankers . I. L. R. 44 Bom. 474

——— illegality of—

See Contract Act (IX of 1872), ss. 56 (2) and 65. I. L. R. 40 Bom. 570

——— incapacity to make—

See Hindu Law—Minor.
I. L. R. 38 Mad. 166

——— induced by threat to commit suicide—

See Contract Act (IX of 1872), ss. 15, 16 . . I. L. R. 41 Mad. 33

——— made before 1886—

See Malabar Tenants' Improvements Act (Mad. Act I of 1900).
I. L. R. 36 Mad. 410

——— made by telegram—

See Civil Procedure Code 1908, O. 7 r. 10 . . I. L. R. 1 Lah. 203

——— of pre-emption—

See Pre-emption I. L. R. 38 Mad. 114

——— public policy—

See Contract Act 1872, s. 23.
I. L. R. 44 Bom. 6

——— recision of—

See Limitation Act (IX of 1908), Sch. I, Art. 95 . I. L. R. 37 Bom. 158

See Sale . I. L. R. 43 Calc. 790

——— suit for specific performance of—

See Limitation Act (IX of 1908), Sch. I, Art. 113 . I. L. R. 41 Mad. 18

——— to contribute to costs of litigation—

See Contribution . 1 Pat. L. J. 201

——— to pay money—

See Marriage . 15 C. W. N. 447

——— to sell—

See Contract for Sale.

See Contract Act (IX of 1872), ss. 39, 55, 64, 65, 73, 74 and 75.
I. L. R. 38 Mad. 178

CONTRACT—*contd.*

——— to sell—*contd.*

See Hindu Law—Alienation.
I. L. R. 38 Mad. 1187

See Registration Act, 1877, ss. 3, 17, 40.
I. L. R. 35 Mad. 63

——— to sell goods without authority—

See Limitation Act (XV of 1877), Sch. II, Arts. 36, 115, 120.
I. L. R. 38 Mad. 275

——— Risk Note 'B'—

See Railway Coy.
I. L. R. 45 Bom. 1201

——— Signed by party personally—whether oral evidence can show he contracted as agent—

See Evidence Act, 1872, ss. 91 and 92.
I. L. R. 45 Bom. 1242

——— variation of—

See Sale for arrears of revenue.
I. L. R. 39 Calc. 981

——— void—

See North-Western Provinces Rent Act (XII of 1881).
I. L. R. 39 All. 645

——— Unconscionable bargain—

See Landlord and Tenant. (Misc.)
1 Pat. L. J. 604

1. ——— Construction of—"*Or 700-800 say seven to eight hundred tons*" *Words of description and not of estimation—Warranty—Equitable set-off.* The plaintiff, owner of a stock of coal at Shalimar Depôt, agreed to sell to the defendant "the entire stock at Shalimar Depôt or 700-800 say seven to eight hundred tons of steam coal" for immediate delivery. The entire stock at Shalimar Depôt in fact amounted to 469 tons only, which the plaintiff duly delivered. On a suit by the plaintiff for the price of the coal sold and delivered :—*Held*, that the words "or 700-800, say seven to eight hundred tons," must be construed to be descriptive of the words "entire stock" and not merely words of estimation; that the delivery of only 469 tons was a breach of the contract by the plaintiff and that the defendants were entitled to set-off against the plaintiff's claim the damages caused by such breach. Kallyanjee Shamjee *v.* Shorrock (1910)
I. L. R. 37 Calc. 334

2. ——— Sale—Deposit—*Failure of purchaser to complete contract—Vendor entitled to retain deposit.* Plaintiff agreed to purchase 500 bales of cotton yarn from defendants and to deposit 5 rupees per bale as earnest money. He deposited somewhat more than half of the earnest money and thereafter repudiated the contract. *Held*, that plaintiff was not entitled to recover that portion of the earnest money which he had paid. *Collins* v. *Stimson, 11 Q. B. D. 142, Howe* v. *Smith, L. R. 27 Ch. D. 89, Ex parte Barrell ; In re Parnell, I. L. R. 10 Ch. App. 512,* and *Bishan Chand* v. *Radha Kishen Das, I. L. R. 19 All. 489,* referred to. Roshan Lal *v.* The Delhi Cloth and General Mills Company (1910) . I. L. R. 33 All. 166

3. ——— Suit for damages for breach of contract is not supplying railway sleepers according to contract—*Specification of Railway Company as to dimensions and quality of sleepers—Implied warranty where agents had knowledg*

CONTRACT—*contd.*

of purpose for which the sleepers were required—Stipulation that "passing" of sleepers was to be by manufacturer, a party to contract—Requirements in such a case—Insufficiency of means taken to make sleepers conform with the contract—"Passing" of sleepers not reliable. In this case the respondent was the transferee of contracts entered into by one Iyer (i) with the Madras Railway Company to supply them with 1,500 sleepers, and (ii) with the appellants through their agents at Madras to purchase from them 1,500 sleepers to enable him, as he stated to the appellants' agents, to carry out his contract with the Madras Railway Company the basis of which was a specification of the Railway Company's requirements in the matters of dimensions and quality. The contract with the appellants through their agents was contained in letters which passed between the parties, and was never embodied in a formal instrument. In one of the letters written by the agents to Iyer it was stipulated that "the passing of our Moulmein or Rangoon friends the Bombay-Burmah Trading Corporation" (the appellants) "is as usual final as regards both measurement and quality." On the transfer of the contracts to the respondent a formal agreement was drawn up between him and the Madras Railway Company and duly executed by both, and in it the description of the sleepers to be supplied was practically identical with that in the specification

respondent for damages in consequence of the rejection by the Railway Company of a quantity of the sleepers as not being in accordance with the contract nor fit for the purpose for which they were required, one of the questions raised was whether Iyer had ever given a copy of the specification of the Railway Company to the appellants' agents and so made it the basis of his contract with the appellants. As to this the first Court found that he did so, and the Appellate Court came to a contrary conclusion: *Held,* that it was unnecessary to decide the question, *first,* because their Lordships concurred with the opinion of the Court of Appeal that "the evidence showed that the specification merely contained an enumeration of the qualities of a good sleeper usually insisted on by railway authorities;" *secondly,* because the appellants having through their agents been fully informed of the purpose for which Iyer purchased the

Company: and the point was therefore irrelevant.

the stipulation as to the "passing" of the sleepers in the contract between themselves and Iyer which was confirmed by them on the transfer of the contract to the respondent, was maintainable. On this point the Courts below also differed, the first Court deciding in favour of the appellants, and the Court of appeal in favour of the respondent. *Held,*

CONTRACT—*contd.*

that on the true construction of the stipulation as to "passing" it must have been contemplated that there was some standard with which those sleepers should be compared, which at the lowest must have been the standard set up expressly or impliedly by the contract between the parties, which was the specification or at least the requirement that the sleepers were reasonably fit, as sleepers of the dimensions described, for use by the Madras Railway Company so that the right conferred upon the appellants by the stipulation amounted merely to the right to determine by and through the skilled and experienced persons whom they should necessarily employ for the purpose, acting honestly and impartially according to the best of their judgment whether the goods supplied were in conformity with the requirements of the contract under which they were so supplied. The real defence therefore rested upon the alleged fact that the sleepers were "passed" by the two expert persons employed for the purpose in the impartial

sent out as the manufacture of their employers; and there was not therefore any "passing" of the sleepers within the meaning of the contract. BOMBAY-BURMAH TRADING COROORATION, LIMITED, *v.* AGA MAHOMED KHALEEL SHIRAZI (1911)

I. L. R. 34 Mad. 453

4. ———— Sale of goods—Goods not appropriated—*Re-sale, power of, in contract—Measure of damages.* The plaintiffs contracted to sell 750 tons of sugar at an agreed price for delivery in equal instalments from August to December, 1910 under an agreement which contained the following term: "The goods to be at

option of re-selling the same in the open market by private sale or by public auction and hold the buyers responsible for all consequences." The defendants failed to take delivery of 125 tons under the August shipment The goods remained in bulk and were never ascertained or even appropriated for the purposes of the agreement. After notice to the defendants the plaintiffs purported to dispose of the goods under the power of re-sale provided in the agreement and brought an action for the recovery of damages estimated on the basis of such re-sale: *Held,* that as the goods had not been ascertained or even appropriated for purposes of the agreement, they did not come within the power of re-sale as framed, and the "re-sale" was inoperative as a method of measuring damages: *Moll Schutte & Co.* v. *Luchmi Chand, I. L. R. 25 Calc. 505,* distinguished *Semble:* A power of re-sale in a contract can be so framed as to operate on goods even before appropriation. Inasmuch as the claim for damages was based on re-sale in the circumstances of the case, no decree could be made for damages on the basis of the difference between the contract and market rates. ANGULLIA & CO. *v.* SASSON & CO (1912)

I. L. R. 38 Calc. 768

CONTRACT—*contd.*

5. ———————— *Covenant in sale-deed to discharge a debt due to a third party—Suit for compensation for breach—Actual damage not necessary to support suit—Cause of action—Limitation Act (XV of 1877), Sch. II, Art. 116.* On a sale of immoveable property the vendees covenanted with the vendors to pay a certain sum of money on account of a mortgage debt due by the vendors. They did not pay in accordance with the covenant, and the mortgagee thereupon brought a suit upon his mortgage and obtained a decree. *Held*, on suit by the vendors for compensation for breach of the covenant, that it was not necessary that the vendors should have suffered any loss before they could bring their suit, and that, as no time was specified in the sale-deed for the payment of the mortgage money, limitation began to run from the date of the execution of the deed. *Lethbridge* v. *Mytton, 2 B. & Ad. 772; Carr* v. *Roberts, 5 B. & Ad. 78, Loosemore* v. *Radford, 9 M. & W. 657; Ashdown* v. *Ingamells, I. R. 5 Exch. D. 280; Dorasinga Tevar* v. *Arunachalan Chetti, I. L. R. 23 Mad. 441; Raghunath Rai* v. *Brijmohan Singh, All. Weekly Notes, 1901, 14; Kumar Nath Bhattacharjee* v. *Nobo Bhuttacharjee, I. L. R. 26 Calc. 241,* and *Battley* v. *Faulkner, 3 Barn. & Ald. 228; 22 R. R. 390,* referred to. RAGHUBAR RAI *v.* JAIJ RAJ (1912)

I. L. R. 34 All. 429

6. ———— Return of goods not up to sample—*Purchaser not bound to return goods to vendor.* When goods sent to a purchaser, professedly in execution of a contract of sale, are not of the kind which the vendor had agreed to supply, it is not the duty of the purchaser to see that such goods are returned to the vendor: it is enough if he gives notice to the vendor that the goods are lying at the place to which they were sent at the vendor's risk. *Grimoldby* v. *Wells, L. R. 10 C. P. 391,* followed. PHAGGU MAL *v.* BABU LAL, (1913)

I. L. R. 35 All. 325

6(a). ———— **Goods supplied for special purpose**—Appellants agreed to supply 'C' sleepers for the Railway and therefore implied by warrants that their supplies would be good for that purpose—They were rejected as unfit for the purpose—Appellants relied on a stipulation in the contract to the effect that the "passing" of the sleepers by themselves would be final both as regards measurement and quality. *Held*, that this did not mean that they were entitled to deliver sleepers not up to warranty—They had to employ skilled and impartial people to say whether these supplies conformed with their warranty. THE BOMBAY-BURMAH TRADING CORPORATION, LTD., *v.* AGA MAHOMED KHALEEL SHIRAZEE

15 C. W. N. 981

7. ———— Carriage of goods on inlands waters—*of Lower Burma—Receipt for goods shipped on cargo boats plying on river Irrawaddy—So-called mate's receipts not negotiable documents, nor documents of title—Transfer of Property Act (IV of 1882), s. 137—Rate Circular issued by shipowners—Delivery by them of cargo without production of mate's receipt—Liability of Shipping Company.* The plaintiffs (appellants) advanced money to the first defendant under an agreement by which the money was to be employed in purchasing paddy to be stored in the plaintiffs' godown at Dounggyi and thence to be taken to Rangoon for sale. The agent of the first defendant at Dounggyi induced the plaintiffs' agent to allow the paddy to be shipped to Rangoon in boats belonging to the second defendant Company in the name of the first defendant as shipper. Eleven boat-loads in all were sent in respect of eight of which the first defendant paid the money to the plaintiffs' nominee at Rangoon. In respect of the cargoes of the last three boats the agent of the first defendant endorsed and delivered to the plaintiffs what purported to be mate's receipts for the cargoes loaded. The first defendant sold the cargoes, obtained delivery of the paddy from the defendant Company without producing the mate's receipts which the Company's agents had given for the paddy and delivered the paddy to the purchasers, paying nothing to the plaintiffs. In a suit against the first defendant for the amount due for advances, and against the defendant Company for damages for that amount on the ground that the Company's agents had delivered the paddy to the first defendant without production by him of the mate's receipts, and that their doing so was in breach of a representation which the Company made to the public by a printed Rate Circular or Notice, and by their usual course of business, that delivery of cargo carried by the Company's boats would only be made to persons holding mate's receipts for the cargo. *Held* (affirming the decision of the Chief Court of Lower Burma), that the receipt was not bill of lading, nor a mate's receipt, and not a negotiable instrument; nor was it a document falling within s. 137 of the Transfer of Property Act (IV of 1882), and therefore not a negotiable document in the sense of that section. It was merely a simple ordinary receipt for goods, and not a document of title upon the transfer of which the goods passed. *Held*, also, that the clause in the defendant Company's circular that "mate's receipts must be given up before discharge is allowed to commence, or in the event of the mate's receipt not having come to hand, the Company's usual guarantee must be signed," merely set forth a mode in which in conducting their own business, the Company would protect themselves in the course of their trade, but did not constitute an obligation upon which the plaintiffs were entitled to found any liability on the part of the Company if the clause was not strictly complied with. There was therefore no document constituting a contract, and no course of business from which a contract could be inferred between the plaintiffs and the defendant Company. Nor was there any failure of duty on the part of the Company in delivering the goods without production of the mate's receipt by reason of the knowledge that the plaintiffs had rights against the shipper, because the evidence in the case showed that these rights had been the subject of negotiation and settlement, which resulted in the plaintiffs consenting to the goods being forwarded in the name of the first defendant, to whom they were therefore rightly delivered. NATCHEAPPA CHETTY *v.* IRRAWADDY FLOTILLA COMPANY (1913) . . **I. L. R. 41 Calc. 670**

8. ———— Illegality—Promissory note executed for compounding a charge of grievous hurt if valid—*Practice—Revision—Grounds of interference—Moral as opposed to legal justice—Mere errors of procedure, or technical defects.* Where a promissory note was executed as consideration for compounding a charge of grievous hurt against a person who had died previous to the complaint, *Held*, that, as the offence could not be compounded except with the consent of the person to whom the

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grievous hurt was caused, the agreement to pay money, evidenced by the promissory-note was illegal and the promissory-note was consequently unenforceable. The fact that the complainant may have a right to claim damages for the injury caused to the deceased would make no difference, unless such right had been set up and proved. The High Court as a Court of Revision has no power to consider justice apart from such justice as the law recognises. *Sheikh Nubbee Buksh* v. *Bebee Hingon, 8 W. R. 412,* referred to MOTTAI *v.* THANAPPA (1914) . . I. L. R. 37 Mad. 385

9. ———— Minor's rights over property purchased for his benefit—*by maternal uncle—Sale of such property by father, invalid.* Where certain immoveable property was purchased for the benefit of a minor by his maternal uncle, and was subsequently sold by the minor's father, as if it belonged to the joint family of which himself and the minor were members: *Held,* in a suit by the minor after attaining majority to recover the property from the alienee, that the sale for the benefit of the minor was valid, and he was entitled to recover. *Kulla Pandithan* v. *Ramayi, Second Appeal No. 881 of 1909,* followed. *Kamta Prasad* v. *Sheo Gopal, I. L. R. 26 All. 342, Ulfat Rai* v. *Gauri Shankar, 8 All. L. J. 670,* and *Meghan Dube* v. *Pran Singh, I. L. R. 30 All. 63,* referred to. The essential fact which renders void a transaction by a minor is that some agreement by the minor is necessarily an essential part of the transaction. But when a contract by the minor is not a necessary condition for upholding his right in property, his right should be maintained. *Mohori Bibee* v. *Dharmodas Ghose, I. L. R. 30 Calc. 539 Navakotti Narayana Chetty* v. *Logalinga Chetty, I. L. R. 33 Mad. 312,* referred to. MUNIA *v.* PERUMAL (1914) . . I. L. R. 37 Mad. 390

10. ———— Earnest money forfeited—damages for breach *of contract—ascertainment of—deposit of, forfeiture of—Credit for forfeited amount.* Where a person deposits a certain amount as earnest-money for the due performance by him of his part of the contract under which he agrees to pay the other party a certain sum but breaks the contract thereafter, the other party who becomes entitled to retain the deposit as forfeited under the terms of the contract must, in a suit by him for damages for the breach of contract, give credit for the amount retained as forfeited and can only recover the difference between the actual loss sustained and the amount of the forfeited deposit. *Ockenden* v. *Henly, 1 E. B. & E. 485; s. c. 27 L. J. Q. B. 361,* followed. VELLORE TALUK BOARD *v.* GOPALASWAMI NAIDU (1914)
I. L. R. 38 Mad. 801

11. ———— Breach of contract—*Attachment of plaintiff's property in consequence—Right of suit without actual damage.* The defendant having agreed with the plaintiff as one of the terms of a compromise of a suit *in forma pauperis,* to pay part of the Court fee, if subsequently levied and having failed to do so in consequence of which the plaintiff's properties were attached, *Held,* that on the defendant's failure to pay the plaintiff according to his contract, the plaintiff was entitled to sue at once and recover substantial damages. RAMALINGATHUDAYAR *v.* UNNAMALAI ACHI (1914) I. L. R. 38 Mad. 791

12. ———— Privity of—*No right of suit, on the contract, generally. A* mortgaged his lands to *B,* part of the consideration therefor, being *B*'s promise to discharge a debt of *A* to *C.* *Held,* that *C* who was a stranger to the contract cannot sue *B* for the payment of his debt without joining *A* as a party. *Per curiam.* The following are some of the circumstances under which a stranger to a contract can sue the promisor:—(*a*) the creation of a trust in favour of the plaintiff in respect of the amount sued for; but a direction to pay as in the present case, does not of itself create an express or constructive trust, owing to the absence of the elements necessary to constitute a trust; (*b*) the creation of a charge on immoveable property by the promisor or allocation by the promisor of the specific money in suit in favour of the plaintiff; (*c*) the creation of a settlement on marriage, in which the plaintiff may be beneficially entitled, as provided by s. 23 of the Specific Relief Act: and (*d*) estoppel as against the promisor, owing to transactions between the plaintiff and the promisor. *Khwaja Muhammad Khan* v. *Husaini Begam, I. L. R. 32 All. 410,* and *Debnarain* v. *Ramasadhan, 17 C. W. N. 1143,* distinguished. ISWARAM PILLAI *v* SONNIVAVERU TARAGAN (1913) . . I. L. R. 38 Mad. 753

13. ———— Privity of contract—*Right of third parties to sue on covenant in lease.* Where on a lease of certain muafi land the lessees undertook, as between themselves and their lessor, to be responsible for the payment to the zamindars of certain sums which the muafidar was primarily bound to pay: *Held,* that the zamindars could not enforce this covenant by suit against the lessees. *Khwaja Muhammad Khan* v. *Husaini Begam, I. L. R. 32 All. 410, Touche* v. *The Metropolitan Railway Warehousing Company, L. R. 6 Ch. App. 671,* and *Debnarayan Dutt* v. *Chunilal Ghose, I. L. R. 41 Calc. 137,* distinguished. MANGAL SEN *v.* MUHAMMAD HUSAIN (1914)
I. L. R. 37 All. 115

14. ———— *Stranger's right of suit on—Family settlement—Trust—Provision for nuptials of plaintiff, a daughter of the family—Her right of suit though not a party to the contract.* A person though not a party to a contract can sue to enforce the terms thereof if it be a family settlement by which some provision is made for him or her as a member of the family (*e.g.*) for maintenance or marriage, though the same is not made a charge upon the family properties. *Iswaram Pillai* v. *Taregan, 26 Mad. L. J. 127,* distinguished. If the contract constitutes by its terms a trust in favour of the plaintiff, a stranger to the contract a suit to enforce such trust is beyond the cognisance of a Court of Small Causes. SUNDARARAJA AIYANGAR *v.* LAKSHMIAMMAL (1914)
I. L. R. 38 Mad. 788

15. ———— Interpretation of—Contracts should be interpreted by themselves and it is improper to interpret one contract by reference to another because they may seem to differ very little, as it may result in identifying contracts which are wholly different. *Gobbey* v. *Aratoon, I. L. R. 17 Calc. 449,* distinguished. *Southwell* v. *Bowditch, L. R. 1 C. P. D. 374,* followed. PATIRAM BANERJEE *v.* KANKINARRA CO., LD. (1915)
19 C. W. N. 623
I. L. R. 42 Calc. 1050

16. ———— Specific performance and damages—*Contract alleged not proved, but another found by Court—Decree for specific performance or*

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damage, if lies. The principle upon which the Court refuses specific performance of a contract, not the subject-matter of the suit, is equally applicable to the claim for damages for breach of that contract. The principle on which damages are decreed in a suit for specific performance considered. NILKANTA RAI CHAUDHURI *v.* LALIT MOHAN BANERJEE (1915) . . . . . 19 C. W. N. 933

17. ———— Arbitration—Calcutta Baled Jute Association's contract—*Effect of clause containing home guarantee—Arbitration in London between Calcutta purchaser and London purchaser, whether binding on Calcutta seller.* R. D. & Co., a firm carrying on business in Calcutta as balers of jute, sold 500 bales of jute to E. D. S. & Co. for shipment to London. The contract contained a clause in writing, known in the export trade as "a Home Guarantee," that is, a clause by which the Calcutta seller guaranteed the weight, condition and quality at the port of destination. E. D. S. & Co. sold the jute to a London buyer, who claimed an allowance for inferiority of quality; and upon an arbitration in London an award was given against E. D. S & Co. R. D. & Co. brought this suit in Calcutta against E. D. S. & Co. to recover the price of the 500 bales of jute. E. D. S. & Co. contended that they were not liable on the ground that under the terms of the contract R. D. & Co. had guaranteed the condition and quality of the goods at the port of destination; that by the award the goods had been invoiced back to the sellers; and that in terms of the contract R. D. & Co. were bound by the award. *Held*, that the clause in writing, that is to say the 'home guarantee,' does not mean that a London award in a submission by the Calcutta purchaser and the London purchaser in accordance with the rules and conditions of the London Association contract of 1913, would be binding in a dispute between the Calcutta seller and the Calcutta buyer. To make such an award binding upon a total stranger to the London submission there should be a clear and unambiguous agreement to that effect. *Held*, also, that although it may be correctly contended that any dispute about quality, between the Calcutta seller and the Calcutta buyer may be validly referred to arbitration in London in accordance to that clause, the meaning of the clause cannot be extended so as to make an award between the Calcutta purchaser and the London purchaser binding upon the Calcutta seller. RAM DUTT RAMKISSEN DASS *v.* E. D. SASSOON & Co. (1915) I. L. R. 43 Calc. 77

18. ———— Trafficking in offices—*Official corruption—Contract for return of money paid to Nazir to secure appointment as peon—Suit to enforce such contract, maintainability of—Public policy—Contract Act (IX of 1872), ss. 23, 65.* The sale of a recommendation, nomination or influence in procuring a public office is illegal and void, for trafficking in offices would inevitably tend to official corruption: and the Court will not assist a party who has entered into a contract tainted by moral turpitude, both sides being *particeps criminis, in pari delicto. Tappenden* v. *Randall, 2 Bos. & P. 467 ; 5 R. R. 662,* followed. A suit to enforce a contract for the return of money paid to a *Nazir* to secure an appointment as a District Court peon for the plaintiff's son is not maintainable. *Bai Vijli* v. *Nansa Nagar, I. L. R. 10 Bom. 152* referred to. *Pichakutty* v. *Narayanappa, 2 Mad. H. C. R. 243,* discussed and distingushed. Such an agreement is void *ab initio,* its object being opposed to public policy within the meaning of s. 23 of the Indian Contract Act : while s. 65 thereof applies to an agreement *subsequently* (*i*) found to be void, (*ii*) or made void by supervening circumstances. *Bakshi Das* v. *Nadu Das, 1 C. L. J. 261,* and *Gulabchand* v. *Ful Bai, I. L. R. 33 Bom. 411,* considered inapplicable. LEDU COACHMAN *v.* HIRALAL BOSE (1915) . . I. L. R. 43 Calc. 115

19. ———— Part performance—*equitable doctrine of, if may be invoked by stranger to—Relinquishment of share in tenure without registered deed but for consideration by purchaser out of possession to person in possession—Remand order, scope of.* Where a permanent tenure having been sold in execution of a decree for rent obtained against G, the question was whether C at the date of the sale had a subsisting interest in the tenure, so that (if he had) certain under-tenures held by G were not touched by the sale, and it appeared that C having acquired a share in the tenure at an execution sale, had subsequently for consideration relinquished the share to G who was and continued in possession but no conveyance was executed to give effect to this transaction : *Held*, (in a suit by the purchaser at the rent sale to eject G). that though a mere admission or disclaimer cannot operate to pass title to property where a conveyance is required under the law to transfer title, here G could have sued C for specific performance of the contract and G could have successfully resisted a suit to recover possession by C. That by the application of the equitable doctrine of part performance, C. was precluded from setting up any title against G and had no subsisting right to the share at the date of the rent suit. *Walsh* v. *Lonsdale, L. R. 21 Ch. D. 9, Puchha Lal* v. *Kunj Behari Lal, 18 C. W. N. 445,* and *Mohammed Musa* v. *Aghore Kumar Ganguli, L. R. 42 I. A. 1 : I. L. R. 42 Calc. 801,* relied on. *Jadunath Poddar* v. *Rup Lal Poddar, 4 C. L. J. 23 : s. c. 10 C. W. N. 650, Oodey Koowur* v. *Ladoo, 13 Moo. I. A. 585,* and *Dharam Chand Baid* v. *Mauji Sahu, 16 C. L. J. 436,* distinguished. *Held*, further, that the purchaser though no party to the contract was entitled to invoke the aid of this doctrine in the same way as a creditor could in respect of contract of purchase made by his debtor with a stranger. That a remand order by the High Court directing a trial upon the issue whether C had a subsisting interest in the property covered an enquiry as to whether C. had lost his interest in the property by the operation of the equitable doctrine of part performance. KHAGENDRA NATH CHATTERJEE *v.* SONATON GUHA (1915) . . 20 C. W. N. 149

20 ———— **Bond signed by defendant only, and registered**—*suit upon* A contract in writing in this country does not necessarily imply that the document must be signed by both the parties thereto. *Apaji Bapuji* v. *Nil Kanta, 3 Bom. L. R. 667, Ramasami Chetti* v. *Sekhanoda Chetti, 1 Mad. L. J. 737, Girish Chandra* v. *Kunjo Behary, I. L. R. 35 Calc. 683 : s. c. 12 C. W. N. 628, Ambalayani Pandrama* v. *Vaguram, I. L. R. 19 Mad. 52, Kotappa* v. *Vallur Zemindar, I. L. R. 25 Mad. 50, Zemindar of Vizianagram* v. *Behara Suryanarayana, I. L. R. 25 Mad. 587,* and *Sanney Kotappa* v. *Venkata Narasimham Naidu, 11 Mad. L. J. 125,* referred to. CHELLAPHROO CHOWDHURI *v.* BANGA BEHARI SEN (1915) . 20 C. W. N. 408

5. ———— What constitutes—*Conditional proposal to make provision for the plaintiff by purchase*

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of immoveable property on condition of her living with the promisor until her death—Acceptance by plaintiff and performance of condition—Suit against heirs of promisor to recover village purchased for plaintiff by relative, a wealthy and childless Rani—Limitation—Representation—Practice of Privy Council—Grant of special leave to cross-appeal. This appeal arose out of a suit brought by the appellant for possession of a village called Repudi which had belonged to her great-aunt, a wealthy, childless and widowed Rani, and to which on her death in 1899, the three defendants had in litigation between themselves been declared to be entitled in equal shares as her heirs. The appellant had been brought up by the Rani from an early age, and had lived with her until 1886, when she [illegible]

[illegible] ation that she and her husband would continue to reside with her. This they did until 1893, during which time the Rani purchased two small properties in her own name and transferred them after a time to the appellant. In 1893 the Rani purchased Repudi also in her own name though, making no concealment of her intention that the appellant was eventually to have it: but the Rani's delay in transferring it to her caused unpleasantness, and the appellant's husband left and went to his own home. Negotiation took place, and eventually the Rani on 12th October 1893 wrote to the appellant a letter in which she said, "Repudi was purchased for you alone. I shall retain it under me so long as I am alive and afterwards convey it to you yourself." Thenceforth the appellant and her husband lived with the Rani until her death. *Held* (reversing the decision of the High Court), that the letter was not merely an expression of intention but a conditional promise by the Rani, and the promise was accepted and the condition performed by the appellant and her husband, and there was accordingly a complete contract between the parties. *Maunsell* v. *Hedges, 4 H. L. C. 1039, Maddison* v. *Alderson, L. R. 8 A. C. 467*, and *Jordan* v. *Money, 5 H. L. C. 185*, referred to and discussed. *Held*, also, that the Rani's dying declaration constituted a re-affirmation and confirmation of the contract; the true effect of the language being to declare that Repudi was already the appellant's and that the Rani knew an oral bequest to be unnecessary. From such a contract it was not open for those representing the Rani or her estate to resile from or fail to perform the obligation to deliver possession of the village to the appellant, such possession to take effect from the Rani's death. The cause of action in the suit was on a ground common to all the defendants. The third defendant did not appeal from either of the decree against him in the District Court and in the High Court. He was, however, in each case made a respondent by another defendant who appealed. On the present appeal by the plaintiff to the Privy Council, the Judicial Committee granted the application of [illegible]

RAO v. AIPA RAO (1916) . I. L. R. 39 Mad. 509

21. ———— Carriage of goods by rail—Risk note—*Liability of company for goods consigned on a risk note—Burden of proof.* Where goods are booked for carriage by railway under a "risk note" and are lost in transit it lies upon the consignor claiming damages against the railway company to show that the loss was occasioned by the theft or wilful neglect of the company's servants. *Sheobarat Ram* v. *The Bengal and North-Western Railway Company, 16 C. W. N. 766*, referred to. *Bengal and North-Western Railway Company* v. *Haji Mutsaddi 7 All. L. J. 833*, distinguished. EAST INDIAN RAILWAY COMPANY v. NATHMAL BEHARI LAL (1917)

I. L. R. 39 All. 418

22. ———— Damages of a breach—Custom of the Bombay Silver Market—*Shroffs, ostensible buyers and sellers—Shroffs acting for outside principals work either for kacchi of for pakki adat—kacchi adat distinguished from pakki adat—Principal of kacchi adatia may sue in his own name for damage or breach of contract without impleading the kaccha adatia.* On the 13th of July 1914, the plaintiff, a merchant, in the name of his *kachha adatia* and agent H and acting by his broker B entered into a contract whereby H agreed to buy and the defendants to sell 50 bars of silver at Rs. 75-5-0 per 100 tolas for the ensuing *Shravan*, *i.e.*, August *vaida*. The contract was entered into subject to the rules of the Panch Shroff Association whereby it was the duty of the defendants to tender a delivery order by the 12th of August 1914 On the 10th of August, the plaintiff tendered to H the price of bars and on the 11th H asked for a delivery order. The defendants failed to give a delivery order by the 12th August. The plaintiff thereupon sued the defendants without making H a party for damages for breach of contract at the rate of Rs. 3-3-0 per 100 tolas which was the difference in price between the contract rate and the rate prevailing in the market on the 13th of August. The defendants pleaded a custom of the silver market whereby the selling Shroffs were not personally liable to the principal of the buying *adatia*. The defendants without prejudice further stated that the rate of Rs. 76-12-0 must be taken to be the highest buying and selling rate with reference to which damages could be assessed, as the Shroffs at a special meeting held on the 16th August 1914 resolved that where a party was not able to give delivery, silver bars could be bought and sold at Rs. 76-12-0. *Held*, (i) that the evidence called by the defendants fell far short of proving the custom alleged; (ii) [illegible] were recover- [illegible] asure, it did [illegible] he principal [illegible] rincipal and agent applied, and the plaintiff was entitled under the contract to claim the difference in price between the contract rate and the market rate at the time of breach. It was not disputed at the trial that a custom of the Bombay Silver Market for forward contracts was that only Shroffs were the ostensible buyers and sellers though Shroffs might have and often did have outside principals for whom they were acting. The Shroffs, when acting for principals, worked sometimes for *kacchi adat* and sometimes for *pakki adat*. In the case of *kacchi adat* the *adatia* Shroff guaranteed the performance of the contract to the other Shroff, but did not guarantee its performance to his own principal. In the case of *pakki adat* the *adatia* Shroff who then acted for a higher commission was liable as a

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principal both to his own employer and to the other Shroff. ABRAHAM E. J. ABRAHAM *v.* SARUPCHAND (1917) . . . I. L. R. 42 Bom. 224

23. ———— Damages for Breach after outbreak of war—*to supply enemy goods out of stock in a particular ship—Royal Proclamation porhibiting contract as illegal, effect of—Capture and condemnation of steamer and goods by Prize Court, effect of, on contract—Purchase of goods from Prize Court by defendant and bringing goods to place of performance by other steamers, effect of—Contract to supply goods of a certain description and quality—Supply of inferior goods, effect of.* A contract made on the 25th August 1914, after the outbreak of war with Germany on the 4th August 1914, to supply German dyes expected to arrive by certain steamers believed to have started on their voyage from Germany before the war, is unenforceable, if under the contract the defendant was not to be liable in case of non-arrival of the steamers at certain ports on account of the state of war and the ship and the dyes therein were as a fact seized during the voyage and condemned as prize by a Prize Court. *Held* further, (*a*) that the effect of the Royal Proclamation of 9th September 1914, prohibiting trading with the enemy and in enemy goods as illegal was to render the further performance of the contract illegal and to put an end to the contract; (*b*) that the condemnation of the goods by the Prize Court related back to the date of seizure and divested the owners of the goods as from the date of seizure; (*c*) that the fact that the defendants for their own convenience bought the goods from the Prize Court and brought them to the place of performance is immaterial as the goods ceased to be goods consigned to the defendants; and (*d*) that a contract to supply dyes of 40 per cent. strength on arrival of certain steamers is not enforceable when the steamers arrive with dyes of inferior description and quality, *viz.*, 16 per cent. strength. *Hale* v. *Rawson, 27 L. J. C. P. 189*, distinguished. *Arnhold Karberg Co.* v. *Blythe Green Jourdain & Co.*, [*1916*] *1 K. B. 495 The Odessa*, [*1916*] *A. C. 153*, and *The Zamora* [*1916*] *2 A. C. 77*, followed. ABDUL RAZACK *v.* KHANDI ROW (1917) . I. L. R. 41 Mad. 225

24. ———— Damages for Breach of promise to marry—*parties being Konkani Mahomedan—suit for damages for breach of promise to marry as under English law not maintainable under Mahomedan law.* Under Mahomedan law in a suit for breach of promise to marry the plaintiff cannot recover the damages peculiar to an action for breach of promise under the English law. The action under the English law though based upon the hypothesis of a broken contract is attended with some of the special consequences of a personal wrong and damages may be given of a vindictive and uncertain kind not merely to repay the plaintiff for temporal loss, but to punish the defendant in an exemplary manner. This anomaly should not be introduced in the case of Mahomedans whose views of the relationship of the married parties to one another are so different to those of persons governed by the English law. ABDUL RAZAK *v.* MAHOMED HUSSEIN (1916) . I. L. R. 42 Bom. 499

25. ———— By certificated guardian on behalf of minor with Courts leave—*Specific performance.* Where a guardian of minors appointed by Court, with the Court's sanction, agreed to sell the minor's property to A at a price which was above that fixed by the Court. *Held*, that a suit by A for specific performance of the contract was maintainable INNATUNNESSA BIBI *v.* JANAKI NATH SARKAR (1917) 22 C. W. N. 477

26. ———— Privity of—*Agreement between vendor and purchaser that the latter will pay the former's debt to a third person out of consideration money retained with him, if may be enforced by vendor's creditor.* The first two defendants borrowed on a promissory note a sum of money from the plaintiff; they thereafter transferred their properties to the third defendant who executed an agreement in favour of his vendors expressly undertaking to pay to the plaintiff his dues out of the consideration money retained in his hands. The plaintiff sued his debtors as also the third defendant for his money. *Held*, that the plaintiff was entitled to enforce the agreement made between the third defendant and his vendors. The principle underlying the decision in *Debnarain Dutta* v. *Ramsadhan Mandal, I. L. R. 41 Calc. 137; s. c. 17 C. W. N. 1143* applied to the case and the distinction that the arrangement between the first two defendants and third defendant was never brought to the notice of the plaintiff was not material. DWARKA NATH ASH *v.* PRIYA NATH MALKI (1916) . . 22 C. W. N. 279

27. ———— *Third party's right to sue on—Limitation Act (IX of 1908), s. 18, arts. 62, 115 and 116—Suit for rent by the third party to contract—Date from which limitation begins.* Contrary to his undertaking to redeem a prior *kanam* and to collect and pay the *jenmi*, arrears of rent due by the *kanamdar* a *melkanamdar* assigned his rights and liabilities under the *melkanam* to the *kanamdar* by the registered deed in 1909 without the knowledge of the *jenmi* and thus enabled the *kanamdar* to continue in possession for a further period. The *jenmi* who came to know of the assignment in 1912 at once recognized it, demanded arrears of rent from the *kanamdar* and brought the suit in 1913 against the *kanamdar* and the *melkanamdar* for all the rent due during the periods of the *kanam* and the *melkanam*. *Held*, by WALLIS, C.J., and KUMARASWAMI SASTRIYAR, J. (BAKEWELL, J., dissenting) that (*a*) the *jenmi* was entitled to recover from the *kanamdar* the arrears of rent as moneys had and received to the plaintiff's use and that the suit was not barred by limitation by reason of Art. 62, and s. 18 of the Limitation Act. *Per* WALLIS, C.J., and BAKEWELL, J. The *jenmi* was not entitled to sue on the assignment to which he was not a party. *Per* KUMARSWAMI SASTRIYAR, J. The *jenmi* was entitled to sue on it. *Jamna Das* v. *Ram Autar Pande, I. L. R. 34 All. 63*, and *Tweddle* v. *Atkinson, 30 Ch. D. 57*, and other cases considered. ITTI PANKU MENON *v.* DHARMAN ACHAN (1917) I. L. R. 41 Mad. 488

28. ———— *Stranger to a contract, when can sue—Privity of contract—The relation of trustee and cestui que trust when established—Covenant between assignor and assignee, whether a stranger can enforce it—Part payment, effect of.* *H* demised on the 8th October 1910 a certain zemindary to *N* for a term of three years at a yearly rent of Rs. 10,000. (Rs. 6,000 out of which was to be appropriated by *N* in reduction of the debts due to him from *H*.) It was also agreed that in certain events *N* would pay *H* 75 per cent. of the actual realisable arrears of

CONTRACT—*contd.*

rent. On the 16th December 1910 *H* mortgaged to *K* (in consideration of a sum of Rs. 10,000 due to *K* from *H*) the sums payable to him under the demise of the 8th October 1910. *N* was put into possession of the demised premises on the 26th January 1910. By an Indenture, dated 23rd January 1911, *H* assigned to *N* all arrears of rent payable to him by *N* for three years and (also all other moneys payable to him) under the said demises of 8th October 1910. By the said indenture *N* covenanted with *H* that he would pay the said sum of Rs. 10,000 with all interests and costs due to *K* from *H* under the void mortgage, dated 16th December 1910, and would keep *H* indemnified against the same. On the 23rd March 1911, *N*, in pursuance of this covenant, paid to *K* a sum of Rs. 5,000. *K* (plaintiff-appellant) brought this suit to recover the balance due under his mortgage from *N* (1st defendant-respondent by virtue of his covenant contained in the indenture of the 23rd January 1911 and also against *H* (the second defendant). *H* did not contest the suit: *Held*, that the suit must be dismissed as there was no privity of contract between *K* and *N*; neither was *N* a trustee for *K* in respect of the sums payable by *H* to *K*. A contract can create no right or liability in a person who is not a party to it, unless he can claim or be charged through a party as in the case of a *cestui que trust* claiming through a trustee. There is however no doubt that a contract may be *in form* with a named person and yet intended to secure a benefit to another as a *cestui que trust*, in such a way that the latter may sue in his own right to enforce the contract. KHERODE BEHARI GOSWAMI *v.* RAJA NORENDRA LAL KHAN (1918)
23 C. W. N. 453

29 ———————— Where the appellants contracted with Government to maintain the rights of all tenure-holders entered in the Record-of-Rights ... [illegible] *kabulyat*

[illegible] ppel-

[illegible] nure

holders covered by the Record-of-Rights had obtained a fraudulent entry therein and had no such rights as these recorded was not maintainable MAHARAJA KUMAR MANMATH NATH ROY *v.* SHEIKH AMEER KHAN . 2 Pat. L. J. 39

[illegible]

1, article 75. A contract whereby a labourer engages to work without any payment whatsoever, under conditions that make it practically impossible for him to discharge the debt until some other capitalist redeems him is wholly void. Where two labourers executed a bond for a consideration of Rs. 10 repayable at the end of two years with interest and the second of the two executants undertook to labour for the promisee for the period of two years without remuneration and agreed that in the event of his absenting himself from work at any time during that period the promisee should be entitled to recover the principal with interest: *held* (i) that the bond was a slavery bond and was therefore illegal and void; and [illegible] provision for the payment of interest

[illegible] contract

[illegible] general

[illegible] earliest

date applicable to [illegible] bonds

under article 75 of the Limitation Act, 1908, is also applicable to cases of contracts which are subject to a condition and therefore time began to run against the promisee from the date the second executant of the bond absented himself from work. SATISH CHANDRA GHOSH *v.* KASHI SAHU
3 Pat. L. J. 412

31. ———————— Interpretation—Implied terms—*Compensation, assessment of.* Plaintiffs contracted to suppy labour for reclamation work undertaken by the defendant Trust. The agreement *inter alia* provided that the plaintiffs were to find the necessary labour for filling and emptying waggons of sand and were to be paid by measurement of the area reclaimed, having, before commencing work, satisfied themselves as to the correctness

[illegible]

enclose the area to be reclaimed and this would be in progress probably when the works would be commenced and it was stipulated that the plaintiffs were not to make any claim for alleged or actual loss of material being washed away during the progress of the work and when quoting their rate for the labour in filling and emptying, it must include all and every such contingency as loss in bulk through washing or spreading by the sea,

[illegible]

ground at the completion of the work and no allowance whatever as stated in the previous clause would be entertained for sinking, washing away, etc. The trial Judge held that the plans and sections added an implied term to this con-

[illegible]

protection, the inadequacy being proved by the mere fact of the discrepancy between what they considered the proved waggon-loads deposited and the proved amount measured *Held*, by the Judicial Committee, that assuming without deciding that the contract had an implied condition, that condition was only to execute the protection as shown on the plans. KARACHI PORT TRUST *v.* J. MACKENZIE DAVIDSON (1918)
22 C. W. N. 961

32. ———————— **Sale on condition that the vendor or his descendants should have the right to repurchase**—*Nature of the right reserved, whether personal or assignable—Specific Relief Act (I of 1877), s 23—Construction of document—Second Appeal—Civil Procedure Code (Act V of 1908), s. 100.* One V obtained a decree against G. G being unable to satisfy the decretal debt sold his land to V in 1903 on condition that after the lapse of ten years G or his descendants should have the right to repurchase it within two years for the same price for which the land was sold. After the death

[illegible]

A suit having been brought to recover possession of the land sold by G, the question was raised whether on the terms of the sale deed of 1903 the intention of the parties was that the right reserved

CONTRACT—*contd.*

was to be a right personal to G and his descendants or a right which he could assign to any other person. *Held*, on the construction of the sale deed, that the intention of the parties was that the assignees outside the family would not enforce the contract specifically. It was a case of personal quality mentioned in s. 23 of the Specific Relief Act, 1877, as the personal quality need not necessarily be restricted to particular skill or learning but might include anything peculiar to a man or his descendants which would entitle them to special favour at the hands of the other contracting parties. In second appeal the High Court will have as good a right as the lower appellate Court to put its own construction upon a document as a whole in order to arrive at the intention of the parties thereto. VITHOBA MADHAV *v.* MADHAV DAMODAR (1918). **I. L. R. 42 Bom. 344**

33. ———— Wagering Contract—*Pakka Adatia business in Bombay, if necessarily wagering transaction—Speculation and wagering distinguished. Pakka Adatia* dealings are well established as a legitimate mode of conducting commercial business in the Bombay market. Speculation does not necessarily involve a contract by way of wager and to constitute such a contract a common intention to wager is essential. BHAGWANDAS PARASRAM *v.* BURJORJI RUTTONJI BOMANJ (1917) . . . . **I. L. R. 42 Bom. 373**
22 C. W. N. 625

34. ———— Suretyship—*Interpretation—Sale of principal debtor's interest in subject of contract if discharges him or surety—Forbearance of creditor, to sue principal debtor, if ground of discharge.* Anything done or any promise made for the benefit of the principal may be a sufficient consideration to a surety for giving a guarantee. Where the sureties undertook liability for the performance by a lessee of the conditions of the lease, the fact that the lessee's interest was sold in execution and purchased by a stranger did not have the effect of releasing the debtor or his sureties from liability to perform the covenants and conditions of the lease as agreed upon by them. Mere forbearance on the part of a creditor to sue the principal debtor or to enforce any other remedy against him, does not in the absence of any provision in the guarantee to the contrary discharge the surety, KALI CHARAN *v.* ABDUL RAHMAN (1918) . . . **23 C. W. N. 545**

35. ———— To supply goods indented from England—*Terms of indent if incorporated in the contract.* Upon the interpretation of a contract by appellants to deliver to respondents certain articles which both parties knew were to be shipped from England, the question was whether a stipulation in the following words, *viz.*, "Terms cash, less three months discount equal to 1¾ per cent. *Per* Indent Nos. 906, 907, 908, 909" (the number referring to indents which under these numbers were the contracts made by the appellants with English manufacturers for the supply of the goods), was meant to incorporate the forms of the indents as terms of the contract: *Held*, that the indents were not made parts of the contract in suit, and the date of shipment in the indent was not incorporated in the contract as the date of shipment under the contract. ALEXANDER *v.* GOCUL DASS (1918) . **21 C. W. N. 1091**

36. ———— Broker—"*Principal contract*"—*Appropriation and assent—Stoppage in transitu—*

CONTRACT—*contd.*

Assignment—Contract Act (IX of 1872), ss. 99, 108 193, Exceptions (1), (2)—Bill of lading, assignment of. Where the plaintiff, a broker, liable on a principal contract appropriated the goods to the contract and the defendant assented to the appropriation by accepting the documents representing goods in qustion and dealing with and handing the same to a third party: *Held*, that the property in the goods passed and the provisions of Exception (*1*) of s. 108 of the Contract Act were not applicable. *Held*, also, that the plaintiff must prove that for the purposes of Exception (*3*) of s. 108 of the Contract Act the circumstances under which the defendant obtained possession of the documents amounted to an offence on his part. *Held*, also, that the plaintiff had the right of stoppage conferred by s. 99 of the Contract Act. *Held*, also, that the delivery of the bills of lading to a third party amounted to an assignment of the bills of lading within the meaning of s. 102 of the Contract Act RAMENDRA NATH ROY *v.* BRAJENDRA NATH DAS (1919) . . . **I. L. R. 46 Calc. 831**

37. ———— Specific performance of Agreement to lease certain share in property—*at fixed rent and premium—No express provision made for payment of kists and interest on arrears or for security—Draft approved of by pleader to be prepared—Receipt of earnest money—Agreement whether completed or not—Intention of parties.* There may be a completed agreement though a document has to be executed embodying its terms. It depends on the question whether the parties intended that there should be no binding contract till the execution of a document or whether they intended the document to be merely commemorative of the terms of a bargain already completed, even though its execution is in a manner required by law. *Hyam* v. *Gubbay 20 C.W.N. 66*, referred to and distinguished. *Winn* v. *Bull 7 Ch. D. 29* and *Hampshire* v. *Wickens 7 Ch. D, 555*, distinguished. Where the defendant entered into an oral agreement to grant the plaintiff a *putnit* lease of his specified share in certain *mouzas* at a fixed annual rent and a stipulated premium, and a draft *pottah* was to be prepared and approved of by his pleader, and part of the premium was paid at once and accepted by the defendant as earnest money, but no such draft was prepared and approved of, and there was no express provision made by the parties as to the payments of *kists*, interest on arrears of rent and as to security for due payment of the rent: *Held*, that the agreement was complete and enforceable in a suit for specific performance, notwithstanding the omission of the approved draft and of express provisions as to *kist*, interest, and security, it having been found by the lower Appellate Court that the draft was intended by the parties to be merely commemorative of the terms already agreed upon and not a condition of the completion of the agreement; and further, that the matters relating to the *kists* and interests were presumably intended to be regulated by the Tenancy Law of the country, and that no provision for security was necessary. BIJOYA KANTA LAHIRI CHOWDHURY *v.* KAILASH CHANDRA BHOUMIK (1919) . . . **I. L. R. 46 Calc. 771**

37(a). ———— X and Y who were carrying on business at Cawnpore and Calcutta agreed to accept for accommodation of Z's firm in Cawnpore a hundi for Rs. 2,500 drawn on X and Y in Calcutta by one A in Delhi in favour

CONTRACT—*contd.*

of one B in Delhi and in the case of payment by the acceptors of the amount of the Hundi to debit the same to the accommodation party Z's firm—In a suit by the acceptors against the accommodation party to recover the amount of the Hundi which was duly accepted and the amount which was paid to B in Calcutta. *Held,* that the Plaintiffs cause of action would not be complete unless they proved the fact that they had accepted the hundi in Calcutta in accordance with their undertaking to the drawers of the hundi and paid the bill in Calcutta on due date in accordance with their acceptance. *Held,* also that part of the cause of action arose within the Local limits of the ordinary jurisdiction of the High Court. RAMCHANDER GAURISHANKAR, *v.* GANAPATRAM BISWANATH . I. L. R. 47 Calc. 583

38. ———— Railway Risk Note——*Liability of Company for goods consigned on a risk note—Burden of proof—Indian Evidence Act (I of 1872), s. 103.* The plaintiff consigned certain bales of piecegoods by the defendants' Railway under a risk note. By the terms of the risk note in consideration of a special reduced rate being charged the consignor agreed to hold the Railway Administration harmless for any loss except for

event. The goods were properly carried in a closed waggon, but one of the bales was lost in transit. The plaintiff having sued the defendant Railway Company for the value of the missing

there was any theft from the train. The defendant Company having applied to the High Court under its revisional jurisdiction. *Held,* reversing the decree and dismissing the suit, that the burden lay on the plaintiff under s. 103 of the Indian Evidence Act to give proof of the fact that there was wilful neglect or theft by railway servants and, he not having done so, no question was reached of robbery from a running train. *East Indian Railway Company* v. *Nathmal Behari Lal I. L. R. 39 All. 418,* approved. B. B. & C. I. RAILWAY COMPANY *v.* RANCHHODLAL CHHOTALAL & Co. (1919) . . . I. L. R. 43 Bom. 769

39. ———— Forfeiture of deposit—*Failure of purchaser to carry out his part of the contract—Vendor entitled to retain deposit.* Where a plaintiff has advanced money to the defendant by way of earnest money and as a guarantee for the fulfilment of the contract in respect of which he is suing, he cannot recover the earnest money where it is found that the breach of the contract is due to his own default. *Bishan Chand* v. *Radha Kishan Das, I. L. R. 19 All. 489, Roshan Lal* v. *The Delhi Cloth and General Mills Company, Limited I. L. R. 33 All. 166,* and *The Vellore Taluk Board* v. *Gopalasami Naidu, I. L. R. 38 Mad. 801,* referred to. MUHAMMAD HABIBULLAH *v.* MUHAMMAD SHAFI (1919) I. L. R. 41 All. 324

40. ———— Offer and acceptance when acceptance may be inferred—*Receipt of money sent by would-be purchaser.* The plaintiffs, on the 7th of February, 1918, wrote to the defendants

inquiring the price of cocaine. The defendants replied on the 13th of February that it was Rs. 20 per ounce "without engagement," meaning thereby that, as the rate was varying from day to day, they could not give any definite quotation On the 14th of February the plaintiffs sent to the defendants a money order for Rs 17-8-0 and asked the defendants to set aside for them an amount of cocaine epresented by this sum. The money was received on the 16th of February. On the 23rd of February the plaintiffs sent to the defendants the permit which they had received for the import of the cocaine.

defendants had sent. The plaintiffs thereafter sued the defendants for damages for non-delivery. *Held* that it was a legitimate inference from the conduct of the defendants in receiving the money sent by the plaintiffs and crediting it to their account that they had accepted the plaintiff's proposal. BISHAN PADO HALDAR *v* CHANDI PRASAD & Co. . . I. L. R. 42 All. 187

40(a). ———— B entered into a contract with C for sale of 30 bales of dhoties with the condition "we sold the goods as were bought by us to L J batta chafage, all other terms according to "Bahar (importing) Firms." The contract between B and L J had a clause for arbitration embodied in it—B filed a suit in respect of 27 bales out of 30 for no delivery and referred the matter to arbitration in

41. ———— Uncertainty—*Agreement to convey land by way of gift*—An *egrarnamah* contained

free of cost, and if I and my heirs refuse to give, in that case the Sitambari Jain Society shall take the same of its own power." *Held,* that, if this provision was an attempt to create an interest in favour of future generations of Sitambaris it was void for remoteness. *Held, further that the* provision was not intended to create an interest in favour of the Sitambaris and that such a provision could not in India, be regarded as *creating* an interest in favour of the other party to the transaction. A contract to convey immovable property by way of gift does not create any interest in the property. DAHYA BHAI *v.* MAHRAH BAHADUR SINGH . . . . 1 Pat. L. J. 238

42. ———— *Uncertainty—Public Policy—agreement by* Gayawal *to pay part of his earning from certain ceremonies to an* Acharjya *—maintainability of suit on the agreement.* Where the defendant, a *Gayawal* undertook, for a consideration, that if he performed any ceremonies without calling in the plaintiff, an *Acharjya,* to assist him, he would pay to the latter in one set of circumstar...
the whole of
the performar

CONTRACT—*contd.*

agreement not being void as being against public policy, or for uncertainty, a suit lay at the instance of the plaintiff for recovery of the amounts due to him under the terms of the agreement. BABULAL BARIK GAYAWAL *v.* HARIHAR PANDIT

1 Pat. L. J. 539

43.———— Forfeiture of deposit—A deposit, if nothing more is said about it, according to the ordinary interpretation of businessmen, a security for the completion of the purchase, so that in the event of the contract being performed it is brought into account, but if the contract is not performed by the payer, it is forfeited to the payee. But every payment made by the purchaser to the vendor is not in the nature of a deposit liable to be forfeited if the purchaser violates his contract. It is incumbent upon the Court in each case to ascertain the real intention of the parties from all the terms of the contract. NAWAB KHAJA HABIBULLAH *v.* ARMAN DEWAN

24 C. W. N. 40

44. ———— Broker appointing under-broker—D. & Co., on 31st May 1911, appointed the Respondents to be their brokers for the sale and purchase of sugar for a period of five years. The Respondents being by the agreement authorised to appoint under-brokers, on the 8th January 1911, entered into an agreement with the Appellants constituting them under-brokers "in respect of all contracts to be entered into by them (the Respondents) for and on behalf of the D. & Co., under the Respondents' agreement" with D. & Co., "and during the subsistence of the said agreement." On the 2nd December 1912 a new agreement was entered into between D. & Co., and the Respondents, differing in many material respects from the contract of 31st May 1911 and appointing the Respondents brokers in the same business for a new period of five years on different terms. On the 12th August 1912, the Appellants' contract was summarily ended by the Respondents without any justifying reasons. In a suit by the Appellants for damages for wrongful dismissal: *Held* (no case being made that the previous agreement between D. & Co. and the Respondents was ended simply as a means of defeating the Appellants rights)—That the appointment of the Appellants' as under-brokers terminated on 2nd December 1912 with the termination of the original contract of D & Co. with the Respondents. LACHMANDAS KHANDELWAL *v.* RAGHUMULL **24 C. W. N. 577**

44(a). ———— C. I. F.—To purchase and ship—E. and Co. Commission Agents entered into a contract with defendants under which they undertook to purchase and ship certain goods "on account and risk" of defendants and did ship them C. I. F. on a Germanship—Owing to outbreak of war during transit the goods were delayed—On defendants refusal to accept they were sold by the Plaintiff the liquidator of E and Co., who sued defendants for damages. *Held,* that E and Co. as Commission Agents were under the special contract, the general law and s. 222 of the contract Act to recover damages for breach of contract. HARRY MEREDITH *v.* ABDULLA SAHIB

I. L. R. 40 Mad. 1060

44(b). ———— *Fidelity guarantee* —Contract Act ss. 129 and 131—Upon the appointment of a Khazanchee to a Bank in 1903 he, his father and the Bank entered into an agreement whereby the father deposited security and the Bank agreed to employ the son subject to 3 months' notice and the son agreed to act as Khazanchee and to inquire and if required report to the Bank upon the solvency of Asiatics having dealings with the Bank and any loss arising for the carelessness or default in so doing. The Khazanchee was also a customer and in 1907 and 1908 deposited promissory notes for which in 1908-1909 he without informing the Bank, received payment from the makers—The money went to reduce his debit but the Bank relying on the notices made further advances. In 1910 the Khazanchee became insolvent—In 1913 his father's executors sued for return of the securities deposited by the father. *Held,* that the agreement of 1903 did not constitute a continuing guarantee under the Contract Act s. 129 so as to be *ipso facto* revoked on death of father under s. 131 and that the Bank was entitled to hold the securities against the son's default. SEN *v.* BANK OF BENGAL

L. R. 47 I. A. 164

45. ———— Impossibility of performance—Where the parties were fully aware of the restriction imposed by Government on the supply of railway waggons on account of the war and a contract was entered into for the sale of goods and delivery thereof in the manner stipulated in the contract on the assumption that by the time the goods would become deliverable under the contract the said restriction would be removed: *Held*—That the contract was void being impossible of performance and the buyer was not entitled to recover any compensation from the seller who was excused from the performance of the contract. KUNJILAL MONOHAR DASS *v.* DURGAPROSAD DEBIPROSAD . . . . **24 C. W. N. 703**

46. ———— Anticipating breach—*Measure of damages*—Damages for breach of contract by renunciation thereof before performance is due are measured by what the individual would have suffered by the continued breach due to the time of complete performance less any abatement by reason of circumstances of which he ought reasonably have availed himself. MANINDRA CHANDRA NUNDY AND OTHERS *v.* ASWINI KUMAR ACHARJYA . . . **25 C. W. N. 297**

47. ———— Failure of condition—Where a contract provided that it should be void if there was a fluctuation in price announced by a certain syndicate—*Held* that the contract could not be avoided because that syndicate continued to exist on out-break of war. TOOLSIDAS TEJPAL *v.* M. F. VANKATA . . **25 C. W. N. 26**

48. ———— Public policy—*agreement to bring about adoption—suit for recovery of consideration money.* Although it is now established that where money is paid for a purpose which is contrary to public policy it may be recovered at any time before the consideration for the payment has been performed, yet if the contract involves anything of criminality or moral turpitude such as the courts on that ground would refuse to enforce then not only will the court refuse to enforce the contract, but it will not assist either party to recover back anything paid under the contract even though the contract has not been performed. Where the plaintiff had paid the *guru* of a Hindu widow Rs. 5,000 as a consideration for him to induce the widow to adopt one of the plaintiff's sons on the understanding that if the adoption

CONTRACT—*contd.*

did not take place the money would be refunded, and the adoption did not take place with the result that the plaintiff claimed Rs. 5,000 as damages for the breach of contract: *Held*, that the Court would not assist the plaintiff to enforce the terms of the contract or to recover the money paid by him. RAGHUBAR DAS MAHANT *v.* RAJA NATABAR SINGH . . . 4 Pat. L. J. 542

49. ———— Minor—*Void contract—Indian Contract Act (IX of 1872), s. 65.* Plaintiff sued to recover value of the goods sold to the defendant. The defendant contended that he was a minor at the date of the transaction. The Subordinate Judge held that the defendant was a minor and dismissed the plaintiff's suit. On an application being made to the High Court, it was contended that under s. 65 of the Contract Act the defendant was either bound to restore the goods or to give its price. *Held*, discharging the rule, that s. 65 of the Contract Act started from the basis of there being an agreement or contract between competent parties, and had no application to a case in which there never was and never could have been any contract. *Mohori Bibee* v. *Dharmodas Ghose (1903) 30 Cal. 539*, relied on. MOTILAL MANSUKHRAM *v.* MANEKLAL DAYABHAI (1920)

I. L. R. 45 Bom. 225

50. ———— Sale for purchase of goods of particular quality and description—Breach of contract—*Date of breach is the date on which goods are to be supplied according to contract—Date of breach not postponed until it is ascertained whether goods supplied are not according to contract—Measure of damages.* On 9th May 1918, the defendants agreed to sell to the plaintiffs 50 tons of Yellow Katha wheat at Rs. 8-2-0 per cwt. The delivery was to be in May-June 1918, at the seller's option. The last day for such delivery accordingly fell on 30th June 1918. The Railway receipts relating to the contract goods were handed over to the plaintiffs within the contract time. The plaintiffs took delivery and warehoused the goods about the 13th July 1918. On examining the goods the plaintiffs became dissatisfied with their quality and contended that there was not a proper and fair tender of the goods against the contract. Subsequently, a [illegible]
August 1 [illegible]
wheat ter [illegible]
On 20th [illegible]
goods. C [illegible]
49 tons of wheat of the quality and descripton mentioned in the contract, and sued to recover Rs 2,230-15-0, the difference between the price paid by them for 49 tons and the contract price. The trial Court held that as there was an attempted performance of the contract, the date of the breach must be taken to be the date when the parties actually found that the goods tendered were not of the contract quality and that as there was no delay on plaintiffs' part to buy against the sellers, the plaintiffs were entitled to recover the sum claimed with interest. The defendants appealed: *Held*, reversing the decision of the trial Court: (1) that inasmuch as the breach of contract was in respect of goods to be delivered at a future date, the ordinary rule applied that the measure of damages was the difference between the contract rate and the market rate at the date of the breach; (2) that the date of breach must be considered to be the date when the seller ought to have tendered goods according to the contract and failed to do so; (3) that in the absence of an agreement to the contrary, the date of the breach was not postponed until it was ascertained whether the goods were of the contract quality or not; (4) that as the plaintiffs had failed to prove that the due date must not be taken to be the date of the breach or that there was any difference between the contract rate and the market rate at the due date they were not entitled to claim damages against the defendants. RAMCHANDRA RAMVALLABH *v.* VASANJI SONS & Co. (1920)

I. L. R. 45 Bom. 129

51. ———— Illegal consideration—*Past co-habitation whether good consideration.* A past co-habitation will not be good consideration for the transfer of property. KISONDAS *v.* DHONDU (1919) . . . I. L. R. 44 Bom. 542

51(a). [illegible]
A seller u [illegible]
sued the [illegible]
delivery [illegible]
the seller had not the goods in his possession at the date of the contract and the buyer was not therefore bound to take delivery. *Held*, that if at the time of entering into the contract and the period intervening between that date and the date the seller was in a position to deliver when called on he had sufficiently complied with the terms of the contract. MULCHAND CHANDOLIA *v.* KUNDAN MULL . . I. L. R. 47 Calc. 458

52. ———— Sale and purchase of goods to be manufactured by a mill—*Vendor agreeing to give delivery as and when the goods are received from the Mill—Contract conditional and not absolute—Vendor not bound to deliver goods on failure of the Mill to supply goods—No implied warranty that the Mill would manufacture and supply goods—Implied condition that the Mill would supply goods—Condition failing, both parties released from contract—Buyer not entitled to damages.* On the 26th November 1917, the plaintiffs entered into a contract with the defendants for the purchase of 864 bales of Dhoties manufactured by a particular Mill. The contract which was in Gujarati provided: "Delivery by the 31st December 1918. Goods to be manufactured (*bunto*) are sold The same are to be taken delivery of as and when the same may be received from the Mill." The plaintiffs obtained delivery of 360 bales only from the defendants who failed to deliver the balance of 504 bales. The plaintiffs accordingly sued to recover Rs. 70,216-12-0 as damages, contending that the contract was absolute and that the defendants had committed a breach in not supplying the full number of bales contracted for. The defendants pleaded that the contract was conditional, the condition being that the goods were to be delivered to the plaintiffs if they were supplied by the Mill and not otherwise. The defendants also submitted that they had done everything in their power to get delivery of the remaining bales from the Mill, but the Mill failed to supply the same to the defendants. The trial Court held that the contract was not absolute but conditional only and that the plaintiffs were not entitled to claim damages except with regard to 23 bales which the defendants in the circumstances of the case were bound to deliver to the plaintiffs. The plaintiffs were accordingly awarded Rs. 2,875 as damages, but the rest of their claim was disallowed. The plaintiffs appealed:— *Held*, by *Heaton J.*, confirming the decision of the

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trial Court, that the basis or the foundation of the contract was the anticipation common to both the parties to the contract that the Mill would supply the goods to be manufactured to the vendor and that if that anticipation was disappointed the foundation of the contract disappeared and neither party had any claim against the other for damages. *Held*, by *Marten J.*, concurring, that on the true construction of the contract the vendor did not warrant the manufacture and supply by the Mill of the goods in question but that there was an implied condition that the goods were to be manufactured and supplied by the Mill; and that if that condition was not fulfilled both parties were released *quoad* those unmanufactured goods. *Taylor* v. *Caldawell (1863) 3 B. & S. 826; F. A. Tamplin Steamship Company, Limited* v. *Anglo-Mexican Petroleum Products Company (1916) 2 A. C. 397* and *Tribhovandas* v. *Nagindas (1919) 21 Bom. L. R. 1137*, referred to. HURNANDRAI FULCHAND *v.* PRAGDAS BUDHSEN (1919)

I. L. R. 44 Bom. 907

53. ———— Anticipatory breach—*Damages—Costs—High Court Original Side Rules, Ch. XXXVI, r. 93.* On the defendants' repudiation of a contract to pay the plaintiff certain share in the profits on contracts, secured by him for the defendants, to supply goods, the plaintiff brought a suit for damages, before time for performance of the supply contracts had arrived: *Held*, that the plaintiff was entitled to sue at once but his damages were to be assessed according to the cost of performance not at the time and place of the breach, but at the time and place set for performance. *Bradley* v. *Newson Son & Co., [1909] A. C. 16, Bilasiram* v. *Gubbay, I. L. R. 43 Calc. 305* referred to. "Anticipatory breach" takes effect as a premature destruction of the contract rather than a failure to perform it in its terms. Costs are allowed as incidental damages to indemnify a party against expense of successfully vindicating his rights in a Court. Only in very special or exceptional cases costs on special Scale (Scale No. 3) should be allowed. MANINDRA CHANDRA NANDI *v.* ASWINI KUMAR ACHARJYA

I. L. R. 48 Calc. 427

54. ———— Death of vendor before completion—*Vendee put in possession of property by vendor's widow—Suit to recover possession—Vendee can plead his contract of sale and possession delivered under it.* In January 1904, N, the owner of property in suit, entered into an agreement with the defendant for sale of the property and received a part of the consideration as earnest money. Before the sale deed could be executed N died, and his widow who was then a minor executed the deed in September 1904 in pursuance of the agreement of sale, and put the defendant in possession of the property on receipt of the balance of the consideration amount. Thereafter the widow adopted plaintiff who in 1915 sued to recover possession of the property, contending that the sale was invalid on account of the minority of the widow. The Court of First Instance passed a decree in favour of the plaintiff for possession on his paying within six months Rs. 1,600 to the defendant as compensation for cancellation of the sale deed. On appeal, *held*, reversing the decision of the lower Court and dismissing the plaintiff's suit, (1) that there was no objection to the widow putting the purchaser in possession and receiving the purchase price and thus carrying out the fiduciary obligation arising under the contract entered into by her husband; (2) that the defendant by reason of his obtaining possession under a contract of sale could successfully resist the plaintiff's suit to eject him. *Bapu Apaji* v. *Kashinath Sadoba (1916) 41 Bom. 438*, followed. LAXMANRAO *v.* BHAGWANSINGH (1920)

I. L. R. 45 Bom. 434

55. ———— Right to enchance rent—*Expression "putni taluk" whether imports fixity of rent—Hereditary tenure whether implies fixity of rent.* See Landlord and Tenant. BHUPENDRO CHANDRA SINGHA *v.* HARIHAR CHACKRAVARTI

24 C. W. N. 874

56. ———— Restraint of Trade—*Goodwill, sale of Contract Act (IX of 1872), s. 27.* By a written agreement the respondent purported to buy from the appellant the goodwill of his business of plying ferry boats between certain places on a river, together with the interest which he had acquired by agreement for the use of landing-places and settlements for the collection of tolls at landing-places; and the appellant agreed that for three years he would not ply boats between the places in question. The appellant sued to recover the consideration agreed: *Held*, that the agreement was for the sale of the goodwill of a business within Exception 1 to s. 27 of the Indian Contract Act, 1872, and therefore was not void under that section as being in restraint of trade. Judgment of the High Court reversed. CHANDRA KANTA DAS *v.* PARASULLAH MULLICK, (1921) . . . I. L. R. 48 Calc. 1030

57. ———— Wagering contract—*Criteria for determining whether a speculative contract is also a wagering contract.* When persons who are in a position to carry out a contract at the time of making the contract or can reasonably be expected to be in that position when the time of performance falls due, contract to receive or deliver goods at a future date, such contracts are not necessarily wagering contracts because an element of speculation enters into them, even if the contract provides for the alternative of receiving or paying as differences instead of for actual delivery. The determination whether the parties intend to take delivery is important in arriving at a decision as to whether such contracts are or are not by way of wager, and another important essential is whether the parties are dealing with actual commodities that they are handling or expecting to handle or agreeing to settle an account according to fluctuation in prices of commodities in which they do not have and cannot expect to have any real title. SRI NEWAS *v.* RAM DEO

I. L. R. 43 All. 585

58. ———— Specific performance of—*Contract—Agreement of sale executed on an unstamped paper—Part performance by delivery of possession of part of the property and execution of stamped but unregistered sale deed of the rest of the property—Secondary evidence of the agreement of sale not permissible—Suit for specific performance competent.* The defendant agreed in writing (unstamped) to sell two of his lands and a house to the plaintiff in consideration of an adjustment of accounts between the parties. In pursuance of the agreement, the defendant handed over to the plaintiff possession of the lands, and executed a stamped but unregistered sale-deed of the house. On the plaintiff subsequently suing

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for specific performance, the written agreement of sale abovementioned was not forthcoming: *Held*, that secondary evidence of the unstamped agreement of sale was not admissible, even on payment of penalty. *Raja of Bobbili* v. *Inuganti China Sitaramasami Garu (1899) 23 Mad. 49*, followed. *Held*, further on the facts that the agreement of sale having been confessed and in part carried into execution, the matter had advanced beyond the stage of Contract and the equities which had arisen could not be administered unless the Contract was regarded—Specific performance was therefore decreed. HIRALAL RAMNARAYAN *v.* SHANKAR HIRACHAND

I. L. R. 45 Bom. 1170

59. ——— **Sale of goods**—*Delivery of goods to be given on arrival of a steamer—Steamer arriving without goods—Warranty that the goods were on board the steamer—Vendor liable for breach of contract.* The defendant contracted to sell goods to the plaintiff under the following terms: "We have duly made a contract to give you the delivery of two tons of sodium sulphide packed in two cwt. drums of United Alkali's make shipped per S. S. *City of Delhi* at the rate of Rs. 50 per cwt. deliver at Bombay. In case of the steamers meeting with any accident on the way we are not bound to give you the goods, but on arrival of the aforesaid steamer we are bound to give you the delivery of the goods." The *City of Delhi* arrived in Bombay harbour but it did not carry the contract goods on board. The plaintiff having sued to recover damages for breach of contract. *Held*, allowing the suit, that the defendant by contracting that he would be bound to deliver the goods on arrival of the steamer gave a warranty that the goods which he had sold were on board the steamer but as the steamer arrived without the goods he was liable. *Hale* v. *Rawson (1858) 4 C. B. N. S. 85*, relied on. BHAILAL CHATURBHAI *v.* KALYANRAI VRAJRAI (1921)

I. L. R. 45 Bom. 1222

CONTRACT ACT (IX OF 1872).

See EXECUTION . **I. L. R. 44 Mad. 919**

——— **Common Carriers (including carriers by Sea) not governed by**—

See BILL OF LADING.

I. L. R. 33 Mad. 941

——— **A Bailee for hire**—Is ordinarily bound to return the article hired at the end of the period of hire but when the article is hired out for use for a certain purpose there is an implied warranty it is fit for that purpose and if there is breach of warranty the bailee is not liable to pay the hire and need take no steps to return the article to the bailor. ISUFFALLI HASSANALLY *v.* JEBRAHIM DAJIBHAI

I. L. R 45 Bom. 1017

——— **ss. 1, 118**—*Evidence Act (I of 1872) s. 92—Contract for sale and purchase of piece-goods to be manufactured according to sample—Purchasers to clear goods within twenty-four hours*

arbitration—Power of arbitrators to award an allow-

CONTRACT ACT (IX OF 1872)—*contd.*

unreasonable—Custom cannot vary written contract. In September and October, 1913, the defendants entered into seven contracts with the plaintiffs, referred to under the letters A to G, for the sale and delivery of piece-goods of certain specified descriptions. The contracts provided for delivery of the goods by instalments within a fixed period. As soon as the goods were ready for delivery the defendants sent a delivery order to the plaintiffs, whereupon the plaintiffs would either remove the goods from the defendants' premises or sign the delivery order acknowledging that the goods had been taken delivery of and the price debited to them, in which case the goods remained with the defendants at the risk of the plaintiffs. The goods were subsequently cleared by the plaintiffs at their convenience on payment of the price, interest thereon at 9 per cent., warehouse rent, and all other charges. A common feature of all the contracts was that the defendants had agreed not to give delivery of similar goods to other customers during the period fixed for delivery under the plaintiffs' contracts. Contract A was for the 251 bales, of which the plaintiffs took delivery of some while the contract was cancelled as regards others and 84 bales remained the subject of dispute as the plaintiffs contended that the bales were inferior in quality and were not otherwise in accordance with the contract. The dispute was referred to the arbitration of two experts in the trade nominated by the parties. During the survey of the goods both parties being represented by their respective salesmen the arbitrators were asked by the plaintiffs to award an allowance in price in the event of their holding that the goods are different in quality from the sample. The arbitrators found that there was a difference in finish, quality, width, and, in some cases, of design and colour, and they decided that the plaintiffs were entitled to an allowance of 4 annas per piece but must take delivery of the 84 bales with the allowance. The plaintiffs, however, refused to take delivery of the bales with any allowance on the ground that they were not bound to do so under their contract and that the arbitrators had, in fact, acted beyond the scope of the reference under the contract. Contracts B, C, and D covered 658 bales, of which 159 were taken delivery of by the plaintiffs who refused to take delivery of the rest on the ground that the defendants had committed a breach of

delivery of, while as to 42 the contract was cancelled and the plaintiffs demanded the balance of 113 bales on payment of Rs. 7,236 being the amount due by them on an account, being taken in respect of all the seven contracts. The defendants refused to deliver the 113 bales on receipt of Rs. 7,236 but claimed Rs. 34,734-7-6, the contract price thereof. The plaintiffs thereupon filed a suit asking for delivery of 113 bales on payment of Rs. 7,236. The defendants pleaded that, with respect to 84 bales under the contrtac A, the plaintiffs were bound by the award of the arbitrators and that with respect to 499 bales under the contracts B, C, and D, the plaintiffs wrongly rejected to take delivery thereof, as the defendants had

CONTRACT ACT (IX OF 1872)—*contd.*

given delivery of goods to other customers by sending them delivery orders and obtaining their signatures before the period of plaintiffs' contracts begun to run. The defendants counterclaimed Rs. 2,00,230-12-0 in respect of 722 bales of which the plaintiffs failed to take delivery. The defendants subsequently amended the written statement by pleading a custom of the trade that the buyer could not reject for difference in quality provided the same was not excessive or unreasonable and could be met by an allowance in the price. *Held,* (i) that the custom alleged by the defendants was inconsistent with the stipulation in the contract that a certain quality of goods should be delivered in return for payment of a certain fixed price. *In re North-Western Rubber Company, Limited, and Huttenbach & Co. [1908] 2 K. B. 907,* followed. *In re Walkers, Winser, & Hamm and Shaw, Son & Co. [1904], 2 K. B. 152,* not followed; (ii) that the plaintiffs were bound by the award of the arbitrators made in pursuance of their request, and not objected to by their opponents. *Re an arbitration between Green & Co. and Balfour, Williamson & Co., 63 L. T. 525,* referred to; (iii) that the defendants had not committed a breach of the contracts B, C, and D as the debiting of the goods to the buyers and their signing a delivery order marked the period of delivery rendering them liable for not clearing the goods from the premises of the defendants who held as warehousemen and bailees for the buyers; and (iv) that the plaintiffs' suit should be dismissed and the defendants' counter-claim be allowed. RUTTONSI ROWJI *v.* THE BOMBAY UNITED SPINNING AND WEAVING CO. (1916) . I. L. R. 41 Bom. 518

———— s. 2

See LAND ACQUISITION.

I. L. R. 44 Bom. 797

———— s. 2 (a), (b)—

See COMPANIES ACT, ss. 28, 45, 61.

I. L. R. 36 Bom. 557

———— s. 2, (d)—

See CONSIDERATION.

I. L. R. 45 Calc. 774

———— s. 2, (i)—There is nothing in the Contract Act (IX of 1872) to show an intention that a person not a party to the contract can sue on it. SHANKAR VISHVANATH *v.* UMABAI (1913) I. L. R. 37 Bom. 471

———— ss. 2 (d), 16, 25—*Consideration—Loan of money, not advanced until the borrowers made themselves responsible for a previous loan to their brother—Undue influence—Inadequacy of consideration.* Defendant No. 1 being under arrest on a charge of embezzlement his brothers defendants Nos. 2 and 3 approached the plaintiff for a loan in order therewith to obtain the release of defendant No. 1 on bail and to arrange for his defence. Plaintiff with whom defendant No. 1 had previous dealings refused to advance any money unless defendants Nos. 2 and 3 made a "*mobalaqbundi*" including a previous debt of defendant No. 1 amounting to Rs. 3,062-1, defendants Nos. 1 and 2 failing to obtain money elsewhere accepted these terms, took a loan of Rs. 1,200 and made the *mobalaqbundi* in the way desired: *Held,* that the acknowledgment of liability by the defendants Nos. 2 and 3 was a part of the consideration which they gave for the money borrowed from plaintiff; that the Rs. 1,200 advanced was good and valuable consideration for the promise or promises made by defendants Nos. 2 and 3 and there was no inadequacy of consideration within the meaning of Explanation (2) of s. 25 of the Contract Act. Urgent need of money on the part of the borrower does not of itself place the lender in a "position to dominate the will" within the meaning of s. 16 of the Contract Act. BIJOY SINGH DUDHURIA *v.* KUMUDI KANTA TALUKDAR (1918) . . . . 23 C. W. N. 690

CONTRACT ACT (IX OF 1872)—*contd.*

———— ss. 2 (d) 16, 25—*contd.*

———— ss. 2 (d), 62—

See DEBTOR AND CREDITOR.

I. L. R. 41 Calc. 137

———— s. 3—

See COMPANIES ACT.

I. L. R. 36 Bom. 557

———— ss. 4, 61 and 103—*Transfer of Property Act (IV of 1882), s. 137—Stoppage in transit—Instruments of title—Railway receipts, effect of assignment of.* A, from Bagalkote, consigned to B at Bombay certain consignments of bales of cotton. These consignments A entrusted to the Madras and Southern Mahratta Railway at Bagalkote for conveyance to Bombay, which was effected by rail as far as Murmagoa on the lines of that Company and afterwards from Murmagoa to Bombay by sea by ships of the Bombay Steam Navigation Company. The Railway Company issued in respect of these consignments receipts which A handed over to B as the consignee of the goods in exchange for hundies for the amount of the value of the goods drawn by B in favour of A. These railway receipts contained, *inter alia,* the following condition:—"That the railway receipt given by the Railway Company for the articles delivered for conveyance must be delivered up at destination by the consignee to the Railway Company or the Railway may refuse to deliver and that the signature of the consignee or his agent in the delivery book at destination shall be evidence of complete delivery. If the consignee does not himself attend to take delivery he must endorse on the receipt a request for delivery to the person to whom he wishes it made and if the receipt is not produced the delivery of the goods may at the discretion of the Railway Company be withheld until the person entitled in its opinion to receive them has given an indemnity to the satisfaction of the Railway Company." While the goods were in transit and in the possession of the Bombay Steam Navigation Company, B became insolvent and some of the hundies given by him to A in respect of the goods in transit were dishonoured. A thereon purported to stop the goods and gave the Steamship Company instructions not to deliver them to B but to C. In the meantime B had borrowed monies from D and E and had transferred to D and E respectively the railway receipts for certain of these consignments as security. On the arrival of the bales at Bombay, they were claimed by D and E respectively and also by C. The Bombay Steam Navigation Company filed two suits, one against A, B and D and the other against A and E, claiming that the defendants in each suit might be restrained from taking proceedings against the plaintiff Company in relation to the bales, and that the defendants in each suit might be required to interplead together concerning their claim to the goods in question in

CONTRACT ACT (IX OF 1872)—*contd.*

given delivery of goods to other customers by sending them delivery orders and obtaining their signatures before the period of plaintiffs' contracts begun to run. The defendants counterclaimed Rs. 2,00,230-12-0 in respect of 722 bales of which the plaintiffs failed to take delivery. The defendants subsequently amended the written statement by pleading a custom of the trade that the buyer could not reject for difference in quality provided the same was not excessive or unreasonable and could be met by an allowance in the price. *Held*, (*i*) that the custom alleged by the defendants was inconsistent with the stipulation in the contract that a certain quality of goods should be delivered in return for payment of a certain fixed price. *In re North-Western Rubber Company, Limited, and Huttenbach & Co.* [1908] *2 K. B. 907*, followed. *In re Walkers, Winser, & Hamm and Shaw, Son & Co.* [1904], *2 K. B. 152*, not followed; (*ii*) that the plaintiffs were bound by the award of the arbitrators made in pursuance of their request, and not objected to by their opponents. *Re an arbitration between Green & Co. and Balfour, Williamson & Co., 63 L. T. 525*, referred to; (*iii*) that the defendants had not committed a breach of the contracts B, C, and D as the debiting of the goods to the buyers and their signing a delivery order marked the period of delivery rendering them liable for not clearing the goods from the premises of the defendants who held as warehousemen and bailees for the buyers; and (*iv*) that the plaintiffs' suit should be dismissed and the defendants' counter-claim be allowed. RUTTONSI ROWJI *v.* THE BOMBAY UNITED SPINNING AND WEAVING CO. (1916) . I. L. R. 41 Bom. 518

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CONTRACT ACT (IX OF 1872)—*contd.*

——— ss. 2 (d) 16, 25—*contd.*

good and valuable consideration for the promise or promises made by defendants Nos. 2 and 3 and there was no inadequacy of consideration within the meaning of Explanation (2) of s. 25 of the Contract Act. Urgent need of money on the part of the borrower does not of itself place the lender in a "position to dominate the will" within the meaning of s. 16 of the Contract Act. BIJOY SINGH DUDHURIA *v.* KUMUDI KANTA TALUKDAR (1918) . . . . . 23 C. W. N. 690

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I. L. R. 41 Calc. 137

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——— ss. 4, 61 and 103—*Transfer of Property Act (IV of 1882), s. 137—Stoppage in transit —Instruments of title—Railway receipts, effect of assignment of.* *A*, from Bagalkote, consigned to *B* at Bombay certain consignments of bales of cotton. These consignments *A* entrusted to the Madras and Southern Mahratta Railway at Bagalkote for conveyance to Bombay, which was effected by rail as far as Murmagoa on the lines of that Company and afterwards from Murmagoa to Bombay by sea by ships of the Bombay Steam Navigation Company. The Railway Company issued in respect of these consignments receipts which *A* handed over to *B* as the consignee of the goods in exchange for hundies for the amount of the value of the goods drawn by *B* in favour of *A*. These railway receipts contained, *inter alia*, the following condition:—"That the railway receipt given by the Railway Company for the articles delivered for conveyance must be delivered up at destination by the consignee to the Railway Company or the Railway may refuse to deliver and that the signature of the consignee or his agent in the delivery book at destination shall be evidence of complete delivery. If the consignee does not himself attend to take delivery he must endorse on the receipt a request for delivery to the person to whom he wishes it made and if the receipt is not produced the delivery of the goods may at the discretion of the Railway Company be withheld until the person entitled in its opinion to receive them has given an indemnity to the satisfaction of the Railway Company." While the goods were in transit and in the possession of the Bombay Steam Navigation Company, *B* became insolvent and some of the hundies given by him to *A* in respect of the goods in transit were dishonoured. *A* thereon purported to stop the goods and gave the Steamship Company instructions not to deliver them to *B* but to *C*. In the meantime *B* had borrowed monies from *D* and *E* and had transferred to *D* and *E* respectively the railway receipts for certain of these consignments as security. On the arrival of the bales at Bombay, they were claimed by *D* and *E* respectively and also by *C*. The Bombay Steam Navigation Company filed two suits, one against *A*, *B* and *D* and the other against *A* and *E*, claiming that the defendants in each suit might be restrained from taking proceedings against the plaintiff Company in relation to the bales, and that the defendants in each suit might be required to interplead together concerning their claim to the goods in question in

CONTRACT ACT (IX OF 1872)—*contd.*

——— ss. 4, 61 and 103—*contd.*

such suit. *Held*, that reading s. 103 of the Contract Act in conjunction with s. 137 of the Transfer of Property Act (as provided for by s. 4 of the Transfer of Property Act) railway receipts must be taken to be mercantile documents of title fulfilling one or other of the conditions specified in the explanation to s. 137 of the Transfer of Property Act, *viz*, proving in the ordinary course of business the possession or control of goods, or authorising or purporting to authorise either by endorsement or delivery the possessor of the document to transfer or receive the goods thereby represented, and that under the third condition of the railway receipts in question it was clear that those documents fell under the latter class. *Great Indian Peninsula Railway Company* v. *Hanmandas Ramkison and Virji Hansraj, I. L. R. 14 Bom. 57*, not followed. Simultaneously with these suits *D* had filed a suit against *A* and *B* to recover the monies advanced by him against the railway receipts transferred to him. Subsequently the entries in the general account of *B* in *D's* books showed that various sums were credited to *B* which, if the rule laid down in s. 61 of the Contract Act were applied, would extinguish that debt. *Held*, that the intention of *D* as indicated by his suit to enforce his claim against the proceeds of the bales of cotton covered by the railway receipts in question negatived the application of the rule. *Held*, accordingly, that *D* and *E* were respectively entitled to the benefit of s. 103 of the Contract Act as against *A* and, the bales having been sold, that the persons in whose hands the sale-proceeds were should hand over the net sale-proceeds to *D* and *E*, deducting any charges justly due. AMERCHAND & Co. *v.* RAMDAS VITHALDALS (1913) . I. L. R. 38 Bom. 255

——— s. 6—

See CIVIL PROCEDURE CODE (ACT V OF 1908), ss. 47, 115
I. L. R. 42 Mad. 776

——— ss. 7, 8, 9—

See CONTRACT . I. L. R. 42 All. 187

——— s. 9—

See s. 56—
26 C. W. N. 573

——— s. 10—

See COMPANIES ACT, ss. 28, 45, 61.
I. L. R. 36 Bom. 557

See LAND ACQUISITION.
I. L. R. 44 Bom. 797

to himself to his minor wards in satisfaction of money which he owed to them. After the guardian's death the minors sued his heirs for possession of the property. *Held*, on the finding, that the transaction was *bonâ fide* and for the benefit of the

——— s. 11—

See MINOR . I. L. R. 40 Mad. 308

CONTRACT ACT (IX OF 1872)—*contd.*

——— s. 11—*contd.*

——— *Minor—Sale—Minor vendee subsequently dispossessed by third party—Right of vendee to recover purchase-money from vendor.* Where certain zamindari property was sold to persons who were minors at the time of sale, and the purchasers were subsequently ousted on suit by third parties, it was *held* that the purchasers were at any rate entitled to recover from the vendors the sum which they had paid as purchase-money. *Mir Sarwarjan* v. *Fakhr-ud-din Mahomed Chowdhuri, L. R. 39 I. A. 1; I. L. R. 39 Calc. 232*, and *Mohori Bibee* v. *Dharmodas Ghose, I. L. R. 30 Calc. 539*, distinguished. WALIDAD KHAN *v.* JANAK SINGH (1913)
I. L. R. 35 All. 370

——— ss. 11, 64, 65, 70— Sale by a minor—*Discharge of mortgage by vendees—Sale not completed—Suit by vendees to recover consideration paid.* *H* and *R*, two Hindu widows of whom *R* was a minor, sold a shop to the plaintiffs. Registration of the sale-deed was refused, and the vendees thereupon sued to recover Rs. 231 alleged to have been paid to certain mortgagees in discharge of a mortgage on the shop, and Rs 100 as paid in cash to the vendors, and they asked for sale of the shop. *Held*, that the sale being by a minor, the plaintiffs acquired no interest to support their discharge of the mortgage, and that the remaining sum of Rs 100 not having been paid for necessaries was also not recoverable. SHIAM LAL *v.* RAM PIARI (1909) . . . I. L. R. 32 All. 25

——— ss. 15, 16—*Threat by a stranger to a contract, to commit suicide, held out to his wife and son and inducing them to enter into contract on that account—Validity of contract—Coercion and undue influence—Suicide whether 'an act forbidden by Indian Penal Code'—'Prejudice' in s. 15, meaning of.* By a threat of suicide, a Hindu induced his wife and son to execute a release deed in favour of his brother in respect of certain properties which they claimed as their own. *Held* by WALLIS, *C.J.*, and SESHAGIRI AYYAR, *J.* (OLDFIELD, *J.*, dissenting), that the threat of suicide amounted to coercion within s. 15 of the Indian Contract Act, and that the release deed was therefore voidable. *Per* WALLIS, *C. J.*, and SESHAGIRI AYYAR, *J.*—Suicide is an 'act forbidden by the Indian Penal Code' and suicide by a Hindu if, actually committed, will be an act not only to his own prejudice but also 'to the prejudice' of his wife and son with s. 15. *Per* OLDFIELD, *J.*—Suicide is not 'an act forbidden by the Indian Penal Code, directly or inferentially; and hence the threat did not amount to coercion and the release was not voidable on that account. As the person who held out the threat was not a party to the release deed, it was not voidable on account of "undue influence" within s. 16 of the Indian Contract Act. AMMIRAJU *v.* SESHAMMA (1917) . . I. L. R. 41 Mad. 33

——— ss. 15 to 18—

See HINDU LAW ADOPTION.
I. L. R. 39 Bom. 441

——— ss. 15, 69, 70, 72, illus. (b)—

See VOLUNTARY PAYMENT.
I. L. R. 40 Calc. 598

——— s. 16—(as amended by Act VI of 1899)—

See s. 2 . . 23 C. W. N. 690

CONTRACT ACT (IX OF 1872)—*contd.*

——— s. 16—(as amended by Act VI of 1899)—*contd.*

See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXIII, R. 3.

I. L. R. 38 Mad. 850

See LETTERS, PATENT, Cl. 29.

2 Pat. L. J. 663

——— *Interest, grounds for reduction of—Undue influence.* It is not open to a Court to reduce the rate of interest in a promissory note unless the stipulation as to interest was obtained by the exercise of undue influence as defined in s. 16, Indian Contract Act (Act IX of 1872). *Balkishan Das* v. *Madan Lal, I. L. R. 29 All. 303*, dissented from. *Dhanipal Das* v. *Raja Maneshar Bakhsh Shing, 33 I. A. 118*, followed. *Per* THE CHIEF JUSTICE.—It was not open to the District Judge on general equitable grounds to interfere with the contract between the parties unless he was satisfied that the contract was brought about by the exercise of undue influence. *Per* SANKARAN NAIR, *J.*—Excessive interest in itself may be evidence of the fact that the debtor must have been in a very helpless condition to accept the terms imposed by the creditors. KESAVULU NAIDU *v.* ARITHULAI AMMAL (1913)

I. L. R. 36 Mad. 533

——— *Undue influence—Onus of proving undue influence—Suit to cancel contract on ground of undue influence —Domination of will must be put in action.* To treat undue influence as having been established by proof of the relations of the parties having been such that the one naturally relied upon the other for advice and the other was in a position to dominate the will of the first in giving it, is erroneous. That merely proves influence. But both by the Law of India and the Law of England more than mere influence must be established so as to render it, in the language of the law, 'undue.' It must be established that the person in a position of domination has used that domination to obtain unfair advantage for himself and so as to cause injury to the person relying upon his authority or aid. When the relation of influence as above set forth has been established, and it is also made clear that the bargain is with the person who influences the other and is in itself unconscionable then the person in a position to use the influence has a heavy burden thrown on him of proving affirmatively that no domination was practised. POOSATHURAI *v.* KANNAPPA CHETTIAR

I. L. R. 43 Mad. (P. C.) 546

——— ss. 16. 19—

See UNDUE INFLUENCE.

I. L. R. 42 Calc. 286

——— ss. 16, 19A—Undue influence—*Contract—Facts necessary to justify interference of Court on the ground of undue influence.* The power of a Court to interfere with contracts alleged to be unconscionable is limited by the provisions of the Indian Contract Act, 1872, ss. 16 and 19A. The fact that an excessive rate of interest is charged in a contract is not alone sufficient to establish that the making thereof has been induced by undue influence, but the Court must also find that the lender was in a position to dominate the will of the borrower when the contract was entered into before any presumption arises that the contract was induced by undue influence. *Balkishan Das*

CONTRACT ACT (IX OF 1872)—*contd.*

——— ss. 16, 19A—*contd.*

v. *Madan Lal, All. Weekly Notes (1907) 55. Kirpa Ram* v. *Sami-ud-din Ahmad Khan, I. L. R. 25 All. 284*, and *Dhanipal Das* v. *Maneshar Baksh Singh, I. L. R. 28 All. 570*, referred to. DEBI SAHAI *v.* GANGA SAHAI (1910)

I. L. R. 32 All. 589

——— ss. 16, 74—

See HINDU LAW (MINOR).

2 Pat. L. J. 212

See INTEREST.

I. L. R. 42 Calc. 652, 690
24 C. W. N. 444

——— *Interest—Stipulation for compound interest on default—Hard and unconscionable bargain—Limit of Court's powers to interfere—onus probandi —Mortgage suit—Part of property sold to third party—Purchaser not impleaded, effect of—Practice—Subordinate Courts bound to follow decisions of Patna High Court.* A contract cannot be avoided by a Court merely because it considers that the rate of interest is hard and unconscionable or unusual, or that it will be ruinous to the debtor, and a debtor cannot be relieved from his obligations except by showing that he comes within s. 16 or 74 of the Contract Act, 1872. A vague suggestion without a definite finding that the lender was in a position to take advantage of the pressing needs of the borrower does not entitle the Court to reduce the rate of interest unless the Court finds that the lender used his position to take an unfair advantage over the borrower. An agreement to pay interest on a mortgage bond at 2 *per cent. per mensem*, with yearly rests, is not necessarily a hard and unconscionable bargain. *Per* MULLICK, *J.*—The subordinate Courts within the jurisdiction of the Patna High Court are bound to follow the decisions of that Court whether they are in conflict with the decisions of other High Courts or not. KAMLA PRASAD *v.* PANDEY RAM CHANDRA PRASAD NARAIN SINGH

4 Pat. L. J. 565

——— s. 18, cl. (3)—*Civil Procedure Code (Act V of 1908), O. XXI, r. 91—Stamp Act (II of 1899), s. 35—Court-sale—Discovery that the judgment-debtor had no saleable interest—Failure of consideration—Suit by auction-purchaser for possession or return of purchase-money—Relations of the judgment-creditor and the auction-purchaser—Suit not cognizable by Small Causes Court—Unstamped document regarded as non-existent.* A Court-sale purchaser having discovered that the judgment-debtors had no saleable interest in the property sold brought a suit against the judgment-creditor for recovery of possession of the property, or in the alternative, return of the purchase-money on the footing of total failure of consideration. A question having arisen as to whether the suit was maintainable: *Held*, that the suit was maintainable, inasmuch as under the Civil Procedure Code (Act V of 1908) there was an implied warranty of some saleable interest when the right, title and interest of a judgment-debtor was put up for sale, and the purchaser's right based on such implied warranty to a return under certain conditions of the purchase-money which had been received by the judgment-creditor was recognized. The relations of the parties, namely, the judgment-creditor and the Court-sale purchaser were in the nature of contract. *Held*, further, that such a

CONTRACT ACT (IX OF 1872)—*contd.*

———— s. 18, cl. (3)—*contd.*

suit, though the subject-matter was less than
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YAK GANGADHAR BHAT (1910)
I. L. R. 35 Bom. 29

———— ss. 18 and 19—

See CHUKANI RIGHT.
I. L. R. 42 Calc. 28

———— s. 19—*Registered deed of gift—Right of revocation not reserved by the donor—Title of the donee—Challenge by a third party having no title.* Though it might be open to a donor, within the time allowed by the Law of Limitation, to attack

SHAMRAV (1911) . . **I. L. R. 36 Bom. 37**

———— ss. 19, 19A—

See S 16 . **I. L. R. 32 All. 589**
See TRUSTS ACT (II OF 1882), s. 88.
I. L. R. 43 Bom. 173

See UNDUE INFLUENCE.

I. L. R. 42 Calc. 286

———— s. 20—*Contract made under a mutual mistake as to the nature and extent of vendor's title—Contract to grant mining lease by Mogoli Brahmattardar at a time when Brahmattardars generally were believed to own subsoil rights—Refusal to complete contract on decisions of Court throwing doubts on the law—Suit for refund of advances—Specific Relief Act (I of 1877), s. 36.* In October, 1908, the defendants, who owned a share in some *Mogoli Brahmattar* land, contracted to give the plaintiffs a lease the object of which was to enable the plaintiffs to work coal underground. The contract expressly provided that there should be a good title. At this time it was generally believed that the rights of the tenure-holders included mineral rights. The plaintiffs advanced some

unless defendants satisfied them as to their title to the property, which, the defendants not having done, the plaintiffs sued for refund of the advances: *Held,* that the contract was void under s. 20 of the Indian Contract Act as having been entered into under a mutual mistake. That the contract had also been broken by the defendants by their failure to show a good title and to cure the defect therein, and the plaintiffs were entitled to recover the money advanced by them. RAM CHANDRA MISRA *v.* GANESH CHANDRA GANGOPADHYAY (1916)
21 C. W. N. 404

———— ss. 20 and 56—

See s. 56 . . . **26 C. W. N. 573**

CONTRACT ACT (IX OF 1872)—*contd.*

———— ss. 20 and 65—*Fraudulent representation and impersonation by one of the executants of a deed—Mistake as to a matter of fact essential to the agreement—A person fraudulently mortgaging property not his own—Mortgagee believing in good faith the mortgagor to be owner of property—Transfer of mortgage by mortgagee in favour of a third party—Deed of transfer signed by the mortgagor as a concurring party, the mortgagor again fraudulently representing to be owner—Transferor and transferee acting under the belief that the real owner concurred in the transfer—Failure of consideration—Avoidance of contract* Under the will of their father, J. F. and L M. became entitled as tenants-in-common to equal moieties of a house at Mazagaon in Bombay . The third son C was given a right of residence in the house so long as he lived in harmony with his brothers and sisters. C, however, fraudulently representing himself to be his brother, L. M., purported to create a mortgag of a moiety of the said house in favour of the defendant. Subsequently the defendant in consideration of a sum of Rs. 1,770 paid to him by the plaintiff, transferred the said mortgage in favour of the plaintiff. The plaintiff having insisted that the said L. M. should be a party to the deed of transfer C fraudulently representing himself to be L. M. joined in executing the said deed as a concurring party. The plaintiff having discovered that the mortgage and the transfer deeds were not executed by L. M but by a forger in his name, sued the defendant as transferor for return of the purchase-money, as on a total failure of consideration. The trial Judge applied the maxim "*caveat emptor*" and dismissed the suit. The plaintiff thereupon appealed: *Held,* that the defendant was bound under s. 65 of the Indian Contract Act to repay the purchase-money to the plaintiff inasmuch as both parties being in the belief that the real owner had joined in the transfer were under a mistake as to a matter of fact essential to the agreement which was, therefore, avoided under s. 20 of the Indian Contract Act. ISMAIL ALLARAKHIA *v.* DATTATRAYA (1916) . . . **I. L. R. 40 Bom. 638**

———— s. 21, 65 and 72—

See CONTRACT WITH ENEMY.
I. L. R. 44 Bom. 631

———— s. 23—

See AGREEMENT AGAINST PUBLIC POLICY.
See BILL OF LADING.
I. L. R. 38 Mad. 941
See EXPECTANCIES.
I. L. R. 39 Mad. 554
See HINDU LAW—MARRIAGE.
I. L. R. 39 Bom. 538
See LIMITATION ACT (IX OF 1908), s. 19.
I. L. R. 40 Mad. 701
See MARRIAGE . **15 C. W. N. 447**
See PUTNI . . **14 C. W. N. 1031**

———— *Agreement to remunerate third party for using his influence to bring about settlement of civil dispute, if opposed to morality or public policy.* Where *A* promises to remunerate *C* in consideration of the latter undertaking to use his influence over *B* so as to effect a compromise of a civil dispute between *A* and *B'* the consideration or object of the agreement is

CONTRACT ACT (IX OF 1872)—*contd.*

——— s. 23—*contd.*

not illegal and it is enforceable. SYED MAHOMED ZAHURUL HUQ *v.* SHAH WAZIRUL HUQ (1911) 16 C. W. N. 480

2. ——— *Criminal breach of trust, prosecution against gomastha dropped at the instance of Magistrate on accused executing mortgage bond for the amount embezzled—Compounding non-compoundable offence, if contrary to public policy.* Where at the trial of a *gomastha* for criminal breach of trust under s. 408, Criminal Procedure Code, the Magistrate having suggested that the matter should be settled out of Court the accused executed out of Court a mortgage bond in favour of his master for the amount embezzled, and the prosecution was dropped and the accused was acquitted or discharged, though the withdrawal of the prosecution was not mentioned in the mortgage bond as forming part of the consideration: *Held*, that the mortgage bond was illegal and a suit on its basis was not maintainable. *Per* CARNDUFF, *J.*—It is against public policy to compound a criminal case which is declared to be non-compoundable by the Criminal Procedure Code and an agreement to that end is wholly void in law. *Williams* v. *Bayley, L. R., 1 H. L. 200,* referred to. The circumstance that the Magistrate wrongfully suggested or sanctioned the compromise makes no difference. *Collins* v. *Ballantern, 1 Sm. L. C., Ed. 11 at p. 369,* relied on. *Sheikh Nubbee Buksh* v. *Bibee Hingon, 8 W. R. 412,* not followed. SHEIKH MAJEBAR RAHMAN *v.* SYED MUKTASHEB HOSSEIN (1912)

I. L. R. 49 Calc. 113
16 C. W. N. 854

3. ——— *Agreement between several firms to fix rates for ginning and baling cotton and to share profits—Agreement neither in restraint of trade nor against public policy. Held,* that an agreement whereby certain firms fixed the rates to be charged for ginning and baling cotton and further as to the manner in which the profit should be shared by the parties thereto, was an agreement neither in restraint of trade nor opposed to public policy. *Haribhai Manek Lal* v. *Sharafali Isabji, I. L. R., 22 Bom. 61,* and *Fraser & Co.* v. *The Bombay Ice Manufacturing Co., I. L. R. 29 Bom. 107,* followed. KUBER NATH *v* MAHALI RAM (1912) . . . I. L. R. 34 All. 587

4. ——— *Contract between third parties for the payment of money on the failure of a marriage void as opposed to public policy.* An arrangement between *A* and *B*, that *B's* daughter shall marry *A's* son and that, if she fails to do so, *B* shall pay a sum of money to *A*, is opposed to public policy and void under s. 23, Indian Contract Act (IX of 1872). *Venkata Kristnayya* v. *Lakshmi Narayana, I. L. R. 32 Mad. 184,* applied. *Hermann* v. *Charlesworth,* [1905] *2 K B. 123,* referred to. *Purtamdas Tribhovandas* v. *Purshotamdas Mangaldas, I. L. R. 21 Bom. 23* explained. DEVARAYAN *v.* MUTTURAMAN (1914) . . I. L. R. 37 Mad. 393

5. ——— *Forest Act (VII of 1878)—License—Agreement to enter into partnership contravening the terms of the license—Agreement not unlawful.* An agreement to share profits which would contravene the terms of the license as between the Forest Officer and the licensee is not forbidden by law, nor would it defeat the provisions of any law. *Raghunath Lalman,* v. *Nathu Hirji Bhate, I. L. R. 19 Bom. 626,* distinguished. NAZARALLI SAYAD IMAM *v.* BABAMIYA DUREYATIMSHA (1915)

I. L. R. 40 Bom. 64

6. ——— *Contract — Agreement opposed to public policy—Assignment of mortgage taken by a patwari. Held,* that the taking of an assignment of a mortgage by a patwari is not a transaction opposed to public policy within the meaning of s. 23 of the Indian Contract Act, 1872. *Shiam Lal* v. *Chhaki Lal, I. L. R. 22 All. 220,* and *Sheo Narain* v. *Mata Prasad, I. L. R. 27 All. 73,* overruled. BHAGWAN DEI *v.* MURARI LAL (1916) . . . . I. L. R. 39 All. 51

7. ——— *Contract—Agreement opposed to public policy—Purchase by a kanungo of mortgaged property. Held,* that there exists no legal prohibition against a kanungo purchasing mortgaged property and suing to redeem the mortgage existing on it, nor is such a transaction opposed to public policy within the meaning of s. 23 of the Indian Contract Act, 1872. KAMALA DEVI *v.* GUR DAYAL (1916) . I. L. R. 39 All. 58

8. ——— *Agreement to pay money to the vakil's clerk for giving special attention to a case, whether opposed to public policy.* An agreement by which a litigant binds himself to pay his vakil's clerk a certain amount for giving special attention to his legal business which his vakil was bound to see to in consideration of his fee, is opposed to public policy and is void and unenforceable. *Ex parte, Cotton 9 Beav. 107,* referred to. SURYANARAYANA *v.* SUBBAYYA (1917)

I. L. R. 41 Mad. 471

9. ——— *Public policy interpreted according to the dicta of English Judges—Contracts for the sale and purchase of gold sovereigns at bullion rates for forward deliveries—Notifications under the Defence of India Act (IV of 1915).* The plaintiff, a commission agent, entered into contracts on behalf of the defendant his up-country constituent to purchase sovereigns for Vaishakh and Jeth *vaidas* of Samvat year 1974, *i.e.*, May and June 1918, settlements. The defendant failing to make payment on the *vaida* days the plaintiff sued for damages occasioned by breach of the contracts. The defendant contended *inter alia* that the contracts were opposed to public policy within the meaning of s. 23 of the Indian Contract Act and in support of his contention relied upon two Notifications issued under the Defence of India Act (IV of 1915). The first Notification dated 29th June 1917 and published on 9th July 1917, provided that "no person shall melt, break up or use otherwise than as currency, any current gold or silver coin." The second Notification which was subsequent to the date of breach of the contracts and issued on the 22nd August 1918 provided that "no person shall sell or purchase, or offer to sell or purchase, any coin for an amount exceeding the face value of such coin, or shall accept or offer to accept any such coin in payment of a debt or otherwise for an amount exceeding its face value." The trial Judge dismissed the plaintiff's suit holding that the trafficking in the gold currency of the country while the Great War was in progress tended to defeat and embarrass the whole scheme of the Government finance and was in its very essence opposed to public policy which in India at any rate was defined by and coincided with

CONTRACT ACT (IX OF 1872)—*contd.*

——— s. 23—*contd.*

therefore been contrary to public policy. ...

s. 23 of the Indian Contract ...
clear general head of public policy could be evolved which would justify the Court in holding them unlawful *on the ground*; (2) that if the case was to be decided on the Notifications the contracts must be shown to be forbidden by law and would then fall under the first head of s. 23 of the Indian Contract Act and any reference to public policy would be irrelevant; (3) that the contracts were *not obnoxious to the Notification of June* 1917 and were untouched by the Notification of August 1918. *Per* HAYWARD, *J*.—"There was, in my opinion, no substantial justification for holding that those dicta (*i.e.*, the English Judges on public policy) should be disregarded by Judges in India and that public policy should be interpreted under s. 23 of the Indian Contract Act as comprehending all the political policies from time to time of the Government of India" SHRINIVASDAS LAKSHMINARAYAN *v.* RAMCHANDRA RAMRATTANDAS (1919) . I. L. R. 44 Bom. 6

10. ——— *Contract for supply of copies of a specimen picture—Copyright in the picture obtained by a firm in England—Publication of picture in India not fraudulent—Copyright at ... Copyright Act of 1862 (25 &* ... 1912, the ... plaintiff ... him three ... twenty thousand copies of picture of the Coronation of Their Majesties ... was originally ... Mansell & Co., ... in the said picture. The defendant having committed a breach of contract, the plaintiff sued for damages. The defendant contended that the ... English ...

... to sue for damages for breach. The Fine Arts Copyright Act of 1862 (*25 & 26, Vict. c. 68*) does not extend to any part of the British Dominions outside the United Kingdom. As soon as an author, a publisher or a painter gave to the world what *he had written or created, it became public property*, and there was no right at Common Law before the Statute of Anne (8 Anne c. 19) which ...

Shamsul Ulama M. Zaka (1895) ... referred to. VASUDEO GANESH *v.* ANUPRAM HARIBHAI (1919) . . I. L. R. 44 Bom. 720

... *recover from agent money realized.* The illegality of a contract between the principal and a stranger, under which an agent recovers money due to the principal is no bar to the principal recovering the money so realized from the agent. PALANIYAPPA CHETTIAR *v.* CHOCKALINGAM CHETTIAR (1921) I. L. R. 44 Mad. 334

12. ——— *Contract in restraint of trade. Held*, on a construction of the *kabuliyat* that an agreement whereby the plaintiff, in consideration of an annual rental, granted to the defendant the right to carry on a trade in hides in a particular district, but which did not contain any undertaking that the plaintiff would not grant a *similar right to any one else, was not void under* the Contract Act 1872, s. 23, as being against public policy. A suit for the rent reserved in a *kabuliyat* is governed by Article 116 of the Limitation Act 1908, and not by Article 110. *K. L. Mackenzie v. Maharaja Sir Rameshuar Singh* BAHADUR. . . . . 1 Pat. L. J. 37

13. ——— "*Public Policy*" —*Anti-nuptial agreement to provide for wife's maintenance in event of dissensions between the parties. Held*, that an ante-nuptial agreement entered into between the prospective wife on the one side and the prospective husband and his father on the other (the parties being Muhammadans) with the *object of securing the wife against ill*-treatment and of ensuring her a suitable amount ... maintenance in case such treatment was meted ... against public ... *d Ayeb, I. L. R.* ... MUHAMMAD MUIN- ... L. R. 43 All. 650

——— ss. 23, 65—

See AGRA TENANCY ACT (II OF 1901), ss. 10, 20, 83. I. L. R. 39 All. 173

——— *Agreement for consideration to procure appointment to a public office—Failure to fulfil promise—Suit to recover amount paid, if lies—Pari delicto, parties—Refund.* Any contract to appoint one to a public office or involving the sale of a public office or securing an office for the promisor or recommending him for such office is opposed to public policy. Such contracts are void without reference to the question whether *improper means are contemplated or* used in their execution. *Pichakutty* v. *Narayannappa, 2 Mad. H. C. R. 243*, distinguished and doubted. Where the contract alleged was that ... Judge's Court ...

by plaintiff as aforesaid on the ... defendant had failed to perform his promise within *the time stipulated: Held, that the parties in* this case being clearly in *pari delicto*, the Court would not assist the plaintiff to recover the money. Although where money has been paid under an unlawful agreement but nothing else done in performance of it, the money may be recovered back, this *exception will not be allowed if the agreement* is actually criminal or immoral s. 65 of the Contract Act aptly applies only in cases of agreements which are subsequently found to be void on account of some latent defect or of circumstances unknown at the date of the agreemen-

CONTRACT ACT (IX OF 1872)—*contd.*

——— s. 23, 65—*contd.*

or of an agreement which is afterwards made void by circumstances which supervene. LEDU COACHMAN *v.* HIRALAL BOSE (1915)

I. L. R. 43 Calc. 115
19 C. W. N. 919

———*Marriage brocage agreement—Money paid under, when recoverable—Principle of English Law, applicability of—Transfer, ostensible or real, whether a proper test.* A marriage brocage agreement is unlawful and void *ab initio* and brokerage paid thereunder is recoverable if the agreement or substantial part of it is not performed. Such an agreement does not fall within s. 65 of the Contract Act and the rule to be applied is the rule of English Law. *Taylor* v. *Bowers, 1 Q. B. D. 291, Kearley* v. *Thomson, 24 Q. B. D. 742 ; Barclay* v. *Pearson,* [1893] *2 Ch. 154,* and *Petherperumal Chetty* v. *Muniandy Servai, I. L. R. 35 Calc. 551,* referred to. *Ledu Coachman* v. *Hiralal Bose, I. L. R. 43 Calc. 115,* dissented from. The rule applies whether the transfer of the property under the agreement was merely ostensible or real. *In re Great Berlin Steamboat Company, 26 Ch. D. 616,* followed. SRINIVASA *v.* SESHA (1917)

I. L. R. 41 Mad. 197

——— s. 24—

See CIVIL PROCEDURE CODE (ACT V OF 1908), s. 11 . **I. L. R. 40 Bom. 614**
See CONTRACT . **3 Pat. L. J. 412**

——— *Contract void—Consideration unlawful—Agreement to stifle criminal prosecution—Agreement against public policy.* The plaintiff sued for specific performance of a contract whereby the defendant's husband had agreed to convey certain land to her (plaintiff) for Rs. 150 subject to the condition that in the event of a criminal prosecution for criminal breach of trust instituted by the plaintiff against the said intending vendor not being withdrawn, the contract was not to be enforced. The defendants contended that the contract was void as being opposed to public policy. *Held,* dismissing the suit, that the contract could not be enforced as part of the consideration was void on the ground of being opposed to public policy. BANI RAMCHANDRA *v.* JAYAWANTI GOVIND (1918) . **I. L. R. 42 Bom. 339**

——— s. 25—

See HATCHITTA. **I. L. R. 46 Calc. 746**

See HINDU LAW (JOINT FAMILY).
I. L. R. 2 Lah. 263

——— to pay time barred debt—

See LIMITATION ACT, 1908, s. 19.
6 Pat. L. J. 121

——— *Public policy—Agreement for future separation between husband and wife—Mahomedan law—Agreements void.* An agreement for future separation arrived at between husband and wife (who are Mahomedans) is void as being against public policy under s. 25 of the Indian Contract Act (IX of 1872). *Meherally* v. *Sakerkhanoobai, I. L. R. 7 Bom. L. R. 602,* followed. BAI FATMA *v.* ALIMAHOMED AIYEB (1912)

I. L. R. 37 Bom. 280

———"Debt," *meaning of.* A promise to pay the amount which may be found due by an arbitrator on taking accounts between the parties is not a promise to pay a "debt" within

CONTRACT ACT (IX OF 1872)—*contd.*

——— s. 25—*contd.*

the meaning of s. 25 of the Indian Contract Act (IX of 1872), the amount not being a liquidated sum. The decision of SUBRAHMANYA AYYAR, *J.*, in *Sabju Sahib* v. *Noordin Sahib, I. L. R 22 Mad. 139, 143,* followed. DORAISAMI PADAYACHI *v.* VAITHILINGA PADAYACHI (1916)

I. L. R. 40 Mad. 31

——— Agreement partly void—*partly enforceable, but indivisible.* The defendant executed an agreement in favour of the plaintiff (who was his brother and for some time had managed his properties) to this effect: "I have been very much benefited by the works done by you and there is possibility of more good being done by you in future. In consideration of these benefits I actuated by my sense of duty, promise to grant you for your enjoyment a life-long annuity of Rs. 150": *Held,* that the agreement so far as it related to past services was enforceable and void as regards future services but the agreement being one and indivisible and it being impossible to apportion the promised reward between the past and the future the whole agreement was void. BASANTO KUMAR CHOUDHURY *v.* MADAN MOHAN CHOUDHURY (1918) . **23 C. W. N. 639**

———Time Barred debt—*Not necessary that the agreement should in terms refer to the barred debt.* A promissory note purported to be executed for cash received, but the real consideration was proved to be a debt, the recovery of which was barred by Statute of Limitations: *Held,* that the promissory note was a contract enforceable under s. 25, cl. (3) of the Indian Contract Act. A party to a contract may prove that the actual consideration was something different from that recited in the document and effect must be given to the real consideration. A contract falling within s. 25, cl. (3) of the Indian Contract Act is no exception to this rule. The agreement will be enforced if the real consideration is shown to be a barred debt, though no reference is made in the document to such debt. *Appa Rao* v. *Suryaprakasa Rao, I. L. R. 23 Mad. 94,* considered. *Vasudeva* v. *Narasimma, I. L. R. 5 Mad. 6, 8,* referred to. *Kumara* v. *Srinivasa, I. L. R.* MOODELLY *v.* MUNISAWMI MOODELLY (1909)

I. L. R. 33 Mad. 159

———*Debt barred, promise to pay—Conditional promise—Suit to recover debt if lies.* Acknowledgment of a barred debt cannot give a fresh start to limitation in favour of the creditor. Under cl. (3) of s. 25 of the Contract Act a barred debt is considered a good consideration for a promise to pay, the new promise furnishing the measure of the creditor's right; the whole of the promise whether free or clogged with a condition gives the cause of action. Where *A* and *B* entered into an agreement of partnership wherein it was, *inter alia,* provided that 6 annas out of the profits of the business in the share of *A* would go toward liquidating a previous debt of Rs. 600 due by *A* to *B*, which had become time-barred at the date of the agreement: *Held,* that *B* could not recover the debt except in the manner provided in the agreement. BINDAE DASYA CHUTIANI *v.* CHOTA (1912) . . . **16 C. W. N. 636**

——— s. 26—

See CUSTOM (MARRIAGE).
I. L. R. 1 Lah. 574

CONTRACT ACT (IX OF 1872)—*contd.*

——— s. 26—*contd.*

——— *Kabinnamah—Autho-*

him in the event of his marrying a second wife is not void under s. 26 of the Contract Act. It is lawful for a Mahomedan husband to delegate to his wife power to divorce on certain conditions and the husband marrying a second wife is such a condition. *Badarannissa* v. *Mafiatala, 7 B. L. R. 442,* and *Ayatunnessa* v. *Karam Ali, 12 C. W. N. 907,* referred to MAHARAM ALI *v.* AYESA KHATUM (1915) . . . . 19 C. W. N. 1622

——— s. 27—

See s. 23 . I. L. R. 34 All. 587
I. L. R. 34 All. 587
1 Pat. L. J. 37

See CONTRACT . I. L. R. 48 Calc. 1030

——— *Agreement in restraint of trade—Mutual agreement between two neighbouring landowners not to hold cattle markets on the same day.* *Held,* that an agreement entered into by an owner of land with the owner of adjoining land, to the effect that a market for the sale of cattle should not be held on the same day on the lands of both of them, is not an agreement to which the principle of s. 27 of the Indian Contract Act, 1872, applies. POTHI RAM *v.* ISLAM FATIMA (1915)
I. L. R. 37 All. 212

——— *Agreement in restraint of trade—Sale of goodwill with undertaking to abstain from business for a term—Goodwill, what is—Buying off a newly-started rival business, if purchase of goodwill—Agreement not divisible, wholly void—Compensation.* Defendant had been carrying on business as a carrier of passenger by boats between certain terminal stations calling *en route* at certain intermediate stations. Plaintiff started a rival business and having secured the terminal ghats could embark and re-embark passengers at more central points. After running it for a few months during which he did not acquire a name for punctuality, safety, or convenience, he was bought off by defendant by an agreement by which for a consideration to be paid by defendant he purported to transfer his leases of ghats and his "goodwill" and bound himself not to exercise the business for a period of three years *Held,* that plaintiff had no "goodwill" to transfer and the word "goodwill" was introduced into the agreement only to circumvent the provision of s. 27 of the Contract Act, which the undertaking to abstain from carrying on boat business for three years contravened. The provision of s. 27 making agreements in restraint of trade not permitted by the exceptions to that section "to that extent" void implies that, if the agreement can be broken up into parts, it will be valid in respect of those parts

Act, defendant should be made to compensate the plaintiff for the advantages he had received under it. PARASULLAH MULLIK *v.* CHANDRA KANTO DAS (1917) . 21 C. W. N. 979

CONTRACT ACT (IX OF 1872)—*contd.*

——— s. 27—*contd.*

——— *Rival businesses in plying ferry boats—Sale of goodwill of one to the owner of the other—Agreement not to start similar business by vendor, if in restraint of trade.* The res[illegible]
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purported to sell to the respondent the goodwill of his trade in plying the ferry boats and every description of interest and ownership which the appellant had acquired in the several landing places as well as settlements obtained for the collection of tolls By a separate document the appellant undertook to close the business of plying the particular ferry boats and that if he ever carried on the business again he would return the whole amount of consideration. *Held,* that

and INLAND REVENUE COMMISSIONER *v.* MULLER (3) and as used in the same sense in s. 27 of the Contract Act. CHANDRA KANTA DASS *v.* PARASULLAH MULLICK . . L. R. 48 I. A. 508
26 C. W. N. 345

——— s. 28—*Limitation Act (IX of 1908), s. 3—Insurance—Agreement in restraint of legal proceedings—Modification of the law of limitation by agreement of the parties—Rights and remedies, distinction between—Conditional release or forfeiture not invalid* The S Insurance Co. granted a policy of insurance against fire to the B Co. on certain property of the latter, the policy containing a clause to the effect that if a claim were made and rejected and an action or suit were not commenced within three months after such rejection, all benefit under the policy should be forfeited. Damage was caused to the property of the B. Co. thus insured and a claim was made by that company of the S. Insurance Co which was rejected by the latter. More than three months after such rejection the B. Co. filed a suit against the S. Insurance Co. to recover the amount of their claim. *Held,* that there is a distinction between the extinction of a right and the loss of a remedy, that s. 28 of the Contract Act was aimed only at

of action a covenant not to sue had sometimes been held equivalent in effect to a conditional release, and that the condition of forfeiture in the policy in question in the suit was not within the scope of s. 28 of the Contract Act. The correctness of the decision in *Hirabhai* v. *Manufacturers Life Insurance Co., 14 Bom. L. R. 741,* doubted. *Per* BATCHELOR, *J.*—As I understand the matter, what the plaintiff was forbidden to do was to limit the time within which he was to enforce his rights; what he has done is to limit the time within which he is to have any rights to enforce; and that

——— s. 30—

See PAKKA ADATIA.
I. L. R. 45 Bom. 242

CONTRACT ACT (IX OF 1872)—*contd.*

——— s. 30—*contd.*

See WAGERING . I. L. R. 37 Bom. 264

See WAGERING CONTRACTS.

I. L. R. 42 Bom. 373

———*Contract collateral to a wagering contract not unenforceable.* Where an agent has incurred losses on behalf of his principal he is not disentitled to recover as against the principal by reason of the contract in respect of which such losses were incurred being a wagering contract. *Shibbo Mal v. Lachman Das, I. L. R. 23 All. 165,* followed. *Thacker v. Hardy, I. L. R. 4 Q. B. D. 685,* referred to. JAGAT NARAIN *v.* SRI KISHAN DAS (1910) I. L. R. 33 All. 219

———*Wagering contract—Purchase of grain pit through agent—Intention of parties.* The plaintiffs, who were commission agents, purchased for the defendants at their request a grain pit. The defendants, however, did not pay the price agreed upon and the plaintiffs resold the pit at a loss. They then sued the defendants to recover the loss on the resale of the pit and their commission. *Held,* that whether or not it might have been the intention of the parties that the grain pit should be resold as it was, the defendants making a profit or bearing a loss on the transaction, the transaction between the parties was not a wagering contract within the meaning of s. 30 of the Contract Act. *Forget v. Ostigny, [1895] A. C. 318,* and *Jagat Narayan v. Sri Kishan Das, I. L. R. 33 All. 219,* followed. BISHESHAR DAYAL *v.* JWALA PRASAD (1914)

I. L. R. 36 All. 426

———*Bombay Act III of 1865, s. 1—Lottery—Sanction of Government of India—Effect of sanction to save criminal prosecution—Sanction cannot override Imperial Acts or Acts of Indian Legislature defining civil law—Contract to purchase a ticket in a lottery though sanctioned by Government is void—Injunction cannot be granted in support of a void contract—Motion—Costs.* In April 1917, the Western India Turf Club organised a War Loan Lottery having previously obtained the sanction of the Government of India for such undertaking as a special case. The tickets in the said lottery from No. 1 onwards were offered to the public at Rs. 10 each. The plaintiff being desirous of securing a particular ticket bearing the number 15315 purchased the same through one of the agents of the Club, who had the disposal of such ticket. A receipt for Rs. 10 was passed to the plaintiff in which the number of the ticket was entered. As the book containing the ticket had not been sold to that number the agent of the Club agreed actually to hand over the ticket itself when he got to the particular number in the book. Through some mistake the book containing the particular ticket was sent to Calcutta where it was issued and delivered to defendant No. 3. The plaintiff insisting on having the ticket purchased by him applied to the Club for its delivery to him. The club thereupon, decided to withdraw the ticket 15315 altogether, to return the plaintiff's money paid in respect of that ticket and to issue a new ticket 15315 A to the 3rd defendant. The 3rd defendant altered the number of the ticket to 15315 A but the plaintiff declined to abide by this arrangement. The plaintiff then sued the Club and 3rd defendant for an injunction and order restraining the 1st defendant, the Secretary of the Club, and 2nd defendant, a member of the Club, on behalf of himself and all other members of the Club from withdrawing ticket No. 15315 from the lottery and from paying the amount of any prize drawn by that ticket or any other ticket substituted in place thereof to the 3rd defendant. *Held,* (i) that the effect of the sanction of the Government of India being merely to save any prosecution under the criminal law, so far as the civil law was concerned, the Government had no power to overrule the Imperial Acts or the Acts of the Indian Legislature which determined the rights of parties; (ii) that having regard to the first portion of s. 30 of the Indian Contract Act which provided "that agreements by way of wager are void" the contract in question was an agreement by way of wager and was consequently void; (iii) that the contract sued on was also one of the character mentioned in the first portion of s. 1 of Bombay Act III of 1865 and was, therefore, null and void; (iv) that no injunction could be granted in support of a void contract. DORABJI JAMSETJI TATA *v.* EDWARD F. LANCE (1917)

I. L. R. 42 Bom. 676

——— ss. 30 and 57—*Intention of the parties—Payment of differences—Contract Act (IX of 1872), s. 57.* There is no authority for the proposition that, because under the terms of a contract an obligation to pay or receive differences may arise on the happening of a particular event, the contract is void as a wager if that event does not happen. Such a result would be inconsistent with the principle underlying s. 57 of the Contract Act. JOSHI NARBADASHANKAR *v.* MATHURADAS (1910)

I. L. R. 34 Bom. 519

——— ss. 30 and 65—*Money advanced on account of satta transactions not recoverable.* *Held,* that no suit will lie for the recovery of money deposited with another on account of *satta* transactions. *Dayabha Tribhovandas v. Lakhmichand Panachand, I. L. R., 9 Bom. 358,* followed. CHHANGA MAL *v.* SHEO PRASAD

I. L. R. 42 All. 449

——— ss. 32, 34, 56 and 65—*Guarantee—Contract, construction of—Whether contingent or unconditional agreement—Inadmissibility of evidence of what took place after the execution of the contract on question of its construction.* The question for determination in this appeal was the construction of the following letter dated 7th August 1909, which was signed by the defendant, and given to the plaintiffs as security for the repayment of the loan of Rs. 1½ lakhs mentioned therein. "In consideration of your having at my request acceded to the proposal of the Secretaries, Treasurers and Agents of the Tricumdas Mills Company, Limited, to advance to the Mills Rs. 1½ lakhs, I hereby bind myself to procure a loan within two weeks of Rs. 11 lakhs on the first mortgage of the Mills' block property, and to pay you thereout the said sum of Rs. 1½ lakhs agreed to be advanced by you to the Mills." In a suit for damages for breach of the contract contained in the letter the Courts in India held in favour of the defendant that "all he had undertaken to do was to procure the lending of Rs. 11 lakhs if a first mortgage of the Mills was given, and to pay thereout Rs. 1½ lakhs to the plaintiffs." *Held* (reversing that decision), that on its true construction the document amounted to a substantial undertaking by the defendant

CONTRACT ACT (IX OF 1872)—*contd.*

——— s. 32, 34, 56 and 65—*contd.*

that a loan of Rs. 11 lakhs should be procured, and that out of that loan the sum of Rs. 1¼ lakhs should be repaid to the plaintiffs. *Semble*: Evidence of what took place after the execution of the document was not admissible on the question of its construction. VISSANJI SONS & CO. *v.* SHAPURJI BURJORJI (1912) . . I. L. R. 36 Bom. 387

——— s. 37—

See DAMDUPAT, RULE OF.
I. L. R. 42 Calc. 826

See TRANSFER OF PROPERTY ACT (IV OF 1882), s. 54 . I. L. R. 39 Mad. 462

——— ss. 38, 54—

See CIVIL PROCEDURE CODE (ACT V OF 1908), O XXIII, R 3
I. L. R. 38 Mad. 959

——— s. 38—

See MORTGAGE . 5 Pat. L. J. 376

——— s. 39—

See LESSOR AND LESSEE.
I. L. R. 42 Mad. 203

See MORTGAGE . . 2 Pat. L J. 168

——— *Contract—Mortgage—Part of consideration unpaid —Effect of such non-*

mortgage has not been paid, neither renders the mortgage invalid nor entitles the mortgagor to rescind it at his option. *Gokal Chand* v. *Rahman, Punj. Rec. 1907, 274,* dissented from. *Tatia* v. *Babaji, I. L. R. 22 Bom. 176, Subba Rau* v. *Devu Shetti, I. L. R. 18 Mad. 126, Bajrangi Sahai* v. *Udit Narain Singh, 10 C. W. N. 932,* and *Baij Nath Singh* v *Paltu, All. Weekly Notes, 1908, 38,* referred to. RASHIK LAL *v.* RAM NARAIN (1912)
I. L. R. 34 All. 273

——— ss 39, 55, 63 and 73—*Breach of con-*

expiry, in the absence of an agreement between the parties to extend the time for performance. The measure of damages in such a case is the difference between the contract rate and the market rate at the expiry of the period agreed upon as the time for delivery in the contract. *Per* WHITE, *C.J.*—S. 63 of the Contract Act does not entitle a *promisee* for his own purposes and without the consent of the *promisor* to extend the time for performance which had been agreed to by the parties to the contract. Nor does s 55 enable him to keep alive a broken contract in the hope of being able to recover heavier damages for its breach. *Ogle* v. *Earl Vane, L. R. 2 Q. B. 275, 284,* and *Ashmore & Co.* v. *Cox & Co., [1899]*

sions on the part of the *promisee* advantageous to the *promisor*, and cannot be invoked to support an extension of time by the *promisee* for his own benefit. S. 55 read with s 2 (i) means nothing more than this: on the *promissor's* failure to

CONTRACT ACT (IX OF 1872)—*contd*

——— s. 39, 55, 63 and 73—*contd.*

perform within the contract time, the *promissor* loses the power to enforce the contract, that is, to claim any advantage due to himself thereunder. The *promisee* has the option of enforcing it or not as it may suit him, and if he elects to enforce the contract he can, under s. 73, obtain only such damages as naturally arose in the usual course of things from the breach or the parties knew, when they made the contract, to be likely to result, which cannot include any aggravation of damages caused by the *promisee's* action or inaction subsequent to the breach. MUTTHAYA MANIAGARAN *v.* LEKKU REDDIAR (1914)
I. L. R. 37 Mad. 412

——— ss. 39, 55, 64, 65, 73, 74 and 75—*Vendor and Purchaser—Right to recover deposit 'forfeited' by terms of a contract to sell* A entered into a contract on 24th February 1903 with *B* for the purchase of lands belonging to the latter for Rs. 41,000 Of this amount Rs 4,000 was paid in advance, Rs. 20,000 was agreed to be paid by means of a mortgage and the balance before the 24th May 1903, when the conveyance was to be executed. The contract provided that the Rs. 4,000 was to be forfeited if there was any delay on the part of the purchaser. It was also stipulated that the vendor was to execute the conveyance either in favour of the purchaser or those nominated by him. In part performance of this contract a sale of a portion of the lands was effected in favour of *M* on the 28th March 1903 Just before the day for payment, *B* gave notice to *A* that if the sale was not completed on or before the agreed date, the contract would be avoided. *A* failed to perform the contract before that date. Subsequently *B* sold the lands to third parties and realised Rs 1,500 in excess of the price stipulated by *A*. *A* brought a suit for the specific performance of the contract, or, in the alternative to recover the Rs 4,000 paid by him. The Subordinate Judge disallowed the claim for specific performance but decreed the return of the deposit of Rs 4,000 to *A* *B* appealed. *Held*, by the Court (SADASIVA AYYAR, *J.*, dissenting), that *A*, the plaintiff, was not entitled to a return of the deposit. Neither s. 64 nor s 74 of the Indian Contract Act (IX of 1872) is applicable to such a deposit, and a stipulation for its forfeiture in case of breach is not one by way of penalty. The law of India on this subject does not differ from the English law. A stipulation to forfeit 10 per cent. of the consideration in case of breach is neither unreasonable nor extraordinary. A vendor can be given relief by way of rescission of contract and at the same time, in the absence of express stipulation to the contrary, may be allowed to retain the deposit. *Howe* v. *Smith, L. R. 27 Ch D. 89,* applied *Per* WHITE, *C. J* —(i) The last rule would apply *a fortiori*, when, as in this case, there is an express agreement to forfeit the deposit. (ii) Since the Judicature Acts, the question whether time is of the essence of the contract, must be governed by rules of equity, and purchaser is entitled in such cases, as here, to fulfil his contract within a reasonable time after the agreed date. *Per* MILLER, *J.*—(i) Time was of the essence of the contract in this case. (ii) The agreement to forfeit is not wanting in consideration as the deposit is not made as part payment but as security for the purpose of binding the bargain. *Per* SADASIVA AYYAR, *J.*—*A* was

CONTRACT ACT (IX OF 1872)—*contd.*

———— ss. 39, 55, 64, 65, 73, 74 and 75—*contd.*

entitled to recover the deposit under the Indian Contract Act which is exhaustive as regards the law of Vendor and Purchaser and the English law is not applicable. A stipulation to forfeit a deposit is a stipulation to pay a penalty. Time was of the essence of the contract in this case. NATESA AIYAR *v.* APPAVU PADAYACHI (1913)

I. L. R. 38 Mad. 178

———— ss. 39, 73, 120—*Suit for price of goods bargained and sold—Cause of action—Indian Contract Act has not altered the law relating to recovery of debts and liquidated demands—Civil Procedure Code (Act V of 1908), s. 128.* Before the passing of the Indian Contract Act wherever a consideration was executed for which a debt payable at the time of action had accrued due either under an express promise or under one implied by law the debt might be sued for in an *indebitatus* count; thus the count lay where the consideration moving from the seller of goods was executed by his providing goods and only the money debt due by the buyer remained. The form of count in such a case both in England and in Bombay would have been for money payable by the defendant to the plaintiffs for goods bargained and sold by the plaintiffs to the defendant. The cause of action was said to sound in debt and not in damages. In s. 128 of the Civil Procedure Code of 1908 there is legislative recognition that such suits as were maintainable in respect of debts at the time of the Common Law Procedure Act, 1852, are still maintainable in British India. The Indian Contract Act has not altered the law relating to the recovery of debts and liquidated demands. The fact that a party to a contract may under s. 39 of the Indian Contract Act, when the other side has refused to perform it, put an end to it and sue for compensation for the breach, does not oblige him to take that course at his peril; he may if he prefers to sue to recover any debt due to him which has arisen from his execution of his part of the contract. *Per* BATCHELOR, *J.*—S. 73 of the Indian Contract Act prescribes the method of assessing the compensation due to a plaintiff suing upon a breach of contract, but it does not affect to extinguish or to limit a plaintiff's right to recover a determined sum due to him upon a contract which he for his part keeps on foot. If that is so, the mere absence from the Act of a specific provision giving the remedy of a suit to recover the price cannot be construed as the distinct legislative withdrawal of that remedy. P. R. & Co. *v.* BHAGWANDAS (1909)

I. L. R. 34 Bom. 192

———— s. 41—

See MORTGAGE. . I. L. R. 39 All. 178

———— ss. 41 and 47—

See SPECIFIC RELIEF ACT 1877 ss. 41 & 34 . . . . . . 4 Pat. L. J. 682

———— s. 43—

See CIVIL PROCEDURE CODE, 1882, s. 43. I. L. R. 33 Mad. 317

See CO-SHARER . 15 C. W. N. 332

See LANDLORD AND TENANT. I. L. R. 34 All. 604

———— ss. 43, 68, 69, 70, 72, 146, 222—

See CONTRIBUTION . I. L. R. 38 Calc. 1

CONTRACT ACT (IX OF 1872)—*contd.*

———— s. 44—

See JOINT JUDGMENT-DEBTORS. I. L. R. 39 Mad. 548

———— ss. 44. 74—

See PENALTY . I. L. R. 44 Calc. 162

———— s. 45—*Partnership—Suit by surviving members to recover debt due to firm—Representatives of deceased members not necessary parties to suit.* *Held*, that the representatives of a deceased partner are not necessary parties to a suit for recovery of a debt which accrued due during the lifetime of the deceased partner. *Held*, also, that s. 45 of the Indian Contract Act does not apply to a suit to recover a debt due to a partnership firm. *Gobind Prasad* v. *Chandra Sekhar, All. Weekly Notes (1887) 133. Motilal Bechardass* v. *Ghellabhai Hariram, I. L. R. 17 Bom. 6* and *Debi Das* v. *Narpat, I. L. R. 20 All. 365*, followed. UGAR SEN *v.* LAKHMI CHAND (1910) . . . I. L. R. 32 All. 638

———— s. 47—*Sale and purchase of cotton goods —Forward contract, March delivery—Contract not to be cancelled on any account—Contract governed by the Rules of the Bombay Trade Association—Rule 17 of the Bombay Cotton Trade Association—Vendor bound to tender goods without demand from the purchaser—Railway receipt not a delivery order—Vendor committing a breach cannot sue for damages—Vendor not mulcted in costs, breach being technical.* By a contract, dated the 25th January 1914, the defendant agreed to purchase from the plaintiff 200 bales of cotton—March delivery, between the 15th and 25th. The contract was expressed to be, in all details, governed by the Rules of the Bombay Cotton Trade Association, subject to the exception that it was not to be cancelled on any account. Under Rule 17 of the Rules of the Bombay Cotton Trade Association, the vendor was bound to tender a delivery order backed by the goods before 1 P.M., of due date. In the event of his failure to do so, the buyer had three courses open to him: (i) to cancel the contract; (ii) to buy at seller's risk; (iii) to close at the room-rate of the day. On the 19th March 1914, the plaintiff handed over to the defendant a railway receipt for 100 bales. On the 25th March 1914, the defendant applied to the railway authorities for delivery of the goods, and failing to get the same returned the railway receipt the next day to the plaintiff informing him that by reason of non-performance on the plaintiff's part, the contract had been cancelled by the defendant. The plaintiff, relying upon the clause of the contract precluding either party from cancelling the same in any event, claimed the sum of Rs. 2,279-13-0, the difference between the contract price and the market price in respect of 100 bales. The plaintiff further contended that giving a railway receipt was tantamount to giving possession of the goods, and that inasmuch as the defendant had accepted the railway receipt and did not notify the plaintiff that the goods had not come to hand before due date, he was estopped from pleading that the plaintiff had not made a sufficient tender under Rule 17 of the Bombay Cotton Trade Association. *Held*, (i) that it was the plaintiff's duty to satisfy himself that the goods covered by the receipt had actually arrived before due date, and that, if he failed to do so, he would not be absolved from the obligation of tendering the delivery order backed by the goods according to the contract; (ii) the plaintiff having shown himself to be in the breach could not approach the

CONTRACT ACT (IX OF 1872)—*contd.*

——— s. 56—*contd.*

GURMUKHRAI (1915) . I. L. R. 40 Bom. 517

——— s. 54—

See O. XXIII, R. 3.

I. L. R. 38 Mad. 959

——— s. 55—

See s. 39 . I. L. R. 37 Mad. 412

See SALE OF LAND.

———*When time may be considered of the essence of a contract—Where intention to make time of essence of contract is not specifically expressed in unmistakable terms—Rule of equity to disregard letter of contract, and take contract substantially as meaning completion of it within reasonable time—What takes place prior to signing of contract but nothing that takes place afterwards, to be looked at in judging of intention.* By an agree-

agreement, and it was agreed that the title was

have been registered; and there was a clause to the effect that if the purchaser did not pay the amount of the purchase-money within the fixed period he should forfeit his right to the earnest-monies and the vendor should be at liberty to resell the property. On 3rd October 1911 requisitions as to title were made by the appellant. The respondent did not comply with the requisitions, but on 6th October he asserted a right to put an end to the contract on the ground that time was of its essence, and claimed to be entitled to the deposit of Rs. 4,000 as the appellant had failed to complete his purchase within the time fixed In a suit for specific performance: *Held* (reversing the appellate judgment of the High Court), that time was not of the essence of the contract. S. 55 of the Contract Act (IX of 1871) did not lay down any principle which differed from those that obtained as regards contracts for the sale of land by which equity in such a case looks, not at the letter, but at the substance of the agreement in order to ascertain whether the parties notwithstanding that they named a specific time within which completion was to take place, really intended no more than that it should take place within a reasonable time *Lennon* v. *Napper, 2 Sch. & Lef. 682 Roberts* v. *Berry, 3 DeG. M. & G. 284, 289, Tilley* v. *Thomas, L. R. 3 Ch. 61,* and *Stickney* v. *Keeble, [1915] A. C. 386,* referred to as laying down the doctrine adopted by, and embodied in s. 55 in reference to sales of land. The special jurisdiction of equity to

expressed stipulation that time is intended to be of the essence of the contract. Equity will also infer an intention that time should be of the

CONTRACT ACT (IX OF 1872)—*contd.*

——— s. 55—*contd.*

plation of equity be affected by what takes place after it has once been entered into. *Held,* therefore, that there was nothing in the language of the agreement or the subject-matter to displace the presumption that for the purpose of specific performance time was not of the essence of the bargain. The subject-matter or the character of the leasehold were not such as to take the case out of the class to which the principle of equity applies. The appellant did not bind himself, by his correspondence subsequent to the agreement, to a new agreement that time, if it was not originally of the essence, should be made so. As to the language of the agreement itself their Lordships agreed with the view of the Trial Judge that there was nothing said in it sufficient to exclude the equitable canon of interpretation; and with his conclusion that the defendant had no justification in claiming in the circumstances to treat time as of the essence JAMSHED KHODARAM *v.* BURJORJI DHUNJIBHAI (1915) . I. L. R. 40 Bom. 289

———*Contract, when time of the essence of—Contract for the assignment of leasehold property, effect of the insertion of a definite date for completion and payment of the purchase-money with conditions as to forfeiture of the earnest-money and liberty for the vendor to re-sell—Certificate of lessor that conditions of lease have been complied with not necessary* C agreed to sell to I his interest in a property, held on lease from the Secretary of State for India, on certain conditions as to improvement for cultivation, etc., and as to not assigning or *underletting the lands until these conditions had* been carried out without the consent in writing of the Collector of Thana, for Rs. 85,000, of which Rs. 4,000 was paid on the execution of the agreement and it was agreed that Rs 80,500 should be paid on the signing of the conveyance, which was to be prepared and received within 2 months from the date of the agreement, and Rs. 500 on the transfer of the land after the conveyance should have been registered. It was further provided that

the agreement time was of the essence of the contract. *Held,* further, that I could not insist on C

(1913) . . . . I. L. R. 38 Bom. 77

———*Contract for sale of land and machineries—Test as to time being of the essence of the contract—Unnecessary delay of purchaser causing forfeiture of right to specific performance.* The Defendant entered into an agreement withthe Plaintiff for the sale of certain land and machineries, wherein it was stipulated that the purchase was to be completed within the time and in the manner stated in the agreement and on failure thereof the vendor would be at liberty to cancel the agreement, forfeit the earnest-money and claim damages or specific performance of the contract: *Held,* that it is well-settled that the mere fact that a date has been mentioned for the performance of the agreement does not conclusively prove that

CONTRACT ACT (IX OF 1872)—*contd.*

—————— s. 55—*contd.*

time was intended to be of the essence of the contract. The Court has to determine whether from an express promise to that effect or because such a promise is implied from a consideration of the real intention of the parties inferred from the nature of the contract, time was to be deemed of the essence of the contract. That an intention to treat time as essential in the case could not be inferred from the provision in the agreement regarding the vendor's liberty to cancel the agreement and forfeit the earnest-money in case of default on the part of the purchaser, nor from the nature of the contract which was for the sale of land directly for the purpose of trade and commerce. It is well-settled that although in a contract for the sale of land the time fixed for completion is not initially of the essence of the contract either party may be guilty of such unnecessary delay as entitled the other to serve upon him a notice limiting a time at the expiration of which he will treat the contract as at an end. The reasonableness of the time so limited is determined by the Court with reference to not merely what remains to be done at the date of the notice but all the circumstances of the case including the previous delay of the party in default and the attitude of the other side in relation to it. That in the circumstances of the case there was no unnecessary delay on the part of the purchaser and at the date of the institution of the suit the contract was specifically enforceable. MAHADEO PROSAD AGARWALA *v.* NARAIN CHANDRA CHAKRAVARTI . . . **24 C. W. N. 330**

—————— *Sale of goods—Failure to deliver at agreed time—Extension of time—Failure to deliver within extended time—Damages—Loss of profit.* When after the seller of goods has failed to deliver them at the agreed time the buyer has agreed to an extension of time for delivery, the effect of section 55 of the Indian Contract Act is that the buyer is entitled to damages computed in the ordinary way if the seller fails to deliver within the extended time. The promise for the non-performance of which the third paragraph of s. 55 provides that compensation cannot be claimed is the promise to deliver at the time originally agreed. Where the measure of damages for a failure to deliver is the loss of the profit which the buyer would have made from delivering the goods under a contract of sale which he has made, it is not material that the buyer by delivering under that contract other goods which he has in stock has made as much profit as he would have made if there had been no failure to deliver to him. Judgment of the High Court affirmed. MUHAMMAD HABIB-ULLAH *v.* BIRD AND COMPANY

I. L. R. 43 All. 257

—————— *Joint creditors, discharge by one, effect of—Waiver of time clause in compromise.* One joint creditor can give a valid receipt to a debtor in full discharge of the claims of himself and of the other joint creditors. Where the plaintiffs, in a suit on a mortgage bond on which Rs. 997-11-0 was due, agreed to accept Rs. 400 in full discharge of the debt if paid within 8 days, and the defendants failed to comply with this condition, but paid Rs. 360 on the 15th day after the compromise, and one of the plaintiffs accepted this sum and gave the defendants a receipt therefor : *Held* (in a suit to recover the full amount due on the mortgage), that the plaintiffs, by acceptance of the Rs. 360 tendered by the defendants, must be taken to have waived the condition in the compromise, and that they were entitled to recover only the unpaid amount due under the compromise, namely, Rs. 40. PARBHU RAM PANDEY *v.* MUSSAMMAT JHALO KUER . . **2 Pat. L. J. 520**

—————— ss. 55, 64, 73, 74—**Right of party to recover deposit, forfeited by terms of contract**—*A* entered into a contract with *B* for the purchase of lands belonging to the latter for Rs. 41,000. Of this amount Rs. 4,000 was paid in advance, Rs. 20,000 was agreed to be paid by means of a mortgage and the balance before the 24th May when the conveyance was to be executed. The contract provided that the Rs. 4,000 was to be forfeited if there was any delay on the part of the vendee. It was also stipulated that the vendor was to execute the conveyance either in favour of the purchaser or those nominated by him. In part performance of this contract a sale of a portion of the lands was effected in favour of *M* on the 28th March. Just before the day of payment *B* gave notice to *A* that if the sale was not completed on or before the agreed date, the contract would be avoided. *A* failed to perform the contract before that date. Subsequently *B* sold the lands to third parties and realised Rs. 1,500 in excess of the price stipulated by *A*. *A* brought a suit for specific performance of the contract or, in the alternative, to recover the Rs. 4,000 paid by him. The Subordinate Judge disallowed the claim for specific performance but decreed the return of the deposit of Rs. 4,000 to *A*. On appeal by *B* against this decree: *Held, per* WALLIS J., that *A* was not entitled to a return of the deposit. Time was of the essence of the contract and *B* was justified in avoiding it under s. 55 of the Indian Contract Act. *A* was not therefore entitled to specific performance or to damages. A deposit is primarily a security or guarantee for the performance of the contract. The provisions of s. 64 of the Contract Act requiring a party who avoids a contract to restore any benefit derived thereunder do not extend to such deposits. Ss. 73 and 74 of the Act do not apply to such cases. The distinction drawn by Courts of Equity between stipulation for liquidated damages and those for penalty have no bearing on such cases. A stipulation for forfeiture of deposit is not a stipulation for a penalty and it is not agreed upon as liquidated damages, though it goes in reduction of damages. *Manian Patter* v. *The Madras Railway Co., I. L. R. 29 Mad. 118,* referred to. *Srinivasa* v. *Rathnasabapaty, I. L. R. 16 Mad. 474,* referred to. *Per* SANKARAN NAIR, *J.*—*A* was entitled to a return of the deposit. To entitle a vendor to retain the deposit, there must be acts by the purchaser which not only amount to delay sufficient to deprive him of the remedy by specific performance but which would make his conduct amount to a repudiation of the contract. A purchaser may recover damages if he shows his readiness and willingness to complete the contract within a reasonable time after the stipulated date; and that vendor rescinding the contract before the lapse of such reasonable time, cannot retain the deposit, though his rescission may be lawful. A contract does not go off merely by non-payment before the stipulated time. The vendor becomes entitled to damages under ss. 73 and 74 of the Contract Act, but the contract itself is not at an

CONTRACT ACT—*contd.*

——— ss. 55, 64, 73, 74—*contd.*

end. The stipulation as to forfeiture in this case must be treated as a penalty. The rule that the distinction between penalty and liquidated damages do not apply to pecuniary deposits, holds good only when there is no means of accurately ascertaining the damages. Where they can be ascertained and are below the deposit amount, the presumption will be that the parties intended it as a penalty and the deposit will not be forfeited. Ss. 73 and 74 of the Contract Act apply to pecuniary deposits and "penalty" includes deposits. Where a person at whose option a contract is voidable rescinds it under s. 55 of the Contract Act, before the contract is determined by the default of the other party, he will be entitled to recover damages under ss. 73 and 74 of the Act. He must however return the deposit as a "benefit" within the meaning of s. 64 of the Act. NATESA IYER v. APPAVU PADAYACHI (1909)

I. L. R. 33 Mad. 375

——— s. 56—

See S. 32. . I. L. R. 36 Bom. 387

See CONTRACT. . I. L. R. 41 Mad. 225

24 C. W. N. 703

See CONTRACTS C. I. F.

I. L. R. 42 Bom. 473

See SALE OF GOODS.

I. L. R. 45 Calc. 28

———*Performance of contract* [illegible]

Customs Act (VIII of 1878)—Construction of contract—Charter-party—Bill of lading. The plaintiffs, a firm of naturalised Germans doing business in London made a contract on the 24th July 1914 with the defendant firm through their London agent, by which the defendants agreed to supply the plaintiff-firm with 1,000 tons freight at 11 *s.* 6*d.* per ton, the material to be carried being manganese from the Port of Bombay for Antwerp, shipment in September On the 4th of August 1914 war broke out between Great Britain and Germany. On the 7th of August 1914, the Government of India, by a Proclamation duly published in Bombay under the Sea Customs Act prohibited the export from India of ammunition and explosives and all materials used in the manufacture thereof. Under the Sea Customs Act, the Government of India is only empowered to prohibit the export of specified articles or things, and the specification must be exact and *nominatim.* Manganese not being expressly specified in the last mentioned notification the Government of India issued on the 17th of October 1914 a further notification in supersession of the notification of the 5th of August, by which manganese was amongst other articles specifically prohibited. On the 7th of September 1914, the defendants relying on the earlier notification telegraphed to the plaintiffs that owing to *force majeure* the contract was cancelled. The plaintiffs refused to accept the cancellation and insisted upon the performance of the contract. They subsequently sued the defendants in damages in the sum of £525 or Rs. 7,937. The defendants pleaded: (i) that the export of manganese from India was prohibited by the Government of India notification of the 5th of August 1914 published in Bombay on the 7th of August 1914;

CONTRACT ACT—*contd.*

——— s. 56—*contd.*

(ii) that the performance of the contract became impossible as no freight was procurable during the month of September from Bombay to Antwerp; (iii) that it was an implied condition, and of the essence of the contract, understood by both parties to be so, that there should be freight available from Bombay to Antwerp. *Held,* (i) that having regard to the form of the earlier notification dated 5th of August 1914, the plaintiffs were right in contending that the defendants might have performed their part of the contract on the 7th of August 1914 without contravening any law, or being able to avoid it under s. 56 of the Indian Contract Act as having been made unlawful after they had entered upon it. (ii) The performance of the contract did not become impossible within the meaning of s. 56 of the Indian Contract Act, merely because freights from Bombay to Antwerp were not procurable from a commercial point of view, when the defendants repudiated the contract. (iii) That no implied condition could be read into the contract that it was agreed by the parties that normal freight conditions should continue. (iv) That the defendants had committed a technical breach of contract, as the plaintiffs had not proved that they had any intention of shipping 1,000 tons of manganese to Antwerp in September, nor had they suffered any loss on account of non-shipment. Before a contract can be broken on the ground that the acts to be done have become impossible the Courts must be very sure that they are physically impossible. Physical impossibility must go much further than mere difficulty or the need to pay exorbitant prices. The latter part of s. 56 deals with cases where the acts to be done were at the time the contract was made lawful but a legal prohibition has supervened after the [illegible]

s. 23. KARL ETTLINGER v. CHAGANDAS & CO. (1915) . . . I. L. R. 40 Bom. 301

[illegible]

formance of contract A contract contained in a letter provided for the sale by the defendants-appellants to the plaintiffs-respondents of 150 tons of basic steel bars "at £5 7*s* 6*d*, per ton c. i. f., *i.e.,* free Hooghly. Shipment in three monthly lots . . . . Terms 45 days' credit from the date of the delivery of the goods." The appellants caused the goods to be shipped from Antwerp on the 2nd July, 1914, on a German steamer, the S.S. "*Steinturm.*" That steamer was on the high seas on the outbreak of war between England and Germany on August 4th, 1914. Then she was captured by the British Government and taken to Colombo as prize. After condemnation of the ship by the Prize Court the goods were sent on to Calcutta in charge of the Crown and the latter wanted certain extra charges to be paid before the goods could be delivered to the consignees in Calcutta. The buyers, respondents, refused to pay these charges, and the sellers, appellants, thereupon sold the goods to third parties. On the buyers, respondents instituting a suit to recover a certain sum for damages for breach of contract the sellers contended that they were not liable to pay any damages for breach of

CONTRACT ACT—*contd.*

——— **s. 56**—*contd.*

contract because the contract had come to an end on the outbreak of war. *Held,* reversing the decision of Chaudhuri, *J.*, that the contract of affreightment which was an integral part of the contract with the buyers became unlawful on the outbreak of war inasmuch as it was a contract with an alien enemy, and under the provisions of s. 56 of the Indian Contract Act the contract with the buyers became impossible of performance. MADHORAM HURDEO DASS *v.* G. C. SETT (1917)
21 C. W. N. 670

——— **ss. 56, 9, 20**—

——— *A contract for "sale of certain goods on arrival," if enforceable when goods shipped from Germany were captured after the outbreak of war by a belligerent but after proceedings in a Prize Court arrived in a different ship two years after—Such arrival if comes within the meaning of "arrival" contemplated by the contracting parties—Doctrines of frustration, applicability of.* Defendant contracted to supply Plaintiffs with five cases of white shawl cloth. The contract was made on 21st January 1914, and it was headed "contract shipment and arrival." The goods were to be shipped in July and August 1914. The Defendant had previously ordered 50 cases of white shawl cloth from sellers in London. In part fulfilment of the Defendant's order 20 cases were shipped in July 1914 by his sellers in a Germany ship S. S. "Spitzfels," Hamburg to Calcutta. The German ship was captured by the British in the Mediterranean shortly after the outbreak of the war and was condemned as prize. Under Government orders the cargo was transhipped at Alexandria into a different ship, which arrived in Calcutta in June 1916, delivery to the consignees being made conditional upon payment of extra charges in the nature of transhipping and forwarding expenses. There was a provision in the contract that in case of loss of the ship the contract should stand cancelled. There was a further provision in the contract that if the goods did not arrive within the specified time, the sellers should notify their buyers and the latter should declare whether they are prepared to grant an extension of time otherwise the contract should be considered as cancelled. The Defendant did not inform the Plaintiff of the arrival of the cases in June 1916 and he similarly ignored his other buyers of 1914, and sold them to other dealers at a profit to himself, the market having risen. The Plaintiff in July 1917 in consequence of information which he had received tendered the contract price to the Defendant and brought the present suit for non-delivery of the goods. *Held*—That having regard to the capture of the ship and the transhipment, the Plaintiff was not entitled to the delivery of the goods on thier arrival in June 1916 in the same way as if there had been no interruption. GOURI SANKAR AGARWALLA *v.* H. P. MOITRA
26 C. W. N. 573

——— ss. 56, 65—

——— *Contract of charter-party—Contract impossible of performance—Freight paid in advance—Export of goods shipped on board prohibited by Government—Claim for refund of freight—Bills of lading—Shipping orders—Common carriers—Carriers by sea—Private carriers—Carriers Act (III of 1865)—Carriers by sea excluded by the Carriers Act—Loss by way of demurrage.* On the 1st April 1915, the defendant Steamer Company entered into an agreement with C. & Co., a firm of freight contractors, whereby the latter chartered the steamer *Hejaz* for a voyage, Bombay to Naples, Genoa and—or Marseilles, any two discharging ports at charter's option. Subsequently, the *Jeddah* was substituted for the *Hejaz.* The plaintiffs procured from C. & Co., freight for 2,500 bales of cotton on the said steamer and were given the shipping orders which they presented to the defendants. The plaintiffs put 2,500 bales of cotton on board the *Jeddah* and the defendants issued twenty-five bills of lading relating to them, having received in advance Rs. 32,610-6-2 for freight. The import of cotton into Genoa being prohibited by orders of Government, the *Jeddah* did not leave the harbour and the voyage had to be abandoned. Eventually the steamer unloaded her cargo, and the plaintiff before getting delivery of their goods were required to deposit Rs. 12,500 to cover the expenses and loss incurred by the ship. The said sum was deposited by the plaintiffs under protest. The plaintiffs subsequently demanded the return of Rs. 32,610-6-2 paid by them for freight, and on the defendants' disputing their liability to return the amount filed the suit for the recovery of the freight paid and for an account of Rs. 12,500 deposited to defray the costs of unloading. The defendants pleaded, (i) that money paid in advance for freight was irrecoverable at law; (ii) that they were common carriers and that the rights and liabilities of common carriers were governed by the principles of English law as modified by the Common Carriers Act of 1865; (iii) that in any event they were not liable to return the freight-money, as they were ready and willing to perform their part of the contract; and (iv) that they were entitled to retain Rs. 5,038-3-7 out of the sum deposited with them for expenses and loss incurred by the ship. *Held,* (*i*) that the contract became impossible of performance under s. 56 of the Indian Contract Act and that the defendants were bound under s. 65 of that Act to restore the sum of Rs. 32,610-6-2, being the advantage they had received under the contract; (ii) that on the evidence before the Court, the defendants could not be treated as common carriers, they having let out and chartered the whole ship to C. & Co., for a private gain; (iii) that carriers by sea in India are not entitled to the benefits of Act III of 1865; (iv) that the defendants were entitled to claim demurrage and expenses incurred for unloading the cargo. *Nugent* v. *Smith, 1 C. P. D. 423,* referred to. *The Irrawaddy Flotilla Company* v. *Bagwandas, I. L. R. 18 Calc. 620,* considered. BOGGIANO & CO. *v.* THE ARAB STEAMERS CO., LTD. (1915) . . **I. L. R. 40 Bom. 529**

——— *Contract with hostile firm—Hostile firm incorporated in alien territories, and having a branch in Bombay—Contracts with enemy become illegal on the outbreak of war—Trading with enemy—Impossibility of performance owing to the outbreak of war—proclamations and Ordinances on the outbreak of war between Great Britain and Germany—Hostile Foreigners Trading Order—Extension of time of performance, after breach—Waiver of breach.* The defendants were a German Joint-stock Company incorporated under the laws of

CONTRACT ACT—*contd.*

———— ss. 56, 65—*contd.*

Hanover, having a branch in Bombay, under the

chase from the plaintiffs the total quantity of waste of the several descriptions specified in the contract produced in the plaintiffs' mills during the year ending the 31st December 1914 at the respective prices specified in the contract, and to take delivery of whatever waste might be ready at least once monthly. The defendants deposited with the plaintiffs 3½ per cent. Government Promissory Notes of the face value of Rs. 2,200 to be retained by the plaintiffs against the fulfilment of the contract. On the 4th August 1914, war was declared between Great Britain and Germany. On the 18th August the plaintiffs wrote to the defendants calling upon them to take delivery of waste under the contract. On the 22nd August, the manager of the defendant company replied that on account of the existing political position the defendants were not allowed to do business in India and requested the plaintiffs to keep the delivery of waste standing over until business was allowed to be resumed. On the 5th September, the defendants' manager was interned as an alien enemy, the defendants' local business ceasing for all practical purposes. On the 11th November, the plaintiffs again called upon the defendants to take delivery of the waste, the defendants replying that they were unable to arrange for further delivery until the declaration of peace. On the 14th November, an order called the Hostile Foreigners Trading Order was issued by which an hostile foreigner or firm was prohibited from carrying on or engaging in any trade or business in British India except under a license issued by or under the authority of the Governor-General in Council subject to such conditions, restrictions and supervision as the Governor-General in council may direct. On the 3rd December, the plaintiffs again called upon the defendants to comply with their notice of the 11th November on or before the 8th December and subsequently extended the time for taking delivery until the 16th December The defendants replied on the 18th December referring to the internment of their manager and claimed that under s. 56 (2) of the Indian Contract Act, the defendants were relieved from the performance of their part of the contract. On the 8th February 1915, the defendants obtained a license limited to the winding up and liquidation of their local business under Government supervision. On the 16th February the plaintiffs informed the defendants that they had sold the waste of which the defendants had been under contract to take delivery at a loss of Rs. 4,270-13-0 and after deducting the value of the deposit demanded payment of Rs. 2,074-13-2. On the 11th March, the plaintiffs filed the suit to recover the sum of Rs 4,270-13-0 from the defendants and for a declaration that the plaintiffs were entitled to retain the 3½ per cent. Government Promissory Notes and to set off their value in part satisfaction of the decretal amount. The defendants pleaded (i) illegality of contract on the outbreak of war, (ii) im

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Held, (

on the outbreak of war and was dissolved on the 4th August 1914, (ii) that it had become impossible for the defendants to perform their part of the contract, owing to subsequent events arising from a state of war, (iii) that assuming that it only became so after the 14th November 1914, the plaintiffs gave the defendants further time for taking delivery until the 16th December and so waived any breach committed before that date, (iv) that the defendants were entitled to a return of their deposit under s. 65 of the Indian Contract Act. *Janson* v. *Driefontein Consolidated Mines, Limited,* [*1902*] *A. C. 484, 509, W. Wolf & Sons* v. *Carr. Parker & Co, Limited, 31 T. L. R 407,* and *Kreglinger & Co.* v *Cohen, 31 T. L R. 592,* referred to. TEXTILE MANUFACTURING CO, LTD. *v* SALOMON BROTHERS (1915)

I. L. R. 40 Bom. 570

———— s. 57—

See s. 30 . I. L. R. 34 Bom. 519

———— ss. 59, 60—

See SALE FOR ARREARS OF REVENUE.

I. L. R. 38 Calc. 537
15 C. W. N. 443

59 to 61 of the Indian Contract Act enacted the rule of the Civil Law as laid down in *Clayton's Case, 1 Mer. 572, 604,* with certain modification. KUNDAN LAL *v.* JAGANNATH (1913)

I. L. R. 37 All. 649

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principal
stalment
interest.

with interest at a certain rate and the defendant was directed to pay in regularly yearly instalments of a certain amount and he did pay the instalments as they fell due but did not say how the payment was to be appropriated, and the decree-holder claimed that he was at liberty to appropriate out of each payment as it was paid sufficient to satisfy the interest due at the date of payment and to credit the balance only to principal. *Held,* that he was entitled to do so. *Per* RICHARDSON, *J.* (WALMSLEY, *J. dubitante*)—Where both principal and interest are payable under a contract or a decree, in the absence of provision in the contract or decree and of appropriation by the debtor, the creditor has the right to pay himself the interest first. BISWANATH BHATTACHARYA *v.* SOMESHWAR SARMA (1917) . . 21 C. W. N. 1055

account If he omits to make an express appropriation the right to do so devolves on the creditor. Where neither party has exercised the right s. 61 of the Contract Act 1872, which is an enabling section entitles the Court to apply the payments to discharge the debts in the order in which they were contracted. Ss. 60 and 61 of

CONTRACT ACT—*contd.*

——— ss. 60 and 61—*contd.*

the Contract Act 1872, provide a procedure analogous in all particulars to the English Law of appropriation. In order to create a fresh period of limitation under the proviso to s. 20 of the Limitation Act 1908, the fact of part-payment of a debt must appear in the handwriting of the person making the part-payment. BISHUN PERKASH NARAYAN SINGH *v.* MD. SIDDIQUE

1 Pat. L. J. 474

——— s. 62—*Sale deed, registered—Stipulation by vendee for benefit of vendor's creditor, if enforcible by latter—Creditor informed of arrangement by purchaser and purchaser acknowledged as debtor—Purchaser if trustee—Novation—Limitation Act (IX of 1908), Sch. I, Art. 116—Consideration, definition of, in Contract Act and in English law—Justice, equity and good conscience, rule of, Courts in India to be guided by.* Where a sum is payable by *A B.* for the benefit of *C. D., C. D.* can claim under the contract as if it had been made with himself. Defendants Nos. 1 to 4 had executed a bond in favour of the plaintiff-defendants Nos. 1 to 4 on 18th August 1903, sold all their properties to defendant No. 5 by a registered deed which provided that a part of the consideration money was to remain with defendant No. 5 for payment of the debt of the plaintiff. The same day this arrangement was communicated to plaintiff by defendant No. 5 whom plaintiff accepted as his debtor. On the 25th of January 1908, plaintiff brought a suit against the defendants for recovery of the money; *Held,* that there was no novation of contract within the meaning of s. 62 of the Contract Act. That plaintiff was entitled to sue and recover from defendant No. 5 on the registered deed of sale although he was not a party to the contract, and the suit was not barred by limitation. *Tweedle* v. *Atkinson, I. B. & S. 393,* commented on and held to be no authority in India. *Muhammad Khan* v. *Husaini Begum, I. L. R. 32 All. 410, 14 C. W. N. 865; Gregory* v. *Williams, 3 Merivale 582, Touche* v. *Metropolitan Railway Warehousing Co., L. R. 6 Ch. App. 677, Gandy* v. *Gandy, 30 Ch. D. 57,* referred to and followed. Consideration as defined in the Indian Contract Act is wider than the requirements of the English law. In India the Courts are to be guided in matters of procedure by the rule of justice, equity and good conscience. DEBNARAIN DUTT *v.* RAMSADHAN MONDAL (1913) I. L. R. 41 Calc. 137

17 C. W. N. 1143

——— *Novation—where debtor has disabled himself from performing his promise under the new contract—Rescission—right to revert to old consideration.* Plaintiff sued to recover from defendant *N S* the money due to him on a bond executed in 1914. In 1916 *N S* executed a lease of land for 14 years in favour of one *A C* and on the same day sold to plaintiff and other creditors the right to recover the lease money from Amir Chand in payment of their debts. *N S* however, refused to perform his contract with *A C* and to deliver possession of the land. The whole scheme therefore for payment of the debts fell through. Notwithstanding this, defendant contended that there had been a novation of contract, and that plaintiff could no longer sue on the bond. *Held,* that under the circumstances of the case the plaintiff was entitled to rescind his sale contract and to revert to his previous consideration; s. 62 of the Contract Act being no bar to the suit. *Raja Ram* v. *Mehr Khan (66 P. R. 1888),* followed. *Bhagat Ram Ganpat Rai* v. *Chajju Ram (15 P. W. R. 1918),* Mussammat *Bhag Bhari* v. *Gujar Mal (63 P. R. 1917), Allah Ditta* v. *Nazar Din (53 P. R. 1916, F. B.), Dwarka Nath* v. *Priya Nath (22 Calc. W. N. 279),* and *Debnarayan Dutt* v. *Chuni Lal Ghose (I. L. R. 41 Calc. 137, 146),* distinguished. NAJAT SHAH *v.* RANGU RAM

I. L. R. 2 Lah. 323

——— ss. 62, 63—

See ARBITRATION. I. L. R. 41 Calc. 35

——— s. 63—

See s. 4. . I. L. R. 38 Bom. 355

See s. 39. . I. L. R. 37 Mad. 412

See s. 55 . I. L. R. 43 All. 257

——— *Release conditional on a future event valid—Evidence Act, s. 95—Evidence aliunde admissible to prove claim released.* It was not the intention of the Legislature in enacting s. 63 of the Contract Act to depart from the English law, under which releases contingent on the happening of a future event are valid. Such releases are valid under the Contract Act. Unlike the English law requires consideration in the case of releases not under seal, the Contract Act requires no consideration in the case of releases. When a deed of release is silent as to the claim released, evidence *aliunde* is admissible under s. 95 of the Evidence Act to show what claim was intended to be released. MATHEW HENRY ABRAHAM *v.* THE LODGE "GOOD WILL" No. 465, BELLARY (1910)

I. L. R. 34 Mad. 156

——— *Time extension of, if creates new contract—Delivery after expiry of extended time, acceptance of, if amounts to new contract—Contract varied by introduction of fresh terms, effect of—Plaint, statements in, when merely descriptive.* By mere extension of time for delivery of goods a contract is not wiped out and no new contract arises; only the promisee gets certain rights under s. 63 of the Contract Act. But in a case where subsequent to the contract a new term was introduced for the inspection of goods by the defendants in the plaintiff's godowns before delivery and after the time for delivery had long expired the defendants took delivery of 375 bales of jute, the original contract being for much more and there being nothing to show what was the new agreement or arrangement under which such delivery was taken: *Held,* that the old contract had been superseded and the defendant could rely on the arbitration clause in the old contract and compel the plaintiff to submit the matter to arbitration in terms of such contract, and a suit would lie for the recovery of the price of the goods so delivered. LUCHMI NARAIN BHAIRADAH *v.* HOARE MILLER & Co. (1913) . . 17 C. W. N. 1098

——— s. 64—

See s. 39 . I. L. R. 38 Mad. 178

See s. 55 . I. L. R. 33 Mad. 675

——— *Benefit, meaning of—Sale by guardian of wards' lands—Sale, not for binding purposes—Purchase of other lands for wards out of sale-proceeds—Suit by vendee for possession of portion of lands—Right of wards to avoid sale—Duty of wards to convey purchased lands or their value—*

CONTRACT ACT—*contd.*

——— s. 64—*contd.*

Suit by wards to set aside sale held barred by limitation—Competency of wards to set up plea of invalidity of sale in defence in vendee's suit—Limitation Act, Art. 44—Form of decree. Where a guardian sold lands belonging to her wards for purposes not binding on them and, with the sale-proceeds, purchased subsequently other lands for them but the purchase of the specific lands was not in the contemplation of the parties at the time of sale and did not form part of the same transaction as the sale, the lands so purchased did not constitute a *benefit* arising out of the sale under s. 64 of the Indian Contract Act and the wards were not bound to convey them to the vendee before they avoided the sale. Where the vendee from the guardian under a voidable sale, having obtained possession of a portion of the lands, sued to recover the remainder, after a suit by one of the wards who had attained majority to set aside the sale had been dismissed as barred by limitation under art. 44 of the Limitation Act, it is open to the wards to set up the plea of invalidity of the sale in defence in the vendee's suit in respect of the portion of the lands in their possession. The vendee will be entitled in such suit to a decree for the value of the lands and in default of payment to a decree for possession. CHINNASWAMI REDDI *v.* KRISHNASWAMI REDDI (1918) . . . . I. L. R. 42 Mad. 36

——— ss. 64. 66—

See LIMITATION ACT 1877, SCH. II ART. 91 . . I. L. R. 38 Mad. 321

——— ss. 64, and 65—

See s. 11 . . I. L. R. 32 All. 25

——— *Written contract—Material alteration by one party, effect of—Breach of contract—Damages—Repayment of advance.*] If a written contract is materially altered by one party without the knowledge and consent of the other, the former is not entitled to damages for breach of contract, but is entitled to a repayment of the advance made by him. ANANTHA RAO *v.* SURAYYA (1920) . . I. L. R. 43 Mad. 703

——— s. 65—

See s. 23 . . I. L. R. 43 Calc. 115

I. L. R. 40 Mad. 197

See s. 27 . . 21 C. W. N. 979

See s. 56 . . .

I. L. R. 40 Bom. 529, 570

See s. 32 . I. L. R. 37 Bom. 387

See AGRA TENANCY ACT (II OF 1901), ss. 19 AND 20. I. L. R. 32 All. 383

See BHAGDARI AND NARWADARI TENURES ACT (BOM. V OF 1862), s. 3.

I. L. R. 39 Bom. 358

See BROACH AND KAIRA INCUMBERED ESTATES ACT (XXI OF 1881), s. 28.

I. L. R. 41 Bom. 546

See CONTRACT . I. L. R. 45 Bom. 225

See HINDU LAW JOINT FAMILY.

5 Pat. L. J. 622

——— *Void agreement, party* [illegible] *it—* [illegible] *evi-* [illegible] *by*

CONTRACT ACT—*contd.*

——— s. 65—*contd.*

document, if admissible. Where the plaintiff claimed the consideration money mentioned in a *kobala* and the defendant pleaded that the real consideration for the *kobala* was the service rendered to the plaintiff in inducing a third person to sell a certain property to the plaintiff and that there was no contract for payment of money: *Held*, that oral evidence to show the real nature of the transaction was rightly admitted. S. 65 of the Contract Act does not apply when the object of the agreement is illegal to the knowledge of both parties at the time when it was made. Where a *kobala* was executed mainly in consideration of the services rendered by the defendant in inducing his employer to sell a property to the plaintiff and was thus void, the contract could not be regarded as having been " discovered to be void," or " become void " within the meaning of s. 65 of the Contract Act. *Held*, further, that in the circumstances of the case both the parties being in *pari delicto*, no relief should be granted NATHU KHAN *v.* SEWAK KOERI (1911) . . . 15 C. W. N. 408

——— *Agreement discovered to be void—Compensation, payment of—Bhagdari Act (Bom. Act V of 1862)—Alienation of unrecognised subdivision of a bhag—Valatdana patta.* In 1902 the plaintiff executed a *valatdana patta* of lands forming an unrecognised sub-division of a *bhag*, in favour of defendants who were put in possession. The deed contained a personal covenant whereby the plaintiff bound himself to give compensation to the defendants in case their possession was obstructed. In 1910, the plaintiff sued to recover possession of the property by redeeming the *valatdana patta* which he alleged was a mortgage. The lower Courts held that the alienation was void under the provisions of the Bhagdari Act (*Bom. Act V of 1862*); and following the decision of *Jijibhai* v. *Nagji, 11 Bom. L. R. 693*, ordered that the plaintiff could recover possession on payment of moneys he had received from the [illegible]

ant in the agreement. *Per* SHAH, *J.*—Neither under s. 65 of the Indian Contract Act nor under the ruling in *Jijibhai* v. *Nagji, 11 Bom L. R. 693*, is the Court bound to award compensation in all cases as a matter of course where a document is found to be void in consequence of the provisions of the Bhagdari Act. It has to be considered in each case whether the agreement is discovered to be void and whether any person has received any advantage under such agreement as required by s. 65 or whether the covenant in each particular case justifies the order of compensation. The amount of compensation also has to be determined [illegible]

——— *Minor—Minority suc-* [illegible]

CONTRACT ACT—*contd.*

——— s. 65—*contd.*

satisfied that the Judge's discretion has not been judicially exercised, interfere with it and make the order which the court below ought to have made. It is no ground for giving costs against a successful defendant that the defendant pleaded that he was a minor at the time when the transaction upon which the suit was based was entered into, there being nothing to suggest that the plaintiff had been misled as to the real age of the defendant by any action or statement on the part of the latter. RADHE SHIAM *v.* BEHARI LAL (1918)

I. L. R. 40 All. 558

——— *Vendor and purchaser—Failure of purchaser to obtain possession of the subject-matter of his contract—Suit for recovery of consideration paid—Execution of decree—Civil Procedure Code (1908), O. XXI, r. 89.* The judgment-debtors' interest in certain immovable property was attached in execution of a decree and sold. Before confirmation of the sale the judgment-debtors sold the same property, privately, with the condition, *inter alia,* that if the purchaser failed to get possession of the property sold owing to any act or omission on the part of the vendors, the purchaser should have the right to recover the sale consideration with interest. An application to have the execution sale set aside was made by the purchaser and failed, and the sale was confirmed. The purchaser under the private sale then sued his vendors to recover the consideration paid by him. *Held,* that the plaintiff was entitled to recover by virtue of the provisions of s. 65 of the Indian Contract Act, 1872, notwithstanding that the case was not provided for by the terms of his contract. *Isardas v. Asaf Ali Khan, I. L. R. 34 All. 186,* and *Pandurang Laxman Uphade* v. *Govind Dada Uphade, I. L. R. 40 Bom. 557,* referred to. MAHABIR PRASAD PANDE *v.* GANGA DIHAL RAI

I. L. R. 42 All. 7

——— ss. 65, 73—

See CONTRACT.

I. L. R. 42 Bom. 499

——— s. 68—

See CONTRIBUTION **I. L. R. 38 Calc. 378**

——— Debt by minor—*Necessaries—Hindu Law—Joint Hindu Family—Money borrowed to defray expenses of sister's marriage.* One of the brothers in a joint Hindu family, consisting of two brothers and a sister, all minors, the sister being about 13 years of age, borrowed a sum of money to provide for the expenses of the sister's marriage. After the death of the borrower the lender sued the surviving brother to recover the sum so advanced from the property of the joint family in his hands. *Held,* that the suit was maintainable notwithstanding that the deceased brother was a minor at the time that the money was advanced. *Tulsha* v. *Gopal Rai, I. L. R. 6 All. 632, Vaikuntam Ammangar* v. *Kallapiran Ayyangar, I. L. R. 23 Mad. 512, Sham Charan Mal* v. *Chowdhry Debya Singh, I. L. R. 21 Calc. 872,* and *Chapple* v. *Cooper, 13 M. & W. 252,* referred to. NADAN PRASAD *v.* AJUDHIA PRASAD (1910) . . . . **I. L. R. 32 All. 325**

——— *Agreement by minor to sell immovable property, validity of—Suit for recovery of money—liability of property for money*

CONTRACT ACT—*contd.*

——— s. 68—*contd.*

advanced. Where a minor, in order to secure funds to meet his marriage expenses, entered into an agreement for the sale of certain immovable property, *held* that the minor was bound to repay the amount received and that the minor's property was liable for such amount. The plaintiff's claim being for Rs. 134-10-0 only, *held* that no second appeal lay from the decision of the lower appellate court dismissing the plaintiff's suit. PATHAK KALI CHARAN RAM *v.* RAM DENI RAM . . . . . **2 Pat. L. J. 627**

——— *ss. 68 to 72*—

See CONTRIBUTION

I. L. R. 38 Calc. 1

——— *s. 69*—

See ADVERSE POSSESSION

I. L. R. 45 Bom. 638

See CONTRIBUTION . **14 C. W. N. 361**
I. L. R. 38 Calc. 1
I. L. R. 45 Calc. 691.

See PATNI REGULATION, *s. 13.*

15 C. W. N. 404

See REVENUE RECOVERY ACT, SS. 3, 35.

I. L. R. 33 Mad. 41

——— 'Interested in paying,' meaning of—*When payment not voluntary.* A person is interested in making a payment within the meaning of s. 69 of the Contract Act, when there is an apprehension of any loss or inconvenience or of any detriment capable of being assessed in money. A person whose immoveable property is attached for a debt due by another is 'interested' in paying the debt to save the property and can recover from the person by whom it is due. Payment under such circumstances is not a voluntary payment. SUBRAMANIA IYER *v.* RUNGAPPA REDDI (1909)

I. L. R. 33 Mad. 232

——— *"Interest in the payment," meaning of—Decree against Hindu widow and sale of husband's estate—Sale set aside by reversionary heir by deposit under s. 310A, Civil Procedure Code (XIV of 1882)—Suit to recover deposit from widow—Payment, if voluntary, if decree in law appears to bind widow personally.* Where by a deposit duly made under s. 310A of the Civil Procedure Code of 1882 the reversionary heir expectant upon the death of a Hindu widow in possession of her husband's estate as his heiress, had a sale in execution of a decree for arrears of rent of properties other than the defaulting tenure set aside, and then sued the widow for recovery of the amount deposited: *Held,* that as the decree-holder professed to sell the entire interest in the properties sold and the auction-purchaser also claimed to have acquired the entire interest, the reversionary heir was "interested in the payment" of the decretal amount which the widow "was bound by law to pay"—within the meaning of s. 69 of the Contract Act. Until the sale is confirmed, the judgment-debt remains unsatisfied, and it is in satisfaction of the judgment-debt that the payment under s. 310A, (excluding the portion which represents damages payable to the execution purchaser) is made. The question whether in point of law the reversionary interest was or was not touched by the sale, being a matter for serious controversy, the

CONTRACT ACT—*contd.*

———— s. 69—*contd.*

payment could not be viewed as a voluntary payment. The words "interested in the payment of money which another is bound by law, to pay" may include the apprehension of any kind of loss or inconvenience and not merely the actual detriment capable of assessment in money. S. 69 thus lays down a more comprehensive rule than is supported by English authority. PANKHADATI CHAUDHURANI *v.* NANI LAL SINGH (1913)

18 C. W. N. 778

———— *Payment by a person interested which another is bound by law to pay—Gift of land by donor who undertakes to pay judi on the land—Another donee taking gift of the rest of the donor's property with full notice of the obligation, but the gift deed containing no stipulation to that effect—Obligation of the second donee to pay the judi.* *K*, who owned considerable property, gave a portion of it to his daughter's husband (plaintiff) in 1878, the deed of gift expressly providing that *K* undertook to pay the *judi* in respect of the portion. In 1902, *K* made a gift of the residue of his property to *B*, the gift-deed containing special reference to the previous gift of 1878 and enjoining the donee to act according to that gift. The *judi* was regularly paid by *K* first and *B* afterwards. In 1905, *B* in his turn made a gift of the property to the defendant, the deed of gift in this case contained a reference to the gift of 1878, but it contained no words requiring the donee defendant to abide by the terms of that gift. The defendant having failed to pay the *judi* to Government, the plaintiff was required to pay it. He sued to recover the amount from the defendant. *Held*, that the plaintiff was entitled to recover the amount from the defendant under s. 69 of the Indian Contract Act (IX of 1872), because the defendant was bound in law to pay the money in the payment of which the plaintiff was interested and which the plaintiff had paid. SOMASHASTRI *v.* SWAMIRAO KASHINATH (1917) . . . . I. L. R. 42 Bom. 93

———— *Decree for rent against recorded tenant who had sold his share before the whole of the amount sued for fell due—Sale in execution set aside by deposit by a co-sharer—Latter's right to recover from recorded tenant—Contribution suit for—Suit brought after recorded tenant ceased to own any interest in the tenure if suit of Small Cause Court nature—Provincial Small Cause Courts Act*

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the beginning of 1308, *B. S.*, the latter transferred his share to a stranger. Thereafter the landlord sued defendant No. 1, who was the sole recorded tenant, for arrears of rent for the years 1307 and 1308 and had the tenure sold. The sale was set aside under s. 310A, Civil Procedure Code, 1882, upon the application of the plaintiff who deposited the whole amount within the statutory compensation to the purchaser. Subsequently he sued for recovery of two-sevenths of the sum deposited from the defendant No. 1 without making the latter's vendee a party or asking any relief from him: *Held*, that the defendant as the recorded tenant was "bound by law" to pay the amount of the decree passed against him, within the meaning of s. 69, Contract Act, and the plaintiff as a person interested in the payment of the debt within that section was entitled to be reimbursed by the defendant No. 1; and the fact that he had transferred his share before the arrears for 1308 accrued due was no defence against the portion of the claim which related to that year. *Held*, further, that the fact that at the date of the institution of the suit the defendant No. 1 had no interest in the tenure did not put the case outside the scope of Art. 41 of the Second Schedule of the Provincial Small Cause Courts Act, and the provisions of s. 102 of

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tiff was in law entitled to recover more than ⅐th from the defendant No. 1. BATUK NATH MANDAL *v.* BIPIN BEHARI CHAUDHURI (1912)

16 C. W. N. 975

———— ss. 69 and 70—

See CIVIL PROCEDURE CODE 1908, O. XXI, R. 89 . . 2 Pat. L. J. 676

See CO SHARER . 15 C. W. N. 332

See CONTRIBUTION I. L. R. 38 Calc. 1
I. L. R. 45 Calc. 691

See NEGOTIABLE INSTRUMENTS ACT, 1881, s. 30 . . I. L. R. 39 Mad. 965

See VOLUNTARY PAYMENT.
I. L. R. 40 Calc. 598

———— *Contribution, suit for—Co-sharer under-raiyats—Sale by one to the other not recognised by landlord—Decree for rent against both discharged by vendor—Right to recover.* *A* and *B* were under-raiyats in respect of a non-transferable holding. *B* transferred his share to *A* in 1904. The transfer was not recognised by their landlord. The landlord obtained a decree in a suit for arrears of rent against *A* and *B* in respect of the years 1902 05, whereupon *A* satisfied the decree and brought a suit for contribution against *B*. *Held*, that s. 69 of the Contract Act is applicable to the present case, and *B* is bound to make compensation to *A*. *Held*, further, even assuming that s. 69 has no application, s. 70 undoubtedly covers the case PROSUNNO KUMAR BOSE *v.* JAMALUDDIN MAHOMED (1912) . . . . 18 C. W. N. 327

———— *Suit for contribution—Co-owners—Purchasers of different portions of zamindari—Attachment for arrears of revenue—Payment by a purchaser of the whole amount of arrears—Suit by him for the entire amount against the zamindar and the other purchaser—Personal liability of registered holder only—Liability of share of the other purchaser—Zamindar liable, only for proportionate share—Sale-proceeds of zamindari, liability of—Property partly in Agency Tract—Defendant-purchaser, resident therein—Jurisdiction of Subordinate Court.* The plaintiff was a purchaser in an auction sale held in execution of a decree, of some villages in a zamindari of which the first defendant was the registered holder. The sixth defendant was a similar purchaser of some other villages therein within the jurisdiction of the Agency Court. For default in payment of revenue accruing due subsequent to the plaintiff's purchase, one of the villages purchased by

CONTRACT ACT—*contd.*

———— **ss. 69 and 70**—*contd.*

him was attached by the Government; the plaintiff paid the full amount due on the entire zamindari to save his village from revenue sale. The plaintiff brought the suit in the Subordinate Judge's Court against the first defendant, defendants Nos. 2 to 5 (who were his undivided brother, sons and nephew, respectively) and the sixth defendant, to recover the full amount paid by him from all the defendants personally and from the sale-proceeds of the rest of the zamindari kept in deposit in the Government treasury. The defendants pleaded non-liability in law for the full amount, while the sixth defendant raised the further plea that the Subordinate Judge's Court had no jurisdiction to entertain the suit as against him. *Held,* (*a*) that the only person who is personally bound to pay the revenue to the Government is the registered holder; (*b*) that a co-owner who pays to the Government the whole revenue due on an estate is not entitled to a personal decree against the other co-owners who, not being registered holders, are not under a personal obligation to pay the revenue, though it may be a charge on the lands in their holding; (c) that s. 70 of the Indian Contract Act does not apply to such a case; (*d*) that the Subordinate Judge's Court had no jurisdiction to entertain the suit as against the sixth defendant to enforce the charge on the villages purchased by him, as the lands did not lie within its jurisdiction; (*e*) that s. 69 of the Indian Contract Act does not apply to a suit for contribution, as "*the person interested in the payment of money*" must be a person who is not himself bound to pay the whole or any portion of the amount; (*f*) that the plaintiff was entitled to sue the first defendant only for contribution and to recover from him and from the sale-proceeds in deposit only the share of revenue payable on account of the property in the hands of the first defendant. *Subramania Chetti* v. *Mahalingasami Sivan, I. L. R.* [illegible] *Mad. 41, Prauykyi* v. *Pakaram Haji, 15 I. C.* [illegible], *Narain Pai* v. *Appu, 28 I. C. 456,* and *Futteh* [illegible]*li* v. *Gunganath Roy, I. L. R. 8 Calc. 113,* followed. *Raja of Vizianagaram* v. *Raja Setrucherla Somasekharaz, I. L. R. 26 Mad. 713,* distinguished. *Gajapathi Kistna Chendra Deo* v. *Srinivasa Charlu, 25 Mad. L. J. 433, Raja of Pittapuram* v. *Secretary of State, 16 Mad. L. T. 375, Yogambal Boyee Ammani Ammal* v. *Naina Pillai Markayar, I. L. R. 33 Mad. 15, Mangalathammal* v *Narayanaswami Ayyar, 17 Mad. L. J. 250, Manindra Chandra Nandy* v. *Jamahir Kumari, I. L. R. 32 Calc. 643,* and *Moule* v. *Garrett, 7 Ex. 101, 104,* referred to. JAGAPATI RAJU *v.* SADRUSANNAMMA ARAD (1915) . **I. L. R. 39 Mad. 795**

———— *Darputnidar of a co-sharer putnidar, depositing decretal amount to prevent sale of the putni in execution of a decree obtained against only some of the putnidars, if a person legally "interested in the payment"—Suit by putnidar not party to the decree for declaration and injunction to restrain darputnidar taking possession under s. 171 of the Bengal Tenancy Act (VIII of 1885)—Power of Court to grant conditional injunction—Condition that plaintiff should pay his share of rent paid by defendant.* The payment made by the *darputnidar* of a share of a *putni* of the whole rent due on the *putni* to save it from being sold in execution of a decree obtained by the landlord in a suit for arrears of rent brought against some only of the *putnidars* comes within ss. 69 and 70 of the Contract Act. Where, after an order under s. 171 of the Bengal Tenancy Act was made in favour of such a *darputnidar,* one of the *putnidars* who was not a party to the landlord's suit for rent sued for a declaration and injunction that his right in the property was not affected thereby and the Court below decreed the suit and granted the injunction but made it conditional on the *putnidar* paying to the *darputnidar* the amount of rent proportionate to his share of the *putni. Held,* that the order making the injunction conditional was proper. RAJANI KANTO MONDAL *v.* HAJI LAL MAHOMED (1917) . . . . . **21 C. W. N. 628**

———— "*Lawful payment,*" *what is—"Interested in paying," who are—Deposit of decretal amount to prevent rent-sale by person claiming under a forged mortgage-bond—Sale set aside—Tenant, if liable to repay by reason of "benefit" received—Bengal Tenancy Act (VIII of 1885), s. 171 (3)—"Interest voidable on sale."* Plaintiff, alleging to be mortgagee of a tenancy which was about to be sold in execution of a rent decree, proceeded to deposit the decretal amount under s. 170, cl. (*3*) of the Bengal Tenancy Act, whereupon the tenant challenged his right to do so on the ground that the alleged mortgage was a forged document. The executing Court accepted the deposit, but without deciding the question of the genuineness of the mortgage. In a suit by the plaintiff to recover the amount paid it was found that the mortgage was not genuine. *Held,* that the plaintiff was not a person having an interest in the tenancy which was voidable on the sale within s. 170, cl. (*3*) of the Bengal Tenancy Act, nor was he interested in the payment of the money within the meaning of s. 69 of the Contract Act, nor was the payment lawful within the meaning of s. 70 of that Act. That the plaintiff was also not entitled to recover on the ground of defendant having benefited by the payment since it is not in every case in which a man has benefited by the money of another that an obligation to repay that money arises; there must be an obligation, express or implied, to repay. PANCHKORE GHOSE *v.* HARIDAS JATI (1916)
21 C. W. N. 394

———— *Putnidar's suit for rent against some darputnidars—Sale thereunder set aside by deposit of decretal money and statutory compensation to auction-purchaser by co-sharer not made party—Suit for contribution, if lies.* The Plaintiff who was part owner of a *darputni* which had been sold by the *putnidar* in execution of a decree for rent obtained by him in a suit in which the Plaintiff had not been made a party had the sale set aside by depositing the decretal money and the statutory compensation of five per cent. of the purchase money due to the auction purchaser and then sued the other co-sharers for contribution: *Held,* That though the decree was not binding on the Plaintiff, as the entire *darputni* had been put up to sale, Plaintiff had the right to sue under s. 70 of the Contract Act though not under s. 69 and that not merely in respect of the decretal amount but also of the statutory compensation money intended for the auction purchaser. *Suchand* v. *Balaram, I. L. R. 38 Calc. 1 (1910), Jognarain* v. *Badri Das, 16 C. L. J. 156 (1911),* and *Batuk*

CONTRACT ACT—*contd.*

———— s. 69—*contd.*

Nath v. *Bepin Behary, 16 C. W. N. 975 (1912)*, referred to. KANGAL CH. PAL *v.* GOPI NATH PAL. **24 C. W. N. 1068**

———— s. 70—

See s. 11 . . **I. L. R. 32 All. 25**

See s. 69.

See CIVIL PROCEDURE CODE, O. XXI, r. 89 . . . **2 Pat. L. J. 676**

See RENT DECREE . **14 C. W. N. 699**

———— *of the Contract Act does not apply where, the party sought to be made liable, though benefited, had no option but to enjoy the benefit.* In order to enable a party to recover money paid by him from another under s 70 of the Indian Contract Act, it is necessary that the party sought to be made liable must not only have benefited by the payment but must also have had the opportunity of accepting or rejecting such benefit. Where no such option is left to him and the circumstances do not show that he intended to take such benefit, he cannot be said to have "enjoyed such benefit" within the meaning of the section. When the person paying is interested in making the payment, he cannot be presumed, in the absence of evidence to show that he intended to act for the other party also, to have acted for such other party S. 70 of the Contract Act reproduces the English Law as laid down in *Lampleigh* v. *Brathwait, 1 Sm. L C 163, Abdul Wahid Khan* v. *Shaluka Bibi, I. L. R. 21 Calc. 496, 504,* followed. *Damodara Mudaliar* v. *Secretary of State for India, I. L. R. 18 Mad. 88,* considered. A person paying money into Court under s. 310A of the Civil Procedure Code of 1882 to set aside a sale in execution, cannot recover such money from the defendant who has obtained possession of the property when he has made the payment to protect his own interest and the circumstances do not show that he would not have made the application if the defendant had not consented. YOGAMABAL BOYEE AMMANI AMMA *v.* NAINA PILLAI MARKAYAR (1909) **I. L. R. 33 Mad. 15**

-sion." *Held*, that the defendant was bound to pay his portion of the peshkash only from the time of the sub-division when alone the exact amount due by the defendant was ascertained; and that plaintiff who had paid the whole peshkash was entitled to recover from the defendant under s. 70 of the Indian Contract Act whatever the defendant was liable to pay after the sub-division. S. 70 of the Indian Contract Act should be applied in all cases where the requirements of the section are fulfilled, whatever might be the English Law on the subject. A person must be said to have enjoyed the benefit of an act within the meaning of s. 70 of the Indian Contract Act, when he in fact enjoyed the benefit by accepting or adopting it, without objecting to it. S. 70 does not require that the defendant must have an option of declining the benefit if that means that before

CONTRACT ACT—*contd.*

———— s. 70—*contd.*

the benefit is conferred he must be given the choice of accepting or declining it *Per* MILLER, *J.*—The fact that plaintiff's interest also might have suffered if the act was not done will not make the act any the less one done for the defendant. *Narayanaswami Naidu* v. *Sri Rajah Vellanki Sreenivasa Jagannatha Rao, I. L. R. 33 Mad. 189,* and *Yogambal Boyee Ammani Ammal* v. *Naina Pillai Markayar, I. L. R. 33 Mad 15,* referred to. *Per* SADASIVA AYYAR, *J. Obiter :* If the benefit conferred is inseparably accompanied by onerous obligations that a reasonable man would refuse to accept, s. 70 will not apply. *Damodara Mudaliar* v. *Secretary of State for India, I. L R. 18 Mad. 88,* and *Jognarain* v. *Badri Das, 16 C. L. J. 156,* followed. *Yogambal Boyee Ammani Ammal* v. *Naina Pillai Markayar, I. L. R 33 Mad. 15,* dissented from *Abdul Wahid Khan* v. *Shaluka Bibi, I L. R. 21 Calc. 496,* and *Ram Tuhul Singh* v. *Bisseswar Lall Sahoo, 2 I A. 131,* distinguished. *Rajah of Vizianagaram* v. *Rajah Setucherlaraz Somasakara, I. L. R. 26 Mad 686,* referred to. SRI SRI SRI CHANDRA DEO *v.* SRINIVASA CHARLU (1913) . . . **I. L. R. 38 Mad. 235**

———— *Payment made for another—Non-gratuitous payment—Obligation of person enjoying the benefit—Mortgage—Stranger paying off a*

The defendant

In 1904, the

and obtained a decree for the mortgage amount or in default, the sale of the property. The mortgagee applied in 1905 for sale of the mortgaged property. About that time, the plaintiff went into possession of the lands on a ten years' lease from defendant No. 1. Shortly afterwards defendant No 2, who held a money-decree against defendant No. 1, brought the property to sale and purchased it himself. In 1907, the property was put up to sale in execution of the mortgagee's decree. But defendant No. 1 borrowed a sum of Rs. 2,463 from the plaintiff and paid off the mortgagee. Subsequently, defendant No. 1 sold a portion of the property mortgaged to plaintiff for Rs. 4,000, the consideration being made up of Rs. 2,463 with other sums lent to defendant No. 1, personally. In 1908, defendant No. 2 sued plaintiff to recover possession of the land; and obtained possession. The plaintiff filed the present suit to recover the amount of Rs. 4,000 from the defendants personally or by sale of the property. *Held*, that defendant No. 2 was not personally liable to re-pay Rs. 2,463 to the plaintiff under s. 70 of the Indian Contract Act (IX of 1872) for, it could not be said that the payment was made for defendant No. 2, the plaintiff having without reference to the second defendant, intruded himself in order to make the payment without the second defendant's knowledge. *Held*, further, that the land in possession of defendant No. 2 was chargeable with the sum of Rs. 2,463, because the plaintiff being a stranger who paid off a subsisting mortgage was entitled to be subrogated to the position of the mortgagee. *Held*, also, that defendant No. 1 was personally liable to make good the deficiency. *Per* BATCHELOR *J.*—"S. 70 of the Indian Contract Act makes provision for compensation to be paid by a person enjoying the benefit of a non-gratuitous act, but for the operation of the section certain conditions are prescribed. They are that the thing done

CONTRACT ACT—*contd.*

——— s. 70—*contd.*

shall be lawfully done, that the intention shall not have been to do it gratuitously, and that the other person shall enjoy the benefit.' TANGYA FALA *v.* TRIMBAK DAGA (1916)

I. L. R. 40 Bom. 646

——— *The Civil Procedure Code (Act V of 1908), O. I, r. 8, O. XXI, r. 89 and s. 35—Suit by a member of a caste on behalf of himself and all other members—Suit dismissed with costs, the plaintiff being ordered to pay costs—Caste property attached in execution of decree—Attachment resisted by the caste—Caste property sold under order of Court—sale set aside on payment of all money under various attachments by two members of caste—Members paying money entitled to compensation out of caste property—Construction of decree in a representative suit—Observations in giving leave and drawing up order for costs in representative actions.* One *S*, a member of the Dakshani Fulmali caste, on behalf of himself and all other members of the caste sued two other members, the headmen of the caste for an account of the caste moneys received by them and for further relief. Prior to its institution the suit had neen authorised by a resolution of the caste at a general meeting. The suit was dismissed and the Court ordered that the plaintiff should pay the defendants their costs of the suit. *S* appealed, and the Appellate Court dismissed the appeal with costs. In execution proceedings for the recovery of a portion of the costs the only immoveable property of the caste consisting of a *sabhagraha* or Caste Meeting House was attached and after an unsuccessful attempt on behalf of the caste to have the attachment raised, the right, title and interest of *S* and all members of the caste in the property were sold. Subsequently two members of the caste *B* and *H* to save the property for the caste got the sale set aside under O. XXI, r. 89, by paying to the purchaser the compensation required under the Rule and to the judgment-creditors the moneys due under their attachment. *B* and *H* further paid off the moneys due under all other attachments, the total amount expended by them on behalf of the caste being Rs. 7,234. *B* and *H* claiming to be reimbursed for the amount paid by them sued the members of the caste praying that the defendants in their individual capacity and as representatives of the caste might be ordered to contribute towards the payment of the total amount paid by the plaintiffs and that in the alternative it may be declared that the plaintiffs had a charge on the *sabhagraha* for the said amount. The defendants contended that no personal decree could be passed against all the members of the caste, that the judicial sale and the warrants for attachment in the prior suit were made *per incurium* without jurisdiction and were not binding on the caste, and that by the form of the decree in the prior suit *S* alone was liable for all costs incurred. *Held*, (i) that under s. 70 of the Indian Contract Act the plaintiffs were entitled to compensation in respect of the moneys paid by them including the five per cent. amount paid to the purchaser under O. XXI, r. 89 (ii) that on the plaintiffs undertaknig not to levy execution except against the immoveable property or the shares of the members of the Fulmali caste therein, the defendants and all other members of the Fulmali caste should pay to the plaintiffs the sum of Rs. 7,234; (iii) that costs as between party and party of all parties be taxed and paid out of the immoveable property, the plaintiffs' costs having priority over those of the contesting defendants. *Suchan Ghosal* v. *Balaram Mardana, I. L. R. 38 Calc. 1, 7; Taff Vale Railway* v. *Amalgamated Society of Railway servants, (1901) A. C. 426*, and *Markt & Co. Limited,* v. *Knight Steamship Company Limited, (1910) 2 K. B. 1021*, referred to. In giving leave under O. I, r. 8, in a representative action, the Court should exercise caution before it makes persons liable for large sums who are not actually parties to a suit, nor have personally authorised it. On the other hand the representative should not be an impecunious person as otherwise a caste or similar body might carry on litigation with little fear of adverse consequences supposing the liability for costs fell only on their impecunious representative and not on themselves. Similarly in drawing up order for costs in a representative action it should be stated whether the representative party alone or the representative and all other members of the body he represents are to bear the costs, assuming there in jurisdiction in the particular case to make such an order. BHICOOBAI *v.* HARIBA RAGHUJI (1917) . . . **I. L. R. 42 Bom. 556**

——— *Sale—Specified sum left with vendors for payment to mortgagees of property other than the subject of the sale—Interest paid by purchasers in addition to specified sum—Gratuitous payment.* On the sale of certain immoveable property of large value it was agreed between the parties that a specified portion of the purchase money should, instead of being paid to the vendors directly, be paid on their behalf to a certain mortgagee who held a mortgage over property of the vendors other than the subject of the sale. Owing to a delay in the registration of the sale-deed, which was caused by the action of the vendors, the purchasers did not immediately pay the stipulated sum to the mortgagee, and when they did come to tender it, the mortgagee refused to accept it upon the ground that by that time a further sum had fallen due as interest. The purchasers thereupon paid the further amount claimed. Subsequently the vendors sued the purchasers for the balance of the purchase money remaining unpaid, and the purchasers claimed to set off against the unpaid purchase money the sum which they had paid as interest, as above described. *Held*, that the purchasers were not entitled to the set-off claimed, as the payment of interest was in excess of the sum stipulated to be paid to the mortgagee and was in the circumstances a purely gratuitous payment. SURAJ BHAN *v.* HASHMI BEGAM (1918)

I. L. R. 40 All. 555

——— Contribution against person enjoying benefit of non-gratuitous act—*P. & D* were owners of an insanitary tank and for ignoring an order of the Municipal Corporation for filling up same were sued criminally whereupon *P* filled up the tank and brought a suit for contribution against *D* who also was in receipt of rent from tenants who were settled on the filled up tank. *Held*, that case was within s. 70 of the Contract Act, because the tank was filled up lawfully without intending to do it gratuitously and the person for whom it was done was enjoying

CONTRACT ACT—*contd.*

——— **s. 70**—*concld.*

——— The word "Lawfully" *in this section cannot be regarded* as mere surplusage and the meaning is that the person must have a lawful interest in making the payment and it must be considered in each individual case whether the person making the pay-

25 C. W. N. 1029

——— **ss. 70, 222**—

See LIMITATION ACT, 1877, SCH. II, ARTS 61, 63, 118, 120 *I. L. R. 34 Mad.*

——— **s. 72**—

See CONTRIBUTION **I. L. R. 38 Calc. 1**

See INCOME TAX **I. L. R. 42 Calc. 151**

See SALE OF GOODS **I. L. R. 42 Bom. 16**

See VOLUNTARY PAYMENT. **I. L. R. 40 Calc. 598**

——— Money paid under compulsion of legal proceedings cannot be recovered. *Marriot* v. *Hampton, 7 T. R. 269,* followed. BISWANATH GORAIN *v.* SURENDRA MOHAN GHOSE (1913) . . **19 C. W. N. 102**

——— *Coercion—Money paid* ... *pro-* ... *Money* ... *ndant* ... *non-* ... *money* ... *ng of* s. 72 of the Indian Contract Act, and can be recovered back. The maxim *in pari delicto potior est conditio defendentis* does not apply to such a case. *Willimams* v. *Hedley, 8 East, 738 Unwin* v. *Leaper, 1 M. & G. 747,* and *Atkinson* v. *Denby, 6 H. & N. 778,* followed. *Kanhaya Lal* v. *National Bank of India, Limited, I. L. R. 40 Calc. 598,* referred to. The fact that the money was actually paid as the result of an arbitration is immaterial if the plaintiff's consent to the arbitration was obtained by means of the prosecution. MUTHUVEERAPPA CHETTY *v.* RAMASWAMI CHETTY (1915) . . . **I. L. R. 40 Mad. 285**

——— *Civil Procedure Code (1908), O. XXI, rr. 46, 58 and 63—Suit to recover money paid into court under order for attachment of a debt—Payment made under compulsion, but money admitted to be due to creditor.* D owed money to a contractor. The amount was uncertain, but, whatever it was, the debt due by *D* was attached by a creditor of the contractor. *D* under pressure from the Court, paid into Court a sum of Rs. 975, admitting at the time that this amount, if not more, was due to the contractor, and the amount so paid was withdrawn by the

CONTRACT ACT—*contd.*

——— **s. 72**—*contd.*

tractor, that the suit must fail. S. 72 of the Indian Contract Act, 1872, implies that money paid by mistake or coercion was not really due to the person to whom it was paid, and cl. (3) of O. XXI, r. 46, of the Code of Civil Procedure operates quite independently of any question as to the circumstances under which the payment was made or the motives which may have influenced the making of it. MAHADEO PRASAD *v.* DIGBIJAI SINGH . . **I. L. R. 43 All. 272**

——— **s. 73**—

See s. 39 . **I. L. R. 37 Mad. 412**

See BENGAL TENANCY, ACT ss. 67 & 68 **4 Pat. L. J. 282**

See SALE OF GOODS. **I. L. R. 43 Calc. 305**

See VENDOR AND PURCHASER. **I. L. R. 1 Lah. 380**

——— **Meaning of "Compensation" in Art. 115 of Limitation Act**—

See LIMITATION ACT 1908, SCH. I, ARTS. 52, 56, 115. **I. L. R. 2 Lah. 376**

——— *Lessee of zamindari property undertaking to pay Government revenue payable by lessor—Default—Sale for arrears of revenue—Measure of damages.* Where a lessee of zamindari property undertook to deposit the Government revenue payable by the lessor and the property was sold for arrears of revenue upon the lessee's fail ... the lessor was ... default but th ... the estate to ... danger to the ... room for the application of the doctrine that a plaintiff is not entitled to damages for breach of contract when by use of reasonable precautions he might have avoided loss. In the lease which covered only a portion of the zamindari there was a clause that a separate account of the portion leased, was to be opened at the lessee's instance and the loss on account of sale for arrears of revenue was to be assessed at Rs. 500. But no separate account was opened, and on default of payment of revenue by the lessee, the whole estate was sold. *Held,* that the measure of the loss sustained by the lessor was the market value of the estate sold. ROHIM BUKSH MANDAL *v.* SHAJAD AHMAD CHAUDHURY (1914) **19 C. W. N. 1311**

——— *Contract to sell immovable property belonging to himself and minor members by manager of a joint Hindu family—Breach of contract—Damages against manager, recoverable—English rule on the subject not applicable—Transfer of Property Act (IV of 1882), s. 55 (2), applicability of, to executory contracts. Held* by the Full Bench :—A manager of a joint Hindu family who has agreed to sell immovable property belonging to himself and the minor members of the family is personally liable under s. 73 of the Indian Contract Act (IX of 1872) for damages for failure to perform the contract when it is found that it is not binding on the minors. *Gas Light and Coke Company* v. *Towse, 35 Ch. D. 519,* not followed. The law in India as laid down by the Indian Contract Act as to the

CONTRACT ACT—*contd.*

——— Meaning of "Compensation" in Art. 115 of Limitation Act—*contd.*

right to damages for breach of contract to sell immovable property is different from that in England. Knowledge of the purchaser of the defect of title in his vendor does not affect his right to recover damages, *Per* ABDUR RAHIM, J. (SADASIVA AYYAR, J., *contra*)—S. 55 (2) of the Transfer of Property Act is applicable also to cases of executory contracts. ADIKESAVAN NAIDU *v.* GURUNATHA CHETTI (1916)
I. L. R. 40 Mad. 338

——— *Breach of contract to sell goods—Measures of damages—No actual loss by breach—No market for the goods at place of delivery—Liability for damages—Rule of Indian and English Law, comparison of.* The defendants agreed to sell a certain quantity of molasses to the plaintiffs by monthly instalments, and failed to deliver one of the instalments assigning as a reason the difficulty of obtaining freight. The plaintiffs did not purchase other molasses against the contract and there was no market for the goods at the place of delivery. The plaintiffs, who were not found to have incurred any actual loss from the non-delivery, sued to recover damages from the defendants for breach of the contract. *Held,* that the plaintiffs were entitled to damages as the case fell within illustration (*a*) of s. 73 of the Indian Contract Act which lays down that the measure of damage in a case like this is the sum by which the contract price falls short of the price for which the purchaser *might have* obtained goods of like quality at the time when they ought to have been delivered. English and Indian cases discussed. HAJEE ISMAIL AND SONS, *v.* WILSON & Co. (1918)
I. L. R. 41 Mad. 709

——— ss. 73, 74—

See s. 55 . I. L. R. 33 Mad. 375

——— ss. 73, 107—

See DAMAGES . I. L. R. 43 Calc. 493

——— s. 74—as amended by Act VI of 1899—

See s. 39 . I. L. R. 38 Mad. 178

See APPEAL . I. L. R. 48 Calc. 1036

See HINDU JOINT FAMILY
2 Pat. L. J. 212

See INTEREST
I. L. R. 42 Calc. 652, 690

See LANDLORD AND TENANT
I. L. R. 42 Mad. 652

See MORTGAGE CONSTRUCTION (S)
I. L. R. 44 Calc. 162

See PENALTY . I. L. R. 44 Calc. 162

——— Interest—*No interest originally, but exorbitant interest on default—Court's power to curtail exorbitant interest even then and award reasonable compensation. Held,* by the Full Bench: Even when no interest is payable until default but interest at an exorbitant rate is payable as from the date of default, the Court has power under s. 74 of the Contract Act to treat the latter stipulation as a penalty and award reasonable compensation in lieu of such excessive interest. The English and Indian decisions as well as the statutory law including the Usury Laws Repeal Act (XXVIII of 1855) prior to the amendment of s. 74 reviewed. *Per* SUNDARA

CONTRACT ACT—*contd.*

——— s. 74 as amended by Act VI of 1899—*contd.*

AYYAR, J.—The principle underlying the Court's interference with the contract between the parties as to a payment to be made by way of damages is this:—The doctrine that the Court will carry out all contracts between parties is confined to the carrying out of the primary contract and does not extend to a secondary or subsidiary contract to come into operation if the primary contract is broken. In bonds securing payment of money, the contract regarded as primary is the promise to pay the amount due to the creditor with interest, if any, agreed upon. Any further contract, to be binding on the promiser if he breaks this contract is regarded as a secondary one intended to secure the fulfilment of the primary contract, and the Courts both in England and in India do not feel bound to carry out such a secondary contract apart from its justice and reasonableness. MUTHUKRISHNA IYER *v.* SANKARALINGAM PILLAI (1913) . I. L. R. 36 Mad. 229

——— *Interest, excessive rate of—Court's power to declare rate a penalty and award reasonable interest.* The Court is competent to grant relief whenever the rate of interest appears to it to be penal. The fact that the rate of interest is excessive may be sufficient by itself to justify the inference that the rate was penal and unenforcible. Once the stipulated rate of interest is found to be unenforcible, the plaintiff is in the hands of the Court which will decree such rate of interest as may appear to it to be reasonable. *Abdul Majid* v. *Kherode, Chandra Pal, I.L.R.42 Calc. 690 s. c. 19 C. W. N. 809,* and *Khagaram Das* v. *Ram Sankar Das, I. L. R. 42 Calc. 652, s. c. 21 C. L. J. 79; 19 C. W. N. 775,* referred to. CHELLAPHROO CHOWDHURI *v.* BANGA BEHARI SEN (1915)
20 C. W. N. 408

——— *Penalty, whether change from simple to compound interest is.* S. 74 of the Contract Act, 1872, does not prescribe that an increase of interest after the due date must, in every case, be treated as a penalty. In a case where the rate of interest was only 12 *per cent. per annum, held,* that a change from simple to compound interest after the due date was not a penalty within the meaning of the section. LAKHI CHAND SAHU *v.* PEAR CHAND SAHU . 2 Pat. L. J. 283

——— *Provision for lower rate of interest in case of punctual payment—Penalty.* If a mortgagee stipulate for a higher rate of interest in default of punctual payment he must reserve the higher rate as payable under the mortgage and provide for its reduction in case of punctual payment, and if he do so he will be entitled to recover the higher rate. But he cannot effect his object by reserving the lower rate and then fixing a higher rate in case of non-payment of the lower rate at the appointed time, such an agreement being considered in the nature of a penalty. *Wallis* v. *Smith, L. R. 21 Ch. D. 261,* referred to. KUTUB-UD-DIN AHMAD *v.* BASHIR-UD-DIN (1910) . I. L. R. 32 All. 448

——— *Loan—Default in payment—Enhanced interest—Interest calculated in anticipation added to principal—Penalty—Relief against penalty.* The defendant received Rs. 2,440 on a bond which he executed for Rs. 5,500 in the plaintiff's favour. The balance of the amount

CONTRACT ACT—*contd.*

———— s. 74 as amended by Act VI of 1899—*contd.*

of the bond was made up of interest calculated upon the sum of Rs. 6,000 for 39 months at the rate of 1½ per cent. per mensem added in advance. The amount was made re-payable in monthly instalments of Rs 50 for the first 12 months and after that of Rs 100 for another 26 months and the balance at the end of the 39th month. In case of default in payment of any instalment, the whole amount of the bond became due at once; but if the plaintiff waited longer the defendant agreed to pay interest at 5 per cent. per month till payment. There was default in payment; and the plaintiff sued to recover the amount of the bond together with interest at 5 per cent. per month. The Subordinate Judge held that the stipulation for addition of interest in anticipation in the amount of the bond as also the stipulation for enhanced interest at the rate of 5 per cent. per month on default, were unenforceable at law and awarded the plaintiff's claim for Rs 2,440 with interest at the rate of 1½ per cent. per month. *Held*, that both the stipulations were penal and therefore not enforceable in full by reason of the provisions of s 74 of the Indian Contract Act, 1872. VELCHAND *v.* PLAGG (1911)

I. L. R. 36 Bom. 164

———— *Stipulation to take less than specified rate of interest, if payment punctually made, whether penalty—Manager of mortgaged property nominated by mortgagee and not dismissible by mortgagor at will, if agent of mortgagee—Title paramount, if to be enquired into in mortgage suit.* The mortgage deed provided that interest at 9½ per cent. was to be paid by equal half-yearly payments, but that if the interest at the rate of 7½ per cent. was paid before the half-yearly day appoined for payments of interest the mortgagees shall accept the same in lieu of and in satisfaction for interest at 9½ per cent. *Held*, that if the stipulation was to pay interest at 7½ per cent., and on default of payment on a certain date interest was to be paid at 9½ per cent., there was no doubt that it could be treated as a penalty, though in the converse case it would not be a penalty according to English law. Indian cases appear to have followed the English law. But in the present case the schedule for liquidation of mortgage debt showed that the intention of the parties was that interest should be paid at 7½ per cent. and on default at 9½ per cent. S. 74 of the Indian Contract Act does away with the distinction between penalty and liquidated damages and, under the section as amended by Act VI of 1899 the Court has the power to grant to resort to their equitable jurisdiction in order to grant relief. Where in an English mortgage it was agreed only between the mortgagor and the mortgagees that certain nominees of the mortgagees should be appointed managers and be liable to furnish accounts to the mortgagees to satisfy themselves that their security was not endangered by mismanagement, and a separate deed of management was contemporaneously executed by the mortgagor in favour of the

CONTRACT ACT—*contd.*

———— s. 74 as amended by Act VI of 1899—*contd*

nominees to which the mortgagees were not parties and by which such nominees were appointed managers. *Held*, that the managers were agents of the mortgagor. In a suit upon the mortgage, no question of title paramount should be gone into. SHYAMPEARY DASYA *v.* EASTERN MORTGAGE AND AGENCY CO, LD. (1917)

22 C. W. N. 226

———— An agreement to pay interest at a reduced rate in lieu of the reserve interest at a higher scale as an inducement for punctual payment is not a penal clause within the section. KULADA PRASAD CHAUDHURY *v.* RAMANAND PATNAIK . . . 25 C. W. N. 776

———— Deposit on Sale—*Construction of document—Condition of sale—Penalty—Vendor not entitled to recover more than provided for by conditions of sale.* A Town Improvement Trust, having acquired land for the purpose of making a new road, thereafter proceeded to sell sites along the road. Amongst the conditions of sale were that the purchaser was to deposit 10 per cent. of the purchase money immediately on the sale and the balance within nine months. There was a further condition that "if any, purchaser fail to comply with any of these conditions, his deposit shall be forfeited, and the vendors shall be at liberty to re-sell the lot or lots sold to him either by public auction or by contract." *Held*, on suit by the Trust against a purchaser who had paid only Re. 1 at the time of his purchase and no more, that the plaintiff was only entitled to recover from the purchaser the 10 per cent. deposit which was one of the conditions of sale, and not the difference in price resultant on a re-sale of the property. MUNICIPAL BOARD OF ALLAHABAD *v.* TIKANDAR JANG (1915)

I. L. R. 38 All. 52

———— *Security Bond—Breach of condition—Court not bound to exact full amount—Nature of bond and terms broken should be considered.* Although the Exception to s. 74 of the Indian Contract Act, 1872, says that a person entering into a bond shall be liable, upon the breach of the bond, to pay the whole sum mentioned therein, it does not mean that the Court is bound to exact the whole amount. The Court has discretion to consider the nature of the bond and the terms broken. The defendants, being desirous of exporting 50 bales of peice-goods from Aden to Djibouti, entered into a bond for Rs. 45,600 with the Government the condition of the bond being that if the defendants should produce a certificate from a responsible officer at the port of destination as to the arrival of the goods, or in default of such certificate, should produce good and sufficient reason for the non-production thereof then the bond should be void. The defendants produced a certificate for 40 bales

CONTRACT ACT—*contd.*

———— **s. 74 as amended by Act VI of 1899)**—*concld.*

stances, to exact one-fifth of the penalty. SECRETARY OF STATE FOR INDIA *v.* FRERES

I. L. R. 45 Bom. 1213

———— **s. 81**—

See JUTE . . **I. L. R. 44 Calc. 98**

———— ss. 81, 82, 83—*Usage of jute trade at Chandpur—Jute brought by fariahs and stored in Companies' godowns, burnt before weighment—Jute insured by Company—Incidence of loss—Title, passing of—Unascertained goods—Intention—English law.* Plaintiffs who were *fariahs* used to purchase loose jute from dealers (*beparis*) and sell them to, amongst others, defendants firm at Chandpur. The jute brought by the *fariahs* used to be stored in a godown called the "*fariahs*' godown," and according to the usage of trade at Chandpur, sale was not complete until the jute had been examined, selected and weighed by the purchasing firm. The goods were, however, kept, subject to the firm's lien for advances to the *fariah*, and it appeared that, once the goods were stored in the godown, the *fariahs* were not allowed to remove or sell them to other persons. Some jute which was stored by plaintiffs in defendants' godown, and was insured by the latter as belonging to the firm, caught fire before it had been tested, selected and weighed and was burnt. *Held,* that title in the jute had not passed to the defendants, and the loss fell on the plaintiffs. That the contract being one for the sale of unascertained goods, what remained to be done by the buyer to the goods appropriated to the contract by the seller was not merely for the purpose of ascertaining the price but was also for the purpose of placing the buyers in a position to say whether and to what extent they would for their part accept the goods offered to them. That the fact that the seller could not remove or sell the goods from the godown did not show that the property in the jute had passed to the firm. That the defendants who had an interest in the goods, were justified in insuring them to protect that interest, and were entitled to receive the whole amount of the policies of insurance to indemnify themselves against their loss and were not bound to apply any portion of it to the plaintiff's benefit. When nothing remains to be done to the goods by the seller for the purpose of ascertaining the price, then *primâ facie* the property in them passes although they have not been weighed by the buyer. It would be otherwise in England if the parties intended that property in the goods should not pass until the goods had been weighed. The Indian law is the same and the provisions of s. 81 do not exclude the question of intention which is laid down in the English cases as the determining factor. ABDUI AZIZ BEPARI *v.* JOGENDRA KRISHNA RAY (1916) . . . **I. L. R. 44 Calc. 98**
20 C. W. N. 1224

———— **s. 88**—

See CONTRACT . **I. L. R. 47 Calc. 458**

———— **s. 93**—

See JURISDICTION **I. L. R. 34 Bom. 13**

———— **ss. 99, 102**—

See CONTRACT (36) **I. L. R. 46 Calc. 831**

———— **s. 103**—

See s. 4 . **I. L. R. 38 Bom. 255**

CONTRACT ACT—*contd.*

———— **s. 103**—*contd.*

———— *Transfer of Property Act (IV of 1882 as amended by Act II of 1900), s. 4 and 137—"Instrument of title" to goods—Railway receipt—Stoppage in transit—Assignment of railway receipt, effect of.* On this appeal their Lordships of the Judicial Committee (upholding the decision of the High Court in *Amerchand & Co.* v. *Ramdas Vithaldas Durbar, I. L. R. 38 Bom. 255*), *held* that the "railway receipt" in question in the case was an "instrument of title" within the meaning of s. 103 of the Contract Act (IX of 1872). RAMDAS VITHALDAS *v.* AMERCHAND & Co. (1916) . . . **I. L. R. 40 Bom. 630**

———— **s. 107**—

See DAMAGES . **I. L. R. 43 Calc. 493**

———— **s. 108**—

See CONTRACT . **I. L. R. 46 Calc. 831**

See HYPOTHECATION—

I. L. R. 42 Mad. 59

See RAILWAY RECEIPT.

I. L. R. 38 Mad. 664

See SHARES **I. L. R. 46 Calc. 331, 342**

See VENDOR AND SUB-VENDOR

I. L R. 38 Calc. 127

———— The expression "goods," in s. 108 of the Contract Act includes all moveable property. HAZARIMULL SHOHANLAL *v.* SATIS CHANDRA GHOSH (1918)

22 C. W. N. 1036

———— **s. 108, 178**—

See LIMITATION ACT (IX OF 1872).
ARTS. 48, 49 . **I. L. R. 40 Mad. 678**
I. L. R. 38 Mad. 783

———— *Possession—Hire purchase agreement—Pledge by the hirer, how far valid—Indian Contract Act (IX of 1872), ss. 108, 178.* Under a hire-purchase agreement, dated 9th August 1913, the plaintiffs, the owners, let on hire a machine at Rs. 150 per month, the hirer first defendant having the option of purchasing it at any time during the hiring by paying Rs. 2,100. Cl. 9 of the agreement provided that if the hirer made default in punctually paying any hire or instalment, it should be lawful for the owners to immediately put an end to the hiring and to seize and take away the same. On 2nd December 1914 the first defendant pledged the machine to the second defendant who was a *bonâ fide* pledgee for value. On 17th May 1916 the plaintiffs by letter determined the agreement of hiring under cl. 9, a sum of Rs. 50 being due from the first defendant on account of hire on that date. The plaintiffs brought this action to recover the machine or in default Rs. 2,100 being the value of the machine. The first defendant did not contest the suit: *Held,* that the possession of the first defendant was not possession under s. 178 of the Indian Contract Act and so the plaintiffs were entitled to recover the machinery from the second defendant or its value. There is no distinction between possession under s. 108. Except (1) and s. 178 of the Contract Act. SAUBOLLE *v.* K. V. SEYNE (1918) . . 23 C. W. N. 352

———— **s. 114**—

See CONTRACT . **15 C. W. N. 981**

CONTRACT ACT—*contd.*

——— s. 118—

See s. 1 . I. L. R. 41 Bom. 518

——— s. 120—

See s. 39 . I. L. R. 34 Bom. 192

——— ss. 124, 126 and 132—

See HINDU LAW . 3 Pat. L. J. 396

——— ss. 126, 128—

See PRINCIPAL AND SURETY.

I. L. R. 44 Calc. 978

———*Contract of guarantee—Time-barred debt guaranteed—Liability on principal*

return of the money and a refusal thereof by *M's* father. In 1897, on another demand being made, one *B* by an oral contract of guarantee undertook to repay the temple trustees in case *N* failed to pay. In 1900, the temple trustees brought a suit against *M* and *B* to recover the deposit. The Subordinate Judge decreed the claim against both Against this decree *M* alone appealed and in appeal it was held that the deposit with *M's* father was proved but that the suit was time-barred in 1895. The suit was, therefore, dismissed as against the appellant *M* but the trial Court's decree as against *B* was confirmed. In 1912, the plaintiffs, temple trustees, executed their decree against *B*. In 1915, *B* having died his sons brought a suit to recover from *M* the sum which had been paid by them in execution. Both the lower Courts decreed the claim. On appeal to the High Court. *Held*, that it being ascertained that the debt due to the trustees of the temple was barred by time in 1895 and the contract of guarantee was not made until 1897, *there was not in law any valid contract of* guarantee. The foundation of the contract of guarantee was wanting inasmuch as there was not any enforceable liability in the third person. *Hajarimal* v. *Krishnarav, I. L. R. 5 Bom 647*, distinguished. *Per* BATCHELOR, *Ag. C. J.* By the word 'liability' used in ss. 126 and 127 of the Indian Contract Act, 1872, is intended a liability which is enforceable at law, and if that liability does not exist, there cannot be a contract of guarantee. MANJU MAHADEV *v* SHIVAPPA MANJU (1918) . . I. L R. 42 Bom. 444

——— ss. 126 and 140—*Mortgage—Payment of mortgage-debt by surety, and subsequent suit for sale brought by the surety upon the mortgages redeemed—Limitation—Act No. IX of 1908 (Indian Limitation Act) Sch. I, Art 135. B*, at the request of her sister *L*, agreed to guarantee payment of the amount due under two mortgages executed by *L's* deceased husband. *B* paid up the mortgage money and thereafter sued the representatives of *L*, who had since died, to recover the amount due under the mortgages by sale of the mortgaged property. *Held*, that *B* was entitled to the benefit of the securities held by the mortgagees; but she was in no better position than they had been, and as to one of the mortgages it was found that the suit would have been barred by limitation had the plaintiff been the original mortgagee, and was therefore barred as regards the surety. BARKAT-UN-NISSA BEGAM *v.* MAHBUB ALI MIAN I. L. R. 42 All. 70

CONTRACT ACT—*contd.*

——— ss. 126, 140, 141 145, 69, 70—

See NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881), ss. 30, 47, 59, 74, 94.

I. L. R. 39 Mad. 965

———, ss. 127, 128—

See PROMISSORY NOTE

I. L. R. 38 Mad. 680

——— s. 128—

See CRIMINAL PROCEDURE CODE 1898, s. 514 . . I. L. R. 2 Lah. 204

——— ss. 129 and 131—

See CONTRACT . L. R. 47 I. A. 164

——— s. 131—*Surety—Liability of heirs of surety for default occurring after surety's death—Construction of document.* Two persons engaged themselves as sureties in behalf of a peon in the Postal department. The bond which they executed was in a prescribed form of general application. It bound both the sureties personally and their representatives after their death; but the bond further provided that a surety could terminate his liability in respect of the future by giving six months' notice to the prescribed postal authority. The bond in the present case was executed in 1902. In 1910 one of the sureties died. In 1916 the person on whose behalf the bond was given embezzled a sum of money which was recovered by the Postal department from the surviving surety. The surviving surety then sued the heirs of the deceased surety for contribution. *Held*, that the plaintiff was entitled to recover. MUHAMMAD UBED-ULLAH *v.* MUHAMMAD INSHA ALLAH KHAN I. L. R. 43 All. 132

——— s. 133—*Surety—Written agreement by surety that he would not claim his legal rights in suretyship—Variation in terms of contract without consent of knowledge of surety—Discharge of surety.* Defendant No. 1 was appointed by the plaintiffs as their sub-agent to sell their goods for which he was to be paid commission at the rate of 7½ per cent. on the sale proceeds and to get at office expenses. At the same time, defendant No. 2 agreed to be surety for defendant No. 1 and wrote a letter of indemnity whereby he "expressly waived all or any of the rights as surety (legal equitable, statutory or otherwise) which may at any time be inconsistent herewith and which he might be otherwise entitled to claim and enforce" and that "the guarantee shall not be revocable by him at any time but shall continue during the employment of the sub-agent" At a later date, the plaintiffs and defendant No. 1 varied the contract, without the knowledge of defendant No. 2, by providing that defendant No. 1 was to be paid commission at the rate of 22 per cent. inclusive of all office expenses. The contract of sub-agency having come to an end the plaintiffs sued both defendants to recover money due from defendant No. 1 under the sub-agency. Defendant No. 2 pleaded that the contract having been varied by the plaintiff and defendant No. 1 without his knowledge he was absolved from liability as a surety under the provisions of s. 133 of the Indian Contract Act, 1872:—*Held*, that the variation of the contract involved the result that the surety (defendant No. 2) was discharged as to transactions subsequent to the variation under s. 133 of the Indian Contract Act, 1872. *Held*, further, that the general clause in the letter

CONTRACT ACT—*contd.*

—————— s. 133—*contd.*

of indemnity whereby defendant No. 2 waived all rights under the statutes could not be read as implying any consent to the variation within the meaning of s. 133 or as entitling the plaintiffs to enforce the liability against the surety even though. according to law, he was discharged from such liability. CHITGUPPI & CO. *v.* VINAYAK KASHINATH (1920) . I. L. R. 45 Bom. 157

—————— ss. 134, 137—*Suit against principal and surety—Removal of principal's name as summons could not be served on him—Suit can proceed against surety alone if suit against principal be still in time—Civil Procedure Code (Act V of 1908), O. IX, R. 5, O. XXIII, R. 1.* A suit was brought in 1913 on a promissory note passed in 1912 by defendant No. 1 as principal and defendant No. 2 as surety. No summons could be served on defendant No. 1: his name was therefore struck out and the suit proceeded against defendant No. 2 alone. The lower Court dismissed the suit on the ground that as the principal was discharged by an act of the creditor (plaintiff) in having his (defendant No. 1's) name struck out, the surety also was thereby discharged. On plaintiff's application under extraordinary jurisdiction, *Held*, reversing the decree and remanding the suit, that the mere omission of the plaintiff to pursue his suit against one of the defendants with the result that that defendant's name was struck off and the suit dismissed against him under O. IX, R. 5, of the Civil Procedure Code (Act V of 1908) did not discharge the surety, provided the suit was still in time against the principal. NATHABHAI TRICAMLAL *v.* RANCHHODLAL RAMJI (1914)
I. L. R. 39 Bom. 52

—————— ss. 134, 151—

See HINDU LAW I. L. R. 33 Mad. 308

—————— s. 135—

See CIVIL PROCEDURE CODE 1908.
s. 135 AND O. XXXVII, R. 3.
I. L. R. 43 Mad. 272

See PRESIDENCY TOWNS INSOLVENCY ACT 1909, s. 30 . I. L. R. 44 Mad. 381

—————— ss. 135, 139—*Surety when is discharged.* Mere forbearance on the part of the creditor in the absence of his doing or omitting to do any thing whereby the surety's eventual remedy against the principal debtor is impaired, would not discharge a surety. The surety was not discharged when the creditor merely gave the debtor time to pay up without entering into a binding contract with that object. BAHADUR SING *v.* BASUNTA KUMAR ROY (1913)
17 C. W. N. 695

—————— s. 137—

See s. 134 . I. L. R. 39 Bom. 52

—————— s. 139—*Discharge of surety by act of creditor detrimental to surety—Banker, deposit with—Banker must allow specific direction of depositor even if he be indebted—Debtor, specific appropriation by, to be observed by creditor.* The defendant's brother had an account at the plaintiff Bank which being considerably over-drawn the Bank called for additional security and the defendant gave a guarantee to the Bank agreeing to pay to them on a specified date to the extent of a

CONTRACT ACT—*contd.*

—————— s. 139—*contd.*

specified amount all money then due to the Bank from his brother on current account or otherwise howsoever including all interest, charges and other expenses which the Bank might charge. After the date of payment mentioned in the agreement of guarantee and when there remained due to the Bank a large sum so guaranteed the defendant's brother opened a separate account with the Bank by depositing a certain amount on condition that the Bank would allow him to draw this sum by cheques and not take it in payment of the amount due to them on the guaranteed over-draft account but that any profits of the business carried on by him with the money deposited on the second account would be paid to credit of the over-drawn account. The Bank did not inform the defendant of the opening of this new account and certain sums were transferred from this account to the previous over-drawn account purporting to be profits as aforesaid. After this second account came to an end the Bank claimed from the defendant payment of the balance on the over-drawn account and a copy of the account of the defendant's brother was supplied to the defendant showing the amount due to the Bank on account of principal and interest as also the second account opened by the defendant's brother. The defendant without disputing his liability assured payments of the money due from his brother. *Held*, that on the facts of the case the defendant was not discharged from his liability to the Bank in consequence of the arrangement made by the Bank with his brother in opening the second account. That the defendant was not entitled to have the account re-opened and the Bank entitled to interest after the date mentioned in the agreement of guarantee for payment, at the rate usual on the account but not at any higher rate. *Per* SANDERSON C. J.—That in opening the second account the Bank did not act inconsistently with the right of the defendant as surety within the meaning of s. 139 of the Contract Act under which in order to discharge the surety it must be shown that not only has the creditor omitted to do some act which his duty to the surety required him to do but also that the eventual remedy of the surety himself has thereby been impaired, which was not shown to be the case here. That it was not within the power of the Bank to appropriate the amount in the second account to the previous over-drawn account inasmuch as the depositor deposited that amount on condition that he was allowed to draw against it. That the rule in *Clayton's Case, 1 Mer. 572,* applies only to the items in one current account and when there is no specific appropriation by the debtor; but in the present case there was a specific appropriation by the depositor when he opened the new account and there were in fact two accounts and not one and the rule in *Clayton's Case, 1 Mer. 572,* did not apply. That it was no duty of the Bank to communicate with the defendant with reference to the opening of the new account which was not contrary to the nature of the defendant's engagement but in accordance with the arrangement made by the defendant with the Bank. *Per* MOOKERJEE, J.—That in the absence of special agreement a guarantor has no right to control the appropriation by Customer or Banker of moneys paid in subject to the qualification that the Banker

CONTRACT ACT—*contd.*

——— s. 139—*concld.*

is bound to deal with the accounts in the ordinary way of business. Any specific direction regarding the appropriation of a deposit must be observed by the Bank. In the present case the agreement between the Bank and the depositor made it impossible for the Bank to apply the deposit in reduction of the over-draft on the first account; consequently the fact that the deposit was not so applied did not justify the contention that the Bank were at fault and the surety must be deemed discharged; there was thus no room for the application of the rule in *Clayton's Case, 1 Mer. 572.* That the Bank did not fail in their duty to the defendant when they carried on transactions with his brother under the second account without any intimation to him. The true rule is that if there is any agreement between the principal with reference to the contract guaranteed, the surety ought to be consulted and that if there is any alteration which is not obviously either unsubstantial or for the benefit of the surety he is to be the sole judge whether he remains liable. This is substantially in accord with s. 139 of the Indian Contract Act. GHUZNAVI *v.* THE NATIONAL BANK OF INDIA LTD. (1916) . **20 C. W. N. 562**

——— ss. 140, 141 and 145—

See s. 126 . . **I. L. R. 42 All. 70**

See NEGOTIABLE INSTRUMENTS ACT 1881 s 30 . . **I. L. R. 39 Mad. 965**

——— s. 146—

See CONTRIBUTION **I. L. R. 38 Calc. 1**

——— ss. 150, 152—*Bailment—Machine useless for purpose for which hired—Liability of bailee.* A bailee for hire is ordinarily bound to return the article hired at the end of the period for which

to return the article to the bailor. *Chew v. Jones (1847) 10 L. T. 231,* followed. ISUFALLI HASSANALLI *v.* IBRAHIM DAJIBHAI (1920)

I. L. R. 45 Bom. 1017

——— ss. 151, 152—

See RAILWAY COMPANY

I. L. R. 39 Bom. 191

——— ss. 151, 152 and 161—

See RAILWAY . **I. L. R. 37 Bom. 1**

——— s. 162—*Son's liability for jewellery deposited with father—The son as an involuntary*

Wrongful or unlawful possession of the son, if attracts operation of Art. 49—Statement in a Will, how far evidence. All actions for the recovery of a deposit of moveable property are, by the express words of Art. 145 comprised within it and no exception is made as regards deposits where demand and refusal make the continuance of possession unlawful. The fact of the possession by the depository after demand becoming wrongful does not make Art. 49 applicable. Notwithstanding the provisions of s. 162 of the Indian Contract Act (which is not an exhaustive Code), the relation of depositor and depository does not cease on the latter's death. The relation of the depositor and depository is that of a voluntary bailor and voluntary bailee and when the latter dies his successor becomes and remains an involuntary. PROMOTHO NATH MULLICK *v.* PRODYMNO KUMAR MULLICK

26 C. W. N. 772

——— ss. 172, 173, 176—*Pawn, nature of security—Conditions necessary to fulfil contract of pawn—Right of pawnee to sue independently of the pawn—Government securities, pledge of—Mere delivery without endorsement, effect of.* The guardian of the plaintiffs who were minors, with the leave of the District Judge, lent a sum of money to the major brother, the defendant, on his undertaking to pledge his share in Government securities which stood in the names of himself and the plaintiffs and also his share in the *ejmali* ornaments as security for the advance. The securities were in

not an equitable mortgage but a security intermediate between a simple loan and a mortgage which wholly passes property in the thing conveyed. It is essential to the contract of pawn that the property should be actually or constructively delivered to the pawnee, neither of which was done in this case. That the plaintiffs were entitled to have their remedy on the pronote independently of the alleged pledge under s. 176 of the Contract Act which gives a clear right to the pawnee to institute a suit independently of the pawn. That s. 172 of the Contract Act which defines a pledge deals with "goods," and certain classes of documents are specifically referred to in s. 173 which do not include Government securities. That Government securities are by statute not negotiable or transferable without endorsement on the back by the transferor and mere delivery of Government securities without endorsement gives no property in them for purposes of negotiation or sale. JYOTI PRAKASH NANDI *v.* MUKTI PRAKASH NANDI (1916)

22 C. W. N. 297

——— s. 176—*Pledge—Sale by pawnee of property pledged—Notice of sale.* The words—"He may sell the things pledged on giving the pawnor reasonable notice of the sale"—as used in s. 176 of the Indian Contract Act, 1872, mean that the pawnee must give reasonable notice of his intention to sell; it does not necessarily mean that a sale should be arranged beforehand and that due notice of all details should be given to the pawnor. KUNJ BEHARI LAL *v.* THE BHARGAVA COMMERCIAL BANK, JUBBULPUR (1918)

I. L. R. 40 All. 522

——— s. 178—

See s. 108 . . .

See BAILMENT . **I. L. R. 37 Bom. 122**

——— *Person authorised to take delivery of goods on behalf of consignee pledging receipt—Pledgee if acquires title in the goods—Fraud of third party—Upon which of two innocent persons loss should fall.* Defendant No. 1 who has despatched by railway goods consigned to

CONTRACT ACT—*contd.*

———— s. 178—*concld.*

himself made over the railway receipt without endorsement to the defendant No. 2 for the purpose of obtaining delivery. The defendant No. 2 thus having implied authority to do all that was necessary for the purpose, including authority to endorse the receipt in the name of defendant No. 1 fraudulently and without defendant No. 1's authority offered the receipt to plaintiff as a pledge for an advance which he asked plaintiff to make to him, but plaintiff having insisted on the receipt being endorsed by defendant No. 1, defendant No. 2 later on presented the receipt again to plaintiff, having an endorsement written by himself and purporting to be signed by defendant No. 1 authorising the delivery of the goods to a servant of the plaintiff. Plaintiff thereupon made the advance which defendant No. 2 fraudulently appropriated, and took delivery of the goods from the Railway Company: *Held*, that defendant No. 2 had "possession" within the meaning of s. 178 of the Contract Act of the railway receipt and of the goods it represented and that the plaintiff had acted in "good faith" within the meaning of the first proviso to the section; and that the defendant No. 2 had not obtained the goods by means of an "offence of fraud" within the meaning of the second proviso so that plaintiff had good title in the property. It is unsafe to employ as a separate and independent ground of decision the principle that where one of two innocent persons must suffer through the fraud of a third, the loss should fall on him who enabled the third party to commit the fraud. PROFULLA KUMAR BOSE *v.* NABO KISHORE RAI (1919) . . . . **23 C. W. N. 907**

———— ss. 178, 179—*Goods consigned by up-country merchant to muccadum and agent for sale in Bombay—Pledge of goods by the Agent—Principal knowing of the pledge and receiving money raised by pledge from agent—Pledgee entitled to entire moneys due on pledge—Pledgee's claim not limited to the interest of the pawner in the goods pledged—Custom of up-country cotton merchants.* The plaintiffs, up-country cotton merchants, consigned cotton until the 29th of September 1913 to their usual consignees and agents for sale in Bombay, D. H. and Co. In the course of their dealings the plaintiffs frequently called upon D. H. and Co. to remit money to them in large sums on the security of the cotton in their hands and D. H. and Co. used to raise money by pledge of the plaintiffs' cotton to the 3rd defendants' firm. The plaintiffs' representatives in Bombay knew of this course of dealing. On the 30th September 1913, D. H. and Co. were adjudicated insolvents. The accounts at that date showed that the 3rd defendants had advanced Rs. 83,000 to D. H. and Co. against which they held 757 bales of the plaintiffs' cotton and that D. H. and Co. had remitted to the plaintiffs Rs. 50,000. The plaintiffs sued to recover their cotton from the 3rd defendants unencumbered by the loans raised on the security thereof, alleging that D. H. and Co. were merely their warehousemen and *muccadums* and as such had no right to create any charges on their cotton. At the trial the plaintiffs contended that in any event D. H. and Co. had no authority to charge the plaintiffs' cotton beyond Rs. 50,000 which was the sum remitted by them to the plaintiffs. *Held*, that the plaintiffs having urged D. H. and Co. to pledge their cotton when necessary and having

CONTRACT ACT—*contd.*

———— ss. 178, 179—*concld.*

known through their representatives of the manner in which their cotton was being dealt with, the 3rd defendants were entitled to claim the entire moneys advanced by them on the pledge of the plaintiffs' cotton. S. 179 of the Indian Contract Act does not limit the scope of s. 178 but saves a pledge to the extent of the pledgor's own interest notwithstanding the presence of invalidating conditions falling under one of the provisions to s. 178. In other words whenever he has an interest the person in possession of the goods or documents has unconditional authority to charge at least that interest. LAKHAMSEY LADHA & CO. *v.* LAKHMICHAND PADAMSEY (1916) **I. L. R. 42 Bom. 205**

———— s. 180—

See PARTNERSHIP **I. L. R. 43 Calc. 733**

———— s. 194—

See PRINCIPAL AND AGENT. **I. L. R. 44 Bom. 139**

———— ss. 196 to 200—

See MADRAS IRRIGATION CESS ACT (VII OF 1865), s. 1. **I. L. R. 38 Mad. 997**

———— s. 201 —*Termination of agency—S. 209—After the principal's death, if agent is to be treated as a trustee—Indian Limitation Act (IX of 1908), Art. 89 or 120, applicability of, where an agent is sued for accounts after the principal's death.* C acted as gomastha under J until the latter's death in July 1912, and then he acted as agent under J's widow. The widow, more than three years after her husband's death, brought a suit against the agent for accounts from 1894 to 1915: *Held*—That Art. 89 of the Limitation Act applied to the case and the claim for accounts for the period up to the death of J was barred by limitation as under s. 201 of the Contract Act the agency was terminated on J's death and as the suit was brought more than three years after J's death. *Madhu Sudan Sen* v. *Rakhal Chandra, I. L. R. 43 Calc. 248*, followed. That as C was not sued for any act done by him after the death of his late Principal which he might have done as trustee s. 209 of the Contract Act or Art. 120 of the Limitation Act did not apply. SREEMATI SARASHIBALA DASI *v.* CHUNI LAL GHOSH **26 C. W. N. 321**

———— ss. 207, 253 cl. (10)—

See PRINCIPAL AND AGENT. **I. L. R. 43 Calc. 248**

———— ss. 208, 209—*Suit to recover money—Acknowledgment by defendant's gumasta (agent after his death—Death of the defendant not known to plaintiff—Limitation Act (XV of 1877), s. 19.* Plaintiffs' firm had dealings with one Haji Usman from the 5th January 1901 till the 25th October 1903 Haji Usman's business managed by a *gumasta* (agent). Haji Usman died in or about March 1903, and the plaintiffs had no knowledge of his death. On the 2nd June 1903 the *gumasta* wrote to the plaintiffs a postcard stating, "you mention that there are moneys due; as to that I admit whatever may be found on proper accounts to be owing by me; you need not entertain any anxiety." On the 30th May 1906 the plaintiffs brought a suit against the managers of Haji Usman's estate to recover a certain sum of money on an account stated. The defendants pleaded

CONTRACT ACT—*contd.*

——— ss. 208, 209—*concld.*

the bar of limitation on the ground that there was no acknowledgment of the debt by a competent person. *Held*, that the suit was not time-barred. The *gumasta's* letter of the 2nd June 1903 was an acknowledgment within the meaning of s. 19 of the Limitation Act (XV of 1877). The ... of ss. 208 and 209

[illegible]

all reason- ervation of AHIM HAJI

I. L. R. 35 Bom. 302

——— s. 212—

See CIVIL PROCEDURE CODE, 1908, s. 20 (c) . . I. L. R. 34 All. 49

——— ss. 215, 216—**Principal and Agent**—*Construction of Contract—Agent appointed to sell goods buying them on his own account.* S. 216 of the Indian Contract Act is merely enabling and confers upon the principal the right to claim from his agent the benefit of the transaction to which the agency business related, where the agent, without the knowledge of the principal, has dealt with the business on his own account, instead of on account of the latter. The principal is free to exercise that right or not. The law is that where a party elects to adopt a transaction, he must take its benefit with his burden. He cannot, as is said, " both approbate and reprobate." *But both the benefit and the burden* must, for that purpose, be attached to and incidents of the transaction which the principal has affirmed by election. Where an agent appointed to sell his principal's goods for a fixed price buys them on his own account without the previous ... the principal ... under the ... Contract ... affirm, the principal will be liable to pay to the agent such charges o[illegible] of purcha[illegible] contract [illegible] purchaser, because what is affirmed is the relation of vendor and purchaser. But if those charges are annexed by the terms of the contract to the agency, so as to regulate the relation of principal and agent as distinguished from the relation of vendor and purchaser, the agent is not entitled to recover them. *Salomons* v. *Pender, 3 H. & C. 639* and *Andrews* v. *Ramsay & Co., (1903) 2 K. B. 635,* referred to. JOACHINSON v. MEGHJEE VALLABHDAS (1909) . I. L. R. 34 Bom. 292

——— s. 222—

See CONTRACT (44) .
I. L. R. 41 Mad. 1060

See CONTRIBUTION I. L. R. 38 Calc. 1

See LIMITATION ACT 1877, ARTS. 61, 63, 116 . . I. L. R. 34 Mad. 167

——— s. 226—

See NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881), s. 27.
I. L. R. 40 Mad. 1171

CONTRACT ACT—*contd.*

——— ss. 227 and 237—*Principal and agent* ...

[illegible]

for consignment to himself at Allahabad by passenger train, four boxes of Chinese crackers. There was some discussion at the parcels office amongst the employés of the Company as to whether the consignment could be sent by passenger train, but in the end it was accepted; the sender paid the freight at parcels rates and was given a receipt, which he took away. After...

[illegible]

and letter with ... Company, which, however, only ended in his being told that the goods could not be sent by passenger train, and they continued to remain at Cawnpore. Ultimately the goods were despatched by goods train on the 23rd of June and reached Allahabad on the 28th. The plaintiff was asked to pay Rs. 19-9 as freight and take delivery of the goods. He refused to do either, and the goods were in consequence sold by the Railway Company on the 28th September, 1917, for Rs. 31. The plaintiff then sued the Railway Company to recover Rs. 905-5 0, this sum consisting of damages, value of the goods and various ex... *Held* that ...

[illegible]

... ment could only be sent by goods train to despatch it by this means with all reasonable speed. But the Company was not liable for special damages for not delivering the goods before the 5th June, as the plaintiff had not given notice that they were particularly required for that date *Held* also that, as the Company's agents had rightly or ... on a freight ...

[illegible]

goods in default of payment ... EAST INDIAN RAILWAY COMPANY

I. L. R. 43 All. 623

——— s. 230 (2)—

See SALE OF GOODS .
I. L. R. 42 Calc. 1050

——— ss. 230 (2), 236—

See PRINCIPAL AND AGENT.
I. L. R. 39 Calc. 802

——— ss. 231, 232—

See IMMOVEABLE PROPERTY.
I. L. R. 34 Mad. 143

——— s. 233—

See EVIDENCE ACT 1872, ss. 91 AND 92.
I. L. R. 45 Bom. 1242

See PRINCIPAL AND AGENT.
14 C. W. N. 414

CONTRACT ACT—*contd.*

——— s. 235—

See LIMITATION ACT (XV OF 1877), SCH. II, ARTS. 36, 115 AND 120.
I. L. R. 38 Mad. 275

——— *Principal and Agent —Untrue representation by agent as to extent of his authority—Liability of agent.* *Held*, that s. 235 of the Indian Contract Act, 1872, applies as much to the case of a person who untruly represents the extent of the authority given to him by another as to that of a person who represents himself to be the agent of another when in fact he had no authority from him whatever. *Collen v. Wright, 27 L. J. Q. B. 215; 7 E. & B. 301,* referred to. GANPAT PRASAD *v.* SARJU (1911)
I. L. R. 34 All. 168

——— s. 236—*Contract of sale—Person purporting to contract for undisclosed principal where no such principal exists, if entitled to enforce performance.* A person who purports to contract for an undisclosed principal where no such principal exists, is not entitled to enforce the performance of it. RAMJI *v.* JANKI DAS (1912)
18 C. W. N. 263

——— s. 237—

See COMPANIES ACT (VI OF 1882), SS. 76, 77 . . I. L. R. 36 All. 416

——— ss. 239, 266—

See PARTNERSHIP.

——— ss. 239, 247, 248—*Hindu Law—Joint Hindu family—Family business, started during minority of undivided son—Business continued after son became major—Debts incurred in business—Son, whether partner and personally liable and for what debts—Adjudication as insolvent—Son, whether liable to adjudication—Partner, whether son becomes by helping during minority or taking part in business after majority—Admission of minor to benefits of partnership, meaning of.* A Hindu father, of the Nattukottai Chetti caste, started a business during the minority of his undivided son; it was continued after the son became a major; no public notice of repudiation of partnership (if the son were a partner) was given by the son on his becoming a major; it was found that the son was helping in the business during his minority and was taking an active part in the business after attaining majority. In respect of the debts incurred in the business, both the father and the son were adjudicated insolvents; the son applied to set aside the order of adjudication passed against him, contending that he was not liable to adjudication. *Held* (by the Court), that the business should be held to be joint family business of the father and the son; *Held* (by WALLIS, *C. J.* and SPENCER, *J.*, SADASIVA AYYAR, *J.* dissenting), that the members of a joint Hindu family on attaining majority do not necessarily by virtue of ss. 247 and 248 of the Contract Act or otherwise become personally liable for, and liable to adjudication in respect of, debts contracted in the joint family business during their minority. Meaning of "admitted to the benefits of the partnership" in s. 247 considered. The fact that the minor helped in the joint family business is not enough to show admission: within the meaning of the section. *Samalbai Nathubhai* v. *Someshwar, I. L. R. 5 Bom. 38, In the matter of Haroon Mahommad, I. L. R. 14 Bom. 189* and other cases considered. *Lutchmanan Chetty* v. *Sivaprokasa Modeliyar, I. L. R. 26 Calc. 349,* followed. *Per* SADASIVA AYYAR, *J.* Both by the rules of Hindu Law and by s. 48 of the Contract Act (which also applies to this case), the son was personally liable for all the debts in respect of non-payment of which he was adjudicated an insolvent. Partnership in a family business does not depend upon the consent of the partners in many cases but upon the family being a trading family and the business being conducted for the benefit of the family, persons born into the family from time to time becoming partners as a matter of course. THE OFFICIAL ASSIGNEE OF MADRAS *v.* PALANIPPA CHETTY (1918) . . . . I. L. R. 41 Mad. 82

——— ss. 239, illus. (*a*) 249, 251, 252—

See PARTNERSHIP I. L. R. 39 Bom. 261

——— s. 247—

See SALE OF GOODS
I. L. R. 40 Calc. 523

——— *Insolvency—Position of minor partner in a firm.* A minor partner of a firm cannot as such be adjudged an insolvent. The creditors of the firm are not entitled to proceed against him personally, but are restricted to his interest in the property of the firm. *Sanyasi Charan Mandal* v. *Asutosh Ghosh, I. L. R. 42 Calc. 225,* followed. JAGMOHAN NARAIN *v.* GRISH BABU . . . . I. L. R. 42 All. 515

——— ss. 247, 248—

See HINDU LAW . 23 C. W. N. 500

——— ss. 247, 253, 254—

See MINOR .
I. L. R. 43 Calc. 225

——— s. 251—

See LIMITATION ACT (IX OF 1908), SS. 19, 20 . . I. L. R. 37 Mad. 146

——— ss. 252, 254, sub-s. (6)—

See PARTNERSHIP
I. L. R. 42 Bom. 380

——— s. 253—The stoppage of business or refusal of a partner to supply Capital, whenever demand is made, cannot be treated as desolution of a partnership. The question whether there has been an abandonment by a partner is a matter of inference to be drawn of the facts of each case. HARAMOHAN PODDAR *v.* SUDARSON PODDAR 25 C. W. N. 847

——— *Dissolution of partnership by death of a partner—Execution of a trust deed by a partner, the other partner, affixing his signature as an attesting witness, if can be treated as a "contract to the contrary"—Representatives of deceased partner, if entitled to profits of the business continued by the surviving partner.* A partnership business was carried on by two persons, one of whom died in August 1915. On the day previous to his death he executed a trust deed for continuance of the business after his death and the other partner affixed his signature thereto only as an attesting witness, but after the execution of the deed said that he would not carry on the business unless his remuneration was fixed The trustees too subsequently refused to carry on the business. The surviving partner continued the

CONTRACT ACT—*concld.*

——— s. 253—*concld*

business alone. *Held*—That by the execution of the trust deed and the signature of the other partner as an attesting witness thereto, there was no concluded "contract to the contrary" within the meaning of s. 253 of the Contract Act, and the partnership was dissolved by the death of one of the partners in August 1915 by virtue of the operation of cl. (10) of the section. *Held* further —That as to the profits made out of the business by the surviving partner subsequently the latter was bound to share them with the representatives of the deceased partner, after making all just allowances including fair remuneration for his management, in accordance with the maxim accessorium *sequitur suum principale.* MAHAMED KAMAL *v.* HAJI HEDAYETULLA

26 C. W. N. 463

——— s. 254 (5)—*Suit for dissolution of partnership by a partner who has himself been guilty of misconduct* Plaintiff sued defendant for dissolution of partnership on the ground of disputes between the partners and also misconduct and dishonesty on the part of the defendant. It was found that the plaintiff himself had been guilty of gross misconduct, that he had destroyed the old account books, had falsely prepared a balance sheet, had made false entries in the books and had tried to deprive the firm of a valuable account. *Held,* that a partner who is himself guilty of misconduct is not entitled to sue for dissolution of partnership, *vide* s. 254 of the Contract Act, and that this suit must accordingly be dismissed. Civil Appeal No. 8 of 1902 decided by a Division Bench of the Chief Court (unpublished), referred to—Also Lindley on Partnership, VII edition, pages 615-617. *Atwood* v. *Maude, 3 Ch. 373, dictum* of Lord Cairns, not followed. RAM SINGH *v.* RAM CHAND

I. L. R. 1 Lah. 6

——— ss. 254, 252———

See PARTNERSHIP **I. L. R. 42 Bom. 380**

——— ss. 261, 263—*Partners—Death of one of the partners—Debt incurred after his death by surviving partner to pay off price of goods ordered by both—Liability of estate of deceased partner.* The estate of a deceased partner is not liable to a creditor for a debt incurred by the surviving partner subsequent to the death of the former, although the debt was incurred to take up bills of lading for, and obtain delivery of, goods which had been ordered by the partners during the lifetime of the deceased partner but did not come forward until after his death. S. 263 of the Indian Contract Act cannot override the express provisions of s. 261 of the same Act. The creditor will be entitled in respect of such a debt to a decree against the surviving partner personally and against the assets of the partnership in his hands. *Bagel* v. *Miller,* (1903) *2 K. B. 212,* referred to. SESHI AMMAL *v.* VAIRAVAN CHETTIAR (1918) . . . . **I. L. R. 42 Mad. 15**

CONTRACT C. I. F.

See CONFISCATION **I. L. R. 42 Calc. 334**

See C. I. F. CONTRACTS.

I. L. R. 42 Bom. 473

See CONTRACT . . .

CONTRACT C. I. F.—*contd.*

See CONTRACT TO PURCHASE AND SHIP GOODS . **I. L. R. 41 Mad. 1060**

See SALE OF GOODS

I. L. R. 40 Bom. 11
I. L. R. 42 Bom. 16
I. L. R. 45 Calc. 28
I. L. R. 1 Lah. 22

——— *To purchase and ship goods—C. I. F. contracts, nature of—C. I. F. contract with ordinary vendor and with commission agent, difference between—Outbreak of war, effect of—Liability of vendor and vendee—Special terms as to risk in contract, effect of—Indian Contract Act, s. 222.* E. & Co., who were commission agents, entered into a contract with the defendants under which they undertook to purchase and ship certain goods 'on account and risk' of the defendants, and did ship them under a C. I. F contract on board a German ship. Owing to the outbreak of war during their transit, the goods did not arrive at their destination until long after due time. On defendants' refusal to accept the goods, they were sold by the plaintiff, the liquidator of E. & Co., who sued the defendants for damages for breach of contract; the defendants denied the liability. *Held,* that E. & Co. being commission agents of the defendants, were entitled, both under the special terms of the contract and under the general law of agency embodied in s 222 of the Indian Contract Act, to recover damages for breach of contract In an ordinary C I. F. contract between vendors and vendees, the tender of a bill of lading after the contract of affreightment has been dissolved by the outbreak of war is not such a tender as the vendees are bound to accept and they are not bound to pay for the goods *Arnhold Karberg & Co.* v. *Blythe Green Jourdain & Co., (1916) 1 K. B. 495,* followed. Where, however, goods are purchased from a

and agent still subsists for all other purposes; the true principal is that the assimilation is only to be carried so far as is necessary to give necessary efficacy to the transaction. *Ireland* v. *Livingston, L. R. 5 H. L. 395 Cassaboglou* v. *Gibb 11 Q B. D. 797, Willamson* v. *Barbour, 9 Ch. D. 529,* referred to HARRY MEREDITH *v* V. K ABDULA SAHIB (1918) . **I. L. R. 41 Mad. 1060**

——— *Addition of C. I. to C. I. F. in indent form—Bill of Exchange presented along with shipping documents and accepted by the merchant in India—Goods shipped on an alien ship —War between the Governments of the shipper and the shipmaster—The alien ship seized as a prize—Bill not paid at maturity, the acceptor not receiving goods—Release of the alien ship and delivery of the goods to the acceptor—Acceptor refusing to pay interest and notarial charges held liable to pay the same—Bill of Exchange presented without shipping documents after the outbreak of war—Shipping documents becoming void after the outbreak of war—Consequent failure of consideration for the acceptance of the bill—Acceptance conditional—Non-liability of the acceptor to pay the principal amount of the bill interest and notarial charges—The Indian Contract Act (IX of 1872) s. 66—The Negotiable Instruments Act (XXVI of 1881), s. 43.* The plaintiffs were merchants doing business at Glasgow. The

CONTRACT C. I. F.—*contd.*

defendants, merchants in Bombay, ordered through the plaintiff's agent in Bombay, fifty cases of aluminium circles to be delivered at Madras on C. I. F. C. I. terms. The first shipment was to be of fourteen cases and the remaining ones of twelve cases each. The first consignment of fourteen cases was in due course received and paid for by the defendants. The second and third consignments of twelve cases each were shipped from a German port on the 16th and 25th July 1914, respectively, on two German vessels S.S. "Barenfels," and S.S. "Kybfels" Hansa Line. The shipping documents in respect of the "Barenfels" goods were duly delivered to the defendants along with the bill of exchange which the defendants accepted on 31st July 1914. On the 9th October 1914, the plaintiffs drew another bill of exchange in respect of the "Kybfels" goods which the defendants accepted on the 10th November 1914. The shipping documents for the said goods were not however received by the defendants at the time of the acceptance of the bill, but were tendered by the plaintiffs sometime after the filing of the suit. The two bills became payable on the 2nd October 1914 and 12th January 1915, respectively, but were not met by the defendants by payment. War being declared between Great Britain and Germany, S.S. "Barenfels" was in August 1914 seized on the voyage as a prize and on her release by the Prize Court allowed to proceed to Madras where she unloaded her cargo on 8th June 1915, when the defendants obtained possession of their goods on payment of the principal amount due under the first bill but not the interest from the date of maturity to the date of payment. The plaintiffs sued on 2nd February 1915 to recover from the defendants (i) the interest due on the first bill from the date of maturity to the date of payment together with notarial charges, and (ii) the amount due on the second bill with interest. *Held,* (i) that under the first bill inasmuch as the defendants obtained all that they were entitled to obtain under the C. I. F. contract when the bill was presented to them for acceptance, that is to say, good shipping documents, the risk after the acceptance was entirely their own and that having refused payment on maturity they were liable to pay over-due interest after that date and the notarial charges incurred by the plaintiffs; (ii) that under the second bill inasmuch as the bill of lading had become a void contract before it was tendered to the defendants, on the 10th November 1914, there was at that time a failure of consideration for the acceptance of the bill and they were not bound to pay at maturity. *Arnhold Kerberg & Co.* v. *Blythe, Green, Jourdian & Co.; Theodor Schneider & Co.* v. *Burgett & Newsam, (1915) 2 K. B. 379,* followed. It is an accepted principle of the maritime law that all contracts of affreightment are put an end to by the outbreak of hostilities between the Governments of the shipper and the shipmaster. *Esposito* v. *Bowden, 7 El. & Bl. 763,* followed. MARSHAL & Co. *v.* NAGIN CHAND FULCHAND (1916)

I. L. R. 42 Bom. 473

——————— *Breach—Suit for difference—Plaintiff's failure to prove freight, insurance, etc.—Award of nominal damages, if justified.* Where under a c.i.f. contract it was agreed between *S* and *J* that if *S* failed to take delivery of certain timber in time, *J* was to dispose of the same locally and *S* was to pay him the difference in price; and *S* having failed to take delivery, *J* sold the timber by auction in a regular manner and sued for the difference, but did not give clear evidence of the freight, the insurance, the loading charges and certain Port or Customs duties, which had to be deducted: *Held* that as *S* called no evidence on those points at all and there was no suggestion on his side, that these expenses would have wiped out the difference, the Appellate Court in India was not justified in awarding to *J* nominal damages of Re. 1 only. A. V. JOSEPH *v.* R. SHEW BUX (1918)

23 C. W. N. 601

——————— Defendants accepted shipping documents and drafts for the amount due but refused to take delivery on the ground that the goods were not in accordance with the description on the indents, which however shewed the Contract C. I. F. and that the indentors were bound to pay the drafts at maturity and if they had any claim in regard to the nature of the goods they would bring it in manner laid down in the indent. *Held,* that the defendants could not in answer to the claim upon the draft plead failure of consideration because what they contracted for were shipping documents not the goods. STIRLING MASON AND COY. *v.* JAWALA NATH BHAGWAN DAS **I. L. R. 1 Lah. 22**

CONTRACT FOR SALE.

See CONTRACT

See SALE OF GOODS

See EVIDENCE ACT (I OF 1872), s. 92 **I. L. R. 38 Mad. 514**

See SALE . **I. L. R. 41 Calc. 148**

——————— **By Co-partence of his interest—**

See HINDU LAW **I. L. R. 44 Bom. 967**

——————— **of cotton under Bombay Cotton Trade Association Rules—**

See AWARD . **I. L. R. 44 Bom. 780**

——————— *Vendor's interest in the property sold ceasing to exist by Government Resolution—Vendor becoming entitled to other interest—Vendee cannot sue to recover the other right—Pre-emption—Personal right—Transfer—Transfer of Property Act (IV of 1882), s. 6.* The defendant, who was occupant of certain Survey Numbers, had, under a Government Resolution a right of pre-emption in stumps of trees standing on the lands, sold the stumps to the plaintiff. After the date of the sale, Government issued another Resolution by which the right of pre-emption was abolished, and the occupant was awarded only 20 per cent. of the net proceeds of the sale of the stumps by the Forest Department. This percentage was stated to be "a gift from Government and subject to no tribunal". The plaintiff sued to recover the percentage from the defendant, which the latter received from Government in respect of the stumps sold by him. *Held,* that the plaintiff was not entitled to recover anything from the defendant, for what the plaintiff was claiming was a gift or bonus from Government to the defendant under a Government Resolution, which gift or bonus was not and could not have been in the contemplation of the parties when the contract was entered into and which by itself was not transferable. The right

CONTRACT FOR SALE—*concld.*

——— of cotton under Bombay Cotton Trade Association Rules—*concld.*

of pre-emption is a purely personal right which cannot be transferred to any one except the owner of the property affected thereby. JASUDIN *v.* SAKHARAM GANESH (1911) I. L. R. 36 Bom. 139

——— *Construction—Computation of time—"Up to" Wednesday—"Until"—Evidence Act (I of 1872), s. 91—Oral evidence.* On 12th May 1917, the defendant offered to sell his motor-car to the plaintiff company in these words "Nevertheless, I am willing to hand over the car to you against a cheque for Rs. 3,120 . . . . As I intend advertising the car unless you wish to have it, please understand that my offer only holds good *up to Wednesday* next, as the time I have is limited." The plaintiff company sometime on Wednesday, the 16th May, tendered Rs 3,120 to the defendant and asked for delivery of the car, in accordance with the offer of the 12th May. The defendant, however, refused the tender contending that his offer expired on Tuesday, the 15th May *Held*, that upon the true construction of the letter of the 12th May and the words "up to Wednesday," the offer remained open until midnight on Wednesday, and did not expire at midnight on Tuesday. *The King* v. *Stevens, 5 East 244, Bellhouse* v. *Mellor, 4 H. & N. 116, Isaacs* v. *Royal Insurance Co., L. R. 5 Ex. 296,* and *Rogers* v. *Davis, 8 Ir. L. R. 399,* considered. METROPOLITAN ENGINEERING WORKS *v.* DEBRUNNER (1917) . . . . I. L. R. 45 Calc. 481

CONTRACT OF CARRIAGE.

See COMMON CARRIER, LIABILITIES OF. I. L. R. 38 Calc. 28

CONTRACT OF EMPLOYMENT.

See BROKER . I. L. R. 42 Calc. 1050

CONTRACT OF MARRIAGE.

See MARRIAGE, CONTRACT OF. I. L. R. 39 Bom. 682

See CONTRACT (24) I. L. R. 42 Bom. 499

——— breach of—

See PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887), SCH. II, ART. 35 (g). I. L. R. 38 Mad. 274

CONTRACT OF GUARANTEE.

See CONTRACT ACT 1872, ss. 124 TO 147.

See PRINCIPAL AND SURETY.

CONTRACT OF SERVICE.

See SCHOOLMASTER I. L. R. 44 Calc. 917

See SECRETARY OF STATE FOR INDIA. I. L. R. 38 Calc. 378

See TRUST . I. L. R. 41 Calc. 19

See WORKMEN'S BREACHES OF CONTRACT ACT, ss. 1, 2, 4 . 15 C. W. N. 15

CONTRACT TO ASSIGN DOCUMENT.

——— *Damages awardable though no loss is proved—Measure of damages.* *A* as the agent of *B*, took from *D*, a debtor of *B*, for the debt due, a bill in favour of *C*. *A* undertook to get the bill endorsed in favour of *B* by *C*. *A* having failed to do so, for more than a year, *B* sued *A* claiming as damages the amount of the bill with interest. At the settlement of issues *A* produced the promissory-note endorsed in favour of *B*: *Held*, that *B's* suit was maintainable and that the endorsement after the suit was filed could not defeat *B's* claim. The contract to obtain the assignment not having been performed within a reasonable time the contract was broken and the right to sue accrued before the suit was brought. It could not be said that *B* had sustained no damage which he was entitled to recover as the bill standing in the name of a third party prevented him from suing on the original obligation. A promissory-note in consideration of a pre-existing debt is only a conditional payment; and if the promissory-note remains in the hands of the original payee when it is dishonoured, the original debt revives. If, however, the promissory note had been endorsed to a third party a suit on the original debt would not be maintainable. *A debtor, In re, (1908) 1 K. B 344,* referred to It is not necessary that *B* should prove that *D* had become insolvent or that the money could not be recovered if a suit had been brought against *D*. The amount recoverable will be the amount for which the promissory-note was executed. SUBRAMANIAN CHETTY *v.* MUTHIA CHETTY (1912) I. L. R. 35 Mad. 639

CONTRACT TO LEND OR BORROW.

See SPECIFIC PERFORMANCE. I. L. R. 43 Calc. 59

CONTRACT WITH ENEMY.

——— *Status of hostile firms—Common law doctrine—Trading licenses granted to hostile firms, their effect—Licenses granted to manager of a firm, not ultra vires—The Hostile Foreigners' Trading Order of 1914—The Indian Councils Act of 1861, s. 23—Act I of 1915—Interest made payable under contracts entered into before war—Suspension of interest after war—American cases, though not authoritative, noted on a novel point.* The existence of a state of war between the respective countries of the debtor and the creditor suspends the accrual of interest when it would ordinarily be recoverable as damages, and not as a substantive part of the debt, the reason being that a party should not be called upon to pay damages for retaining money which it was his duty to withhold. The accrual of interest is equally suspended, even when the alien enemy creditor remains in the country of the debtor, until the debtor has actual notice that the principal can safely be paid without the possibility of its enuring for the benefit of the enemy during the continuance of hostilities. PADGETT *v.* JAMSHETJI HORMUSJI (1916) I. L. R. 41 Bom. 390

——— *Forward cotton contracts—Manager of an Indian branch of enemy firm entering into contracts prior to war—Pledge of goods as security by manager before and after war—Settlement by manager of pre-war contracts by cross-contracts—Agreement by Liquidator of an Indian branch of enemy firm, valid—Liquidator acting under instruction of Controller of Hostile Trading Concerns—Effect of war—Contract of*

CONTRACT WITH ENEMY—*contd.*

agency, whether terminated by war—Payment made by Liquidator in settlement of a claim cannot be recovered—Mistake of law—Pleadings—The Indian Contract Act (IX of 1872), ss. 21, 65 and 72—The Royal Proclamations of August 1914, Nos. 1 and 2—Treasury Announcements—Hostile Foreigners (Trading) Order of November 1914—The Enemy Trading Act (X of 1916), ss. 4, 5 and 13—Controller can exercise all powers conferred on Official Liquidators by s. 179 of the Indian Companies Act without sanction of Government—Counter-claim. The plaintiffs W. and Sons were a German firm with its head office in Germany and a branch office at Bombay managed by a German named Zoller. Prior to the outbreak of war between Great Britain and Germany on 4th August 1914, the plaintiffs had employed the defendants, an Indian firm in Bombay, as their guaranteed brokers and muccadums on the latter depositing with them Rs. 50,000 by way of guarantee. In July 1914, certain cotton contracts were entered into between the plaintiffs and the defendants for January to March 1915 delivery. On 3rd August 1914, the plaintiffs returned to the defendants Rs. 40,000 out of their deposit amount. On the 5th August 1914, the plaintiffs and the defendants entered into a written agreement (in pursuance of an arrangement arrived at between them the previous day) by which the plaintiffs pledged 799 bales of blankets belonging to them to defendants as security for the balance of the deposit amount and the differences on the forward contracts. On the 27th August 1914, Zoller further pledged certain cotton bales to the defendants by way of additional security. On 3rd September 1914, the forward contracts were closed by Zoller by cross-contracts with the defendants at the prevailing market rates. On 5th September 1914, Zoller was interned and one Tombroff was appointed Liquidator by Government, who in the course of his duties took directions from the Controller of Hostile Trading Concerns. In July 1915, the Liquidator with the assent of the Controller agreed with the defendants that they should sell the blankets and apply the sale proceeds towards the payment of their debt for the cotton differences. In or about September 1915, the Liquidator after communicating with the Controller entered into a further agreement with the defendants which in effect was that the Liquidator was to sell the cotton and the defendants were to give delivery to the purchasers and to allow the Liquidator to receive the purchase money on the express condition that the balance of the defendants' claim remaining after the realisation of the blankets was to be paid out of the proceeds of the cotton. The sales of the blankets and the cotton were duly effected. The sale proceeds of the blankets sold by the defendants being insufficient to pay off the whole amount of the debt due to them, the defendants sent to the Liaquidator on 10th March 1916 a final statement of account showing a balance of Rs. 47,194 due to them and asked to be paid out of the sale proceeds of cotton in the hands of the Liquidator. On 12th April 1916, the Liquidator repudiated his liability to pay that amount or any, alleging that the original pledge of the blankets on the 5th August 1914 was illegal and void, and that he, on the other hand, was entitled to the sale proceeds in the hands of the defendants as pledgee after deducting therefrom Rs. 10,000 being the balance of the deposit due to them and certain expenses incurred by them. On 6th August 1917, the plaintiffs by their Liquidator sued the defendants for the amount of the sale proceeds of the blankets contending, *inter alia,* that the pre-war contracts of July 1914 and the pre-war pledge (if any) of the 4th August 1914 became *ipso facto* void on the outbreak of war, that the further pledges given on the 5th August and the 27th August 1914 were similarly void; that the cross-contracts of the 3rd September 1914 being tainted with the illegality of the pre-war contracts were also void or amounted to the settlement of a nullity; that Zoller's agency terminated *ipso facto* on the outbreak of war and that therefore he had no power to enter into any of the subsequent transactions; and that under s. 65 or s. 72 of the Indian Contract Act they were entitled to recover payments made towards the satisfaction of the defendants' debt, the illegality of the transactions not being discovered by them till November 1915. The defendants resisted the plaintiffs' claim for refunding the money paid and counterclaimed a large amount due at the foot of the account between the parties. On the figures agreed at the trial the plaintiffs' claim was for Rs. 69,467-9-0 and the defendants' counterclaim for Rs. 58,440-9-0 (the plaintiffs admitting their liability for Rs. 10,000, being the balance of the guarantee amount deposited by the defendants). The trial Judge, MACLEOD J. dismissed the plaintiffs' suit and decreed the defandants' counterclaim holding (*i*) that although the pre-war contracts and the two pledges became void on the outbreak of war the settlement of the contracts by cross contract was a legitimate transaction as merely fixing the damages for the breach of contracts of purchase which both parties mistakenly believed could still be legally enforced, (*ii*) that Zoller's agency did not terminate on the outbreak of war and (*iii*) that the Liquidator having agreed that the amount realised by the sale of the blankets and the cotton bales be set off against the satisfaction of the debt due to the defendants, that amounted to a payment which the plaintiffs were not entitled to recover either under s. 65 or s. 72 of the Indian Contract Act, the latter section not applying to a mistake of law. The plaintiffs appealed:—*Held,* confirming the decision of the trial Judge, (1) that assuming but without deciding that the plaintiffs' contentions as to the effect of the war on the transactions in question were correct, the legal position of the Indian branch of an enemy firm up to November 1915 was in view of the Proclamations and orders then in force sufficiently doubtful as to afford some justification for the view that the transactions were valid; (2) that the Liquidator in the course of the winding up was entitled to enter into binding agreements with the defendants for the sale of the blankets and cotton and the application of the sale proceeds in discharge of the defendants' debt irrespective of any disability attaching to Zoller; (3) that the acts of the Liquidator done with the approval of the Controller were validated under s. 13 of the Enemy Trading Act, X of 1916; (4) that assuming that there was a mistake of law which was neither pleaded nor proved, the agreements entered into by the Liquidator with the defendants were "contracts" within the meaning of the Indian Contract Act and could not be avoided under s. 21 of the Act as being made under any mistake of law, and that accordingly

CONTRACT WITH ENEMY—*concld*

the payments made to the defendants were made under the binding contract and could not be recovered under s. 72 of the Act; (5) that s. 65 of the Indian Contract Act did not apply as the payments were made under valid agreements, but assuming that the payments were made under the pre-war contracts and pledges ending 3rd September 1914, the word "agreement," as used in the section did not apply to the pre-war contracts, for, they were "contracts" and not "agreements," and that the words "discovered to be void" were not applicable to the subsequent agreements as the parties knew all the material facts; (6) that no "advantage" within the meaning of s 65 was received by the defendants under the pre-war contracts when *ex hypothesi* they became void on the outbreak of war and payments were made to the defendants in 1915 under subsequent agreements with the Liquidator; (7) that the defendants were entitled to succeed on their counterclaim inasmuch as they changed their position with regard to the cotton in their possession on the faith of a promise made to them by the Liquidator, and that promise was binding in law *W. L. Ingle, Limited* v. *Mannheim Insurance Company (1915) 1 K. B. 227; Halsey* v. *Lowenfeld (1916) 2 K. B. 707; Schaffenius* v. *Goldberg (1916) 1 K. B. 284, Holsworthy Urban Council* v. *Holsworthy Rural Council (1907) 2 Ch 62*, referred to. WOLF & SONS *v.* DADYBA KHIMJI & Co. (1919) .

I. L. R. 44 Bom. 631

CONTRACT WITH GOVERNMENT.

See PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887), SCH. II, ART. 3.
I. L. R. 37 Mad. 533

CONTRADICTORY STATEMENT.

See SANCTION FOR PROSECUTION.
I. L. R. 37 Calc. 618

CONTRIBUTION.

See COMPANY . I. L. R. 40 All. 45

See CONTRACT ACT (IX OF 1872), ss. 69 AND 70 . I. L. R. 39 Mad. 795

See CO-SHARER . 15 C. W. N. 332

See COSTS . I. L. R. 40 All. 672

See HINDU LAW—(DEBT).
I. L. R. 37 Mad. 458

See LIMITATION . .
I. L. R. 39 Mad. 288

See MORTGAGE . I. L. R. 40 Mad. 968
I. L. R. 38 All. 92
I. L. R. 43 All. 42

See SALE FOR ARREARS OF REVENUE.
I. L. R. 44 Calc. 573

See TORT . . 4 Pat. L. J. 486

See TRANSFER OF PROPERTY ACT (IV OF 1882), s. 82.
I. L. R. 33 All. 387, 708
I. L. R. 36 All. 272
I. L R. 37 All. 101
I. L. R. 43 All. 589

———— cause of action for—

See LIMITATION . I. L. R. 39 Mad. 288

———— suit for—

See LIMITATION I. L. R. 39 Mad. 288

CONTRIBUTION—*contd.*

———— suit for—*concld.*

See RENT DECREE . 14 C. W. N. 699

See PROVINCIAL SMALL CAUSE COURTS ACT (IX OF 1887), s. 25; SCH. II, ART. 41 . I. L. R. 41 All. 51

———— suit for in respect of repairs to a jointly owned well—

See LIMITATION ACT 1908, SCH. ARTS. 61 AND 116 I. L. R. 44 Bom. 591

1. ———— Attachment—*Purchase of part of attached property by a third party who satisfies the whole claim—No right of contribution against the remainder acquired by the purchaser.* An attaching creditor does not obtain by his attachment any charge or lien upon the attached property. Where therefore a third party purchased a portion of certain property under attachment and satisfied the whole of the creditor's claim: *Held*, that the purchaser acquired no right of contribution as against the remainder of the attached property. *Moti Lal* v *Karrabuldin, I. L. R. 25 Calc. 179, Peacock* v. *Madan Gopal, I. L. R. 29 Calc. 428*, and *Miller* v. *Lukhmani Debi, I. L. R. 28 Calc. 419*, referred to. LALTA PRASAD *v.* ZAHUR-UD-DIN (1910) . . . I. L. R. 32 All. 479

2. ———— Mortgage-sale—*Sale set aside by consent on one of co-mortgagors paying off decree—Liability of other co-mortgagors to contribute—Equity—Contract Act (IX of 1872), s 69—Charge.* Where a mortgage-decree having been passed against several persons, a sale of the mortgaged property took place, and then one of the mortgagors paid off the decree-holder and by consent the sale was set aside: *Held*, in a suit by him against the other mortgagors for contribution, that although the defendants were not liable under s. 69 of the Contract Act, the plaintiff not having paid the money to prevent the sale, the defendants who kept the property were bound in equity to pay their share of the money which the plaintiff had paid to release the property. The amount was declared to be a charge on the shares of the defendants. PARBHU NARAIN SINGH BAHADUR *v.* BABU BENI SINGH (1909)

14 C. W. N. 361

3. ———— Purchasers of mortgaged property—*Mode of calculating amount as between purchasers of different items of mortgaged property.* *M* mortgaged 3 items of property to one *S* for Rs. 1,300. Two of these items were sold to two persons for Rs. 1,200, and the deeds of sale provided that the amounts for which the profits were sold should be paid to the mortgagee. The sale of the third item was for cash, but the property was not sold free of encumbrance and there was no contract between *M* and the third purchaser that the lands sold to the other purchasers should be liable for the Rs. 1,200 of the mortgaged money. *S* assigned his mortgage and the assignee obtained a decree for the full amount due on the mortgage and in execution the properties sold to the third purchaser were brought to sale and the third purchaser paid up the amount to avoid the sale. In a suit by the third purchaser for contribution, it was contended by [illegible] of Rs. 1,200 [illegible] purchasers an[illegible] the properties [illegible] balance left after deducting such amount:—

CONTRIBUTION—*contd.*

——— suit for in respect of repairs to a jointly owned well—*contd.*

Held, that the contribution must be calculated on the footing that all the properties were liable for the full amount. The benefit of the covenants in the sale-deeds to the other two purchasers could claim the benefit of such covenants only on a contract with the mortgagor giving him such benefit. SESHAGIRI AYYAR *v.* VYTHILINGA PILLAI (1909) . . . . I. L. R. 33 Mad. 211

4. ——— **Degree for costs**—*Some defendants not contesting suit—Liability for contribution not a necessary consequence of a joint decree.* The mere fact that a decree for costs has been made against several persons jointly will not of itself render the co-defendants liable in a suit for contribution; but if one of the defendants pays the full amount of costs and then sues his co-defendants for contribution, he should show some equity existing between himself and his co-judgment-debtors making the latter liable for contribution. *Dearsly* v. *Middleweek, L. R. 18 Ch. D. 236*, referred to. MULLA SINGH *v.* JAGANNATH SINGH (1910). I. L. R. 32 All. 585

5. ——— **Deposit under s. 310A, Civil Procedure Code by co-tenant, not a party**—*to decree for sale for arrears of rent—Decree, satisfaction of, how becomes complete—Contract Act (IX of 1872), ss. 70, 43, 68, 69, 72, 146, 222—Civil Procedure Code (XIV of 1882), s. 310A.* Where an entire tenure was sold in execution of rent-decrees obtained against only some of the tenants, and a tenant, who was not a party to the rent suit, deposited, with the approval of the Court and lawfully, the prescribed amounts under s. 310A of the Code of Civil Procedure to have the sales set aside, with the object of protecting his own interest in the holding, and the sales were set aside, with the result that the liability of the defendants in respect of rent was discharged: *Held*, that the plaintiff was entitled to sue the several defendants for contribution, each according to the share in the decretal debt only, but not in respect of the deposit of 5 per cent. of the purchase-money that the applicant is bound to make under s. 310A, Civil Procedure Code. *Per* JENKINS, *C. J.*—The terms of s. 70 of the Contract Act apply to such a case, and, though they are rather wide, they enable the Courts to do substantial justice in cases where it would be difficult to impute to the persons concerned relations actually created by contract. But it is incumbent on final Courts of fact to be guarded and circumspect in their conclusions, and not to countenance acts or payments that are really officious. *Venkata Gopalaraju* v. *Timmayya Pantulu, I. L. R. 22 Mad. 314*, referred to. *Per* DOSS, *J.* Such a case does not come within the purview of s. 70 of the Contract Act, for the plaintiff must in law be held to have deposited the rent in Court in discharge of his own liability, and not in satisfaction of a debt due by another, co-sharer tenants being liable for the rent, not only jointly, but also severally. It was not the intention of the Legislature that s. 70 should be invoked where relief might be obtained under any other section of the Act, *e.g.*, ss. 43, 68, 69, 72, 146 or 222. S. 69 is applicable in cases like this. *Smith* v. *Dinonath Moorkerjee, I. L. R. 12 Calc. 213*, discussed. *Damodara Mudaliar* v. *Secretary of State for India, I. L. R. 18 Mad. 88*, approved of. Though the plaintiff had no right to make the deposits under s. 310A, Civil Procedure Code, as his interest in the holding was not affected by the sales, he being no party to the decrees, the deposits being in fact made without protest from any party or Court, and the joint obligation of all tenants discharged thereby, the mere fact that the money was deposited under s. 310A did not place him in a position worse than if he had satisfied the entire decree before sale, nor did it alter the equitable right of the plaintiff to be reimbursed proportionately for the deposit, the benefit of which was enjoyed by others. *Fatima Khatoon Chowdrain* v. *Mahomed Jan Chowdry, 12 Moo. I. A. 65 : 10 W. R. P. C. 29*, *Dulichand* v. *Ramkishen Singh, I. L. R. 7 Calc. 648 : L. R. 8. I. A. 93, Johnson* v. *Royal 7 Calc. Mail Steam Packet Co., L. R. 3 C. P. 38, Edmunds* v. *Wallingford, L. R. 14, Q. B. D. 11, The Orchis, L. R. 15 P. D. 38, Judeo Narain Singh* v. *Raja Singh, I. L. R. 15 Calc. 356*, referred to. In apportioning liability between co-obligees in a suit for contribution, which is eminently an equitable suit, regard must be had more to the real nature of the debt than to the decree founded on it. *Ram Tuhul Singh* v. *Biseswar Lall Sahoo, L. R. 2, I.A. 191 : 23 W. R. 305, Ruabon Steamship Co.* v. *The London Assurance* (1900), *A. C. 6*, referred to. A decree is not satisfied and the obligation in respect of it is not discharged until the decree-holder receives the money out of Court and satisfaction of the decree is entered; nor does the compulsion of law initiated by the attachment of the property terminate until such satisfaction. SUCHAND GHOSAL *v.* BALARAM MARDANA (1910). . . . . I. L. R. 38 Calc.

6. ——— **Owner of suit of Revenue-paying estate——paying entire revenue**—*Proportion in which other owners should contribute—Assets as basis of calculation, if those at revenue settlement or those at the date of default to be considered—Collectorate Registers, admissibility—Public document.* Where Government revenue payable in respect of an estate was fixed in perpetuity on the basis of assets as they stood at the time of the settlement, and the assets were at that time determined village by village and revenue proportionate to the assets of each village was also calculated, although the proprietor of the entire estate was made liable for the aggregate amount of revenue. *Held*, that, as between persons in whom in course of time different villages in the mehal became vested, the liability to contribute towards the revenue was to be fixed on the basis of the assets of the villages as determined at the settlement and not as found on valuation at the date of default. LAL MOHAR THAKUR *v.* SHEW GOLAM LAL (1911)
16 C. W. N. 590

7. ——— **Joint tort-feasors**—*Decree against plaintiffs and defendants for mesne profits, Tort not wilful—Plea that plaintiffs' sole wrongdoers to be specially pleaded and made a special issue.* *Held*, that, on the facts of the case, the plaintiffs and defendants against whom as zemindars of estate *A*, a decree for possession and mesne profits had been passed in favour of zamindars of estate *N*, were not wilful tort-feasors—even if the strict law of *Merryweather* v. *Nixam*,

CONTRIBUTION—*contd.*

———— suit for in respect of repairs to a jointly owned well—*contd.*

8 T. R. 186, were applicable in India—and *primâ facie* the plaintiffs who paid the whole of the decretal amount in a proceeding under s. 310A, Civil Procedure Code, were entitled to contribution as against the defendants. In such a suit for contribution, a plea that the plaintiffs were the only wrong-doers in the sense that they alone were in possession of the land in respect of which mesne profits were awarded, is of such a special nature and requires such special consideration that it should be distinctly pleaded and made the subject of a distinct issue. *Dering* v. *Winchelsea, 1 Cox 318,* referred to. BISHNU CHARAN ROY CHAUDHURY *v.* BEPIN CHANDRA ROY CHOWDHURI (1913). **18 C. W. N. 622**

8. ———— **Compromise**—*Claim by party to a compromise alleging payment by himself of money for payment of which he and others were jointly liable—Joint tort-feasors.* A Hindu widow, the owner of considerable property, brought a suit against her four brothers as managers of her estate for the profits of the estate to a considerable amount. One of the brothers had previously brought a suit against her for a declaration that she had adopted his son. These suits were compromised, and the compromise was made a decree of Court. Amongst the conditions of the compromise was one to the effect that the brothers shou'd pay back a certain sum of money belonging to misappropriated by them. *Held,* on suit by one of the brothers who alleged that he had paid on whole sum and asked for contribution, that the rule laid down in *Merryweather* v. *Nixon, 8 T. R. 186,* that there was no right of contribution amongst joint tort-feasors did not apply to this case when the claim was based on the terms of a compromise, and *quære* whether the rule should be applied in India at all. *Palmer* v. *Wick* and *Pulteneytown Steam Shipping Company, Limited, (1894) A. C. 318,* referred to. NIHAL SINGH *v.* THE COLLECTOR OF BULANDSHAHR (1916) **I. L. R. 38 All. 237**

9. ———— **Cost of Litigation**—*Suit by co-plaintiff for expenses of litigation.* Where two plaintiffs join in the institution of a suit and the suit is conducted by one plaintiff alone and the entire expenses of the suit are borne in the first instance by that plaintiff, a suit for contribution by him against the other plaintiff can only succeed upon one or other of the following grounds, namely, (i) that there was an agreement between the two plaintiffs that the expenses should be borne proportionately, or (ii) that the plaintiffs joined in engaging Counsel or Vakil and that after the joint engagement of Counsel or Vakil, the one plaintiff had paid the Counsel or Vakil on behalf of both, or (iii) under the provisions of the Contract Act, 1872, s. 70. UMATUL SOGHRA *v.* MUSSUMMAT BIBI ZOHRA . **1 Pat. L. J. 201**

10. ———— **Joint suit**—*Decree for costs against plaintiff jointly executed against one—Suit*

pay, he will have a suit for contribution against the others. *Mulla Singh* v. *Jagannath Singh, I. L. R. 32 All. 585, Suput Singh* v. *Imrit Tewari, I. L. R. 5 Calc. 720, Dearsly* v. *Middleweel, L. R. 18 Ch. D. 236, Sita Panda* v. *Jujusti Panda, I. L. R. 25 Mad. 599,* distinguished. RAM SARUP *v.* BAIJ NATH . . **I. L. R. 43 All. 77**

11. ———— Mortgage—*Contract Act, 1872, ss. 69, 70. X,* a mortgagee obtained a decree against *A, B* and *C* as representatives in interest of his mortgagor. *A* satisfied the decree-holder

mortgaged property, and urged that his payment was voluntary. The Court of first instance found, on the evidence, that *A* had an interest in the property, but the lower Appellate Court dismissed the suit holding that *A* had none *Held,* that a payment in satisfaction of a decree, by a person who is a party to the decree and was bound thereby, was a payment made lawfully within the meaning, of s. 70 of the Indian Contract Act *Bindubashini Dasi* v. *Harendralal Roy, I L R. 25 Calc. 305, Radha Madhub Samonta* v *Sasti Ram Sen, I L R. 26 Calc. 826,* discussed *Desai Himat Singji* v. *Bhavabhai Khayabhai, I L R 4 Bom. 643, Jivant Ali* v. *Fatch Ali Maibar, 13 C L J. 646 ; 15 C W. N 332,* distinguished SERAFAT ALI *v.* ISSAN ALI (1917) . . . . **I. L. R. 45 Calc. 691**

———————— That so far as the right of contribution against co sharers is concerned it does not matter whether the money is actually handed over by the party seeking contribution or is realised from him by coercive process by the creditor In either case the right to contribution arises from the facts that one of the co-sharers has paid excess of his share and the joint liability of all the co-sharers has been discharged. GOPENDRANATH MONSHI *v.* GHUNDRANNATH MONSHI **26 C. W. N. 340**

CONTRIBUTORY

See COMPANY . **I. L. R. 36 All. 412**
I. L. R. 42 Bom. 264
I. L. R. 39 Bom. 331

See COMPANIES ACT (VI OF 1882)—

ss. 45, 58 . **I. L. R. 42 Bom. 595**

ss 58, 147 . **I. L. R. 40 Bom. 134**

ss. 61, 125, 151 . **I. L. R. 38 All. 247**

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE **I. L. R. 35 Bom. 478**

See PENAL CODE, s. 280.
15 C. W N. 835

———————— *Position of passengers in railway trains who allow a part of their person to project outside the railway carriage.* The plaintiff, while a passenger on a train of the defendants, was travelling with his arm projecting from the railway carriage-window. While the train, in which the plaintiff was travelling, was passing through a station of the defendants, it passed another train of the defendants which was stationary on the parallel set of rails. A door of one of the carriages forming the stationary train, being the eighth carriage to be passed by the train in motion, having been left insecurely fastened owing to the negligence of the defendants' servants, swung open and, striking the arm of the plaintiff which was projecting from the carriage-window,

CONTRIBUTORY NEGLIGENCE—*concld.*

fractured it: *Held*, that under the circumstances the plaintiff was guilty of contributory negligence and was not entitled to recover damages from the defendants. *Held*, however, that the *dicta* in the case of *Dullabhji Sakhidas* v. *G. I. P. Railway Co., I. L. R. 34 Bom. 427*, that (i) a passenger must travel inside and not outside his compartment and, therefore, if he travels outside, he does so entirely at his own risk and the company cannot be held liable for any injury he suffers in consequence; (ii) that a passenger who gets injured owing to putting any part of his person outside his carriage is guilty of contributory negligence cannot be followed as rigid and inflexible rules of law. JEHANGIR MUNCHERJI *v.* B. B. & C. I. RAILWAY CO. (1912) . I. L. R. 37 Bom. 575

——————— *Railway Company—Collision—Damages.* The plaintiff's carriage was damaged by a train of the defendant Company running into it at a level-crossing where the gate had been left open. *Held*, that, on the findings of fact by the lower Appellate Court, negligence on the part of the defendant Company had been established, and that contributory negligence had not been proved. BENGAL PROVINCIAL RAILWAY CO. *v.* GOPI MOHAN SINGH (1913)
I. L. R. 41 Calc. 308

——————— *Breach of statutory duty—Injury to passenger with arm outside carriage window—Contractual obligations.* The fact that a door on a moving train is open is evidence but not conclusive proof, of negligence on the part of the Railway Company. Where there is a statutory obligation, any breach of it which causes an accident is conclusive against the defendant apart from special proof of negligence. But the breach must in itself be the cause of the accident, and the rule does not extend so far as to exclude the defence of contributory negligence. In view of the contractual relations between the parties, a Railway Company is not liable for injuries caused to any part of a passenger which is outside the carriage in which he is travelling, provided that such injuries could not have been received had the passenger remained inside the carriage. The application of the rule that, where there is negligence on both sides, the negligence of the person who had the last chance of averting the accident is the efficient cause thereof, must be restricted to cases where the danger was apparent to both or at least one of the parties before the accident actually happened. DULLABHJI SAKHIDAS *v.* THE G. I. P. RAILWAY CO. (1909)
I. L. R. 34 Bom. 427

CONTROLLER.

——— jurisdiction of—
See DESIGNS . I. L. R. 45 Calc. 606

CONVENIENCE.

See JURISDICTION I. L. R. 41 Calc. 305

——— balance of—
See TEMPORARY INJUNCTION.
I. L. R. 46 Calc. 1001

——— questions of—
See JURISDICTION OF HIGH COURT.
I. L. R. 44 Calc. 595

CONVERSATION.

——— Between pleaders—
See EVIDENCE . I. L. R. 44 Calc. 130

CONVERSION.

See BAILMENT I. L. R. 37 Bom. 122
See CARRIERS . I. L. R. 41 Calc. 703

——— outside British India—
See CRIMINAL PROCEDURE CODE (ACT V OF 1898), ss. 179 TO 188.
I. L. R. 38 Mad. 779

——— Rate of Exchange—
See FOREIGN CURRENCY.
I. L. R. 48 Calc. 886

——— of appeal into Civil Revision Petition—
See PROVINCIAL INSOLVENCY ACT (III OF 1907), s. 46, CL. (3).
I. L. R. 39 Mad. 593

CONVERT.

See JURISDICTION.
I. L. R. 35 Bom. 264
See MALABAR LAW .
I. L. R. 44 Mad. 891

——— to Christiainity—
See HINDU LAW—JOINT FAMILY.
I. L. R. 40 Calc. 407
See MARRIAGE . I. L. R. 33 All. 90

See SUCCESSION ACT, s. 2.
15 C. W. N. 158

——— to Mahomedanism—
See SUCCESSION . L. R. 43 I. A. 35

——— to Roman Catholic religion—
See CHURCH . I. L. R. 39 Mad. 1056

CONVEYANCE.

See CIVIL PROCEDURE CODE (ACT V OF 1908), O II, R. 2.
I. L. R. 38 Mad. 698
See EVIDENCE . I. L. R. 45 Calc. 320
See OFFICIAL RECEIVER.
I. L. R. 46 Calc. 887
See RECEIVER I. L. R. 43 Calc. 124
See VENDOR AND PURCHASER.
I. L. R. 40 Bom. 69
I. L. R. 37 Calc. 362

——— by executor—
See VENDOR AND PURCHASER.
I. L. R. 42 Calc. 56

——— of family lands—
See HINDU LAW—ALIENATION.
I. L. R. 38 Mad. 1187

——— Recitals as to title—
See LEASE.
I. L. R. 42 Bom. 103

CONVICTION.

See MADRAS ABKARI ACT (MADRAS ACT I OF 1886), ss. 56, 64.
I. L. R. 39 Mad. 895

CONVICTION—*concld.*

See EVIDENCE . I. L. R. 42 Calc. 764

See SENTENCE . 3 Pat. L. J. 641

See SEPARATE CONVICTIONS.
I. L. R. 39 All. 623

See THEFT . I. L. R. 41 Calc. 433

———— alteration of—

See APPELLATE COURT.
I. L. R. 38 Calc. 293

———— *Power of High Court to alter section under which conviction obtained.* Where the lower courts have convicted an accused under a wrong section in a case in which no charge was framed it is open to the High Court, if necessary to revise the section under which the conviction has been recorded without any further proceedings. Where a carter removed from the godown of a railway company a bag filled with pilferings from a number of bags consigned to others: *held,* that the bag being in the possession of the railway as bailees the taking it out of the godown amounted to theft. SOUKHI CHAND SAO *v.* KING EMPEROR . . . . 3 Pat. L. J. 354

CO-OPERATIVE SOCIETIES ACT (II OF 1912)

———— ss. 19, 20—*Charge—Priority—Co-operative Societies Act (II of 1912), ss. 19, 20—Attachment—Civil Procedure Code (Act V of 1908), s. 73.* Under s. 73 of the Code of Civil Procedure the claim of a co-operative society cannot be enforced unless they have a decree or charge under s. 20 of the Co-operative Societies Act (II of 1912), though under s 19 of that Act the society might have raised an objection to the attachment by reason of other sections of the Code of Civil Procedure. ABDUL QUADIR *v.* SHAHBAZPUR CO-OPERATIVE BANK (1914) . I. L. R. 42 Calc. 377
18 C. W. N. 1140

———— s. 42—Order of liquidator *declaring each member to be jointly and severally liable—*

gages from the various persons who were members of the society and had received advances, proceeded to make an order, purporting to be passed under s. 42 (*b*) of the Act determining that each of the debtors should be jointly and severally liable, for the full amount of the several debts This order was then taken to the Civil Court having local jurisdiction to be enforced under

vas prob-
did, but
the Act,
nforce it,

and that no appeal lay to the District Judge nor a second appeal to the High Court. MATHURA PRASAD *v.* SHEOBALAK RAM (1917).
I. L. R. 40 All. 89

———— s. 42, sub-cls. (2) (e), (4) and (6)—*Winding up—Order passed in the course of winding up—Order in connection with dissolution—Suit to set aside order—Civil Court—Jurisdiction.* A Liquidator of a

course of the
certain orders
were responsibl

These persons having filed suits for a declaration that the orders were *null and void. Held,* that

CO-OPERATIVE SOCIETIES ACT (II OF 1912)—*concld.*

———— s. 42, sub-cls. (2) (e), (4) and (6)—*concld.*

the orders by the Liquidator were matters in connection with the dissolution of a registered Society, and therefore the Civil Court had no jurisdiction to entertain the suits, under cl. (6) of s. 42, Co-operative Societies Act, 1912. *Mathura Prasad* v. *Sheobalak Ram (1917) 40 All. 89,* referred to. GANPAT RAMRAO *v.* KRISHNADAS PADMANABH (1919) . . . . I. L. R. 44 Bom. 582

CO-OWNERS.

See ADVERSE POSSESSION.
I. L. R. 39 Mad. 879

See CONTRACT ACT (IX OF 1872), ss. 69 AND 70 . I. L. R. 39 Mad. 795

See CO-SHARERS.

See HINDU LAW—PARTITION.
I. L. R. 43 Calc. 1118

See JOINT OWNERS.
I. L. R. 47 Calc. 182

See JOINT PROPERTY
I. L. R. 39 Mad. 54

See JURISDICTION . I. L. R. 42 All. 64

See RIGHT OF SUIT.
I. L. R. 34 Mad. 501

See SALE FOR ARREARS OF REVENUE.
I. L. R. 44 Calc. 573

See TEMPORARY INJUNCTION.
I. L. R. 41 Calc. 436

———— contract by—

See SPECIFIC RELIEF ACT (I OF 1877), ss. 15, 17 . I. L. R. 37 Mad. 403

———— rights of inter se—

See LANDLORD AND TENANT.
I. L. R. 33 All. 308

———— *Sole occupation by, of joint land—Ouster—Suit for joint possession—Justice, equity and good conscience—Statu quo when maintained.* Where it is found that a portion of the joint land was marshy and was jointly possessed by all the co-owners although they had other lands in separate possession and that when the marsh silted up one of the co-owners occupied the silted up land to the exclusion of others. *Held,* in a suit by one of the co-owners for joint possession, that there was ouster, and plaintiff was entitled to recover joint possession without bringing a suit for partition. Where parties are contented with joint possession of a portion of the joint land and separate possession of the rest, from the point of view of justice, equity and good conscience, the *statu quo* ought to be restored and the party dissatisfied relegated to a suit for partition. KUMUD LAL RAY *v.* JOGENDRA MOHAN RAY (1914) . . 18 C. W. N. 609

———— *Right of suit—Held,* that one of several co-owners can maintain an action in ejectment against a trespasser without joining the others. A judgment should not be passed solely on personal inspection. SHUTARI *v.* THE MAGNESITE SYNDICATE, LD.
I. L. R. 39 Mad. 501

———— *Suit by, for joint possession of land and injunction—Injury or lik...*

CO-OWNERS—*contd.*

thereof not alleged in plaint—Hostile title not set up by defence—Decree for joint possession if should be given—Ouster, meaning of—Common law action for ejectment and equity suit for injunction, distinction between, if should be introduced in this country—Principle of equity, justice and good conscience. The plaintiffs and the defendant were co-sharers in a mehal. Each co-sharer was in sole occupation of some lands appertaining to the mehal as *khamar* lands and the defendant was in such possession of some lands. On the defendant commencing some building on portions of the land the plaintiffs brought a suit for recovery of joint possession of the land in dispute on declaration of their proprietary right to their share in it, for demolition of the building raised, for an injunction restraining the defendant from building on the land. The defendant did not claim any exclusive title to the land and the plaintiffs did not allege that they had sustained, or were likely to sustain, any substantial injury by reason of the sole occupation of the land or building thereon by the defendant. *Held,* that the mere fact of sole occupation by one co-sharer does not necessarily constitute an ouster of other co-sharers nor does it entitle the latter to a decree for joint possession. Ouster means 'dispossession of one co-sharer by another where a hostile title is set up by the latter and when the occupation of the latter is not consistent with joint ownership. *Held,* that there being no assertion of hostile title in the present case, there was no ouster of the plaintiffs by the defendant. That the distinction between a common law action for ejectment and an equity suit for an injunction should not be introduced in this country and questions of joint possession and injunction should be decided on the principles of justice, equity and good conscience. That in the present case the mere fact that the land in suit adjoined the dwelling house of the plaintiffs irrespective of any injury would not be a sufficient ground, consistent with the principles of justice, equity and good conscience, to give joint possession or order the demolition of the buildings already erected, or restrain the defendant from building on it. BASANTA KUMARI DASSYA *v.* MOHESH CHANDRA SHAHA (1913) . . . . 18 C. W. N. 328

———————— *Fiduciary relation between co-tenants, conditions giving rise to—Revenue sale—Default by one co-owner—Purchase by that co-owner—Effect on other co-owners—Suit for recovery of possession by other co-owners—Public policy in India, rule of English law, if a safe guide to.* The plaintiff sued to recover possession of her share in certain properties which had been sold away for arrears of revenue or rent, alleging that the defendant No. 1 who was her brother managed the whole estate on behalf of all the co-sharers and that she was in possession jointly with him by receiving her share of the rents and profits, that after she had fallen out with defendant No. 1 the latter did not pay her share of the rents and profits nor give up her share of the properties and in order to deprive her of her share caused the properties to be sold for arrears of revenue and himself purchased the same with his own money in the names of the other defendants: *Held,* that where a revenue sale is caused by the default of a co-owner and the property is afterwards purchased at that revenue sale by that co-owner, there may be such relations between the defaulter and his co-owner as would make it right for the Court to treat such a sale as made for the benefit of both. The relations which exist between co-tenants in England and the consequences of those relations are very different from those which obtain in this country, and English cases like *Biss* v. *Biss, (1903) 2 Ch. 40, 57 ; Kennedy* v. *De Trafford, (1897) A. C. 180,* would hardly be safe guides to follow here. *Doorga Singh* v. *Sheo Pershad Singh, I. L. R. 16 Calc. 194,* commented on. FAIZAR RAHMAN *v.* MAIMUNA KHATUN (1913) . . . . 17 C. W. N. 1233

———————— *Adverse possession—Possession by one co-owner if and when may be adverse against another co-owner—Evidence necessary to constitute adverse, possession—Co-owner, residence of, in different village, leaving ancestral home, and out of possession for 50 years—Possession of the property by the other co-owner—Payment of rent by him to the landlord, and dealing with the entire property by him as his own—Execution of conveyances of the entire property by one co-owner treating it as his own, effect of—Ouster—Principles to be applied to a case of adverse possession as between co-owners—Adverse possession, if mixed question of law and fact—Second appeal.* The entry and possession of land under the common title of one co-owner will not be presumed to be adverse to the others, but will ordinarily be held to be for the benefit of all. The obvious reason for this rule is that the possession of one co-owner is, in itself, rightful and does not imply hostility, as would the possession of a mere stranger. The law will never construe a possession tortious, unless from necessity; on the other hand it will consider every possession lawful, the commencement and continuance of which is not proved to be wrongful; and this, upon the plain principle that every man shall be presumed to act in obedience to his duty, until the contrary appears. In other words, the only difference between the possession of a co-owner and other cases is, that acts, which, if done by a stranger, would *per se* be a *disseisin,* are, in the case of tenancies in common, susceptible of explanation consistently with the real title, acts of ownership are not, in tenancies in common, acts of *disseisin :* it depends upon the intent with which they are done and their notoriety; the law will not presume that one tenant in common intends to oust another; the facts must be notorious and the intent must be established in proof. *Jogendra Nath Rai* v. *Baladeo Das, I. L. R. 35 Calc. 961 : s. c. 12 C. W. N. 127 (1907), Ayenenussa Bibi* v. *Sheikh Isuf, 16 C. W. N. 849 (1912), Loke Nath Singh* v. *Dhakeswar Prasad Narain Singh, 20 C. W. N. 51 (1914), Narendra Bhusan Roy* v. *Jogendra Nath Roy, 20 C. W. N. 1258 (1916), Corea* v. *Appuhamy, (1912) A. C. 230, Mutlu Nayagam* v. *Brito, (1918) A. C. 895, Hardit Singh* v. *Gurmukh, 28 C. L. J. 437 (P. C.) (1918), Thomas* v. *Thomas, 2 K. & J. 79 (83) (1855), Culley* v. *Doe Dem Taylerson, 11 A. & E. 1008 (1014) (1840), Doe Dem Fisher* v. *Prosser, 1 Cowper 217 (1774), Doe Dem Hillings* v. *Bird, 11 East 49 (1809)* and *Doe Dem White* v. *Cuff, 1 Campbell 173 (1808),* referred to. The question of adverse possession is a mixed question of fact and law. The soundness of the conclusions from the facts found is a matter of law and can be questioned by the High Court in second appeal.

CO-OWNERS—*concld.*

Lachmeswar v. *Manowar, L R 19 I A. 48 : s. c. I. L. R. 19 Calc. 253, (1891), Ramgopal* v. *Shamskhaton, L. R. 19 I. A 228 ; s. c. I. L. R. 20 Calc. 93 (1892), Satgur Prasad* v. *Raj Kishore, I. L. R. 42 All. 152 : s. c. 24 C. W. N. 394 (P. C) (1919), Ishan* v. *Bishu, I. L. R 24 Calc. 825 : s. c. 1 C. W. N. 665 (1897), Raiaram* v. *Ganesh, I. L. R. 21 Bom. 91 (1895), Makund* v. *Gopi, 21 C. L. J. 45 (1914), Maruti* v *Banubai, 4 Bom. L. R. 801 (1902), Venkatesh* v. *Bhavani, 5 Bom. L. R. 174 (1903), Rajaram* v. *Nanchand, 5 Bom. L. R. 225 (1903)* and *Ganapati* v. *Ragunath, 11 Bom. L. R.* co-*1087 (1909)*, referred to. Where *B J* and *L* were owners, of whom *B* and *J* left their ancestral home and removed to another village and were not in possession for 50 years, and during this period, *L*, the other co-owner, possessed the property, paid rent to the landlord and dealt with the entire property as his own since 1878 when he transferred the same to his infant nephew who, on attainment of age, on the 23rd December 1902, transferred it to the second Defendant who, on the 23rd March 1908, transferred it to the first Defendant ; and the Plaintiffs claiming title, by purchase, of two-thirds share of the property in 1909 from the representatives of *B* and *J*, sued the Defendants in 1915 for recovery of possession of the same on declaration of their title ; and the Court of first instance found that adverse possession had not been proved and decreed the suit, and on appeal, the lower Appellate Court held that adverse possession had been established and dismissed the suit : *Held*—That on the facts found, the title of the predecessors of the Plaintiffs was not extinguished by adverse possession. The decree of the Subordinate Judge was set aside and that of the Court of first instance restored. *Held also*—That the mere execution of the conveyance in 1878 was not an act of such notoriety as to impress on the predecessors of the Plaintiffs that their co-sharer who lived in the village and occupied the joint property intended to set up a hostile title against them. BALARAM GURIA *v.* SHAMA CHARAN MANDAL

24 C. W. N. 1057

———————— One of several Co-owners can maintain an action in ejectment against a trespasser. SHUTARI *v.* THE MAGNESITE SYNDICATE, LD. **I. L. R. 39 Mad. 501**

CO-PARCENER.

See HINDU LAW—ADOPTION.
I. L. R. 38 Mad. 1105

See HINDU LAW—ALIENATION.
I. L. R. 38 Mad. 1187

See HINDU LAW—COPARCENERS
I. L. R. 41 Mad. 637

See HINDU LAW—GIFT.
I. L. R. 39 Mad. 1029

See HINDU LAW—JOINT FAMILY.
I. L. R. 38 Mad. 685
I. L R. 40 Calc. 407

See HINDU LAW—MAINTENANCE.
I. L. R. 39 Mad. 396

See HINDU LAW—MINOR.
I. L. R. 34 Bom. 72

See HINDU LAW—STRIDHAN.
I. L. R. 36 Bom. 424

CO-PARCENER—*concld.*

———— adverse possession by—

See LIMITATION ACT (XV OF 1877), SCH. II, ART. 127 . **I. L. R. 37 Bom. 64**

———— alienation by—

See LIMITATION ACT (XV OF 1877), SCH II, ARTS. 127, 142.
I. L. R. 37 Bom. 84

See HINDU LAW
I. L. R. 44 Bom. 341, 621, 967

———— decree against a—

See HINDU LAW—COPARCENER.
I. L. R. 40 Bom. 329

———— marriage of—

See HINDU LAW—PARTITION.
I. L. R. 39 Mad. 587

CO-PARTNERS.

———— liability of—

See PARTNERSHIP . **14 C. W. N. 1108**

COPIES.

———— of decree or judgment—

See LIMITATION ACT (IX OF 1908) s. 12
I. L. R. 34 All. 41
I. L. R. 42 All. 260

See PRIVY COUNCIL—
I. L. R. 39 Calc. 510

———— of Document proved in foreign court—

See HABEAS CORPUS.
I. L. R. 39 Calc. 164

———— of forged document—

See FORGERY . **I. L. R. 43 Calc. 783**

———— of Judges notes—*Specific Relief Act (I of 1887), s. 45—Jurisdiction of High Court to direct copy of Presidency Magistrate's notes of deposition to be furnished to a party to a criminal case.* A party to a criminal proceedings is entitled to copies of the Presidency Magistrate's notes of depositions BENI MADHUB BANERJEE *v.* SAILENDRA NATH MUKERJEE (1911)
15 C. W. N. 770

COPYRIGHT.

See CONTRACT ACT 1872, s 23.
I. L. R. 44 Bom. 720

See COPYRIGHT ACT (XX OF 1847), ss. 7, 12 . . **I. L. R 33 All. 24**

———————— *Law Reports—Indian Copyright Act (III of 1914)—Copyright Act (1 & 2 Geo. V, c. 46)—Reports of judgment, copyright in—Selection of judgments, copyright in—Judgments obtained by expenditure of time, labour, or money by one, if may be reproduced by another—Extracts from judgments and facts taken from record, copyright in—Common source of information, reference to—Injunction, perpetual—Pirated matter, direction for delivery and destruction—Damages, assessment of.* It is generally true that in the reports of judgment, the reporter has no copyright but, it cannot be said that in the selection of cases and in the arrangements of the reporting, the reporter has not the protection of law. One is entitled to report such judgments as he obtains by expenditure of his time, labour, money, but when he fails to exert his own energies, he cannot be allowed to

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avail himself of other peoples' industry. Nor will he be allowed to take quotations from judgments or facts obtained by another from the records of a case. The principle is that whilst all are entitled to resort to common sources of information, none are entitled to save themselves trouble and expense by availing themselves for their own profit of other men's works, subject to copyright and entitled to protection. *Lewis* v. *Fullerton, 2 Beav. 6, 8,* followed. JOGESH CHANDRA CHAUDHURI *v.* MOHIM CHANDRA RAI (1914) . . . . . **18 C. W. N. 1078**

——— *Preparation by a member of the Board of Studies, Allahabad University, of a list of graduated selection from different authors for certain examinations—Publication by the Syndicate of a syllabus containing, amongst other items, the selection already referred—Publication of same in book form by a book-seller—Infringement of copyright.* *A*, a member of the Board of Studies of the Allahabad University, prepared at the request of the convener a list of graduated selections from standard Persian authors for the use of candidates for certain examination of the University. In preparing these lists he spent considerable labour, learning and skill. The Board of Studies, after due consideration, adopted with slight modifications the selections shown in the list as the subject for those examinations in Persian and published the lists for the information of the public generally and of the candidates concerned specially. Subsequently to this, *B*, a firm of publishers, compiled books from the original authors according to these lists. *Held,* that *A* had no copyright in the lists as by laying the result of his labours before the Board of Studies he placed the lists unreservedly at the disposal of the University authorities. MUHAMMAD ABDUL JALIL *v.* RAM DAYAL (1916) **I. L. R. 38 All. 484**

——— *Reasons for acquisition of copy-right in a compilation like a grammar—Novel mode of arrangement—Joint Hindu family—Inheritance of copy-right in a work compiled by the father.* There is no reason why a copy-right may not be acquired by the compiler of a book like a grammar, if the arrangement of the subject-matter is novel and has not been employed in previous books of the same nature. Plaintiff compiled a book of this nature; whereupon defendant produced a similar work. He adopted special arrangement of the plaintiff's book, copied a large number of pages verbatim from it, added a small amount of matter of his own and slightly altered the title. *Held,* that the infringement of plaintiff's copy-right extended to the whole of the book and could not be limited to the pages actually copied from plaintiff's compilation. *Held also* that, whether or not a copy-right would in a joint Hindu family pass by survivorship, the sons of a Hindu father who had acquired the copyright were entitled to sue respecting its infringement. GHAFUR BAKHSH AND SONS *v.* JWALA PRASAD SINGHAL . . **I. L. R. 43 All. 412**

COPYRIGHT ACT (XX OF 1847).

——— ss. 7 and 12—*Copyright—Suit for damages for infringement of copyright—Jurisdiction.* A suit to recover damages for infringement of copyright does not lie in the Court within the jurisdiction of which the plaintiff, but not the defendant, resides. Neither is the possessor of a pirated copy of a copyright work bound to deliver it to the owner of the copyright whenever he (the owner) may happen to reside. RAM KISHAN *v.* PIARI LAL (1910) . . . **I. L. R. 33 All. 24**

COPYRIGHT ACT (XX OF 1847)—*concld.*

——— ss. 7 and 12—*concld.*

COPYRIGHT ACT (III OF 1914).

See COPYRIGHT . **18 C. W. N. 1078**

CO-RESPONDENT.

See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XL, R. 22.
I. L. R. 37 Bom. 511

——— absence of—

See DIVORCE . **I. L. R. 45 Calc. 525**

CORPORATION.

See GURNISHEE . . **4 Pat. L. J. 141**

See SALE . . **I. L. R. 43 Calc. 790**

——— Senate of a University—

See UNIVERSITY LECTURESHIP.
I. L. R. 41 Calc. 518

——— suit against—

See PLAINT . **I. L. R. 43 Calc. 441**

CORPORATION-SOLE.

See MUTT, HEAD OF.
I. L. R. 38 Mad. 356

CORROBORATION.

See ACCOMPLICE **I. L. R. 38 Calc. 559**

See CONFESSIONS OF CO-ACCUSED.
I. L. R. 42 Calc. 789

——— necessity of—

See ACCOMPLICE **I. L. R. 38 Calc. 96**

CORRUPTION.

See OFFICIAL CORRUPTION.

CO-SHARER.

See ACQUIESCENCE **I. L. R. 37 All. 412**

See AGRA TENANCY ACT, 1901, s. 159.
I. L. R. 42 All. 311

See BENGAL TENANCY ACT, s. 171.
15 C. W. N. 512; 782

188 . . . **I. L. R. 38 Calc. 270**

See DISPUTE CONCERNING LAND.
I. L. R. 40 Calc. 982

See EXPROPRIETARY TENANT.
I. L. R. 35 All. 27

See HINDU LAW (PARTITION).
L. R. 41 I. A. 247

See IJARDAR.
I. L. R. 48 Calc. 1078

See MAHOMEDAN LAW—PRE-EMPTION.
I. L. R. 39 Calc. 915

See CO-OWNER.

See CO-PARCENER.

See PARTITION . **15 C. W. N. 375**

See PARTITION ACT (IV OF 1893).
15 C. W. N. 552; 555 (foot note)

CO-SHARER—*contd.*

See PENAL CODE s. 447.
I. L. R. 36 All. 474

See PRE-EMPTION **I. L. R. 38 All. 260**

See SALE FOR ARREARS OF REVENUE.
I. L. R. 44 Calc. 573

See UNITED PROVINCES LAND REVENUE ACT (III OF 1901), s. 118.
I. L. R. 39 All. 707

——— **liability of—**

See PENAL CODE, s. 225B.
I. L. R. 32 All. 116

——— **payment by—**

See SALE FOR ARREARS OF REVENUE.
I. L. R. 41 Calc. 1092

——— **suit by—**

See BENGAL TENANCY ACT, s. 188
I. L. R. 38 Calc. 270

1. ——— **Injunction**—*Co-sharer, exclusive enjoyment of portion of property by—Injunction, if may be granted where no injury to other co-sharers found.* Where a co-sharer had taken possession of a small plot of unoccupied land and had erected a tinshed thereon and it was found that by such exclusive possession his other co-sharers had not suffered any substantial injury: *Held,* that no mandatory injunction should be issued requiring him to restore the land to its original condition. *Watson & Co.* v. *Ram Chand Dutt, L. R. 17 I. A. 110 : s. c. I. L. R. 18 Calc. 10, Dilbar Sardar* v. *Hosein Ali Bepari, I. L. R. 26 Calc. 553, Atarjan Bibee* v. *Sheikh Ashak, 4 C. W. N. 788, Lachmyswar Singh* v. *Manowar Hosein, I. L. R. 19 Calc. 253,* referred to. BRAHMOMOYI CHOWDHURANI *v.* GOPI MOHAN ROY CHOWDHURI (1910) . . . . . **15 C. W. N. 188**

2. ——— **Right to contribution**—*Contract Act (IX of 1872), ss. 43, 69, 70—Rent paid by co-sharer in wrongful possession of entire jote—Payment in good faith—Deduction on account of mesne profits—Payment, whether gratuitous* Defen- ... having ... against ... for a ... by the landlord when he was in exclusive possession of the *jote: Held,* that in such cases the principle in *Dakhina Mohan* v. *Sarada Mohan, I. L. R. 4 Bom. 643,* applies, and the plaintiff would be entitled to recover if the payment was made by him in good faith, subject however to a deduction on account of mesne profits realised by him in respect of the defendant's share. If the payment was made with a view to creating title in the entire *jote,* it could not have been made in good faith It would be a voluntary payment and one not made "lawfully" within s. 70 of the Contract Act. *Desai Himat Singhji* v. *Bhavabhai, I. L. R. 4 Bom. 643; Bamasundari* v. *Adhar Chandra, I. L. R. 22 Calc. 28, Tiluck Chand* v. *Saudamini, I. L. R. 4 Calc. 666,* referred to. JINNAT ALI *v.* FATEH ALI MATBAR (1911)
15 C. W. N. 332

Cf. CONTRIBUTION.
I. L. R. 45 Calc. 691

3. ——— *Co-sharer landlord, if may sue for his share of rent when no separate collection—Suit for apportionment, if lies—prayer for apportionment in rent suit, if entertainable—Parties—Decree for entire rent in favour of all co-sharers when may be made.* A co-sharer landlord can maintain a suit for his share of the rent separately if there is an arrangement for separate collection without a division of the lands amongst the co-sharers. The case of *Raj Narain Mitter* v. *Ekadasi Bag, I. L. R. 27 Calc. 479,* does not lay down that there must be a division of the lands before a co-sharer can maintain a separate suit for his share of the rent. A sale of a share in an estate which has been let out in its entirety to a tenant does not of itself necessarily effect of a severance of the tenure or an apportionment of rent, but if the purchaser desires such severance or apportionment, he must give the tenant due notice to that effect and then if an amicable apportionment cannot be made by arrangement between all the parties concerned, the purchaser may bring a suit against the tenant for the purpose of having the rent apportioned making all the co-sharers parties to the suit. Such an apportionment can be asked and effected in the rent suit itself But where in such a suit the plaintiff did not ask for an apportionment though he made all his co-sharers parties, the plaintiff was entitled to ask for a decree for the entire rent in favour of all the co-sharers. SHYAMA CHURN DAS *v.* JOGES CHANDRA RAY (1912)
16 C. W. N. 774

4. ——— **Suit to recover joint possession** *Exclusive possession by a co-sharer—Where possession wrongful at its inception, co-sharers if may recover joint possession.* The defendant was in wrongful occupation as a tenant of a plot of land belonging to the plaintiffs and other co-sharers. Subsequently the defendant purchased the share of one of these co-sharers and thus became interested in the land as a proprietor. In a suit by his co-sharers for joint possession of of the land in suit: *Held,* that the plaintiff's occupation being originally wrongful the subsequent acquisition of joint title did not entitle the defendant to resist the plaintiff's claim for joint possession. *Watson & Co.* v. *Ram Chand Dutt, I. L. R. 18 Calc. 10,* distinguished. SHAIKH SAMARADDI *v.* SHYAMA CHURN SEN (1911)
16 C. W. N. 251

5. ——— *Ouster by other co-sharer, what amounts to—Claim and exercise of exclusive title under a lease from a stranger—When co-sharer in possession may keep exclusive possession—Change of case in second appeal—Remand, prayer for.* The five-sixths owners of an estate A sued the remaining one-sixth owners for recovery of joint possession with the latter of certain lands within the estate. The latter in defence stated the lands in suit were part of estate *B,* which the owners of that estate had given them in lease. This having been found against in the Court of first appeal, the defendants in second appeal prayed to be allowed to set up the defence that they had been in occupation of the lands as co-sharers and were cultivating the same as such with the consent of the plaintiffs. The prayer was disallowed, and *held,* that this was a case of exclusion of co-sharers by other co-sharers and the plaintiffs were entitled to a decree for joint possession. *Watson & Co.* v. *Ram Chand Dutt, L. R. 17 I. A. 110 : s. c. I. L. R. 18 Calc. 10, Lachmeswar Singh* v. *Manowar Hosein,*

CO-SHARER—*contd.*

L. R. 19 I. A. 48 ; s. c. I. L. R. 19 Calc. 253 and *Mohesh Narain* v. *Nawbut Pathak, I. L. R. 32 Calc. 837 : s. c. 1 C. L. J. 437*, distinguished. MOOKERJEE *J.* The rule laid down in *Watson & Co.* v. *Ram Chand Dutt, L. R. 17 I. A. 110 : s. c. I. L. R. 18 Calc. 10*, is a rule of justice, equity and good conscience and must be applied with reference to the circumstances of the individual case before the Court. *Primâ facie* co-owners are entitled to hold joint possession of joint property, and consequently, if one co-sharer seeks to defeat the claim of another co-sharer to joint possession, special circumstances must be alleged and established to justify exclusive occupation by one of them. The principle deducible from the cases is that a co-sharer who has been ousted from joint property is entitled to recover joint possession. To constitue ouster a physical eviction is not essential ; if a co-owner is in possession on behalf of or under an adverse claimant under such circumstances as to evidence a claim of exclusive right and title and a denial of the rights of the other co-sharers, there is an ouster in law. When one co-owner accepts a deed of the whole property from one who has no title and claims and exercises the rights of sole ownership under a denial of any other person's right in the premises, he is in adverse possession to the exclusion of his co-sharers. NARENDRA BHUSAN ROY *v.* JOGENRDA NATH ROY (1916) . . **20 C. W. N. 1258**

6. ———— Lease by majority of common land—*Validity of lease—Lease, whether binding on minority—Suit by minority in ejectment—Remedy, whether limited to partition only—Form of decree.* A majority of co-sharers in samudayam or common land cannot grant a perpetual lease of the common property. Where a lease by some of the co-sharers is found to be invalid, the lessee is not entitled to be maintained in his possession, leaving it to those co-shares objecting to his lease to sue for partition as their only remedy. Where the lease is by some of the co-sharers to a person who is also a co-sharer, and the suit is by other co-sharers to eject the lessee, the proper decree to be passed is one declaring that the lease is not binding on the plaintiffs and directing recovery of possession by the latter on their own behalf and that of the other co-sharers. *Palaniappa Chetty* v *Sreemath Debasikamony Pandara Sannadhi, I. L. R. 40 Mad. 709* applied. *Watson and Company* v. *Ramchund Dutt, I. L. R. 18 Calc. 10*, explained. RAGHAVACHARYULU *v.* GOVINDASARI (1918) . . **I. L. R. 41 Mad. 1068**

CO-SHEBAITS.

See PARTIES . **I. L. R. 46 Calc. 877**

COSTS.

See APPEAL . **I. L. R. 43 Calc. 857**

See ARBITRATION **I. L. R. 40 Calc. 219**

See ATTORNEY **I. L. R. 43 Calc. 932**

See ATTORNEY AND CLIENT.
I. L. R. 40 Calc. 386

See BOMBAY MUNICIPAL ACT (BOM. ACT III, 1888), ss. 297, 301.
I. L. R. 43 Bom. 181

See CIVIL PROCEDURE CODE 1882 s. 206
14 C. W. N. 556

COSTS—*contd.*

See CIVIL PROCEDURE CODE 1908—
s. 35 . **I. L. R. 43 Mad. 61, 284**
O. XXV, R. 1 **I. L. R. 35 Bom. 421**
O. XXXIV, RR. 4, 5 AND 10.
I. L. R. 40 All. 109
I. L. R. 41 All. 473
R. 14 . . **I. L. R. 35 All. 518**
I. L. R. 41 Calc. 173

See CONTEMPT OF COURT—**15 C. W. N. 791**

See CONTRACT ACT (IX OF 1872)—
s. 47 . . **I. L. R. 40 Bom. 517**
s. 65 . . **I. L. R. 40 All. 558**
s. 70 . **I. L. R. 42 Bom. 556**

See CONTRIBUTION **I. L. R. 32 All. 585**
1 Pat. L. J. 201
I. L. R. 43 All. 77

See COURT FEE . **3 Pat. L. J. 443**

See CRIMINAL PROCEDURE CODE—
s. 148 . . **15 C. W. N. 811**
s. 344 . **I. L. R. 42 Bom. 254**

See DECREE . **I. L. R. 38 Calc. 125**

See DIVORCE ACT (IV OF 1869), ss. 2, 4, 7, AND 45 . **I. L. R. 38 Bom. 125**

See EASEMENT **I. L. R. 39 Calc. 59**

See EXAMINATION ON COMMISSION.
I. L. R. 45 Calc. 492

See EXECUTION OF DECREE (48).
4 Pat. L. J. 330

See OUDH ESTATES ACT (I OF 1869).
I. L. R. 33 All. 344

See PAKKI ADAT SYSTEM.
I. L. R. 39 Bom. 1

See PLEADER'S FEE
I. L. R. 41 Calc. 637

See PRACTICE . **I. L. R. 35 Bom. 339**

See PRE-EMPTION
I. L. R. 2 Lah. 294

See PRINCIPAL AND AGENT.
I. L. R. 41 All. 254

See PRIVY COUNCIL
I. L. R. 36 Mad. 501

See REMAND . **I. L. R. 43 Calc. 1104**

See SECURITY FOR COSTS.
I. L. R. 42 Bom. 5

See "SHAWLS," MEANING OF.
I. L. R. 39 Calc. 1029

See SOLICITOR'S LIEN FOR COSTS.
I. L R. 34 Bom. 484
I. L. R. 35 Bom. 352

See SUMMONS, SERVICE OF.
I. L. R. 43 Calc. 447

———— Against Secretary of State—

See CRIMINAL PROCEDURE CODE, s. 524.
5 Pat. L. J. 321

———— appeal courts powers regarding—

See DAMAGES . **29 C. W. N. 352**

———— apportionment of—

See PUNITIVE POLICE.
I. L. R. 40 Calc. 452

COSTS—*contd.*

———— decree against wife—

See RESTITUTION OF CONJUGAL RIGHTS. **I. L. R. 44 Bom. 454**

———— due to mistake—

See LETTERS PATENT 1865 CL. 36. **I. L. R. 45 Bom. 718**

———— **In pre-emption suit—**

See PRE-EMPTION. **I. L. R. 2 Lah. 294**

———— of reaping crops—

See CLAIM . . **15 C. W. N. 817**

———— of wife—

See DIVORCE . **I. L. R. 44 Calc. 35**

———— of restitution of suit dismissed for plaintiff's non-appearance—

See CIVIL PROCEDURE CODE, 1908 O. IX R. 8. **I L. R. 44 Bom. 82**

———— successful litigants deprived of—

See DAMAGES. **24 C. W. N. 352**

———— security for—

See CIVIL PROCEDURE CODE, 1908, O. XXV, R 1 AND O. XXXIII, R. 1. **I. L. R. 36 Bom. 415**

Os. XLI, R. 10, XXV, R. 2, AND XLIII, R. I. **I. L. R. 42 All. 626**

———— wife's claim for matrimonial suit—

See PRESIDENCY SMALL CAUSE COURTS ACT 1852 . **I. L. R. 45 Bom. 318**

———— **When not to be disallowed—**

See CUSTOM—SUCCESSION. **I. L. R. 2 Lah. 366**

———— **Where ejectment proceedings could have been taken in Small Cause Court—**

See BOMBAY RENT (WAR RESTRICTION) ACT, 1918 . **I. L. R. 45 Bom. 1236**

———— **Liability of Guardian ad litem of a lunatic**—*Personal liability of guardian to pay costs incurred by unnecessary appeal.* The guardian *ad litem* appointed by the Court usually gets his costs out of the estate of the defendant whom he represents if he does not recover them from the plaintiff, but when a guardian *ad litem* takes it upon himself to appeal against a decree, he puts himself in the position of a next friend initiating proceedings, and no longer is in the position of a passive guardian *ad litem.* SHAPURJI HORMASJI *v.* MONOSSEH JACOB (1909) **I. L. R. 34 Bom. 374**

———— **Partition**—*Civil Procedure Code (Act V of 1908) s. 107, O. XLI, r. 4, application of—Appellate Court, power of.* It is not necessary for the application of O. XLI, r. 4, of the Code of Civil Procedure that the decree should proceed on every ground common to all the plaintiffs or defendants It is quite sufficient if it proceeds on any ground common to the party to which the appellant belongs. Under s. 107 of the Code, the Appellate Court has the same power as the Court of first instance. *Shama Soonduree Debia* v. *Jardine Skinner & Co., 12 W. R. 160*; *Dildar Ali Khan* v. *Bhauani Sahai Singh, I. L. R. 34 Calc. 878,* and *Ram Kamal Saha* v. *Ahmad Ali, I. L. R. 30 Calc. 429,* referred to. AMBIKA PRASAD SINGH *v.* PERDIP SINGH (1914) **I. L. R. 42 Calc. 451**

———— **Application for Registration as share-holder** *in a Company—Indian Companies Act (VI of 1882), s. 254—High Court Rules, R. 704—High Court Manual of Circular, Ch. VIII.* To regulate costs incurred in obtaining an order [illegible]

I. L. R. 39 Bom. 383

———— **Security for costs.** The fact that the appellant has no money of her own is not in itself a sufficient ground for demanding security for costs. When it appeared that the appeal was not merely vexatious (the appellant's suit having been decreed by one Court), the fact that the appellant had relations who had money to pay was not a sufficient ground for demanding security. MATHURA NATH SINGH *v.* PRIYASHASHI DEBI (1914) . **19 C. W. N. 446**

———— **Discretion of court as to costs**—*Accounts, suit for, against manager—Costs against manager for default or dishonest conduct in accounting—S. 22, Presidency Small Cause Courts Act (XV of 1882).* A person who takes up the management of another's estate and collects and disburses moneys has to be ready with his account. His failure to perform the obvious duty necessitates a suit and he must pay the plaintiff's cost. *Collyer* v. *Dudlley, 2 L. J. Ch. 15,* followed. This is all the more so when he makes a dishonest defence, submits a false account and keeps back books of account or documents. *Hurrinath* v. *Krishna Kumar, I. L. R. 14 Calc. 147, 159,* referred to Where the manager sued the principal for arrears of salary in the Presidency Court of Small Causes and the principal sued the manager in the High Court for accounts and the two suits were heard together in the High Court and an amount less than Rs. 1,000 was found due from the manager to the principal, costs were awarded against the manager on High Court scale No. 11 having regard to the circumstances above stated. SUKUMARI GHOSH *v.* GOPI MOHAN GOSWAMI (1915) **19 C. W. N. 880**

———— *Appellate Court when should interfere with order of primary Court as* [illegible] the [illegible] he [illegible] fied [illegible] late Court will not interfere with an exercise of the discretion of the lower Court unless it has proceeded on a manifestly wrong ground. SARADINDU MUKERJI *v.* CHARU CHANDRA DUTT (1917) **22 C. W. N. 372**

———— **Between Principal and Agent in a suit for account**—*Manager, liability of, for costs—Presidency Small Cause courts Act (XV of 1882), s. 22—Practice.* In the matter of costs, the C[illegible]

COSTS—*contd.*

discretion is to be exercised with special reference to all the circumstances of the case including the conduct of parties. *Sheo Dayl Tewari Chowdhury* v. *Bishunath Tiwari Chowdhury, 9 W. R. 61,* referred to. If a person takes up the management of another's estate and collects and disburses moneys, he must be ready with his account; and if his failure to perform this obvious duty necessitates a suit, then he must pay the costs. *Collyer* v. *Dudley, 2 L. J. Ch. 15,* referred to. So, where a manager has deliberately set up a false defence, and on being ordered to render an account, submits a false account and suppresses important documents thereby hampering and prejudicing the inquiry, it is only right that he should pay the full costs of, and incidental to, the suit. *Ramgopaul Chatterjee* v. *Bhoban Mohan Banerjee, Coryton's Rep. 126,* and *Hurrinath Rai* v. *Krishna Kumar Bakhshi, I. L. R. 14 Calc. 147,* referred to. Because in a suit for an account, a sum of money less than Rs. 1,000 was found due by the defendant, it does not follow that such a suit should have been instituted in the Presidency Small Cause Court, and that the provisions of s. 22 of the Presidency Small Cause Courts Act apply. SUKUMARI GHOSH *v.* GOPI MOHAN GOSWAM (1915) . . . . **I. L. R. 43 Calc. 190**

———— Solicitor's lien for costs—*Minor—Next friend—Attorney's costs for proceedings undertaken on the next friend's instructions—Whether attorney is entitled to a charge on the minor's property for his costs so incurred—Practice.* Where a suit has been brought by a minor through his next friend for declaration of the infant's title to and possession of property, the attorney is entitled to have a charge declared on the properties for the amount of costs incurred by him and he is entitled to recover the same in a suit. *Shaw* v. *Neale, 6 H. L. C. 581, Baile* v. *Baile, L. R. 13 Eq. 497, Pritchard* v. *Roberts, L. R. 17 Eq. 222, In re Howarth, 8 Ch. App. 415, Helps* v. *Clayton, 17 C. B. (N. S.) 553, Ex parte Tweed, (1899) 2 Q. B. 167, Narendra Nath Sircar* v. *Kamalbasini Dasi, I. L. R. 23 Calc. 563, Devkabai* v. *Jefferson Bhaishankar* and *Dinsha, I. L. R. 10 Bom. 248, Khetter Kristo Mitter* v. *Kally Prosunno Ghose, I. L. R. 25 Calc. 887, In re Wright's Trust, (1901) 1 Ch. 317, Watkins* v. *Dhunnoo Baboo, I. L. R. 7 Calc. 140, Sham Charan Mal* v. *Chowdhry Debya Singh Pahraj, I. L. R. 21 Calc. 872, Ispahani* v. *Chundi Charan Pal, 9 C. W. N.* cxcvii, and *Branson* v. *Appasami, I. L. R. 17 Mad. 257,* referred to. KUMAR KRISHNA DUTT *v.* HARI NARAIN GANGULY (1915) . . . . **I. L R. 43 Calc. 676**

———— Costs of the Secretary of State for India, *to be taxed in the ordinary way—Profit costs of the Government Solicitor and brief fees to the Advocate-General, to be allowed on taxation—Application to review the certificate of the Taxing Master.* Where the Secretary of State for India is a party to a suit filed in the High Court in its Ordinary Original Civil Jurisdiction and costs are awarded to him, he is entitled to have his bill of costs taxed in the ordinary way, although the Government Solicitor and the Advocate General employed on his behalf are paid fixed salaries for the conduct of all Crown cases. Hence, all profits costs of the Government Solicitor and brief fees to the Advocate-General should be allowed on taxation. NUSSERWANJI & CO. *v.* S. S. WARTENFELS (1916)
I. L. R. 40 Bom. 588

COSTS—*contd.*

———— Costs to abide the result", *meaning of—Discretion of lower Court, if fettered—Costs to abide and follow the result and costs to follow the event, distinction between.* Where the High Court, in remanding a case to the lower Court, ordered that the costs should abide the result: *Held,* that the words "abide the result" only connote that the order as to costs is to await the passing of the final decision in the case, and have not the effect of fettering the discretion of the trying Judge. Distinction between "abide the result" and "abide and follow the result" or "follow the event" pointed out. PERIAH *v.* LAKSHMIDEVAMMA (1915) **I. L. R. 39 Mad. 476**

———— Trustees—*Discretion as to costs of—Appeal against order for costs—Trustees, when entitled to costs of legal proceedings out of estate.* Although costs of a suit are discretionary with the Judge the Court of Appeal will interfere with the discretion of the Court of first instance where it is found that that discretion was not exercised on correct principles. Persons who are in the position of trustees ought to have their costs out of the trust estate when a question of legal proceedings is concerned unless they have unreasonably carried on or resisted such proceedings. The Court of first instance having come to the conclusion that the *mutwallis* were really trustees ought to have applied this principle in making order as to costs. Where disputes had arisen between the *mutwallis* of a *wakf* estate and the trustees supervising their management and by mutual consent the matter was referred by Court to the Assistant Referee of the Court for report and upon the report being made the *mutwallis* took exceptions to the report which were rejected by Court and the report was confirmed and the Court allowed only one set of costs to the trustees out of the estate and none to the *mutwallis. Held,* on appeal, that the *mutwallis* were entitled to get the costs of the reference out of the estate, but not the costs of the proceedings resulting from their taking exceptions as the exceptions were rightly rejected by the Court of first instance as unreasonable. As the *mutwallis* succeeded in their appeal to a material extent, they, as well as the respondent trustees, were allowed costs out of the estate. AGA MD. SHERAZI *v.* SYED ALI MD. SHOOSTRY (1916) . **21 C. W. N. 339**

———— On appeal for orders—*General rules of the High Court (Civil), rr. 21, 25—Pleader's fee—Order on objection as to jurisdiction raised by defendant returning plaint for presentation to proper Court. Held,* that r. 21 of the General Rules (Civil), and not r. 25, applied to a case where a question as to the jurisdiction of the Court, having been raised by the defendant, was decided against the plaintiff, and the plaint returned for presentation to the proper Court. GAURI SAHAI *v.* BAHREE (1918) . . . . **I. L. R. 40 All. 515**

———— Joint decree for costs against defendants claiming under separate titles *defendants being also wrong-doers—Suit for contribution—Suit not maintainable.* Two persons each holding by a separate title a half share in certain property were arrayed as co-defendants to a suit for recovery of a share in the said property. The plaintiffs obtained a decree with costs, the order for costs being as against the defendants jointly. The plaintiffs decree-holders executed the decree for costs against one of the judgment-debtors, and he then sued the other judgment-debtor for

COSTS—*contd.*

contribution. *Held,* that the suit would not lie. *Fakire* v. *Tasadduq Husian, I. L. R. 19 All. 462,* followed. NAND LAL SINGH *v.* BENI MADHO SINGH (1918) . . I. L. R. 40 All. 672

———— **Successful party not to be deprived of costs unless guilty of misconduct, omission or neglect**—*Discretion of lower Court interfered with, when facts were misapprehended and the established principle violated—Costs occasioned by unnecessary printing at the instance of attorneys, payable by attorneys personally.* A Hindu, Maratha by caste, died possessed of property worth about Rs. 3,000. His widow, the plaintiff, sued the defendant claiming to be another widow of the deceased for a declaration that the latter though living with the deceased was not entitled to the rights of a Hindu wife, but was according to the custom of the community entitled to maintenance out of the estate of the deceased. The trial Judge decided against the defendant and referred the suit to the Commissioner to take an account of the estate of the deceased and for an inquiry as to the proper amount to be allowed to the defendant for maintenance. Before the Commissioner the quantum of maintenance was agreed by consent of parties, but the defendant put in a claim for ornaments which was disallowed. The Commissioner made his report and the suit then came up for further directions and costs before a Judge who was not the trial Judge. It was represented to him on behalf of the defendant that the suit was necessary and that costs should come out of the estate. The plaintiff submitted that the estate was small, that the defendant never had any case and had lost all along the line and that although the plaintiff would be justified in asking for costs against the defendant she would not do so as nothing could be got from the defendant. The learned Judge thought that the plaintiff was more in fault than the defendant and ordered the costs to come out of the estate. The plaintiff appealed. *Held,* (i) that there had been a misapprehension of facts on the part of the learned [illegible] olation [illegible] upon [illegible] lefend- [illegible] of no misconduct. (ii) That the order as to costs out of the estate must be deleted, and the defendant be made to bear her own costs: *Cooper* v. *Whittingham, 15 Ch D 501, Kuppuswami Chetty* v. *Zamindar of Kalahasti, I. L. R. 27 Mad 341,* and *Ranchordas Vithaldas* v. *Bai Kasi, I. L. R. 16 Bom. 676,* referred to. Costs occasioned by the unnecessary printing of certain matter at the instance of parties' attorneys were made payable by the attorneys personally, and not allowed to fall upon the clients. LAXMIBAI *v.* RADHABAI (1917) . . . I. L. R. 42 Bom. 327

———— **When part only of claim allowed.** The Subordinate Judge having decreed the plaintiff's claim for less than half the amount should have allowed the plaintiffs' costs to the extent of their success. KHAGARAM DAS *v.* RAM SANKAR DAS PRAMANIK (1914) . . 19 C. W. N. 775
I. L. R. 42 Calc. 652

———— **Costs of Record—Inclusion of unnecessary matter**—*Disallowance of costs.* Their Lordships directed that the Registrar of the High Court should disallow to the successful appellants the actual costs of printing 331 pages of unnecessary matter wastefully included in the record, and such consequential costs as he might think right in proportion, and that the costs to be taxed in England should also be reduced by such amount as the Registrar of the Privy Council might consider attributable to the insertion of the superfluous matter. GOPAL CHANDRA CHAUDHURI *v.* RAJANI KANTA GHOSH (1919)
L. R. 46 I. A. 299

———— **Security for** *costs—Insolvent plaintiff —Cause of action arising after insolvency—Practice.* In a suit by an undischarged insolvent for a sum of money larger than his liabilities in the insolvency and due in respect of a transaction subsequent to the insolvency, the defendant applied for security for costs.—*Held,* that the plaintiff ought not to be ordered to give security for costs. *Rhodes* v. *Dawson, 16 Q. B D. 548, Cook* v. *Whellock, 24 Q. B. D. 658,* and *Cowell* v. *Taylor, 31 Ch. D. 34,* referred to. E. D. MURRAY *v.* EAST BENGAL MAHAJAN FLOTILLA CO , LD. (1918)
I. L. R. 46 Calc. 156

———— **Solicitor's lien,** *enforcement of—Direct order for payment to solicitor—Jurisdiction of Court—Proper case.* On an application by a solicitor made in a suit in which certain costs had been awarded to his client against the opposite party, the Court has jurisdiction to enforce, in a proper case, the solicitor's lien by making a direct order for payment to the solicitor by the opposite party of such costs. *Khetter Kristo, Mitter* v. *Kally Prosonno Ghose, 2 C. W. N. 508* followed. Where the original client was dead and it appeared that his legal representatives were not people of substance and that they were unable to pay—*Held,* that this was a proper case in which the Court in the exercise of its discretion would make a direct order for payment of such costs to the solicitor by the opposite party. *Harrison* v. *Harrison, L. R. 13 P. W. D. 180,* and *Jackson,* v. *Smith, 53 L J. Ch. 972,* explained. HARNANDROY FOOLCHAND *v* GOOTIRAM BHUTTAR (1919) . I. L. R. 46 Calc. 1070

———— **Witness examined under Presidency Towns Insolvency Act**—(*III of 1909*), *s. 36—Practice* In Insolvency proceedings mortgagee was examined under s 36 of the Presidency Towns Insolvency Act, for the purpose of challenging the mortgage. At the time of such examination attorney and counsel appeared on his behalf. Subsequently when the mortgagee was not challenged he applied to Court for an order for costs against the creditor: *Held,* that a witness examined under s 36 of the Presidency Towns Insolvency Act (III of 1909), was not entitled to the costs of employing attorney or counsel. *In re Waddel, 6 Ch D. 328,* referred to. *In re Appleton, French and Scrafton, Ld., (1905), 1 Ch. 749,* distinguished. ANSHU PROKASH GHOSE *In the matter of* (1919) I. L R. 46 Calc. 795

———— *Magistrate's power to order*—Under s. 148 of the Criminal Procedure Code the Magsitrate who makes the order without any direction as to costs has the power to make same later and it does not amount on review or alteration of his first order. NAFAR CHANDRA PAL CHOWDHURY *v.* SIDDHARTHA KRISNA MAJUMDAR
I. L. R. 47 Calc. 974

———— **Record Containing Superfluous matter**—In this case the Privy Council ordered that the costs of printing certain matter they considered superfluous should be disallowed.

COSTS—*contd.*

GOPAL CHANDRA CHOWDHURI *v.* RAJANIKANTO GHOSH . . . I. L. R. 47 Calc. 415

———— **Appearance of a third party in Administration actions**—*Creditor of heir.* In an administration action a creditor of the heirs of the deceased was allowed to intervene: *Held,* that the unsuccessful claimant should not be made liable for the costs of such intervener. *Williams* v *Buchanan, 7 T. L. R. 226, Hanbury* v. *Upper Inny Drainage Board, L. R. 12 Ir. 217, In re Salmon, Priest* v. *Uppleby, 42 Ch. D. 351, In re Watts, Smith* v *Watts, 22 Ch D. 5, In re Schwabacher, Stern* v. *Schwabacher, (1907) 1 Ch. 719,* referred to. SOURENDRA MOHAN SINHA *v.* MURARILAL SINHA, (1920)

I. L. R. 48 Calc. 352

———— **On vendors—Covenant to indemnify against defective title**—*Attack on title—Liability of vendor to pay not merely taxed costs but all reasonable costs as between vakil and client.* Upon a covenant by a vendor of lands to indemnify the purchaser against all losses that the latter might be put to in defending his title or enjoyment of the lands, from adverse claims, the vendor is bound to pay the purchaser not merely taxed costs as between party and party, of a suit in which he had to defend his title, but the actual costs which he had to pay to his legal advisers and which are reasonable in the circumstances of the case. *Smith* v. *Compton (1832) 3 B. & Ad. 407,* followed. VENKATARANGAYYA APPA RAO *v.* VARAPRASADA RAO (1920)

I. L. R. 43 Mad. 898

———— **Reference**—The costs of a reference under s. 51 of the Income-Tax Act, 1918, made at the instance of the Chief Revenue Authority of Bombay within the local limits of the Original Jurisdiction should be taxed as on the Original Side. AURANGABAD MILLS, LIMITED IN RE (1921)

I. L. R. 45 Bom. 1286

———— **Taxation** —*R. 517, High Court Rules —Counsel's fees—Opinion of Taxing Master on quantum of fees paramount—Principle regulating Court's interference—Practice.* Where the Taxing Master had exercised his discretion in accordance with the principles laid down in r. 517 of High Court Rules. *Held,* that the Court ought not to interfere in taxation unless the master was wrong in principle or very clearly wrong in detail. On a question of the quantum of fees the Court always allows the opinion of the Taxing Master to be paramount. Observations of Bovill C. J. in *Hill* v. *Peel (1870) L. R. 5 C. P. 172 at page 180,* referred to and followed. SADASUKH GAMBHIRCHAND *v.* BAIJNATH HARNANDRAI (1921)

I. L. R. 45 Bom. 1234

COSTS OF REAPING CROPS.

———— **wrongfully attached**—

See CLAIM.

See CIVIL PROCEDURE CODE. 1908, SS. 69, 70, O. 21, RR. 58 AND 60.

15 C. W. N. 817

CO-TENANTS.

See BENGAL TENANCY ACT, S. 171.

15 C. W. N. 782

CO-TRUSTEE.

See PUBLIC TRUST.

I. L. R. 42 Mad. 335

COTTON GAMBLING.

See WAGERING CONTRACT

I. L. R. 39 Calc. 968

COTTON TRADES ASSOCIATION RULES (BOMBAY).

See AWARD . **I. L. R. 44 Bom. 780**

COUNCILLOR.

See BOMBAY DISTRICT MUNICIPALITIES ACT (BOM. ACT III OF 1901), S. 42

I. L. R. 40 Bom. 166

COUNSEL.

See BARRISTER . .

See MALICIOUS PROSECUTION.

14 C. W. N. 86

———— **Bar Council, Resolutions of**—

See LIMITATION **I. L. R. 40 Calc. 898**

———— **duties of**—

See BARRISTER **I. L. R. 44 Calc. 741**

See EX-PARTE CASE.

I. L. R. 44 Calc. 573

———— **professional conduct of**—

See COUNSEL AS WITNESS.

See LIMITATION **I. L. R. 40 Calc. 898**

———— **telegram from**—

See BAIL **I. L. R. 38 Calc. 293**

———— Mr. *X*, a Counsel, on direct instructions from client inserted a ground in the memo. of appeal which constituted a libel on the Judge in the Court below. *Held,* that the conduct of *X* was highly improper. It is no disqualification for a Judge trying a case that before his appointment he was Counsel in other matters for one of the parties. JACOB AND COMPANY *v.* RASH BEHARI GHOSE

I. L. R. 47 Calc. 828

COUNTER-CLAIMS.

———— *Counter-claims by defendant against plaintiffs individually—Original Side Rule No. 47—English Supreme Court Rules, O. XIX, r. 3, construction of.* Where two or more plaintiffs sue for a joint claim, a defendant may set up counter-claims against the plaintiffs individually. The Court has a discretion under r. 47 of the Original Side rules in such a case to decline to allow the counter-claims to be set up on the ground of inconvenience. RAMANADAN CHETTY *v.* ABDUL KARIM SAHIB (1910)

I. L. R. 34 Mad. 226

COUNTERFEIT COIN.

See PENAL CODE SS. 235, 243.

4 Pat. L. J. 525

———— *Possession—Custody —"To become possessed," whether "conscious possession"—Possession with knowledge—Penal Code (Act XLV of 1860), ss. 7 27, 243—Misdirection—Review—Powers of High Court—Letters Patent, 1865, cl. 26—Criminal Procedure Code (Act V of 1898), s 537.* PER CURIAM. To constitute an offence under s. 243 of the Penal Code it is essential to prove that at the time the accused became possessed of the coin he knew it to be counterfeit, whether he was in possession of the coin himself, or his wife, clerk, or servant was in possession of the coin on his account. As

COUNTERFEIT COIN—*contd.*

there was a misdirection to the Jury in a part of the Judge's summing up which related to a material and essential element of the charge the conviction should be set aside in review under cl. 26 of the Letters Patent. *Per* MOOKERJEE, *J.* The term "possession" has to be interpreted in the light of s. 27, Indian Penal Code, which by virtue of s. 7 is applicable wherever the term is used in the Code. S. 27 abolishes the distinction recognized in English law between possession and custody. S. 537 of the Criminal Procedure Code has no application to a case reviewed under cl. 26 of the Letters Patent. Mere non-direction is not necessarily misdirection. *Rex* v. *Stoddart, 2 Cr. App. Rep. 217,* followed. The Judge's note of his charge to Jury is conclusive. *King-Emperor* v. *Upendra Nath Das, 21 C. L. J. 377, 19 C. W. N. 653* referred to. *Per* FLETCHER, *J.* The point of time to be considered was the time when the accused had actual or conscious possession of the counterfeit coins for determining whether he had knowledge at the time that the coins were spurious. *Per* CHAUDHURI, *J.* There is a clear distinction in law between "custody" and "possession." Custody means possession on account of another. S. 27, Indian Penal Code, does not express the complete thought of the legislature on the question of possession, and it is competent to the Court to interpret the words "to b

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COUNTERFEITING TRADE-MARK.

See TRADE-MARK **I. L. R. 40 Calc. 281**

"COURT."

See PRACTICE **I. L. R. 34 Bom. 408**

See WORDS AND PHRASES

——— **duty of—**

See INTEREST . **I. L. R. 42 Calc. 690**

——— **inherent powers of—**

See EXECUTION OF DECREE. **I. L. R. 34 All. 518**

——— **not closed, if the officer on tour—**

See MADRAS ESTATES LAND ACT (I OF 1908), s. 192 **I. L. R. 38 Mad. 295**

——— **power of—**

See INTEREST . **I. L. R. 43 Calc. 632**

See PENALTY . **I. L. R. 44 Calc. 162**

——— *Offence brought under the notice of the Court in the course of a judicial proceeding—Proceeding instituted by one Munsif for resistance to attachment of moveables in execution—Preliminary inquiry and final order by successor—Legality of order—"Judicial proceeding"—Execution proceedings—Criminal Procedure Code (Act V of 1898), ss. 4 (m), 476.* The word "Court" in s. 476 of the Criminal Procedure Code includes the successor of the Judge

"COURT"—*contd.*

notice of the Munsif, on the 23rd December 1908 the fact of resistance to the attachment of moveables in execution of his decree, and the Munsif called upon the opposite party to show cause but his successor, after holding a preliminary inquiry under s. 476 of the Code, ordered their prosecution on 6th October 1909, for offences under ss. 183, 186 and 353 of the Penal Code. *Held,* that the order was not without jurisdiction. Action under s 476 should, as far as possible be prompt and expeditious, and not unduly protracted. The definition of a "judicial proceeding" in s. 4 (*m*) of the Criminal Procedure Code is not exhaustive It includes an execution proceeding; and the resistance to the attachment of moveables is, when reported or complained of to the Court, an offence brought under its notice in the course of a judicial proceeding within the meaning of s. 476 of the Code. BAHADUR *v.* ERADATULLAH MALLICK (1910) . . **I. L. R. 37 Calc. 642**

——— *Limitation Act (XV of 1877), s 14—Interpretation—Court in British India—Court in a Native State in India not included.* The word "Court" as used in s. 14 of the Indian Limitation Act (XV of 1877) means a Court in British India, and not a Court in a Native State of India. CHANMALAPA CHENBASAPA *v* ABDUL VAHAB (1910) . . . . **I. L. R. 35 Bom. 139**

COURT-FEE.

See AD VALOREM COURT-FEE.

See APPEAL IN FORMA PAUPERIS. **I. L. R. 40 Mad. 687**

See CIVIL PROCEDURE CODE, 1882, s. 411. **I. L. R. 34 All. 223**

ss. 268, 278, 283. **I. L. R. 38 Bom. 631**

See CIVIL PROCEDURE CODE—

s. 115 . . **I. L. R. 39 All. 723**

s. 47, O. XXX . **4 Pat. L. J. 166**

O. XXXIII, R. 13. **I. L. R. 35 Bom. 448**

O. XXXIV, R. 6 **I. L. R. 40 All. 553**

See COURT-FEES AMENDMENT ACT, 1899 **I. L. R. 41 Calc. 556**

See COURT-FEES ACT (VII OF 1870)—

ss. 5 AND 12 . **I. L. R. 32 All. 59**

s. 7 . . **I. L. R. 35 All. 92, 94**

s. 7 (ii) SCH. II, ART. 17. **I. L. R. 42 All. 353**
I. L. R. 36 All. 500

s. 7 (IX), SCH. I, ART. 1. **I. L. R. 36 All. 40**

SCH. I, ART. 1 **I. L. R. 40 All. 93**
I. L. R. 36 All. 322

See DECLARATIONS, AND INJUNCTIONS **I. L. R. 38 Mad. 922**

See GHATWALI TENURES. **I. L. R. 41 Calc. 812**

See MADRAS CIVIL COURTS ACT (III OF 1873), ss. 12, 13. **I. L. R. 39 Mad. 447**

See MESNE PROFITS . **3 Pat. L. J. 116**

COURT-FEE—*contd.*

See SUCCESSION ACT (X OF 1865), s. 187
I. L. R. 38 Mad. 988

——— **acceptance of, by Deputy Registrar—**

See APPEAL, VALUATION OF.
I. L. R. 37 Calc. 914

——— **Appeal from order disallowing interest—**

See DECREE.
6 Pat. L. J. 676

——— **deficit—**

See JURISDICTION **I. L. R. 41 Calc. 520**

——— **non-payment of—**

See RES JUDICATA **I. L. R. 35 Bom. 38**

——— **Whether High Court will revise interlocutory order—**

See CIVIL PROCEDURE CODE, 1908
5 Pat. L. J. 400

See EXECUTION OF DECREE.
5 Pat. L. J. 235

——— *deficit, not due to mistake—Extension of time if proper—Limitation.* When an order allowing a plaintiff to deposit deficit court-fees has been made and complied with no question of limitation can be raised. But it is not proper for a Court to extend the period of limitation allowed by law to the prejudice of defendants, by giving the plaintiff time to deposit deficit court-fees when there is no question of any mistake merely to suit the convenience of the plaintiff. SAMBHO KUOR *v* HARIHAR PERSHAD (1914) . . **18 C. W. N. 1071**

——— *Court-fee on memorandum of appeal—Appeal from Order under s. 144 of the Civil Procedure Code (Act V of 1908)—Order, if comes under s. 47 (i) of the Code—Government Notification prescribing Court-fee of Rs. 2.* An order under s. 144 of the Civil Procedure Code comes under s. 47 (*1*) of the Code. Cl. (*6*) of the notification of the Government of India, No. 4650, dated 10th September, 1889, applies to appeals from such orders, and a Court-fee of Rs. 2 is chargeable on such appeals. MADAN MOHAN DE *v.* NOGENDRA NATH DE (1917)
21 C. W. N. 544

——— *Declaratory suit—Consequential Relief.* S. 42 of the Specific Relief Act does not sanction every form of declaration but only a declaration that the Plaintiff is "entitled to any legal character or to any right as to property"—Court fee of Rs. 10 is not sufficient for declaratory suits in strict sense—An injunction is consequential relief. DEOKALI KOER *v.* KEDAR NATH . . . . **I. L. R. 39 Calc. 704**

——— *Appeal for appellate order—Court-fee payable.* Where a suit for possession was dismissed by the first Court and the appellate Court holding that the Plaintiff was entitled to possession sent the case back to the first Court for ascertainment of the mesne profits. *Held*, that the appellate Courts order amounted to a reversal of the decision of the first Court and the Plaintiff should have been given a decree for possession. *Held*, further that an appeal presented by the defendants against the order of the appellate Court was an appeal from an appellate decree and should have been made on an *ad valorem* Court-fee. RAGHUNATH DAS *v.* JHARI SINGH **3 Pat. L. J. 99**

——— *Mesne Profits—Appeal as to.* A memorandum of appeal from an order dismissing an application for ascertainment of mesne profits must be stamped with an *ad valorem* stamp on the amount claimed. NARAIN PRASAD *v.* SHEO KAMESWAR PRASAD SINGH
3 Pat. L. J. 101

——— *Suit for redemption of mortgage—Preliminary decree passed in two parts—Appeal.* The Court of first instance in a suit for redemption of a mortgage passed in effect two preliminary decrees. It first passed a decree declaring the plaintiffs' right to redeem, which was denied by the defendants, against which the defendants filed an appeal, and then, whilst the appeal was pending, a second preliminary decree deciding the amount for which redemption might take place. Against that decree also the defendants appealed. *Held*, that the two appeals were not to be regarded as separate appeals for the purpose of assessing the Court-fee, but should be counted as one. LALTA PRASAD *v.* SHEORAJ SINGH (1917) . . **I. L. R. 39 All. 452**

——— *Appeal—"Decree"—Civil Procedure Code (1908), O. XXXIV, r. 6—Order rejecting application for a decree over against the mortgagor.* An order on an application for a decree under O. XXXIV, r. 6, of the Code of Civil Procedure is a "decree" as that term is defined in the Code. An appeal, therefore, from such an order must bear an *ad valorem* court fee stamp, and not merely a stamp of Rs. 2. MUHAMMAD ILTIFAT HUSAIN *v.* ALIM-UN-NISSA BIBI (1918) . **I. L. R. 40 All. 553**

——— *Appeal—Memorandum of Appeal insufficiently stamped—Conditional admission by Division Bench, effect of—Whether deficit can be paid after expiration of limitation—Negligence of Vakil, effect of—Court-fees Act VII of 1870), s. 4—Limitation Act (IX of 1908), ss. 2 (7) and 5.* Where the mortgagee of property which had been sold for arrears of revenue instituted a suit on the mortgage against the mortgagor the transferees from him and the revenue sale purchasers, and obtained a decree, the lower Court holding that the revenue-sale purchasers were *benamidars* for the transferees from the mortgagor: *held*, that an appeal, the valuation of which was fixed at Rs. 20,000, by the revenue-sale purchasers and which was declared to relate to "a declaration that the revenue-sale is not a *farzi* transaction and that properties purchased by the appellants (the revenue-sale purchasers) are not liable for the mortgage,' should have been stamped with an *ad valorem* Court-fee, as the real object of the appeal was to release the properties purchased by the appellants at the revenue-sale from liability under the mortgage. It appeared that on the 20th August the deficit in Court-fee had been brought to the notice of the appellants' Vakil, and that in November he expressed his willingness to pay the deficit. The matter then went before a Divisional Bench. In the meanwhile the period of limitation had expired. The Divisional Bench passed the following order: "Subject to any objection that may be taken at the hearing, let the deficit Court-

COURT-FEE—*contd.*

fee be received if paid by Monday next." *Held,* (i) that the order of the Divisional Bench was not a definite order condoning the delay in filing the deficit; (ii) that under s 4 of the Court-fees Act, 1870, the Court could not receive an appeal which was not properly stamped; and (iii) that the filing of the appeal on a Court-fee of Rs. 10, with an explanation that this sum was paid "as it is not possible to estimate at a money-value the subject-matter in dispute," was not done in good faith within the meaning of s. 2 (7) of the Limitation Act, 1908, and that the conduct of the Vakil when the deficit in Court-fees was brought to his notice was want only negligent, and that, therefore, the appellants were not entitled to the benefit of the Court's clemency under s. 5 of that Act. JODHAN PRASAD SINGH *v.* NANHKU PRASAD SINGH **3 Pat. L. J. 484**

——— *Suit for avoidance of a registered deed of gift.* In a suit for the avoidance of a registered deed of gift the Court is bound if the Plaintiff proves his case to send a copy of the Court's order to the officer in whose office the instrument has been registered. This is consequential relief for which the Plaintiff must pay *ad valorem* Court-fee. MUSSAMMAT NOOWOOAYAR OJAIN *v.* SHIDAR JHA . . **3 Pat. L. J. 194**

——— *dismissal of suit for possession—decision reversed by appellate Court and suit remanded for ascertainment of mesne profits—appeal from appellate order, Court-fee payable on.* Where a suit for possession was dismissed by the first Court, and the appellate Court, holding that the plaintiff was entitled to possession, sent the case back to the first Court: *held,* that the Court for ascertainment of Where an appeal against costs is distinct and separate from other parts of the appeal court-fees must be paid *ad valorem* on the costs decreed. Where an appellant has failed to pay sufficient fees in the courts below his appeal will not be heard till the deficiency is made good. Where it is the respondent who was in default no decree shall be executed in his favour until the deficiency has been made good· T. K. ROWLINS *v.* LACHMI NARAIN JHA . . . . . **3 Pat. L. J. 443**

——— *Suit for declaration and possession—Court-fees Act (VII of 1870), s. 7 (4) (c).* Where the holder of an eight-anna *mukarrari* interest in an estate which was sold for arrears of Government revenue sued for a declaration that the sale was invalid by reason of fraud and irregularity in its conduct, and prayed for confirmation or restoration of possession: *held,* that the plaintiff must pay an *ad valorem* court-fee on the value of the whole estate sold, and was not entitled to calculate an *ad valorem* fee on ten times the amount of the Government revenue. RAJA DHAKESWAR PRASAD SINGH *v.* JIVO CHOUDHRY . . . **3 Pat. L. J. 448**

——— *Power of High Court to order refund of excess—Code of Civil Procedure (Act V of 1908), s 151.* In the exercise of its inherent powers the High Court has power to make an order directing the Taxing Officer to issue the necessary certificate to enable an appellant to apply to the Revenue authorities to obtain a refund of excess court-fee paid on a memorandum of appeal. CHANDRADHAR SINGH *v.* TIPPAN PRASAD SINGH . . **3 Pat. L. J. 452**

COURT-FEE—*contd.*

——— *Declaratory suit—Consequential relief—Injunction, prayer for—Endowments—Valuation of suit—Jurisdiction—Specific Relief Act (I of 1877), s. 42—Court-fees Act (VII of 1870), s. 7 (iv) (c)—Suits Valuation Act (VII of 1877), s. 8.* The plaintiff brought a suit for declaration that he was the sole *shebait* of the family deity and was entitled as such to exclusive possession of the disputed properties on behalf of the deity, and also for a declaration that the registration of the name of the principal defendant as joint owner of the endowed properties with the plaintiff in the books of the collector, was improperly made. He valued the suit for purposes of jurisdiction, at Rs. 11,005, and paid Rs. 10 as court-fee under Sch. II, Art. 17 (iii) of the Court-fees Act, subsequently on an objection taken under s. 42 of the Specific Relief Act by the principal defendant at the hearing of the suit, a prayer was added in the plaint for an injunction prohibiting the principal defendant from interfering with the plaintiff performing his duties as *shebait* and managing the *debutter* properties and a further *ad valorem* fee was paid by the plaintiff under Sch. I, read with s 7 (iv) (d) of the Court-fees Act, for the injunction. The Court of first instance having heard the suit and dismissed it on the merits, the plaintiff appealed to the High Court, and upon the memorandum of appeal he paid Court-fees in the same manner as in the Court of first instance: *Held,* that the prayer for injunction was arbitrarily undervalued, that its value was the value of the relief claimed, and that the plaintiff was bound to pay *ad valorem* Court-fees upon the plaint and memorandum of appeal on the basis that the value of the relief claimed was Rs. 11,005. *Umatul Batul* v. *Nanji Koer, 11 C. W N. 705, 6 C. L. J. 427, Dayaram Sagjivan* v. *Gordhandas Dayaram, I. L. R. 31 Bom. 72* and *Boida Nath Adya* v. *Makhanlal Adya, I. L. R. 47 Calc 680,* referred to. RAJ KRISHNA DEY *v.* BIPIN BIHARY DEY (1912) **I. L. R. 40 Calc. 245**

——— *Declaratory decree, suit for—consequential relief—Plaint, rejection of—Civil Procedure Code (Act V of 1908), O. VII, r. 11—Valuation of suit—Court Fees Act (VII of 1870), s. 7, paras. iv, cl. (c), v. cl. (a)—Valuation for purpose of jurisdiction—Suits Valuation Act (VII of 1887), s. 8.* In a suit for declaration that a decree amounting to Rs. 2,794 and odd should be declared forged, illusory and unfit for execution and also for a declaration that a family property valued at Rs. 7,000 was not liable to be sold in execution of that decree, the plaintiff paid Court-fee ten times the Government Revenue payable on the land worth Rs. 7,000. The court below rejected the plaint:—*Held,* that the real value of the reliefs claimed was Rs. 2,794 and odd, the value of the decree and that, the plaintiff not having paid court-fee on that amount, the plaint was rightly rejected. A plaintiff cannot value his case for the purpose of Court Fee and for the purpose of jurisdiction at different amounts. HARIHAR PERSAD SINGH *v.* SHYAM LAL SINGH (1913) . . . **I. L. R. 40 Calc. 61F**

——— *Administration Suit—*

COURT-FEE—*contd.*

been made other creditors invited establish their claims may be required to pay *ad valorem* fees. SHASHI BHUSAN BOSE *v.* MANINDRA CHANDRA NANDY . . **I. L. R. 44 Calc. 890.**

———————— *Suit for declaration that entry in Record-of-Rights a nullity.* Where a Court Fee of Rs. 10 was paid in a suit under s. 111A of the Bengal Tenancy Act but the plaintiff prayed for a declaration (*a*) that they were Occupancy Ryots and (*b*) that the entry in the Record-of-Rights showing them as tenure holders was a nullity and plaintiffs on being applied to for the deficit of Court fee on the second head of relief failed. *Held*, (1) that the second prayer being for consequential relief was not such a declaration as was contemplated by the proviso to s. 111A (2) that the judge had no alternative but to reject the plaint, (3) that the plaintiff could not be allowed to strike out the second prayer. MIDNAPUR ZEMINDARY CO., LD., *v* THE SECRETARY OF STATE FOR INDIA **I. L. R. 44 Calc. 352**

———————— In a suit for a declaration that a decree for over Rs. 22,000 was bad and might be set aside the plaintiffs who were interested in only three annas share of the property which was valued at Rs. 9,000 were required to pay a court-fee for the whole of the decretal amount. *Held*, that the plaintiffs must value their suit according to the extent of their claim and the court-fee was payable on that amount. GANESH BHAGAT *v.* SARADA PRASAD MUKERJEE **I. L. R. 42 Calc. 371.**

———————— *Suit for administration or account.* In an administration suit valued at Rs. 30,000 for purpose of jurisdiction and Rs. 100 for adjustment of accounts and wherein court-fees were paid on the latter sum only together with Rs. 10 for the approximate value of the claim for account. *Held* that such a suit was in essence a suit for account within s. 7 (iv) of the Court-Fees Act and that adequate court-fees had been paid. SARAJU BALA DASI *v.* JOGEMAYA DASI **I. L. R. 45 Calc. 634.**

———————— *Suit to set aside mortgage decree, court-fees payable on—Practice—power of High Court to interfere with interlocutory orders.* Where the plaintiffs sued to set aside a mortgage decree for Rs. 12,200 and it was shown that their share in the property affected by the decree was Rs 1,300, *held*, that they were liable to pay court-fees on the latter sum only. Where the record of a case is before the High Court and there appears on the record an obvious error the Court will dispose of the matter at whatever stage it may happen to be. BANKEY BEHARI *v.* RAM BAHADUR **4 Pat. L. J. 191**

———————— *Suit by several raiyats for declaration of rent payable.* Where 78 *raiyats* instituted a suit in respect of 78 holdings (*1*) for a declaration that the rents entered in the *khatian* were higher than the rents actually payable; and (2) for a declaration that 59 rent decrees which the landlord had obtained at the higher rates were contrary to law: *held*, that a court-fee of Rs. 10 should have been paid in respect of each of the 137 causes of action, namely, 78 declarations that the rents entered in the *khatian* were wrong and 59 declarations that the decrees obtained were contrary to law. CHETHRU MAHTO *v.* KHAJA MUHAMMAD KARIM NAWAB **4 Pat. L. J. 297**

———————— *Suit for possession—decree on condition that plaintiff pays off encumbrances—appeal against condition, court-fees, payable on.* Where a suit for possession was decreed conditionally on the plaintiff paying off all encumbrances on the property and the plaintiff appealed against that part of the decree which required him to pay off the encumbrances, *held*, that court-fees on the memorandum of appeal were payable *ad valorem* on the value of the encumbrances. KISHUN DUT MISIR *v.* KASI PANDEY . **5 Pat. L. J. 455**

———————— *Deficiency due from respondent on account of fees paid in lower court——appeal summarily dismissed, whether deficiency recoverable—Procedure—Court-Fees Act (VII of 1870), ss. 10 and 12.* When an appeal has been dismissed by the High Court under O. XLI, r. 11, of the Code of Civil Procedure, 1908, the court has no power to recover from the respondent, who was appellant in the court below, a deficiency in court-fee due on the memorandum of appeal filed by him in that court. *Semble.*—That if in such a case the second appeal resulted in a decree in the respondent's favour the High Court would be competent under its inherent powers to refrain from signing the decree until payment of the deficit. Whenever it is intended to recover a deficit from a respondent before the High Court in respect of something due in the lower court the proper procedure is to admit the appeal for hearing and to take action under s. 12 read with s.10 of the Court-Fees Act, 1870. RAJDEO NARAIN SINGH *v.* RAMDIL SINGH **5 Pat. L. J. 508**

———————— Where in a suit for partition the plaintiff prays for a declaration of his title and confirmation of possession in order to disperse a cloud cast on his title by reason of an entry in the Record-of-Rights stating that defendant was in exclusive possession of part of the land which formed the subject matter of the suit an *ad valorem* court-fee is payable on the value of the plaintiff's share in the land in respect of which his name has not been entered in the Record-of-Rights in addition to the fixed fee for partition. RACHHYA RAUT *v.* MUSAMMAT CHANDO **6 Pat. L. J. 662**

———————— *Two appeals from one decree—Subsequently two second appeals filed by the same party, the subject matter being the same—Consolidation of appeals.* The Court Fees Act, 1870, does not provide for consolidation of appeals. If, therefore, there are two appeals in the same suit, and then one party files two second appeals—one against each decree in first appeal—the appellant will have to pay the full court-fee on each of his appeals. SHIB DAYAL *v.* MEHARBAN **I. L. R. 43 All. 56**

———————— *Appeal from a decree for redemption of a mortgage on payment of Rs. 62,293, the principal amount of which was Rs. 6,400—Court Fees Act, VII of 1870, s. 7, cl. IX and Sch. I, Art. I—whether Court should allow appellant time to make up deficiecy in Court-fee—Civil Procedure Code, Act V of 1908, s 149.* The plaintiff sued for redemption of 3 mortgages, of which

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the principal amount totalled to Rs. 6,400. He alleged that nothing remained due by him under the mortgages The Court decreed redemption on payment of Rs. 62,293. Plaintiff appealed to this Court so far as the payment of money was concerned and valued his appeal for purpose of Court-fees at Rs. 6,400 and paid Court-fee accordingly. At the hearing of the appeal it was objected that the appeal was not properly stamped. *Held,* that Art. I, Sch. I of the Court Fees Act, applied to the appeal and not cl. IX of s 7, and that the proper Court-fee was therefore *ad valorem* on the amount of the subject matter in dispute in the appeal. *Banwari Das* v. *Nathu Shah (5 P R. 1911), Chuni Lal* v. *Beli Ram (58 P. R. 1915), Mansa Ram* v. *Umra (11 Indian Cases 198), Reference under Court Fees Act, 1870) (I. L. R. 29 Mad. 367)* and *Nepal Rai* v. *Debi Prasad (I L. R. 27 All. 447),* followed. *Pirbhu Narain* v. *Sita Ram (I. L. R. 13 All. 94)* and *Bombay Unreported Printed Judgments, 1891, page 218,* disapproved. *Held, also,* that as the omission to pay the proper Court-fee was not due to a *bonâ fide* mistake but was deliberate the Court must decline to allow the appellant time under s 149 of the Code of Civil Procedure to enable him to make up the deficiency. *Ram Sahay Ram Pandey* v. *Lakshmi Narain (42 Indian Cases 672), Saidunnessa* v. *Tajendra Chandradhar (44 Indian Cases 398)* and *Civil appeal No 285 of 1915* (unpublished), referred to LEKH RAM v. RAMJI DAS . . **I. L. R. 1 Lah. 234**

———————— To bring a case within [illegible]

KRISNNA LAL DE . **I. L. R. 39 Calc. 906.**

COURT-FEE STAMP.

———————— *s. 477A of the Penal Code refers to acts relating to Book-keeping.* The removal of new Court-fee stamps for documents and substitution of used ones is not within the section. EMPEROR v. BIBUDHANANDA CHAKRAVARTI . . . **I. L. R. 47 Calc. 71.**

COURT-FEES ACT (VII OF 1870).

———————— **s. 4**—

See COURT-FEES . **3 Pat. L. J. 484**

———————— ss. 4, 6 and 28—*Appeal filed on insufficient stamp, jurisdiction of Court to entertain —Code of Civil Procedure (Act XIV of 1882), ss. 54, 582 and 582 A—(Act XIV of 1882), s. 169 and O. VII, r. 11—Limitation Act (IX of 1908), s. 5—"sufficient cause" whether difficulty in obtaining stamps is.* Where an appellant has deliberately, and to suit his own convenience, paid on his appeal an insufficient court-fee the court is not bound to receive the appeal and give the appellant time to make good the deficiency. Even if the court has power to receive such an appeal, and allow time for the deficiency to be made good, it would be an unreasonable exercise of its jurisdiction to do so. *Semble*—that an appellant who is prevented from filing an appeal within time by difficulties encountered procuring the necessary court-fee stamps may possibly rely upon those difficulties as constituting "sufficient cause" within the meaning of s. 5 of the

COURT-FEES ACT (VII OF 1870)—*contd.*

———————— **s. 4**—*contd.*

Limitation Act, 1908. RAM SAHAY RAM PANDE v. KUMAR LACHMI NARAYAN SINGH **3 Pat. L. J. 74**

———————— s. 5—Taxing officer—finality of order. [illegible]

by the lower court was correct and ordered the plaintiff appellant to pay such fee on his memorandum of appeal, *held,* that the Taxing Officer's order was final and not open to question before the appeal was admitted. MUSAMMAT CHANDERBATI KUER v. GOREY LALL SINGH **4 Pat. L. J. 700**

———————— ss. 5 and 7—*Court-fee—Objections by mortgagee asking for sale of a portion of the mortgaged property exempted by the Court from sale—Reference by Taxing Judge to a Division Bench—Jurisdiction. Held,* that where a party objects by way of appeal or under the provisions of O. XLI, r. 22, of the Code of Civil Procedure to a decree of a subordinate court excluding from liability a portion of certain property, the whole of which he claims to be liable for a mortgage debt, and while accepting the correctness of the amount found due asks that the excluded portion of the property may be also declared liable, court-fees should be paid with reference to the value of the property sought to be rendered liable. *Kesavarapu* v. *Kotta Reddi, I. L. R. 30 Mad. 96,* followed. Where the Taxing Judge referred to a Division Bench a question relating to court-fees referred to him by the Taxing Officer: *Held,* that the Bench had no authority to entertain such reference. KACHERA v. KHARAG SINGH (1910) . . . . **I. L. R. 33 All. 20**

———————— **ss. 5, 12**—

———————— *Court-fee—Decision of Taxing Officer final as to category.* The decision of the Taxing Officer as the proper amount of court-fees payable on a memorandum of appeal, as also incidentally his decision as to the category within which the suit falls, is final and binding upon the Court under s. 5 of the Court-Fees Act, 1870. KUNWAR KARAN SINGH v GOPAL RAI (1909) **I. L. R. 32 All. 59**

———————— *Whether appeal lies* [illegible]

tion that a document or decree is void or inoperative the court-fee to be paid must be calculated on the actual value of the property. LAGAN BAST KUER v. KHAKAN SINGH . **3 Pat. L. J. 92**

———————— s. 5, Sch. I, Art. 1, Sch. II, Art. 17, cl. (6)—

See APPEAL, VALUATION OF. **I. L. R. 37 Calc. 914**

COURT-FEES ACT (VII OF 1870)—*contd.*

——— **s. 6**—

See s. 4 . . **3 Pat. L. J. 74**

——— **s. 7**—

See s. 5 . . **I. L. R. 33 All. 20**

——— **s. 7 (II) and (IV) (c)**—"*other sums payable periodically,*" *whether rent is.* A sum of money payable as rent does not come within the meaning of the words "other sums payable periodically" in s. 7 (*IV*) (*c*) of the Court-Fees Act, 1870. The landlord sued for assessment of rent and recovery of a certain specific sum of money as damages for use and occupation of the land, and the first court fixed Rs. 10-2 per bigha as the rent and awarded damages calculated at that rate for six years. The tenants appealed and paid a court-fee on the memorandum of appeal calculated in accordance with s. 7 (*IV*) (*c*). The appellate court rejected the appeals on the ground that the court-fee should have been calculated in accordance with s. 7 (*II*). *Held*, that the suits were suits to obtain "declaratory decrees or orders where consequential relief was prayed for," and came within 7 (*IV*) (*c*). KALI CHARAN ROY *v.* MAHARAJA BAHADUR KESHO PRASAD SINGH . . . . . **4 Pat. L. J. 561**

——— **s. 7 (ii), Sch. II, 17 (ii)**—*Court-fee—Suit for a sum payable periodically, the reliefs claimed being, first, a declaration of plaintiff's title and, secondly, a specified amount of arrears.* Plaintiff sued for a declaration of her right and that of her descendants to receive a certain annuity, as also for arrears of the same. The reliefs prayed for were thus stated in the plaint :—(*a*) "It may be declared as against the defendants that the plaintiff and her descendants, generation after generation, are entitled to receive from the defendants and their representatives Rs. 100 per mensem, which is a charge on the property mentioned in Schedule A" ; (*b*) "A decree awarding Rs. 1,800 on account of the monthly allowance at the rate of Rs. 100 per mensem for 18 months . . . may be passed." A court-fee of Rs. 10 was paid in respect of relief (*a*), and an *ad valorem* fee in respect of relief (*b*). *Held,* that the suit was one to which s. 7, cl. (*ii*), of the Court-Fees Act, 1878, applied and the court-fee payable in respect to relief (*a*) was consequently to be assessed on a valuation of ten times the amount claimed to be payable for one year. SHAHZADI BEGAM *v.* MAHBUB ALI SHAH . . . . . **I. L. R. 42 All. 353**

——— **s. 7 IV (a)**—

See COURT-FEE . . **3 Pat. L. J. 448**

——— *Suits Valuation Act (VII of 1887), s. 8—Suit for injunction—Valuation of claim.* The plaintiff, in a suit for injunction, valued his claim for Court-fee purposes at Rs. 10 and for purposes of jurisdiction at Rs. 500. The lower appellate Court accepted the valuation for both purposes at Rs. 500 and asked the plaintiff to pay Court-fees for that amount. On appeal to the High Court *Held*, reversing the order, that, under s. 7, cl. 4 (*a*) of the Court-fees Act, 1870, the plaintiff was entitled to value his claim at Rs. 10 for Court-fee purposes, and that it was wholly unnecessary for him to fix any value for the purposes of jurisdiction as by s. 8 of the Suits Valuation Act the value determinable for the computation of Court-fees and the value for the purposes jurisdiction shall be the same. GOVINDA *v.* HANMAYA (1920) . **I. L. R. 45 Bom. 567**

COURT-FEES ACT (VII OF 1870)—*contd.*

——— **s. 7 (IV) B**—

See CIVIL PROCEDURE CODE, s. 2. **I. L. R. 2 Lah. 114**

——— **s. 7 (IV) C**—

See s. 7 (V & VI).
See s. 10.
See SCH. III.

See COURT-FEE.
I. L. R. 40 Calc. 245, 615
3 Pat. L. J. 194, 448
I. L. R. 42 Calc. 370
I. L. R. 44 Calc. 352

See DECLARATION. **I. L. R. 38 Mad. 922**

See JURISDICTION. **15 C. W. N. 823**

See LIMITATION ACT, 1905, SCH. I ACT 152. **I. L. R. 43 Bom. 376**

——— ——— In a suit for an injunction by way of consequential relief the plaintiff has the right to value his claim for the purpose of Court Fees, and the value for the purpose of jurisdiction is the same. BALKRISHNA NARAYAN *v.* JANKIBAL . . **I. L. R. 44 Bom. 331**

——— *Declaratory suit—Consequential relief, prayer for—Injunction, if consequential relief—Specific Relief Act (I of 1877), s. 42.* S. 42 of the Specific Relief Act does not sanction every form of declaration, but only a declaration that the plaintiff is "entitled to any legal character or to any right as to any property." A court-fee of Rs. 10 is not sufficient for suits that are not "declaratory suits" in the proper sense of the expression. An injunction is a consequential relief. *Marsh* v. *Keith, 1 Dr. & Sm. 342; 62 E. R. 410,* followed. The law as to declaratory decrees discussed. DEOKALI KOER *v.* KEDAR NATH (1912) . . **I. L. R. 39 Calc. 704**

——— *Court-fee—Suit for declaration and consequential relief—Valuation for purposes of court-fee.* A prior mortgagee brought a suit upon his mortgage and obtained a final decree for sale to realize Rs. 6,818-12-5. A puisne mortgagee of part of the property covered by this decree, who had not been made a party to the prior mortgagee's suit, subsequently brought a suit against the prior mortgagee asking, *first*, for a declaration that the defendant was not entitled to bring to sale in execution of his decree the property comprised in the plaintiff's mortgage ; and, *secondly*, for an injunction restraining the defendant from bringing the said property to sale. The first relief was valued at the amount of the defendant's decree, namely, Rs. 6,818-12-5, and a court-fee of Rs. 10 was paid in respect of it. The second relief was valued at Rs. 100 only and a court-fee of Rs. 7-8-0 was paid. *Held*, that the plaintiff was bound to pay an *ad valorem* fee on the amount at which the suit was valued, namely, on Rs. 6,818-12-5. JAGESHAR *v.* DURGA PRASAD SINGH (1914) . . . **I. L. R 36 All. 500**

——— *Declaratory suit—Consequential relief—Injunction, prayer for—Endowment—Valuation of suit—Jurisdiction—Specific Relief Act (I of 1877), s. 42—Court-fees Act (VII of 1870), s. 7 (iv) (c)—Suits Valuation Act (VII of 1877), s. 8.* The plaintiff brought a suit for a declaration that he was the sole *shebait* of the family-deity, and was entitled as such to exclusive possession of the disputed properties on behalf of

COURT-FEES ACT (VII OF 1870)—*contd.*

——— **s. 7 (IV) C**—*contd.*

the deity, and also for a declaration that the registration of the name of the principal defendant as joint owner of the endowed properties with the plaintiff in the books of the Collector was improperly made. He valued the suit, for purposes of jurisdiction, at Rs. 11,005, and paid Rs. 10 as court-fee under Schedule II, Art. 17 (*iii*) of the Court-fees Act. Subsequently, on an objection taken under s. 42 of the Specific Relief Act by the principal defendant at the hearing of the suit, a prayer was added in the plaint for an injunction prohibiting the principal defendant from interfering with the plaintiff performing his duties as *shebait* and managing the *debutter* properties, and a further *ad valorem* fee was paid by the plaintiff under Schedule I, read with s 7 (*iv*) (*d*) of the Court-fees Act, for the injunction. The Court of first instance having heard the suit and dismissed it on the merits, the plaintiff appealed to the High Court, and upon the memorandum of appeal he paid Court-fees in the same manner as in the Court of first instance: *Held*, that the prayer for injunction was arbitrarily undervalued, that its value was the value of the relief claimed, and that the plaintiff was bound to pay *ad valorem* court-fees upon the plaint and memorandum of appeal on the basis that the value of the relief claimed was Rs. 11,005. *Umatul Batul* v. *Nanji Koer, 11 C. W. N. 705 ; 6 C. L. J. 427 ; Dayaram Jagjivan* v. *Gordhandas Dayaram, I. L. R. 31 Bom. 73 ;* and *Boidya Nath Adya* v. *Makhan Lal Adya, I. L. R. 17 Calc. 680*, referred to. RAJ KRISHNA DEY *v.* BIPIN BIHARI DEY (1912)

I. L. R. 40 Calc. 245

——— *Declaratory decree, suit for—Consequential relief—Plaint, rejection of—Civil Procedure Code (Act V of 1908), O. VII, r. 11—Valuation of suit—Court-fees Act (VII of 1870), s. 7, paras. iv, cl. (c), v, cl. (a)—Valuation for purpose of jurisdiction—Suits Valuation Act (VI of 1887), s. 8.* In a suit for declaration that a decree amounting to Rs. 2,794 and odd should be declared forged, illusory and unfit for execution and also for a declaration that the family property valued at Rs. 7,000 was not liable to be sold in execution of that decree, the plaintiff paid Court-fee ten times the Government revenue payable on the land worth Rs. 7,000. The Court below rejected the plaint: *Held*, that the real value of the reliefs claimed was Rs. 2,794 and odd, the value of the decree, and that, the plaintiff not having paid Court-fee on that amount, the plaint was rightly rejected. A plaintiff cannot value his case for the purpose of Court-fee and for the purpose of jurisdiction at different amounts. HARIHAR PRASAD SINGH *v.* SHYAM LAL SINGH, (1913) . . . **I. L. R. 40 Calc. 615**

——— *Plaint —Valuation of Suit—Court Fees Act (VII of 1870), s. 7, sub-s. (4), cl. (c).* In a suit for a declaration that a decree for over Rs. 22,000 was bad and might be set aside, the plaintiffs, who were interested only in three-annas share of the property which was valued at Rs. 9,000 were required to pay Court-fee for the whole of the decretal amount:—*Held*, that the plaintiffs must value their suit according to the extent of their claim and the Court-fee need therefore be paid only upon the amount. *Phul Kumari* v. *Ghanshyam Misra, I. L. R. 35 Calc. 202*, and *Harihar Prasad Singh* v. *Shyam Lal Singh, I. L. R. 40 Calc. 615*, referred to. GANESH BHAGAT *v.* SARADA PRASAD MUKERJEE (1914)

I. L. R. 42 Calc. 370

COURT-FEES ACT (VII OF 1870)—*contd*

——— **s. 7 (IV) C**—*contd.*

——— In a suit for a declaration of title the value of the property stated in the plaint determines the Court fee payable. KHETRA MOHAN MOHOPATRA *v* GANESH LAL PANDIT (1921) . . . **6 Pat. L. J. 101**

——— *Suits Valuation Act (VII of 1887), s. 8—Suit for declaration and injunction—Valuation of claim —Valuation for purpose of Court-fees—Valuation for purpose of jurisdiction.* In a suit for a declaration and for an injunction by way of consequential relief, the plaintiff has the right to value his claim for the purpose of Court-fees; and value for the purpose of jurisdiction is the same. The plaintiff brought a suit for a declaration and injunction in the Court of the First Class Subordinate Judge under his special jurisdiction, and valued his claim for the purpose of Court-fees at Rs. 135 and for the purpose of jurisdiction at Rs. 16,000 The trial Court having dismissed the suit, the plaintiff preferred an appeal to the High Court At the hearing he raised a preliminary point that the appeal lay to the District Court and prayed for the return of memorandum of appeal so that it could be presented to that Court: *Held*, overruling the preliminary point, that on the special facts of the case the plaintiff should be taken to have filed the suit properly in the Court below under its special jurisdiction, and to have filed the appeal properly in the High Court. BALKRISHNA NARAYAN *v.* JANKIBAI (1919) . . **I. L. R. 44 Bom. 331**

——— *"consequential relief" —mortgage—suit for sale—sale ordered subjects to incumbrance—appeal.* In a suit by a mortgagee for sale of the mortgaged property defendant No 3 was impleaded on the ground that he held a deed of conditional sale in which there was a recital of a mortgage prior to the plaintiff's mortgage in respect of the same properties. The first Court decreed the suit but the lower appellate Court held that the property could only be sold subject to defendant No. 3's deed which was for Rs. 14,000 The plaintiff appealed and valued his appeal at Rs 14,000 but paid a court-fee of Rs. 10 only. He prayed that the decree should be modified "by removing the condition as to priority of the defendant No. 3 and its redemption by the appellant." *Held*, that an *ad valorem* court fee on Rs. 14,000 should have been paid. PREMSUKH DAS *v.* SHAH GOPI SARAN

4 Pat. L. J. 323

——— *Declaratory suit with consequential relief, basis of valuation in—suit to set aside mortgage decree and sale and to obtain possession, fees payable in.* When consequential relief is sought in addition to a declaration the plaintiff is bound to fix a reasonable valuation upon the consequential relief, and if he puts a ridiculous value upon it the court must fix a reasonable value for him, dealing with each case on its own merits. Two *Mitakshara* sons filed two suits to set aside decrees made upon mortgages executed by their father and sales held under such decrees, and to obtain possession of their individual shares in the joint family property. *Held*, that in effect the suits [illegible] not for recovery of [illegible] ons

COURT-FEES ACT (VII OF 1870)—*contd.*

———— s. 7 (IV) C—*concld.*

with consequential relief and that, therefore, the court-fee payable in each case was not a sum equal to ten times the Government revenue but an *ad valorem* fee calculated on the value of the plaintiff's share in the joint family property. SHAMA PRASAD SAHI *v.* SHEOPERSAN SINGH
5 Pat. L. J. 394

———— s. 7 (IV) (C) and (V)—*Suit for possession as adopted son—validity of adoption contested—court-fees payable.* In a suit for possession of an estate on the ground that he had been validly adopted by the widow of the last male owner under the authority of the latter the plaintiff valued the suit for purposes of court-fees at ten times the Government revenue as if it were a suit for possession only. The validity of the adoption was contested by the defendants. *Held,* that the suit was in effect a suit for declaration that the plaintiff was the adopted son of the last male owner and for consequential relief, namely, possession, and that therefore *ad valorem* court-fees were payable under s. 7 (*iv*) (*c*) of the Court-Fees Act, 1870. UGRAMOHAN CHAUDHRY *v.* LACHMI PRASAD CHOUDHRY . 5 Pat. L. J. 339

———— s. 7, cls. (iv) (c) and (v)—*Suit for declaration of the invalidity of a decree as against the plaintiff or his properties and for possession of some of those properties sold under the decree—Relief for possession only consequential on grant of declaration—No liability to value the declaration as on the amount of the decree—Plaintiff's right to give a combined valuation for both reliefs.* In a suit for (i) a declaration that a certain decree was of no legal effect against the plaintiffs or the properties in their hands and (ii) possession of part of those properties, which had been sold in execution of the decree, *Held,* (*a*) that the two reliefs were connected and were to be taken together, the relief for possession being consequential on the grant of declaration, (*b*) that the plaintiff was entitled to put in respect of both the reliefs a combined valuation for the purpose of court-fees, (iii) that the whole suit was not governed by s. 7, cl. 4 (c) of the Court Fees Act (VII of 1870), as there was a prayer for possession also which was to be valued as per s. 7, cl. 5, notwithstanding that the declaration was asked for, and (iv) that the prayer for declaration was not liable to be valued for purposes of court-fees as upon the amount of the decree sought to be set aside as invalid. RAJAGOPALA *v.* VIJAYARAGHAVALU (1914)
I. L. R. 38 Mad. 1184

———— s. 7 (IV) (c) and Sch. II, Art. 17—

See COURT-FEE. I. L. R. 44 Calc. 352
I. L. R. 40 Calc. 245, 615

———— s. 7, (IV) (f)—

See ADMINISTRATION SUIT.
I. L. R. 44 Calc. 890

See COURT-FEE. I. L. R. 45 Calc. 634

———— *Suit for accounts—Preliminary decree—Appeal by the defendant against the whole decree—Valuation.* In a suit coming under cl. (*iv*), s. 7 of the Court Fees Act, when the plaintiff has valued the relief prayed for and obtained a decree, in this instance; a preliminary decree for an account, and the defendant appeals against the whole decree, he is bound by the valuation in the plaint. *Samiya Mavali* v. *Minammal, I. L. R. 23 Mad. 490,* approved and followed. *Delroos Banoo Begum* v. *Nawab Syud Ashgur Ally Khan, 15 B. L. R. 173* and *Bunwari Lal* v. *Daya Sunker Misser, 13 C. W. N. 815,* referred to. SRINIVASACHARLU *v.* PERINDEVAMMA (1915)
I. L. R. 39 Mad. 725

———— *Suit for administration or account—Valuation for purposes of Court-fees—Jurisdiction—Court Fees Act (VII of 1870), s. 7, cl. IV (f).* In an administration suit valued at Rs. 30,000 for purposes of jurisdiction, and at Rs. 100 for adjustment of account, and wherein court-fees were paid on the latter sum only, together with Rs. 10 for the approximate value of the claim for account. *Held,* that such a suit was in essence a suit for account within the meaning of s. 7, cl. IV (*f*) of the Court-fees Act, and that adequate court-fees had been paid on the plaint which could not be rejected. *Khatija* v. *Shekh Adam Husanally Vasi, I. L. R. 39 Bom. 545, Sasi Bhushan Bose* v. *Maharaja Sir Manindra Chandra Nandy, 24 C. L. J. 448, Satya Kumar Banerjee* v. *Satya Kripal Banerjee, 10 C. L. J. 503,* followed. SARAJU BALA DASI *v.* JOGEMAYA DASI (1917)
I. L. R. 45 Calc. 634

———— s. 7, (IV) (*f*) and s. 11—*Suit for accounts and administration—Valuation of the suit for purposes of court-fees.* In a suit for accounts and administration of the estate by the Court, the claim was valued at Rs. 130 for purposes of Court-fees and at Rs. 30,00,000 for purposes of jurisdiction and pleader's fees. It was contended on behalf of the defendants that the suit had not been properly valued for purposes of court-fees inasmuch as the suit was not an administration suit but was in effect a claim by the plaintiff for her share in the estate. This contention found favour with the lower Courts which held that the suit was not for administration and the stamp duty was payable on the value of plaintiff's share in the property which amounted to Rs. 67,968-12-0. On appeal to the High Court: *Held,* that having regard to the statements in the plaint, an administration suit was maintainable and that it could be treated as a suit for account. The plaintiff would, therefore, be at liberty to value it at Rs. 130 or any other sum under s. 7, cl. IV (*f*) of the Court Fees Act. In the event of a decree being passed for a larger amount than that covered by the fees already paid, the plaintiff would be precluded by the provisions of s. 11 of the said Act from executing such decree until fees liable on the whole amount of the decree had been paid. KHATIJA *v.* SHEKH ADAM HUSENALLY (1915) . . . I. L. R. 39 Bom. 545

———— s. 7, (IV) (f), 11; Sch. II, Art. 17 (vi)—

See ADMINISTRATION SUIT.
I. L. R. 44 Calc. 890

———— s. 7 (V) (a)—

See COURT-FEE—
I. L. R. 40 Calc. 615

———— s. 7, V, (a), c), (d)—

See GHATWALI TENURES.
I. L. R. 41 Calc. 812

———— s. 7, V, (b) Appeal—*Court-fee—Suit for possession—Decree for qualified possession—Appeal seeking to remove the qualification con-*

COURT-FEES ACT (VII OF 1870)—*contd.*

——— **s. 7 (V) (b)**—*contd.*

tained in the decree. Plaintiff brought a claim for possession of certain property as transferee from a Mussammat Gomi, to whom the property had been bec

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granted him a decree for possession, but limited to the life-time of Musammat Gomi. The defendant appealed, and the plaintiff also appealed, seeking to have this condition removed from the decree, and paid a court-fee of Rs. 10 on his memorandum of appeal. *Held,* that the court-fee was sufficient, the plaintiff appellant being in the position of a person in possession of property who sought to clear his title and to obtain a declaration that he had the full right of ownership to the property. RUP CHAND *v.* FATEH CHAND (1911) **I. L. R. 33 All. 705**

——— **s. 7, cl. V (b) and (e)**—*Assessed land—Cocoanut trees thereon—Suit for land and trees—Valuation of suit —Garden, meaning of.* In a suit to recover possession of assessed land on which cocoanut trees stand the valuation should be under s. 7, cl. (*v*) (*b*), and not under cl (*v*) (*e*) of the Court-fees Act (VII of 1870). The word 'garden' in s. 7, cl. (*v*) (*e*) of the Court-fees Act (VII of 1870) should be taken as referring primarily to garden in the English sense, that is, an ornamental or pleasure or vegetable garden attached to a house. *Andothodan Moidin* v. *Pullambath Mamally, I. L. R. 12 Mad. 301,* referred to. The conversion of an assessed arable field into a cocoanut tope does not affect the application of

Venkayya

Murugesa

24 Mad.

v. ABDUL

Mad. 824

——— **s. 7, cl. V. (d)—Suit to recover a two-third share in certain specific plots sold—** *Court fee—Court-fee payable on market value.* Where a Hindu widow possessed of certain zamindari property of the total area of 17 bighas 6 biswas, assessed to a revenue of Rs. 19-7-0, sold 11 bighas and 11 biswas out of the same, which was practically two-thirds of what she possessed, and specified the actual plots sold: *Held,* in a suit by two out of three reversioners to recover two-thirds of the property thus alienated, that, the claim being for specified plots and not a definite share of the whole estate paying revenue, the court-fee should be paid on the market value of the property in suit and not on five times the Government revenue. CHANDHAN *v.* BISHAN SINGH. (1911) . . . . **I. L. R. 33 All. 630**

——— **s. 7, cl. V, sub-cl. XI (cc)**—*Court-Fees Amendment Act (VI of 1905)—Suit to recover immovable property from tenant—Value for jurisdiction and for court-fee, same—Madras Civil Courts Act (III of 1873), s. 14—Suits Valuation Act (VII of 1887), s. 8.* Although suits for recovery of immovable property from tenants have not been expressly withdrawn from the operation of s. 14 of the Madras Civil Courts Act (VII of 1887), the effect of the amendment of s. 7, of the Court Fees Act (VII of 1870) by adding to it cl. (*xi*) (*cc*) is to bring such suits also under the operation of s. 8 of the Suits Valuation Act (VII of 1887) and not under s. 14 of the Madras Civil Courts Act; so that in the case of such suits the valuation for purposes of jurisdiction is the same as for court-fees. NARAYANASWAMI NAIDU *v.* SESHAGIRI ROW (1915) . **I. L. R. 39 Mad. 873**

——— **s. 7, (V) & (VI)**—

See MADRAS CIVIL COURTS ACT (III OF 1873), s. 14 . **I. L. R. 41 Mad. 721**

——— *Court fee—Suit for pre-emption of sale of mortgaged property —Property in possession of usufructuary mortgagee —Possession not claimed. Held,* that in a suit for pre-emption of a sale of land the fact that the land is subject to a usufructuary mortgage and immediate possession cannot be obtained, or is not in fact sought, does not prevent the application of s 7 (*vi*) of the Court-Fees Act to the suit; but the plaintiff must pay court-fees upon the value of the land computed in accordance with s. 7 (*v*) of the Act. *Ram Raj Tewari* v *Girnandan Bhagat, I. L. R. 15 All. 63,* distinguished. DARYAO SINGH *v.* BHARAT SINGH (1909) **I. L. R. 32 All. 19**

——— **s. 7, (V), (X)**—*Court-fee—Suit for specific performance of contract to sell and for possession.* The plaintiffs alleged that the defendants Nos. 2 and 3 having contracted to sell certain property to them and received part of the price, thereafter sold the same property to defendant No. 1, who had notice of the agreement with the plaintiffs, and they asked (i) that the defendants 2 and 3 might be compelled to complete the sale to the plaintiffs and (ii) for possession of the property. *Held,* that the suit was really one for specific performance of a contract and the court-fee thereon was assessable under s. 7, cl. X, of the Court Fees Act, 1870 *Mohi-un-din Ahmad Khan* v *Majlis Rai, I. L. R. 6 All. 231,* referred to. NIHAL SINGH *v.* SEWA RAM (1916) . . . **I. L. R. 38 All. 292**

——— **s. 7 (VI)**—*Suit for pre-emption—Suit partly decreed and partly dismissed—Appeal raising questions both as to true price and as to right to pre-empt—Court-fee.* Five villages were transferred by means of one sale deed, the consideration set forth in the deed being Rs. 44,000 In respect of

ad valorem fee on the difference between 21-44 of Rs. 2,500 and Rs. 21,000, while in respect of (*b*) the appellant should pay a Court-fee calculated according to s. 7, (*vi*), of the Court Fees Act, 1870, on five times the Government Revenue of the three villages claimed. ABINASH CHANDRA *v.* SHEKHAR CHAND (1918) . **I. L. R. 40 All. 353**

——— *Suit for declaration that the plaintiffs are not tenure-holders and that survey entries are not binding on them.* The Court-fee

COURT-FEES ACT (VII OF 1870)—*contd.*

——— **s. 7 (VI)**—*contd.*

payable in a suit in which the plaintiffs pray for a declaration that they are occupancy-tenants and not tenure-holders, and that an entry in the Record-of-Rights describing them as tenure-holders is wrong and is not binding on them is Rs. 10. TEWARI KORA *v.* BHUPAT MANDAR
4 Pat. L. J. 362

——— **s. 7, (IX)**—

See MADRAS CIVIL COURTS ACT (III OF 1873), ss. 12, 13.
I. L. R. 39 Mad. 447

See JURISDICTION.
I. L. R. 38 Mad. 795

——— *Decree on mortgage—Separate liabilities of distinct properties. Appeal in respect of distinct properties.* In a suit for sale on a mortgage a decree was passed declaring the separate liabilities of the different properties mortgaged. One of the defendants whose property was held liable for specific sums of money appealed: *Held,* that the proper Court-fee payable on the memorandum of appeal was a fee calculated on the sums of money for which the defendant's property was held liable and not one calculated on the full amount of the decree. CHHABRAJI KUNWAR *v.* THE COURT OF WARDS (1912)
I. L. R. 35 All. 92

——— *Suit for sale on mortgage—Court-fee payable in appeal—Value of the subject matter—Amount declared due on date fixed for payment.* A decree for sale on a mortgage declared that on the date fixed for payment a specified sum would be due from the mortgagor which included interest *pendente lite.* *Held,* that the Court-fee payable in appeal from such decree was to be assessed, not on the amount claimed in the suit but upon the amount with interest *pendente lite* found due by the Court of first instance at the date fixed for payment. BALDEO SINGH *v.* KALKA PRASAD (1912) . **I. L. R. 35 All. 94**

——— **s. 7, (IX), Sch. I, Art. 1**—

——— *Suit for redemption or foreclosure of mortgage—Appeal—Court-fee.* The criterion laid down in s. 7 (*ix*) of the Court-fees Act, 1870, for determining the court-fee payable in respect of a suit for redemption or foreclosure of a mortgage does not apply to the appeal in such a suit. In the case of appeals or cross-objections in suits for redemption or foreclosure, in all cases in which the amount declared by the Court to be due at the date of the decree can be ascertained by reference to the judgment and the decree, it is that amount at which the appeal or cross-objections should be valued, and future interest should not be taken into account. The rule in *Baldeo Singh* v. *Kalka Prasad, I. L. R. 35 All. 94,* modified. RAGHUBIR PRASAD *v.* SHANKAR BAKHSH SINGH (1913)
I. L. R. 36 All. 40

——— **s. 7 (X)**—

See DECREE . . **3 Pat. L. J. 67**

——— **s. 7 (XI)**—

See SCH. II, ART. 5.
I. L. R. 40 All. 358

See JURISDICTION.
I. L. R. 38 Mad. 795

COURT-FEES ACT (VII OF 1870)—*contd.*

——— **s. 7 (XI)**—*contd.*

——— *Suit for possession against tenant holding on after expiry of lease and others who had not been inducted on land as tenants—Court-fee.* In a suit for *khas* possession against three Defendants, Defendant No. 1 admitted that he had been holding the land as a tenant under the Plaintiff under a lease which had expired. The other two tenants established their plea that there was no relationship of landlord and tenant between the Plaintiff and them: *Held,* that the suit could not proceed as against Defendants other than Defendant No. 1 on a plaint stamped with Court-fee under s. 7, cl. 11 of the Court Fees Act. PRAMATHA NATH GANGULY *v.* AMIRADDI SHEIKH . . . . **24 C. W. N. 151**

——— **ss. 7, 11**—

See SECOND APPEAL. **15 C. W. N. 454**

See COURT-FEE . **I. L. R. 44 Calc. 890**

——— **ss. 7. 11 ; Sch. II, Art. 17 (6)**—*Suit for partition of immoveables, moveables and funds of joint family business*—In a suit for partition, the plaintiff has to include the whole of his claim, that is to say, the whole of the properties which are alleged by him to be properties of the joint family, immoveable properties, moveable properties and funds which according to him have resulted from joint business carried on by members of the family on behalf of all, and such a suit cannot be treated as one for recovery of possession of both immoveable and moveable property requiring for their joinder Court's leave under O. II, r. 4 of the Civil Procedure Code. An order passed in such a suit requiring the plaintiff to elect to proceed either with his claim for recovery of immoveable properties or with that for recovery of the moveables and funds is erroneous. *Held,* that the plaint in the suit was properly stamped as required by s. 7 and Sch. II, Art. 17, cl. (*6*) of the Court-Fees Act. Should the amount due upon taking accounts prove on investigation to exceed the approximate value given in the plaint, the course to be pursued was that under s. 11 of the Court-Fees Act. BENI MADHAB SARKAR *v.* GOBIND CHANDRA SARKAR (1916) . **22 C. W. N. 669**

——— **ss. 7, 12, 17**—*Suits Valuation Act—Suit for declaratory decree in respect of property worth over Rs. 60,000, valued erroneously at Rs. 130—Court which should entertain suit—Objection on the ground of jurisdiction when to be taken—Court-fee, objection as to, to whom open and how corrected.* Plaintiff brought this suit in respect of property all of which, excepting a house in Plaintiff's possession, was in the possession of the Collector. The house was worth about Rs. 250, the value of the rest of the property being over Rs. 60,000. He prayed for declaration of Plaintiff's title to the properties in suit and for an injunction to restrain obstruction to Plaintiff's possession of the house. The Court-fee payable in respect of the former relief being fixed by law at Rs. 10 irrespective of the value of the property, the Plaintiff according to an erroneous practice commonly followed in Bombay valued the prayer for a declaratory decree at Rs. 130 as being the value on which the fee nearest to Rs. 10 would be leviable, and he valued the prayer for an injunction at Rs. 5, the fee paid on his plaint being thus Rs. 10-6-0. The suit was instituted in the First Subordinate Judge's Court which in the circum-

COURT-FEES ACT (VII OF 1870)—*contd.*

———— ss. 7, 12, 17—*contd.*

stances would have jurisdiction to entertain the suit only if the value involved was over Rs. 5,000, and though Plaintiff had in fact, though erroneously, valued the suit at Rs. 135, the Defendant raised no objection on the ground of jurisdiction. A decree having been passed in Plaintiff's favour, the Defendant appealed to the District Judge,

but acting under s 21 of the Civil Procedure Code heard the appeal on the merits and reversed the decree of the First Court. On second appeal to the High Court, *it was held that the suit was* instituted in the proper Court and appeal lay to the High Court and not to the District Court. The High Court in consequence heard the appeal as a first appeal and confirmed the decree of the original Court: *Held*, by the Judicial Committee that the objection as to jurisdiction which was

opponent, but to secure revenue for the benefit of the State, and under s. 12 of the Court Fees Act, the detriment shown only to the revenue is to be corrected by the Appellate Court, and a judgment not shown to have wrongly decided to the detriment of revenue cannot be set aside at the instance of a party on the ground of jurisdiction. RACHAPPA SUBRAO JADHAV DESAI *v.* SHIDAPPA VENKATRAO JADHAV DESAI

24 C. W. N. 33

———— ss. 7 and 17—"*subject,*" *meaning of —claim for possession of land, mesne-profits and* malikana, *whether plaintiff entitled to add the three claims together for the purpose of assessing court-fee—interlocutory orders, interference by High Court with.* The word "subject" in s. 7 of the Court-Fees Act, 1870, means "cause of action." In a suit for recovery of possession of land and for *malikana* and mesne-profits, the plaintiff is entitled to add together the value of the three claims for the purpose of assessing the court-fees payable. He is not bound to assess the court-fee separately on each item of his claim. It has been the established practice in the Calcutta High Court to interfere with interlocutory orders and that practice has been adopted by the Patna High Court. NAURATAN LAL *v.* WILLFORD JOSEPH STEPHENSON . . 4 Pat. L. J. 195

———— s. 7, Sch. II, cls. 3, 4—*Suits for dissolution of partnership—Preliminary decree—Appeal —Court-fee.* In a suit for dissolution of partnership the defendants appealed against the preliminary

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lants ought to pay an *ad valorem* fee according to the amount at which the relief sought was valued in the memorandum of appeal. BHOLA NATH *v.* PARSOTAM DAS (1910) . I. L. R. 32 All. 517

———— s. 8—

See LAND ACQUISITION ACT, 1874, s. 3.
I. L. R. 45 Bom. 277

COURT-FEES ACT (VII OF 1870)—*contd.*

———— s. 8, Sch II Art. 17 (VI)—

———— *Court-fees Act (VII of 1870), s. 8 and Sch. II, Art. 17, cl. vi—Land Acquisition Act (I of 1894), s. 32—Land Acquisition Judge, order of—Appeal—Debutter property—Memorandum of appeal*—Ad valorem *fee—Award.* A certain *debutter* property having been acquired under the Land Acquisition Act, the compensation money

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be invested in Government securities and only the interest should be paid over to the *shebait*, the Land Acquisition Judge passed an order under *s. 32 of the Act* directing the payment of interest only to the applicant. Against this order *T* preferred an appeal to the High Court on a Court-fee stamp of ten rupees only: *Held*, that the case came under the provisions of s. 8 of the

to. *Held*, also, that to bring a case under the provisions of cl. (*vi*) of Art. 17 of Sch. II of the Court-fees Act, it must be established that it was not possible even to state approximately a money value for the subject-matter in dispute; but where the claim to receive the full amount of compensation money was disallowed, and the only relief allowed by the Court was to withdraw the interest on the said money, there it was possible to state approximately the money value of the relief claimed, and therefore in such a case the provisions of Sch. II, Art. 17, cl. (vi) of the Court-fees

v. *Daya*

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I. L. R. [illegible] Calc. 906
17 C. W. N. 933

———— ss. 10 and 12—

See COURT-FEES. . 5 Pat. L. J. 508

———— *deficiency in court-fee paid on plaint—appeal by defendant—respondent called upon to pay deficiency—failure to comply—suit dismissed effect of—Code of Civil Procedure (Act V of 1908), O. VII, r. 11—Res judicata—suit to set aside* ex parte *decree and sale thereunder, whether court-fee payable on amount of decree or value of property sold.* If a plaintiff respondent fails to make good a deficiency in the court-fee paid on the plaint it is competent to the appellate Court to call upon him to pay the deficit,

rejection of the plaint is an inappropriate remedy and the law enjoins a dismissal without option,

valuation. Where a plaintiff asks for a declaration and consequential relief he is bound to pay *ad valorem* fees in proportion to the loss from

COURT-FEES ACT, (VII OF 1870)—*contd.*

——— ss. 7 and 12—*contd.*

which he seeks to be relieved. In a suit in which the plaintiff asks for a declaration that a decree obtained against him and a sale held thereunder are void on the ground of fraud he is bound to pay an *ad valorem* court-fee on the value of his share in the property sold and not merely an *ad valorem* fee on the amount of the decree. PANDIT BRIJ KRISHNA DAS *v.* CHOWDHURY MURALI RAI. **4 Pat. L. J. 703**

See s. 7 (IV) (F) . **I. L. R. 39 Bom. 545**

——— s. 11—

See BENGAL, N.-W.-P. AND ASSAM CIVIL COURTS ACT (XII OF 1887), s. 21, **I. L. R. 32 All. 222**

——— s. 12—

See s. 5 . . **I. L. R. 32 All. 59**
3 Pat. L. J. 92

See APPEAL. . **14 C. W. N. 343**

See CIVIL PROCEDURE CODE, 1908, ss. 2 115, AND 151. . **4 Pat. L. J. 57**

See COURT FEES. . **3 Pat. L. J. 443**

See COURT FEES ACT, ss. 10, 12 AND 17. **4 Pat. L. J. 703**

——— *Court-fees paid in Lower Appellate Court insufficient—Appeal to High Court dismissed—whether High Court has power to restrain execution of decree until realisation of deficiency.* Where an appeal to the High Court has been dismissed, owing to the appellants' failure to pay the deficit due in respect of the court-fee payable by him on a memorandum of appeal or for other good and sufficient reasons, the High Court has no power, after dismissal of such appeal, to call on the respondent to make good any deficiency in the court-fee due in respect of the court-fee payable by him in the Lower Appellate Court, and consequently the High Court has no power in such circumstances to restrain the respondent from executing the decree obtained by him. KUMAR RADHIKA RAMAN PRASAD SINGH *v.* MUSAMMAT JANKI KUER. . **4 Pat. L. J. 472**

——— s. 13—

See CIVIL PROCEDURE CODE (ACT V OF 1908), ss. 115, 151, O. XLI, R. 23. **I. L. R. 42 Bom. 363**

——— s. 17—

See s. 7. . . **4 Pat. L. J. 195**

See COURT FEE. . **3 Pat. L. J. 443**

——— *Suit to obtain a declaration as adopted son and to establish title to property—Injunction with respect to a house—Declaration with respect to other property—Valuation of the plaint—Valuation for pleader's fees—Special jurisdiction of the first Class Subordinate Judge—Appeal to the District Court—Second Appeal—Return of the memorandum of appeal for presentation to the High Court—Jurisdiction.* In a suit for a declaration that the plaintiff was the adopted son of V and as such was entitled to his property, the plaint was valued at Rs. 130 for a declaration of the rights and at Rs. 69,016-9-0 for pleader's fees. The plaintiff prayed for an injunction restraining the defendant from interfering with plaintiff's rights in respect of a house which was already in

COURT-FEES ACT, (VII OF 1870)—*contd.*

——— s. 17—*contd.*

his possession and the injunction was valued at Rs. 5. With respect to the other property which was attached by the Collector after *V's* death, the plaintiff sought for a bare declaration of his rights as *V's* adopted son. The suit was tried by the First Class Subordinate Judge of Belgaum in his special jurisdiction and he allowed the claim. The defendant appealed to the District Judge and he, notwithstanding the plaintiff's preliminary objection that the appeal lay to the High Court and not to his Court, held that the First Class Subordinate Judge had no jurisdiction to try the suit under his special jurisdiction because the suit was for a declaration and consequential relief which was valued at Rs. 5 of the purposes of Court-fees, and the valuation for the purposes of jurisdiction being the same as for the purposes of Court-Fees, that valuation was less than Rs. 5,000. The District Judge, therefore, entertained the appeal and having found that the plaintiff's adoption was not proved, disallowed the claim. On second appeal by the plaintiff: *Held,* reversing the decree, that the First Class Subordinate Judge was entitled to try the suit under his special jurisdiction and his decree was appealable to the High Court. The plaint distinctly laid claim to two subjects, namely, two kinds of properties. First, there was property in the possession of the Collector and its value exceeded Rs. 5,000 and that property having been in the possession of the Collector, it was not necessary for and allowable to the plaintiff to ask for an injunction. He was only entitled to a declaration of his title. The other subject-matter of the suit was the house as to which the plaintiff was entitled to ask for a declaration and consequential relief and to put his own valuation on the plaint. SHIDAPPA VENKATRAO *v.* RACHAPPA SUBRAO (1912) . . . . **I. L. R. 36 Bom. 628**

——— *"Subject" — suits against several tenants for correction of Record-of-Right—Court-fees payable on.* In a suit by a landlord against 25 sets of tenants in respect of 25 holdings for a declaration that their several lands were held under the *batai* system, and that they were wrongly recorded as paying cash rent: *held,* that a court-fee of Rs. 10 should have been paid in respect of each of the 25 sets of tenants. LACHMAN SAHU *v.* SHEIKH ABDUL KARIM. **4 Pat. L. J. 299**

——— s. 19 —*"Property held in trust not beneficially"—Undivided share of deceased co-parcener and "property held in trust not beneficially"—Surviving co-parcener applying for Letters of Administration liable to pay court-fees on the value of share of deceased co-parcener.* Under the Mitakshara Law as administered in this part of India, an undivided co-parcener has power to mortgage or alienate his undivided share and he can at any time enforce partition of his own share. He can not therefore be said to hold *his own* share of the undivided property "as trust-property," not beneficially or with general power to confer a beneficial interest in it, within the meaning of these words as used in Annexure *B* of the form for valuation in Sch. III of the Court-Fees Act, although, as regards the shares of others, he may be said to so hold them. Where a surviving co-parcener governed by the Mitakshara Law, applies for Letters of Administration in respect of property

COURT-FEES ACT, (VII OF 1870)—*contd.*

—— s. 19—*contd.*

standing in the name of a deceased co-parcener,

the death, and he cannot, under s. 19-I (1) of the Court-Fees Act, obtain Letters of Administration to the joint family property, unless he includes such share in the valuation and prays the proper *ad valorem* court-fees upon it. *In the goods of Pokermul Augurwallah, I. L. R. 23 Calc 28*, referred to but not followed. *In the goods of Brindabun Ghose, 11 B. L. R. App. 39*, followed. *In the matter of* DESU MANAVALA CHETTY (1908)

I. L. R. 33 Mad. 93

—— *Court-fee Computation of duty payable on probate or letters of administration. Held*, on a construction of the Court Fees Act, 1870, that no duty is payable in respect of a grant of probate or letters of administration where the value of the estate, after making the deductions specified in annexure B of the third schedule, is less than Rs 1,000. *In the goods of* MRS. E. E. W. MEIK (1916)

I. L. R. 40 All. 279

—— s. 19C—

See PROBATE . **I. L. R. 43 Calc. 625**

—— *Probate of Will—full court-fees paid—beneficiary dies—whether fullcourt-fees payable on her Will.* The estate referred to in s. 19 (*C*) of the Court-Fees Act, 1870, means the property of a deceased person. S. 19 (C) merely means that when fees have already been paid in respect to the whole or part of the property comprised in the estate of a deceased person the fees so paid shall not be payable over again on the grant of a fresh probate of a Will or Letters of Administration of the estate of the same person, *e g.*, when probate is revoked or a portion of an estate remains unadministered. A person who applies for probate of his wife's Will is bound to pay the full court-fees due even though the bulk of the property dealt with in the Will was included in the wife's father's Will of which probate had been granted on full payment of court-fees. BHAGWATI SARAN SINGH *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL **5 Pat. L. J. 36**

—— s. 19 (D)—*Hindu Will—deduction of property which passes by survivorship, validity of.* Where a Hindu by a Will left the residue of his property to his son and the executors when applying for probate claimed exemption from the payment of court-fees on the residue on the ground that the son was entitled to the property by survivorship, *held*, that they were not entitled to the exemption. *In re* ESTATE OF RAM KUMAR PRASAD . . . **5 Pat. L. J. 510**

—— s. 19E—

See PENALTY . **I. L. R. 43 Calc. 230**

—— s. 28—

See s. 4 . . . **3 Pat. L. J. 74**

See CIVIL PROCEDURE CODE, 1882 s. 54

14 C. W. N. 682

Sch. I, Art.—

See APPEAL, VALUATION OF.

I. L. R. 43 Bom. 507

COURT-FEES ACT, (VII OF 1870)—*contd.*

—— s. 28—*contd.*

See 7 (IX) . . **I. L. R. 36 All. 40**

—— *Court-fee—Cross objection filed in appeal.* Under art. 1 of sch. I to the Court-Fees Act, 1870, a party filing cross-objections must pay an *ad valorem fee* according to the value or amount of the subject matter in dispute. LAKHAN SINGH *v.* RAM KISHAN DAS (1917) . . . . **I. L. R. 40 All. 93**

—— Sch. I, Art. I, Sch. II, Arts. I and II —A memo. of cross objection filed in the High Court relating to costs only does not fall within Sch. II, Art. II, or under Sch. II, Art. I, and a Court-fee of Rs. 2 is leviable thereon. KAMAL KUMARI DEBI *v.* RUNGPUR NORTH BENGAL BANK, LIMITED . . . . **25 C. W. N. 934**

—— Sch. I, Art. 1; Sch. II, Art 11.

—— *Civil Procedure Code, 1908, O. XXXIV, r. 5—Court-fee—Appeal from final decree in a mortgage suit. Held*, that an appeal from the final decree passed under O. XXXIV, r. 5, of the Code of Civil Procedure, 1908, requires an *ad valorem* court-fee, and cannot be stamped as an appeal from an order. BAJRANGI LAL *v.* MAHABIR KUNWAR (1913)

I. L. R. 35 All. 476

—— *Court-fee—Subject-matter in dispute in appeal—Suit for possession—Defence of lien for dower—Appeal by defendant.* In a suit for recovery of property in the posses-

Court of first instance decreed the suit for possession holding that payment of the defendant's dower, whatever it might amount to, was not a condition precedent to the plaintiff's obtaining

ying court-
a reference
was liable
ell : *Held*,
the appeal

was the property of which possession was sought and that the court-fee paid was sufficient. HAIDARI BEGAM *v.* GULZAR BANO (1914)

I. L. R. 36 All. 322

—— Sch. I, Art. 11 ; Sch. III—

See s 19 (I). . **I. L. R. 40. 279**

See PROBATE DUTY.

6 Pat. L. J. 411

Probate and Letters of Administration, court-fees payable on—Gross or net value—Court-fee, error as to valuation, revision by High Court. Where the gross value of the property in respect of which application has been made for probate or letters of administration exceeds Rs. 1,000, but the net value after deducting the liabilities against the estate is below that amount, Court-fee is payable under Sch. I, Art. 11 of the Court Fees Act, though it is payable on the said net value under the provisions of Art. 11 of Sch. I read with Sch. III of the Act. The exemption from liability to pay Court-fees provided by s 19, cl. (viii) and Art. 11 of Sch. I of the Act applies only in cases where the gross value does not exceed one thousand

COURT-FEES ACT, (VII OF 1870)—*contd.*

———— **Sch. I, Art. 11 ; Sch. III**—*contd.*

rupees. Where the Court below decided that no Court-fee was payable, on an erroneous view of law, the High Court could interfere in revision under s. 15 of the Indian High Courts Act. THE COLLECTOR OF MALDAH *v.* NERODE KAMINI DASSY 1912) . . . . **17 C. W. N. 21**

———— *Probate duty, assessment —"Value of property," meaning of—Construction of Statute.* Sch. III, Annexures A and B, of the Court-Fees Act make it clear that the duty payable at an application for probate or letters of administration under Sch. I, Art. 11, of the Act is to be calculated upon the net value of the estate obtained by the deduction of the amount of debts from the gross value of the estate. *Collector of Maldah* v. *Nirode Kamini Dassy, 17 C. W. N. 21,* may require re-examination and further consideration. The interpretation of the expression "value of property" in Sch. I, Art. 11, as the "market value" of property or the value of the entire pro perty less the amount of encumbrance, is the reasonable construction of the expression. The true mode of interpreting a Statute like the Court-Fees Act which has been repeatedly amended, is not to consider individual sections, but to take them as a whole and to give effect to the legislative intent upon a particular matter. *In the goods of* KERR (1913) . . **18 C. W. N. 121**

———— *Estate of which gross value over Rs. 1,000, but deducting debts, net value less than that if chargeable with death-duty.* The expression "amount or value of the property" in Art. 11 of Sch. I of the Court Fees Act signifies what is described as the "net total" in Annexure A in Sch. III, obtained by the deduction of the amount shown in Annexure B as not subject to duty from the gross valuation of the movable and immovable property left by the deceased. *Held,* therefore, that no fee was leviable under the article upon the estate of the deceased the gross value of which was shown to be Rs. 1,244-11-0, and the amount of the debts Rs. 522 leaving a net balance of Rs. 722-11-0. *Collector of Maldah* v. *Nerode Kamini, 17 C. W. N. 21* not followed. *In the goods of Harriett Teviot Kerr, 18 C. W. N. 121 : s. c. 18 C. L. J. 308,* referred to. *In the goods of* QUININGBOROUGH (1915)

20 C. W. N. 591

———— **Sch. I, Arts. 11, 12**—*Succession certificate—Grant to widow—Death of widow—Fresh certificate, application by daughter for—Court-fee if must be paid again—Analogy of administration de bonis non, if applies—Fiscal statute, interpretation of —Succession Certificate Act (VII of 1889), s. 14.* Whenever a fresh succession certificate is taken, even though it is to collect debts for which a succession certificate has already been taken out and the duty paid, the duty prescribed by the Court-Fees Act must be paid. R, the widow of a deceased Hindu, took out a succession certificate in respect of certain debts due to the deceased. After her death, S, the daughter of the deceased, applied for a succession certificate in respect of the same debt and urged that stamp duty upon the debts having once been already paid by R, she was not bound to pay duty again : *Held,* that it was an application for a certificate within the meaning of s. 14 of the Succession Certificate Act, and Court-fee was payable on it as such.

COURT-FEES ACT, (VII OF 1870)—*contd.*

———— **Sch. I, Arts. 11, 12**—*contd.*

One fiscal Act cannot be construed by another fiscal Act. *In re* SAROJEBAHSHINI DEBI (1916)

20 C. W. N. 1125

———— **Sch. II, Art. 5**—*Suit for declaration that plaintiff is an occupancy tenant—Agra Tenancy Act (II of 1901), s. 95—Court-fee.* In a suit under s. 95 of the Agra Tenancy Act, 1901, to declare the plaintiffs' status as an occupancy tenant the plaint or memorandum of appeal should bear a court-fee of eight annas as provided in art. 5 of sch. II to the Court Fees Act ; s. 7, cl. xi, of the Act does not apply to such a suit. RATAN SINGH *v.* KHEM KARAN (1918) . **I. L. R. 40 All. 358**

———— **Sch. II, Art. 6**—

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), s. 269 . **I. L. R. 37 Mad. 17**

See STAMP ACT, 1899, s. 2, ARTS. 15 AND 40 . . **I. L. R. 43 Mad. 363**

———— *Stay of execution security bond for, how stamped—Court-fee or non-judicial stamp—Indian Stamp Act (II of 1899), Sch. I, Art. 15.* Bonds given as security in pursuance of the order of the Court for stay of execution must be written on paper properly stamped under the Indian Stamp Act (II of 1899). Such bonds cannot be written on plain paper bearing a Court-fee stamp of annas 8 only, as they are not made by order of the Court within the meaning of Art. 6 of Sch. II of the Court-fees Act. DWARKA NATH DEY *v.* SAILAJA KANTA MULLICK (1916)

21 C. W. N. 1150

———— **Sch. II, Art. 11**—

See COURT-FEES . **3 Pat. L. J. 99, 101**

———— **Sch. II, Art. 12**—*Caveat, what is a—Probate proceeding—Persons upon whom citations issued, preferring objections—Objections if must be stamped as caveat.* A petition by which a party upon whom citation has been issued opposes the grant of probate is not a caveat and need not be stamped as such. A caveat, which is in the nature of a precautionary measures intended to assure that there shall be no proceeding in the matter of the estate of the deceased without notice to the person who files a caveat, is not necessary where persons interested in the estate of the deceased appear upon citation. BHABATARINI DEBI *v.* HARI CHARAN BANERJEE (1916) . **20 C. W. N. 787**

———— **Sch. II, Art. 17**—*Value of suit under judgment-debtor's title disputed—Cancelling of attachment—Suits Valuation Act (VII of 1887) s. 4, valuation under.* Where the prayer in a plaint is not only to cancel an attachment but also for a declaration that the judgment-debtor has no interest in the property, the value of the suit is the value of the entire property claimed by the plaintiff. NARAYANAN SINGH *v.* AIYASAMI REDDI (1915) . . **I. L. R. 39 Mad. 602**

———— *Court-fee payable in suit by person whose claim in respect of property attached in execution of decree has been rejected for default.* Under Art. 17, Sch. II of the Court-Fees Act, a court-fee of Rs. 10 is payable upon the plaint in a suit by a person, whose claim to properties attached in execution of a decree has been dismissed for default, to set aside the decision. An order dismissing a claim for default is an order within the meaning of Or. XXI, r. 63 of the Civil

COURT-FEES ACT, (VII OF 1870)—*contd.*

———— **Sch. II, Art. 17**—*contd.*

Procedure Code, and, subject to the result of a regular suit, is conclusive. SATINDRA NATH BANERJEE *v.* SHIVA PROSAD BHAKAT.

26 C. W. N. 126

———— **Sch. II, 17 (3)**—

See s. 7 (11) . . **I. L. R. 42 All. 353**

See s. 7 (IVc) . .

See COURT-FEE. **I. L. R. 44 Calc. 352**

See APPEAL, VALUATION OF. **I. L. R. 37 Calc. 914**

See VALUATION OF SUIT. **I. L. R. 43 Bom. 507**

———— *Declaratory decree —Suit to have declared declaratory decree not binding on ground of fraud—Consequential relief—Court-fee, amount of.* A suit by the plaintiff to have it declared that a decree passed in a previous suit declaring that certain alienations were not valid was not binding on her is properly instituted on a Court-fee stamp of Rs. 10 only because no consequential relief is needed or sought for in it. BAGALA SUNDARI DEBI *v.* PROSANNA NATH MUKHERJI (1916) . . . **21 C. W. N. 375**

———— *Suit for declaration that entry in record-of-rights a nullity, whether one for consequential relief—Specific Relief Act (I of 1877), Ch VI, s. 42, Bengal Tenancy Act (VIII of 1885), s 111A—Amendment or rejection of plaint —Civil Procedure Code (Act V of 1908), O VII, r. 11—Court-fees Act (VII of 1870), Sch. II, Art. 17, cl. (iii), s. 7 (iv), cl.* (c). Where a court-fee of rupees ten was paid in a suit purporting to be under s. 111A of the Bengal Tenancy Act, but the plaintiffs prayed for a declaration (*a*) that they were occupancy ryots, and (*b*) also that the entry in the record-of-rights showing them as tenure-holders was a nullity; and the plaintiffs on being required to supply the deficit court-fee on the second relief claimed failed to do so within the time fixed by the Court. *Held,* (i) that the second prayer being for a consequential relief was not such a declaration as was comtemplated by the proviso to s. 111A; (ii) that the learned Judge had no alternative but to reject the plaint; and (iii) that the plaintiffs could not be allowed to amend the plaint by striking out the second prayer for relief as the provision of O. VII, r. 11 of the Civil Procedure Code was mandatory. MIDNAPUR ZEMINDARY COMPANY, LTD., *v.* SECRETARY OF STATE FOR INDIA (1916) **I. L. R. 44 Calc. 352**

———— **Sch. II, Art. 17 (6)**—

See ADMINISTRATION SUIT. **I. L. R. 44 Calc. 89**

See APPEAL . . **I. L. R. 37 Calc. 914**

See CIVIL PROCEDURE CODE, 1908, s. 2. **4 Pat. L. J. 57**

See VALUATION OF SUIT. **I. L. R. 43 Bom. 507**

See s. 7 . **I. L. R. 44 Calc. 890**

See s. 8 . . **I. L. R. 39 calc. 906**

————Suit for restitution of conjugal rights—*Court-fee. Held,* that the court-fee payable in respect of a suit for restitution of conjugal rights is a fee of ten rupees under art. 17, cl. VI, of the second schedule to the Court Fees Act, 1870. *Zair Hussain Khan* v. *Khurshed Jan, I. L. R. 28 All. 545,* referred to. AISHA *v.* FAIYAZ HUSAIN (1911) **I. L. R. 33 All. 767**

COURT-FEES ACT, (VII OF 1870)—*concld.*

———— **Sch. II, Art. 17 (6)**—*contd.*

———— *Court-fee payable on plaint—Suit by plaintiff in joint possession to have share partitioned—Fixed fee ten rupees.* In a suit for partition, where the plaintiff alleges that he is in possession and merely claims partition of the property and separate possession of his share, a court-fee stamp of 10 rupees is sufficient. *Reoti* v. *Lachhman, All. Weekly Notes, 1900, 90, Wali-ullah* v. *Durga Prasad, I. L. R 28 All. 340,* and *Bidhata Rai v. Ram Charitar Rai, 12 C. W N 37,* followed. TARA CHAND MUKERJI *v.* AFZAL BEG (1911) . **I. L. R. 34 All. 184**

———— *Suit for partition by a tenant-in-common in possession.* A suit for partition of immoveable property by a person who alleges he is in possession of it as co-tenant on behalf of himself and others is governed by Sch. II, art 17 (6) of the Court-Fees Act (VII of 1870) *Referred Case No. 5 of 1894 (1894) 4 M. L. J., 110,* not followed. *Tara Chand Mukerji* v. *Afzal Beg, (1912), I L. R. 34 All. 184* and *Ahamuddin Tamijuddin* v. *Amiruddin (1918), 44 I. C., 216 (Calc.),* followed. GILL *v.* VARADARAGHAVAYYA (1920) . . . . **I. L. R. 43 Mad. 396**

———— **Sch. III**—

See s. 19(1) . **I. L. R. 33 Mad. 93**
I. L. R. 40 All. 279

———— *Trusts created by testator's Will, liability of, to probate duty.* The trusts referred to in item (4) of Annexure B of Sch III to the Court-fees Act, 1870, are trusts held beneficially by the testator during his life-time and not trusts created by the testator's Will. CHANDRABATI KUER *v.* THE COLLECTOR OF DARBHANGA. **2 Pat. L. J. 611**

COURT-FEES AMENDMENT ACT (XI OF 1899).

———— *Limitation for proceedings of Collector where he thinks the value of an estate has been under-estimated —Form of inventory of estate to be exhibited and filed in Court—"Full and true estimate of property" —Probate and Administration Act (V of 1881). S. 98—Inventory accepted as sufficient by former Judges of Court.* In the matter of an application for letters of administration with the Will annexed the period of limitation in the proviso to sub-s. 4 of s. 19H of Act XI of 1899 (amending the Court-Fees Act, 1870) for the proceedings of a Collector who has reason to believe that the valuation of an estate has been under-estimated, does not begin to run until an inventory under s. 98 of the Probate and Administration Act (V of 1881) has been exhibited and filed in the proper Court; and according to the last-named section the inventory required is declared to be a "full and true estimate of the property" in possession of the person applying for letters of administration. *Held,* that such an estimate was not furnished by the exhibition and filing of a document (in this case a list of the immoveable property of the deceased) which required to be supplemented by a reference

COURT-FEES AMENDMEMT ACT (XI OF 1899)—*contd.*

to various other documents in order to ascertain the valuation of the property notwithstanding it had been accepted as such an inventory as the law required by previous holders of the office of Judge of the Court in which it was filed. BHUBANESWARI KUMAR *v.* COLLECTOR OF GAYA (1913)
I. L. R. 41 Calc. 556

COURT-FEES AMENDMENT ACT (VI OF 1905).

See COURT-FEES ACT (VII OF 1870), s. 7, CL. (V), SUB-CL. XI (CC).
I. L. R. 39 Mad. 873

COURT MARTIAL.

——————— *Trial by under Ordinance I (Government of India) of 1919, if competent to try persons under s. 124A Indian Penal Code—Privy Council, appeal to—Conviction under s. 124A, Indian Penal Code (Act XLV of 1860)—Conclusion of local tribunal in the nature of findings of fact—Privy Council, if should interfere—Free pardon by Crown, if bar to appeal—Conviction by Court Martial Commissioners—Jurisdiction—Ordinance I of 1919.* The Appellant was convicted, by a Court of Commissioners sitting at Lahore under Ord. 1of 1919 and having the powers of a summary Court-martial, of an offence under s. 124A of the Penal Code, in respect of certain articles which were published in the issues of the 6th, 7th, 8th, 9th, 10th and 11th April 1919 of the Newspaper *Tribune* of Lahore during disturbances which occurred at Lahore on the 6th, 10th 11th and 12th April 1919: *Held*—That the Commissioners had jurisdiction to try him. *Bugga* v. *King-Emperor L. R. 47 I. A. 128: s. c. 24 C. W. N. 650,* followed. That the question whether, on a reasonable construction of the articles complained of, the Appellant was or was not guilty of the offence was one which partook so much of the nature of a question of fact, being necessarily dependent not only on the construction of the written matter, but also on the local conditions obtaining at the time of publication and a just appreciation of the effect which the publication under those conditions of the articles in question would be calculated to produce, that the Board could not revise the conclusions of the local tribunal without putting themselves into a position which they have repeatedly declined to assume, *viz.*, that of a Court of Appeal in criminal proceedings. A free pardon by the Crown granted to the Appellant subsequently to his obtaining special leave, if proved, would itself have been a sufficient reason for not entertaining the appeal. *Levien* v. *The Queen, L. R. 1 P. C. 536 (1887),* referred to. KALI NATH ROY *v.* THE KING-EMPEROR (P. C.).
25 C. W. N. 701

COURT OF RECORD.

See CONTEMPT OF COURT.
I. L. R. 41 Calc. 173
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——————— committal to—

See CRIMINAL PROCEDURE CODE, s. 213.
I. L. R. 38 Bom. 114

COURT OF WARDS.

See ADVERSE POSSESSION.
14 C. W. N. 317

See BOMBAY COURT OF WARDS ACT (I OF 1905). **I. L. R. 37 Bom. 313**

See CENTRAL PROVINCES GOVERNMENT WARDS ACT, s. 18.
I. L. R. 40 Calc. 784

See CIVIL COURTS ACT (XIV OF 1869), s. 32 . . **I. L. R. 38 Bom. 662**

See COMPLAINT **I. L. R. 46 Calc. 854**

See COMPROMISE **I. L. R. 44 Calc. 829**

See COURT OF WARDS ACT.

See DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879), s. 2.
I. L. R. 37 Bom. 97

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I. L. R. 38 Bom. 662

See LIMITATION **I. L. R. 43 Calc. 211**
I. L. R. 46 Calc. 694

See OUDH LAND REVENUE ACT (XVII OF 1876), ss. 173, 174.
I. L. R. 38 All. 271

See SPECIFIC RELIEF ACT, ss. 45, 46.
15 C. W. N. 503

See UNITED PROVINCES, COURT OF WARDS ACT . . .

——————— alienation by—

See HINDU LAW—ADOPTION.
I. L. R. 40 Mad. 846

——————— management of widow's estate by—

See HINDU LAW—ADOPTION.
I. L. R. 40 Mad. 846

——————— sanction of—

See MAHOMEDAN LAW—PRE-EMPTION.
I. L. R. 39 Calc. 915

——————— Suit in respect of property taken by—

See COURT-OF-WARDS (PUNJAB) ACT, 1903, SS. 8 AND 19. . **I. L. R. 2 Lah. 151**

——————— whether manager entitled to grant of probate—

See PROBATE AND ADMINISTRATION ACT, 1881, s. 41 . **5 Pat. L. J. 347**

COURT-OF-WARDS ACT.

See UNDER THE VARIOUS PROVINCES.

COURTS (COLONIAL) JURISDICTION ACT (37 & 38 VICT. C. 27).

——————— s. 3—

See HIGH COURT, JURISDICTION OF.
I. L. R. 39 Calc. 487

COURT SALE

See CIVIL PROCEDURE CODE, 1882, ss. 263 264, 318 AND 319.
I. L. R. 36 Bom. 373

s. 317 . . **I. L. R. 35 Bom. 342**

See CIVIL PROCEDURE CODE (ACT V OF 1908), s. 47 . **I. L. R. 42 Bom. 411**

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I. L. R. 43 Bom. 240

COURT SALE—*contd.*

S 70 O. XXI, R. 72
I. L. R. 42 Bom. 621

O. XXI, R. 91 I. L. R. 35 Bom. 29

O. XXI, R. 5 . I. L. R. 36 Bom. 37

O. XXI RR. 95, 96
I. L. R. 43 Bom. 559

See COMPANIES ACT (VII OF 1913), s. 38.
I. L. R. 41 Bom. 76

See MORTGAGE . I. L. R. 38 Calc. 923

See MORTGAGOR AND MORTGAGEE.
I. L. R. 41 Bom. 357

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See SUBSTITUTION OF PROPERTY AND SECURITY . I. L. R. 39 Mad. 283

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———— appeal for application to recover deficiency—

See SECOND APPEAL.
I. L. R. 45 Bom. 223

———— validity of—

See DECREE AGAINST A MAJOR AS MINOR.
I. L. R. 39 Mad. 1031

———— when leave of Court to bid not obtained—

See CIVIL PROCEDURE ACT, 1908, ss. 47, AND 66, O. 11, R. 2.
I. L. R. 44 Bom. 352

————————*Stranger purchaser*, bona fide *effecting improvements—Subsequent eviction, right to value of—Improvements.* A purchase, in a Court auction, who was not a party to the decree, is entitled to the value of the improvements *bonâ fide* effected by him, on being evicted from the property owing to some defect or irregularity in the proceedings leading up to the sale. The time of his making the improvements is immaterial, provided he had then an honest belief in the validity of his title. *Bonâ fides* in this connection mean only honest belief in the validity of his title and does not extend to the necessity of making proper enquiries as to the title and regularity of the prior proceedings. S. 51 of the Transfer of Property Act is inapplicable to a purchaser at a Court-sale. *Per* CURIAM: There is a great distinction between stranger purchasers and decree-holder purchasers. The principle of *caveat emptor* has no application to a Court purchase. There is no covenant for title implied in a Court-sale and the purchaser takes only the right, title and interest of the judgment-debtor. *Quære:* Whether *Zain-ul-Abdin Khan* v. *Muhammad Ashgar Ali Khan, I. L. R. 10 All. 166*, lays down that stranger purchasers in order to be entitled to protection, should make their purchases *bonâ fide? Nanjappa Gounden* v. *Peruma Gounden, I. L. R. 32 Mad. 530, Kundarpa Nath Ghose* v. *Jogendra Nath Bose, 12 C. L. J. 391, Stock* v. *Starr, 1 Sawyer, 15; 22 (India) Fed. Cases, 1084,* and *Bright* v. *Boyd, 1 Story 478,* and *Dharma Das Kundu* v. *Amulyadhan Kundu, I L. R. 33 Calc. 1119,* followed. 24 American Cyclopædia of Law and Procedure, page 70, referred to. MOITHEENSA ROWTHAN v. APSA BIVI (1913)
I. L. R. 36 Mad. 194

COTTON GOODS.

———— sale and purchase of—

See CONTRACT ACT (IX OF 1872), s. 47
I. L. R. 40 Bom. 517

COVENANT.

See MORTGAGE.
I. L. R. 35 Bom. 327; 371
I. L R.39 Calc. 828

See REGISTRATION.
. I. L. R. 45 Bom. 170

———— breach of—

See EJECTMENT I. L. R. 45 Calc. 469

———— Binding on Purchaser of Land—

See AGREEMENT . I. L. R. 41 All. 417

———— For Renewal or Pre-emption—Difference between—

See LEASE FOR A YEAR.
I. L. R. 44 Mad. 230

———— in a mining lease—

See TENANTS-IN-COMMON.
I. L. R. 39 Mad. 1049

———— not to sue—

See CONTRACT ACT, s. 28
I. L. R. 38 Bom. 344

———— personal covenant by mortgagor—

See LIMITATION ACT, 1908, s. 20. SCH. I, ART. 116 . I. L. R. 44 Bom. 500

———— to give mortgagee possession in lieu of interest—

See MORTGAGE. . I. L. R. 46 Calc. 448

———— Covenant to re-purchase purely personal—*Sale with an option of re-purchase—Suit by vendor's grandson against the vendee's daughter-in-law.* A deed of sale with an option of re-purchase contained the following clause:—"I have given the land into your possession; if perhaps at any time I require back the land I will pay you the aforesaid Rs. 600 and any money you may have spent on bringing the land into good condition and purchase back the land." In a suit brought 35 years after execution of the deed by the grandson of the vendor against the daughter-in-law of the vendee to exercise the option of re-purchase:—*Held*, that the convenant to re-purchase was purely personal and the suit was not maintainable. GURUNATH BALAJI v. YAMANAVA (1911) . *I. L. R. 35 Bom. 258*

————————*Covenant in Kabuliyat for payment of Salami on transfer—Involuntary sale and voluntary sale, difference in cases of.* A *kabuliyat* stipulated that at every transfer a certain *salami* should be paid. The tenure in respect of which this *kabuliyat* was given was sold in execution of a money decree. The landlord subsequently sued for recovery of the stipulated *salami*: *Held*—That the covenant did not cover an involuntary sale. A condition in a lease restraining transfer is not applicable to a case of involuntary transfer unless there are words in the covenant which clearly make it applicable to such a transfer. The transfer in execution of a money decree cannot be treated as on the same footing as a voluntary sale. KUMAR MANMOTHA NATH MITRA v. CHUNI LAL GHOSE . . 26 C. W. N. 173

———————— *Property and its sale-proceeds—Charge relating to property, but conviction of misappropriation of the sale-proceeds—Legality of conviction—Absence of dishonest intention at the date of the sale—Penal Code (Act XLV of 1860), ss. 405, 409.* S. 405 of the Penal Code does not cover misappropriation by a person of the sale-proceeds of the property entrusted to him. A person charged with criminal breach of trust of certain property entrusted to him cannot be convicted of embezzling, not the property, but the amount obtained by dealing with it. *Bipra Das Giri* v. *Niradamoni Bewa, 12 C. W. N. 577,* followed. But assuming that "property" in s. 405 of the Penal Code, includes the value thereof, *viz.*, its sale-proceeds, a person cannot be said to have disposed of the property or the sale-proceeds, in violation of his contract, dishonestly, unless it is shown that he had the intention of dishonestly appropriating the sale-proceeds on the date of the sale, of which there was no evidence in the case. An auctioneer is not liable for criminal breach of trust merely because he does not punctually carry out every term in the agreement, *e.g.*, as to the date of the sale and the time of payment of the proceeds. BALTHASAR *v.* EMPEROR (1914)
I. L. R. 41 Calc. 844

———————— *Misappropriated money, suit for—Jurisdiction—Provincial Small Cause Courts Act (IX of 1887) Sch. II, Art. 35 (ii).* A suit for recovery of money with regard to which defendant has committed criminal breach of trust is not triable by a Court of Small Causes. CHERAKUDDIN *v.* RAM SIRAMAN (1920).
I. L. R. 48 Calc. 879

CRIMINAL CASE—*contd.*

———— appeal in—

See PRIVY COUNCIL, PRACTICE OF.
I. L. R. 41 Calc. 568
I. L. R. 42 Calc. 739

CRIMINAL CONTEMPT.

See CONTEMPT OF COURT.
I. L. R. 41 Calc. 173

CRIMINAL CONSPIRACY.

See CHARGE . **I. L. R. 42 Calc. 957**

———— proof of—

See MISJOINDER OF CHARGES.
I. L. R. 42 Calc. 1153

CRIMINAL COURT.—

———— verdict of principle governing interference by Privy Council—

See PRIVY COUNCIL.
I. L. R. 36 Mad. 501

———— *Duty of Criminal Court in respect of a case before it distinguished from the duty of a Civil Court trying a civil case—Relevant documents in existence, but on file of a connected case—Refusal of Court to send for record* Whatever attitude may be taken up by a Civil Court trying a civil suit, where it is the duty of the parties to place their case as they think best before the Court, it is the duty of every Criminal Court to get to the bottom of a case and to bring all relevant evidence upon the record and to see that justice is done. EMPEROR *v.* JANKI PRASAD
I. L. R. 43 All. 283

CRIMINAL HOUSE TRESPASS.

See CRIMINAL PROCEDURE CODE, SS. 145 AND 146 . , **3 Pat. L. J. 147**

CRIMINAL INTENT.

See CRIMINAL TRESPASS.
I. L. R. 43 Calc. 1143

CRIMINAL INTERCOURSE.

See MAINTENANCE **I. L. R. 34 Mad. 86**

CRIMINAL INVESTIGATION DEPARTMENT.

See CONTEMPT OF COURT.
I. L. R. 41 Calc. 173

CRIMINAL JURISDICTION.

———— *Criminal Procedure Code, s. 195—Revision of order of Civil Court under—Civil Procedure Code, s. 115.* A Civil Court in making an order under s. 195 of the Criminal Procedure Code does not exercise criminal jurisdiction. The Criminal Revisional Bench [illegible] jurisdiction to [illegible] *Ram v. Ramji* [illegible] *tter of a petition* [illegible] *Ram Prosad* [illegible] *ru Churn* [illegible] *'12 ; Kali* [illegible] *8 C. W.* [illegible] *I. L. R.* [illegible] interfere with such order under s. 115 of the Civil Procedure Code. The jurisdiction of the High Court to interfere under s. 115 is not ousted by s. 195, sub-s. (6) of the Criminal Procedure Code inasmuch as an application under the latter is not an appeal but a substantive application. *Hardeo Singh. v. Hanuman Dat Narain, I. L. R. 26 All. 244, 247* referred to. RAMDHIN BANIA *v.* SEWBALAK SINGH (1910) . . **I. L. R. 37 Calc. 714**
14 C. W. N. 806

CRIMINAL LAW.

———— *Trial under Ordinance I of 1919—Accused not named in Order for trial—Construction of Ordinance IV of 1919—Exciting Disaffection—Indian Penal Code, s. 124-A—Effect of Pardon.* The appellant, who was the Editor of a newspaper called the *Tribune* published at Lahore, was convicted by a Court of Commissioners sitting at Lahore, under the Martial Law Ordinance, I of 1919, of an offence under s. 124-A of the Indian Penal Code, namely, of having by written words excited or attempted to excite disaffection towards His Majesty or the Government established by law in British India. The order of the Lieutenant-Governor made under Ordinance IV of 1919 did not name the accused who were to be so tried, but referred to "all persons charged with offences connected with the recent disturbances." *Held* (1) that the validity of the Ordinance being established by the decision of the Board in *Bugga* v. *The King-Emperor* (*I. L. R. 1 Lahore 326 : L. R 47 I. A. 128*), the Commissioners' Court had jurisdiction, although the order of the Lieutenant-Governor did not name the accused persons ; (2) that the Court having applied the right principles of law in considering whether an offence under s. 124-A had been committed, their Lordships would not advise an interference with the conclusion arrived at. It being stated by counsel for the Crown that since leave to appeal had been given a free pardon had been granted, their Lordships observed that that would be a sufficient ground (as held in *Lenen* v. *The Queen* [illegible]

I. L. R. 2 Lah. [illegible]4
25 C. W. N. 701

———— *Sentence exceeding legal maximum—Transportation for term of years—Practice of Judicial Committee—Remitted to High Court to revise sentence—Indian Penal Code (Act XLV of 1860), ss. 59, 304.* S 59 of the Indian Penal Code authorizes a sentence of transportation for life, but not one of transportation for a term of years exceeding the maximum term of imprisonment which can be awarded for the offence. The appellants were convicted by a Sessions Judge under the Indian Penal Code, s. 304, of culpable homicide not amounting to murder and were liable under that section to a sentence of imprisonment for a term not exceeding ten years. They were sentenced to three years' rigorous imprisonment. Upon appeal to the High Court the conviction was affirmed, and upon a petition for revision the sentences were enhanced to fourteen years' transportation. *Held*, that ten years was the maximum term of years to which the appellants could be sentenced to transportation, and that the [illegible] sh[illegible] be remitted to the High Court

CRIMINAL LAW—*contd.*

pass sentences according to law. SAYYAPUREDDI CHINNAYYA *v.* KING-EMPEROR (1921)
I. L. R. 44 Mad. 297

CRIMINAL LAW AMENDMENT ACT (XIV OF 1908).

See EVIDENCE ACT, 1872, ss. 25, 114, 133, 157 . I. L. R. 35 Mad. 397

——— ss. 12, 14 (1)—

See BAIL I. L. R. 37 Calc. 412 & 439

CRIMINAL MISAPPROPRIATION.

See CRIMINAL PROCEDURE CODE, s. 179. I. L. R. 34 All. 487

See JURISDICTION I. L. R. 44 Calc. 912

See PENAL CODE (ACT XLV OF 1860), ss. 403 AND 22. I. L. R. 40 All. 119

s. 409. I. L. R. 33 All. 249

CRIMINAL OFFENCE.

——— whether a mere personal matter—

See PENAL CODE, 1860, ss. 304 and 323 . . I. L. R. 2 Lah. 27

CRIMINAL PROCEDURE CODE (ACT V OF 1898).

——— s. 4 (h)—

See COMPLAINT .

See s. 526 . . 4 Pat. L. J. 656

——— *Penal Code (Act XLV of 1860), ss .193, 210—Sanction to prosecute—Complaint—Letter from trying Magistrate to his official superior asking merely for direction as to procedure.* The holder of a decree for rent, passed by an Assistant Collector of the second class, took out execution for a larger sum than was in fact due and also gave in his application a wrong date as the date of the decree. The judgment-debtor paid the amount, claimed under compulsion, and thereafter applied for sanction to prosecute the decree-holder. Upon receipt of this application the Assistant Collector wrote a letter to the District Magistrate, forwarding it through his immediate superior the Sub-divisional Magistrate, in which he stated all the facts of the case and concluded by soliciting orders in the case. The Sub-divisional Magistrate, instead of forwarding this letter to the District Magistrate, himself passed orders for the prosecution of the decree-holder. He tried the case himself and convicted the decree-holder of offences under ss. 193 and 210 of the Indian Penal Code. On appeal the conviction and sentence were upheld by the Sessions Judge. *Held*, that the letter written by the Assistant Collector to the District Magistrate, in which the former did not ask that any action should be taken by the Magistrate, but merely for directions as to how he should proceed, did not amount to a "complaint" within the meaning of s. 4 of the Criminal Procedure Code, and, there being no complaint, the trial was illegal. EMPEROR *v.* SHEO SAMPAT PANDE (1918)
I. L. R. 40 All. 641

——— *Complaint Allegation made in writing to a Magistrate—with a view to his taking action—Examination of complainant before issue of process—Quashing of proceedings.*

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— s. 4 (h)—*contd.*

Where one N. M. wrote a letter to the Sub-Divisional Magistrate in which he stated that the petitioner had used insulting language towards him and asked the Magistrate to take action, and the Magistrate on receipt of that letter issued process against the petitioner without examining the said N. M.: *Held*, that the letter in question certainly comes within the definition of "complaint" given in s. 4, Cr. P. C., and the Magistrate should have examined the complainant and then proceeded in accordance with law. KHETRO MOHAN MITRA *v.* EMPEROR (1913) . . 17 C. W. N. 448

——— *Obstruction of public servant—Complaint—Sanction, want of—Quashing of proceedings.* The Petitioner was summoned under s. 186, Penal Code, for obstructing a peon in the execution of a warrant under the Cess Act. The report of the peon on which the proceedings were started was merely a report of what took place and contained no express or implied request to the Magistrate to take any action; *Held*, that the report did not come within the meaning of a complaint under s. 4, cl. (*h*), Cr. P. C. *Held*, further. The report not being a complaint and there being no sanction by the public officer concerned, *viz.*, the peon, the prosecution under s. 186, Penal Code, was bad. AHMED HUSAIN *v.* EMPEROR (1913) . 17 C. W. N. 980

——— ss. 4 (h), 173, 200, 190—*Charge, presented to Magistrate by Police officer in a non-cognizable case, if "complaint" or "police-report"—Complaint, if must have personal knowledge of the facts—Complaint—Reproduction of the language of section without a statement of facts, if proper complaint—Complaint before Presidency Magistrate—Written record of facts constituting offence, if required—"Police-report" in s. 190 (1) (b), if has wider significance in the Town of Calcutta.* The definition of "complaint" does not require any statement of facts beyond an allegation that some person has committed an offence, but if that definition is read into s. 190 (*1*) (*a*) of the Criminal Procedure Code, it is clear that before a Magistrate takes cognizance he must have before him an allegation of facts constituting the offence; a mere repetition of the words of a section of the Penal Code is not a proper compliance with the provisions of the sub-section. The object of s. 200 of the Criminal Procedure Code, requiring a Magistrate to examine the complainant possibly is that the facts constituting the offence may be ascertained, when, in a written complaint, they are not given. When a written complaint presented to a Presidency Magistrate does not contain an allegation of facts constituting the offence, if the Magistrate examining the complainant does not reduce the examination to writing there may be no written record of the facts constituting the offence. But he is not bound by law to do so. And where a Presidency Magistrate merely noted the fact that he had examined the complainant, the High Court in revision must presume that before he issued process he had before him an allegation of facts constituting the offence. *Quære*:—Whether the term "Police report" in s. 190 (*1*) (*b*) of the Criminal Procedure Code has a wider significance in the town of Calcutta, in view of the fact that s. 173 of the Code does not apply to the Police in Calcutta. The definition of "com-

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— ss. 4 (h), 173, 200, 190—*contd.*

plaint" in s. 4 (*h*) does not contain any limitation such as that the person lodging the complaint must have personal knowledge of the facts; nor does s. 190 of the Criminal Procedure Code. If a complainant is not speaking from personal knowledge a Magistrate taking cognizance would exercise a wise discretion in making the enquiry which he is authorised to do by s. 202 of the Criminal Procedure Code, but he is not compelled to do so. SUKUMAR CHATTERJEE *v.* MOFIZUDDIN AHMED. **25 C. W. N. 257**

——— ss. 4 (h), 190, 200 and 537—*Complaint whether "Committal Sheet" issued by Superintendent of Salt Revenue Department is.* A "Committal Sheet" sent to a magistrate in accordance with paragraph 12 of the "Instructions issued by the Commissioner of Salt Revenue for the guidance of officers of the Salt Revenue Department," containing a definite request to the Magistrate to try the accused for the offences set out in the sheet, is a complaint within the meaning of s. 4 (*h*) of the Code of Criminal Procedure, 1898. Where a Magistrate, on receipt of a complaint, issued process before examining the complainant on oath as required by s. 200 of the Code of Criminal Procedure 1898, but it was not shown that the accused had been in any way prejudiced by the irregularity, *held,* that the conviction of the accused should not be set aside on account of the irregularity, which was covered by s 537 of the Code PHAGU SAHU *v.* KING-EMPEROR **1 Pat. L. J. 592**

——— ss. 4 (h), 190, 200, 202, 528—

See FALSE INFORMATION TO POLICE **I. L. R. 46 Calc. 807**

——— ss. 4 (h), 195 (1)—"*Complaint*"—*Information of the supposed commission of an offence communicated by the District Judge to the District Magistrate with a view to the latter taking action as a Magistrate.* A Munsif, being of opinion that a document filed in a case before him had been tampered with, communicated his suspicions to the District Judge, who thereupon wrote to the District Magistrate, requesting him to take action in the matter. *Held,* that the letter of the District Judge to the District Magistrate amounted to a complaint within the meaning of s. 195 (c), of the Code of Criminal Procedure. *Emperor* v. *Sundar Sarup, I. L. R. 26 All. 514,* followed. EMPEROR *v.* DEBI PRASAD (1912) . **I. L. R. 35 All. 8**

——— ss. 4 (h), 195 (1) (b), 476—

See SANCTION FOR PROSECUTION. **I. L. R. 43 Calc. 1152**

——— ss. 4 (h), 199, 238 (3)—

See PENAL CODE (ACT XLV OF 1860), s. 498 . . **I. L. R. 38 All. 276**

——— ss. 4 (h), 476—"*Complaint*"—*Statement made to Magistrate in his executive capacity—(Indian Penal Code), Act XLV of 1860, s. 211.* *Held,* that it was not competent to a Magistrate to treat as a complaint, and found thereon such procedure as would naturally follow on a complaint including a prosecution under s. 211 of the Indian Penal Code, a statement which was made to him extra-judicially and without any intention or desire that it should be taken as a complaint, but merely

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— ss. 4 (h), 476—*contd.*

in reply to a question asked by the Magistrate. EMPEROR *v.* BHOLE SINGH (1915) **I. L. R. 38 All. 32**

——— s. 4 (k)—

See SS. 202 AND 203 . **5 Pat. L. J. 47**

——— s. 4 (m)—Complaint—*Petition asking for Police warning if complaint—Petition before Magistrate making charges against accused and asking for an order on Police to warn accused, if complaint.* A petition in which the petitioner made certain allegations against a person and asked for an order on the Police to warn him is not a complaint in a criminal case and no sanction to prosecute the petitioner under s. 211, Indian Penal Code, for those allegations can be granted. PURNO CHANDRA GHOSE *v.* HURISH CHANDRA GHOSH (1911) . . . . **15 C. W. N. 1051**

——— ss. 4 (m), 125, 476—

See MAGISTRATE, POWERS OF. **I. L. R. 37 Calc. 72**

——— ss. 4 (m), 476—

See "COURT," MEANING OF. **I. L. R. 37 Calc. 642**

See "JUDICIAL PROCEEDINGS." **I. L. R. 37 Calc. 52**

——— ss. 4 (1) (o), 236, 237, 403 (1)—

See AUTREFOIS ACQUIT. **I. L. R. 45 Calc. 727**

——— s. 4 (p)—*Officer in charge of a police station, meaning of—Search of a house by an authorized officer—Assistance by an unauthorized person, whether unlawful.* Where an officer in charge of a police station has gone on duty to a place outside his local jurisdiction the police officer next in rank deputed to act for him even though he is absent from the station, so long as he is within the jurisdiction, is an officer in charge of a police station. If a police officer entitled to conduct a search enters a building for such a purpose, the association with him of another having no local jurisdiction does not make the other's entry an unlawful trespass *Morris* v. *Wise, 2 F. & F. 51,* and *Sadagopa Charlu* v. *Satrughna Behara, 23 M. L. J. 445,* followed. ASSAN ALLIAR MARAIKAYAR *v.* MASILAMANI NADAR (1918) . . . . **I. L. R. 42 Mad. 446**

——— s. 4 (r) 340—

See MUKHTEAR. **I. L. R. 38 Calc. 488**

——— ss. 4 (t), 195, 476 and 492—

See SANCTION FOR PROSECUTION. **I. L. R. 41 Calc. 446**

——— ss. 4 (t), 417 and 492—

See PUBLIC PROSECUTOR. **I. L. R. 41 Calc. 425**

——— s. 5—

See CALCUTTA RENT ACT, 1920, s. 24. **25 C. W. N. 661**

——— *Several concurrent sentences each by itself non-appealable, if appealable taken collectively.* An accused, who has been sentenced to concurrent terms of imprisonment, no one of which is individually appealable, has no right of appeal against them collectively

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— s. 5—*contd.*

Abdul Khalek v. The King-Emperor, 17 C. W. N. 72, not followed. *Suknandan Singh v. King-Emperor, 16 C. W. N.* cclxxxiv, referred to. SHABIJAN SHEIKH *v.* EMPEROR (1913)

17 C. W. N. 825

——— ss. 6, 435, 439—

See HIGH COURT.

I. L. R. 37 Calc. 287

——— ss. 10 and 406

See APPEAL . I. L. R. 48 Calc. 874

——— ss. 12, 202, 203, 476, 529 (f)—

See MAGISTRATE, JURISDICTION OF.

I. L. R. 39 Calc. 1041

——— ss. 14, 15, 154 161, 164, 241, 285, 2, 295, 364, 465, and 533 and Sch. III (4), (5) and (13)—*Trial of a lunatic-investigation into unsoundness of mind—Subsequent trial by different Judge and assessors, validity of—Confession, power of Honorary Magistrate to record—Construction of Statutes.* The subsequent trial of an accused person whose trial has been postponed by reason of unsoundness of mind is not illegal merely on account of the fact that the Judge and assessors at the subsequent trial are not the same as at the time of the preliminary investigation under s. 465 of the Code of Criminal Procedure, 1898. The word "postponed" in s. 465 is not fortuitous, but has been deliberately chosen to indicate something different from an "adjournment" as used in other sections of the Code. Sub-s. (*2*) of s. 465 is merely an enabling enactment giving the Court, if any, which subsequently tries the accused persons power to take into consideration the earlier proceedings as if they were a part of the record in the trial without the necessity of formal proof. An Honorary Magistrate recording a confession under s. 164 is not performing a judicial act as such. A confession recorded by an Honorary Magistrate of the third class is legal even though such Magistrate has not been empowered to sit singly. The power granted to a Magistrate of the third class in sch. III (*13*) is not confined to cases judicially before him. The fact that the Magistrate had no authority to carry on a preliminary enquiry or to act in a judicial capacity in the case in which the confession was recorded does not affect the validity of the confession. If there is any ambiguity as to the meaning of a statutory provision the Court is entitled to consider what consequences would result from such an interpretation with a view to ascertain what the real intention of the Legislature was. GHINUA ORAON *v.* KING-EMPEROR

3 Pat. L. J. 291

——— s. 15—*Bench of Magistrates—Judgment and conviction by only some, legality of.* The hearing of a case of assault was commenced by six members of a Bench of Magistrates whose legal *quorum* was only two. On adjourned hearings of the case, sometimes four and sometimes only two took part. These two who took part in the proceedings of the case throughout, concluded the trial and delivered judgment convicting the accused: *Held,* that the conviction was legal. *Kuruppana Nadan v. Chairman, Madura Municipality, I. L. R. 21 Mad. 246,* followed. There is no analogy between trial by a Bench of Magistrates and trials by arbitrators or jurors. VENKATARAMA *v.* SAMINATHA (1914)

I. L. R. 38 Mad. 797

——— ss. 15, 16, 350—*Honorary Magistrates—Effect of variations in the composition of Bench during the course of a trial—Local Governments power to make rules.* By rules framed by the Local Government under s. 16 of the Code of Criminal Procedure it was provided (i) that when a Bench of Honorary Magistrates consisted of three members, any two of them should "form a quorum," and (ii) that if the Bench held an adjourned sitting for disposal of a part heard case, and the members of the adjourned session were not the same as sat at the first hearing of the case, the provisions of s. 350 of the Code of Criminal Procedure would be held to apply to the case. A Bench of Honorary Magistrates consisted of three members, *J*, *N* and *P*. A case under the Gambling Act came before the Bench and was partly heard by *J* and *N*. The case was then adjourned and at the next hearing came before *J* and *P*. The accused waived their right under s. 350 of the Code of Criminal Procedure. The prosecution witnesses were cross-examined; the defence witnesses were heard; the accused were examined, and arguments were heard. The case was then again adjourned, and on the next occasion the Bench consisted of *J* and *N*, who proceeded to deliver judgment. *Held,* that the rules framed by Local Government were not *ultra vires*; but, inasmuch as the course followed by the trial had probably been prejudicial to the accused, the trial, so far as the last day's proceedings were concerned, was set aside and the case remitted for disposal to *J* and *P*. *Hardwar Sing v. Khega Ojha, I. L. R. 20 Calc. 870,* discussed. EMPEROR *v.* MATHURA (1918)

I. L. R. 41 All. 116

——— s. 16—*Difference of opinion between Magistrates forming Bench, settlement of, by casting vote of Chairman—Act VII of 1912, s. 3, effect of, on notifications in force in Eastern Bengal and Assam—Act VII of 1905, s. 3, effect of—Notification of Local Government issued prior to 1905, application of, to Districts formerly in Eastern Bengal and Assam.* The notification issued by the then Government of Bengal under s. 16, Criminal Procedure Code, prior to 1905, that a difference of opinion between two Honorary Magistrates forming a Bench is to be settled by the casting vote of the Chairman, which was one of the notifications which were kept in force in the Province of Eastern Bengal and Assam by s. 3 of Act VII of 1905, still applies to the District of Faridpur under s. 3 of Act VII of 1912. ULFAT SHEIKH *v.* THE KING-EMPEROR (1913) . 18 C. W. N. 394

——— s. 16—Rules 1, 2, 4 of—*the rules framed for the guidance of special Magistrates' Bench in the Municipal District of Satara—Bench of three Magistrates commencing a trial—Absence of one Magistrate—The remaining two Magistrates hearing the rest of the case—Trial illegal.* A Bench of three Special Magistrates heard the prosecution evidence; but owing to the absence of one of the Magistrates the remaining two went on with the trial, heard the defence evidence, and convicted and sentenced the accused. A question having arisen whether the trial was void in view of r. 4

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

———— s. 16—Rules 1, 2, 4 of—*contd.*

of the rules for the guidance of the Special Magistrates' Bench: *Held,* that the trial was void, inasmuch as it contravened the provisions of r. 4. EMPEROR *v.* MOHIDIN (1919)

I. L. R. 44 Bom. 400

———— s. 17—*District Magistrate—Powers of Magistrate of the district as regards distribution of criminal work—Delegation. Held,* that s. 17 of the Code of Criminal Prodecure does not empower a District Magistrate to delegate to the senior honorary Magistrate of the district the duty of distributing cases for disposal amongst the other honorary Magistrates and Benches. BAL KISHAN *v.* SIPAHI LAL (1914) . **I. L. R. 36 All. 468**

———— s. 20—A Presidency Magistrate has jurisdiction in respect of offence committed outside Calcutta but within the limits of the Port. GUNPAT RAI KHEMKA *v.* W J. WOOD

I. L. R. 47 Calc. 147
24 C. W. N. 79

———— ss. 21, cl. (2) and 526, cl. (ii)—

See PRESIDENCY MAGISTRATES.
I. L. R. 35 Mad. 739

———— s 35

See APPEAL . **I. L. R. 40 Calc. 631**

———— *Scope of—Section, it covers cases when different kinds of sentences are passed.* S. 35 of the Code of Criminal Procedure is not restricted to cases where the several punishments are all of the same kind, that is, are all sentences of imprisonment or all sentences of transportation, but covers cases where both kinds of punishment are inflicted. KHOHUA MORAN *v.* KING-EMPEROR (1916)

21 C. W. N. 608

———— *Sentences when may be ordered to run concurrently.* S. 35 (*1*), Criminal Procedure Code, authorises a Court to direct that several punishments passed on an accused for two or more distinct offences do run concurrently only when such sentences have been passed on him at one trial. It is not competent to a Court to give such a direction when the sentences have been passed in different trials. BEJOY GOPAL GHOSE *v.* KAMAL MANDAL (1916) . **20 C. W. N. 1300**

———— When a conviction is had before a Magistrate of the first class of several offences and the concurrent sentence is passed for each offence which in itself is not appealable an appeal does not lie to the Sessions Judge. ABDUL JABBAR *v.* THE KING-EMPEROR

25 C. W. N. 614

———— ss. 35 and 408—

See SEDITION. . **I. L. R. 38 Calc. 214**

———— *Appeal—"Aggregate sentences"—whether concurrent sentences are aggregate.* The term "aggregate sentences" in s. 35 (*3*) of the Code of Criminal Procedure, 1898, applies only to consecutive and not to concurrent sentences. Therefore no appeal lies to the High Court where the whole sentence to be served does not exceed four years. GUR SAHAY RAM *v.* KING-EMPEROR . . . . **3 Pat. L. J. 138**

———— *Appeal—"Aggregate sentences"—Concurrent sentences not aggregate.* the term "aggregate sentences" as used in

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

———— ss. 35 and 408—*contd.*

sub-s. (*3*) of s. 35 of the Code of Criminal Procedure applies only to consecutive and not to concurrent sentences. Where therefore an Assistant Sessions Judge passes concurrent sentences and the whole term to be served by the convict does not exceed four years, the appeal under s. 408 of the Code does not lie to the High Court but to the Sessions Judge. *Sher Mohammad* v. *Emperor of India,* Punj. Rec., 1901, Case 85, *Emperor* v. *Tulshidas Lakshman, 11 Bom. L. R. 544,* and *Regina* v. *Gulam Abas, 12 Bom. H. C. R. 147,* approved and followed. *Abdul Khalek* v. *King-Emperor, 17 C. W. N. 72,* dissented from. EMPEROR *v.* TULSI RAM (1913)

I. L. R. 35 All. 154

———— ss. 35, 235—

See PENAL CODE ACT (XLV OF 1860) ss. 71, 147, 323 **I. L. R. 39 All. 623**

———— ss. 35 (3), 413—

See APPEAL. . **I. L. R. 40 Calc. 631**

———— ss. 36, 94, 96, 105 ; Sch. III (8)—

See TRESPASS. . **I. L. R. 39 Calc. 953**

———— s. 42—*Penal Code, s. 187—Omission to give assistance to the police—Extent of powers of police to require assistance.* A sub-inspector of police having received information that persons [illegible]

ing to the zamindar, who was absent, and on two villagers to join him in a search for the dacoits. The agent refused to lend the gun, and the two villagers refused to join the expedition in search of the dacoits. *Held,* that the circumstances of the case were not covered by the provisions of s. 42 of the Code of Criminal Procedure, and the persons in question could not, therefore, rightly be convicted under s. 187 of the Indian Penal Code. EMPEROR *v.* JOTI PRASAD

I. L. R. 42 All. 314

———— s. 49—

See HABEAS CORPUS.
I. L. R. 44 Calc. 459

[illegible]

for the purpose had not been entrusted to him; and a [illegible]
while l [illegible]
guilty [illegible]
Penal [illegible]
dar, 2[illegible]
MUDAL [illegible]

I. L. R. 40 Mad. 1028

———— *"Credible information."* A police constable having knowledge that a warrant of arrest in respect of a cognizable offence was outstanding against a cer-

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— s. 54—*contd.*

tain person attempted to arrest such person and in so doing was assaulted and prevented from effecting the arrest. *Held*, that the existence of the warrant was equivalent to "credible information" that the person in question had been concerned in a cognizable offence, within the meaning of s. 54 (*1*) of the Code of Criminal Procedure, and that the persons preventing the arrest were properly convicted under s. 353 of the Indian Penal Code. *Queen Empress* v. *Dalip, I. L. R, 18 All. 246*, distinguished. EMPEROR *v.* GOPAL SINGH (1913) . . . I. L. R. 36 All. 6

——— ss. 54, 190, 491, 498—

See HABEAS CORPUS.

I. L. R. 44 Calc. 76

——— ss. 55, 58, 110—*Arrest of suspected person—Warrant—Procedure.* S. 55 of the Code of Criminal Procedure is independent of Chapter VIII of the Code, although proceedings under that chapter may follow an arrest under s. 55 as a natural sequence. An officer in charge of a police station can, therefore, arrest or cause to be arrested, without a warrant or an order of a Magistrate any person who is by repute an habitual robber, house-breaker or thief, or otherwise comes within the scope of s. 110. EMPEROR *v.* NEPAL (1913) I. L. R. 35 All. 407

——— ss. 55, 57—*Acquittal of accused by Sessions Judge—Re-arrest by police.* S. 55 of the Code of Criminal Procedure cannot legally be made use of for the purpose of retaining under arrest a person whom a Court, having acquitted him of the offence with which he was charged, has ordered to be set at liberty. *Empress* v. *Madar All. Weekly Notes, 1885, 59,* referred to. EMPEROR *v.* MAIKU (1919) . . I. L. R. 41 All. 483

——— s. 59—

See ARREST BY PRIVATE PERSON.

I. L. R. 41 Calc. 17

See PENAL CODE. s. 107.

5 Pat. L. J. 129

——— s. 75 (1)—

See WARRANT, VALIDITY OF.

I. L. R. 42 Calc. 708

——— "*Presiding officer*"—*Warrant of arrest signed by other than presiding officer—resistance to arrest.* Where a warrant for the arrest of an accused person who failed to surrender on the day named in his personal recognizance was signed not by the Magistrate who had cognizance of the case but by an Honorary Magistrate of the same town, *held*, that the warrant was signed by an unauthorized person and was, therefore, invalid, and that resistance to a constable endeavouring to effect an arrest on the warrant did not amount to an offence under s. 353 of the Indian Penal Code, 1860. *Held, also*, that the accused having surrendered before the warrant was executed and having been again released on his personal recognizance should not have been re-arrested. JAGAPAT KOERI *v.* KING-EMPEROR

2 Pat. L. J. 487

——— ss. 75, 77, 79, 80, 537 and 555—

See WARRANT OF ARREST. 3 Pat. L. J. 493

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— s. 88—*Absconding person, a member of an undivided Hindu family—Undivided interest of his in the family property, or any portion thereof whether liable to attachment under s. 88.* The undivided interest of an absconding person who is member of an undivided Hindu family in the family property or any portion thereof can be attached under s. 88 of the Criminal Procedure Code (Act V of 1898). *Mussamat Golab Koonwar* v. *The Collector of Benares and Raja Odit Narain Sing, 4 Moo. I. A. 246* and *Juggomohon Bukshee* v. *Roy Mothooranath Chowdry, 11 Moo. I. A. 223,* followed. *Re Umayan, 2 Weir's Cr. R. 43* approved. *Re Chinniyan, 2 Weir's Cr. R. 43* overruled. SECRETARY OF STATE FOR INDIA *v.* RANGASAMY AYYANGAR (1916)

I. L. R. 39 Mad. 831

——— ss. 88, 89—

See s. 524 . . 5 Pat. L. J. 321

——— ss. 90, 501 and 537—*Arrest under s. 90—Bond for appearance—S. 501, applicability of.* A warrant purporting to be issued under s. 90 of the Criminal Procedure Code (Act V of 1898) for the arrest of an accused person who has been let out on his own bond is illegal unless the Court records its reasons as required by the section. The omission to do so is an irregularity not cured by s. 537 of the Code. S. 501 of the Code applies only to cases where there are sureties and where through mistake, fraud or otherwise insufficient sureties have been accepted, it does not apply to a case where there are no such grounds. *Re* KARUTHAN AMBALAM (1914)

I. L. R. 38 Mad. 1088

——— s. 90, Sch. V, Form VII—

See WARRANT. . I. L. R. 38 Calc. 789

——— s. 94—

See SUMMONS TO PRODUCE DOCUMENTS.

I. L. R. 47 Calc. 647

See TRESPASS . I. L. R. 39 Calc. 953

——— *Summons may be issued under, to accused to produce document or thing.* Under s. 94, Criminal Procedure Code, a Magistrate has power to issue a summons to an accused person to produce a document or other thing even when its production might tend to incriminate him. *Mahomed Jackariah and Co.* v. *Ahmed Mahomed, I. L. R. 15 Calc. 109,* followed. *Ishwar Chandra Ghosal* v. *The Emperor, 12 C. W. N. 1016,* dissented from. KONDAREDDI, *Re* (1914)

I. L. R. 37 Mad. 112

——— The Chief Presidency Magistrate of Calcutta issued a search warrant in execution of which the books of the Petitioner's firm were taken possession of by the police. The Magistrate's order was set aside by the High Court in revision and thereupon the Magistrate issued a notice on the Petitioner calling upon him to be present in his Court to take delivery of books personally or by agent. The books were made over to the Petitioner's agent and simultaneously a notice was served on the Petitioner's agent under s. 94, Cr. P. C., and the books were taken possession of : *Held*, on a consideration of the circumstances of the case, that the order under s. 94, Cr. P. C., was properly made. T. R. PRATT *v.* KING-EMPEROR . 24 C. W. N. 410

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— ss. 94, 96, 192, 202—

See MAGISTRATE, POWER OF.

I. L. R. 38 Calc. 68

——— ss. 94, 165—

See SEARCH . I. L. R. 41 Calc. 261

See SEARCH WITHOUT WARRANT.

I. L. R. 38 Calc. 304

——— ss. 94, 165—*Scope of—Search for specified article only—Article in possession of accused if can be searched for—General search for stolen property, if authorised.* Where a Sub-Inspector of Police searched the house of one S who had been charged with criminal breach of trust in respect of a sum of money, and the object of the search was to discover the money and a bag in which it was contained and in the course of the search one of the petitioners cut the Sub-Inspector with a sickle on the hand and the other knocked him down and they were convicted under ss. 332, 353, Penal Code: *Held*, that the search was covered by s. 165, Cr. P. C., and the convictions under ss. 332, 353 were right. That under ss. 94, 165, Cr. P. C., a search can be made for a stolen article or incriminating document or thing in the possession of an accused person but one of the safeguards which the Legislature provides against abuse is that the search must be for a specified article or thing and not a search for stolen property generally. BISSAR MISSER *v.* EMPEROR (1913) . . 17 C. W. N. 1209

——— s. 96—

See s. 36. . I. L. R. 39 Calc. 953

——— *General search warrant, issue of, when justifiable.* Under orders of the Government, the officer appointed for the purpose was holding an investigation into the dealings with the Munitions Board with a view to find out what offence if any was committed and by whom in connection with the said dealings. On the application of this officer to the effect that the books and accounts of the Petitioner's firm among others mentioned in the petition were necessary for the purpose of the said investigation the Magistrate issued a general search warrant in respect of the books and documents of the Petitioner's firm specified in the petition: *Held*—That there was no enquiry or trial or other proceeding under the Code and there were no materials

of a Magistrate before the issue of a search warrant that means that the Magistrate should apply his mind to the facts and he ought not to issue a search warrant simply because the police officer asks him to do so. T. R. PRATT *v.* KING-EMPEROR . . . . I. L. R. 47 Calc. 597
24 C. W. N. 403

——— *General search warrant, issue of, when justifiable. Per* CHAUDHURI, J.—An order under s. 96, Cr. P. C., cannot be made to further a police investigation which may or not result in an enquiry. The Magistrate has

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— s. 96—*contd.*

of which the books were wanted had formed a correct opinion. The form of the search warrant in the Code refers "to an enquiry now being made or about to be made." There are separate provisions in the Code for investigation and large powers are given to the police in cognizable cases for seizing of documents. The word "investigation" is defined in the Code and is differentiated from an enquiry. There is no express provision

NEWBOULD, J.—S. 96, Cr. P. C., empowers a Magistrate to issue a search warrant before any proceedings of any kind are initiated and in view of an enquiry about to be made. JAGANNATH AGARWALLA *v.* KING-EMPEROR 24 C. W. N. 405

——— ss. 96, 98—*Search warrant, issue of long after application.* Where in a case of criminal trespass and theft the complaint at the time of applying for process prayed for the issue of a search warrant but the Magistrate after repeated applications made an order for the issue of the warrant more than three weeks after: *Held*, that although the procedure was not contrary to the actual letter of ss. 96 and 98, Criminal Procedure Code, it was so dilatory that it could only tend to defeat the object for which such a warrant is issued. BILAS ROY CHOWDHURY *v.* RAM GOPAL KHEMKOR (1917) . . 22 C. W. N. 719

——— s. 100—

See SEARCH WARRANT.

I. L. R. 45 Calc. 905

——— *Warrant under, legality of, when drawn up on a printed form under s. 98—Penal Code (Act XLV of 1860), ss. 147 and 332—Resistance to the execution of warrant.* There being no printed form for search warrants under s. 100, Criminal Procedure Code, printed form is issued under s. 98, are always used with the necessary modifications for that purpose. When a warrant under s. 100, Criminal Procedure Code, was drawn up on a printed form for use under s. 98, Criminal Procedure Code, and the warrant was snatched away and destroyed by the persons accused of resisting the execution of the warrant: *Held*, that as the accused destroyed the warrant, it must be presumed that the warrant under s. 100 was properly drawn up on a form under s. 98, Criminal Procedure Code, with the necessary modifications. That the error, if any, in the warrant, supposing that the necessary modifications had not been made, would be one of form only. *Bisu Haldar* v. *Probhat Chandra*, *6 C. L. J. 127*, distinguished. GURAMIAH *v.* KING-EMPEROR (1911) . . 16 C. W. N. 336

——— *Custody of child by natural father—Court's power to make over child to adoptive father.* A complaint was filed before the Magistrate alleging that the Petitioner had removed his son whom he had given in adoption to the complainant's son's widow from the complainant's custody without her consent. As soon as the complaint was filed and before the issue of any search warrant which was ordered

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— s. 100—*contd.*

the boy was produced in Court and the Magistrate adjourned the case directing the Petitioner to move the High Court on failure of which the boy was to be made over to the complainant: *Held*—That it was very doubtful if s. 100, Cr. P. C., applied to the case. That under the circumstances the order of the Magistrate was not a proper order and should be set aside. CHAGAN RAI *v.* HERA LAL DOOSAJ . **24 C. W. N. 104**

——— **ss. 100, 552**—

See MAGISTRATE, JURISDICTION OF.
I. L. R. 39 Calc. 403

——— **s. 103**—*Right of investigating officer to search a house—Search made without witnesses—Resistance on the part of householder—Act No. XLV of 1860 (Indian Penal Code), ss. 332 and 503.* A sub-inspector of police investigating a charge of theft requires no warrant to enable him to search a house which he suspects to contain stolen property. But in making such a search he is bound to comply with the provisions of s. 103 of the Code of Criminal Procedure, and if he attempts to make a search without any search-witnesses being present, the owner or occupier of the house is justified in resisting the attempt so far as to exclude him from the house. The owner or occupier is not, however, justified in using any more force than is necessary for such purpose. EMPEROR *v.* NIRMAL SINGH
I. L. R. 42 All. 67

——— *Evidence of search apart from search list—Evidence Act, I of 1872, s. 91—"Matter required by law to be reduced to the form of a document."* When a search has been conducted under s. 103, Criminal Procedure Code, evidence can be given regarding the things seized in the course of the search and regarding the places in which they were found in addition to the evidence of the list which the law directs to be drawn up relating to the particulars of the property found. The words in s. 91, Indian Evidence Act, I of 1872, "any matter required by law to be reduced to the form of a document" could not have been intended by the legislature to mean observations of physical facts which under the ordinary law has to be proved by the testimony in Court. SOLAI NAIK *v.* EMPEROR (1910) . . . . **I. L. R. 34 Mad. 349**

——— **ss. 103, 309, 423**—

See DACOITY . **I. L. R. 41 Calc. 350**

——— **s. 105**—

See TRESSPASS **I. L. R. 39 Calc. 953**

——— **s. 106**—

See SECURITY TO KEEP THE PEACE.
I. L. R. 43 Calc. 671

——— *"Offences involving breach of the peace"—Offence punishable under s. 504 of the Indian Penal Code (Act XLV of 1860), is such an offence—Security for keeping the peace on conviction.* On a conviction for an offence punishable under s. 504 of the Indian Penal Code, the accused was ordered to furnish security to keep the peace for a period of one year under s. 106 of the Criminal Procedure Code. The accused having applied to the High Court to have the order set aside. *Held,* that the order was properly made, for the expression "other offences involving a breach of the peace" in s. 106 of the Criminal Procedure Code included offences which were offences because a breach of the peace had occurred or because a breach of the peace was likely to occur. EMPEROR *v.* SAYAD YACOOB (1918) . . . . **I. L. R. 43 Bom. 554**

——— *Security to keep the peace—"Offence involving a breach of the peace"—Mischief by removing land-mark—Penal Code (Act XLV of 1860), s. 434. Held,* that an offence "involving a breach of the peace," mentioned in s. 106 of the Code of Criminal Procedure, does not mean only an offence which necessarily involves a breach of the peace or of which a breach of the peace forms an ingredient, but includes such an offence as in common knowledge is ordinarily or very probably the occasion of a breach of the peace, as, for example, the removal of a land-mark, *Baidya Nath Majumdar* v. *Nibaran Chunder Gope, I. L. R. 30 Calc. 93, Arun Samanta* v. *Emperor, I. L. R. 30 Calc. 366, Raj Narain Roy* v. *Bhagabat Chunder Nandi, I. L. R. 35 Calc. 315,* and *Muthiah Chetti* v. *Emperor, I. L. R. 28 Mad. 190,* dissented from. EMPEROR *v.* MANIK RAI (1911) . . . . **I. L. R. 33 All. 771**

——— *Security for keeping the peace—Criminal trespass with intent to commit a breach of the peace.* Upon a conviction for criminal trespass, where the intention of the trespass is to commit a breach of the peace an order under s. 106 of the Code of Criminal Procedure may lawfully be passed in the discretion of the Magistrate. *Empress* v *Manik Rai, I. L. R., 33 All., 771, Emperor* v. *Kundan Singh, Weekly Notes, 1885, p. 303,* and *Queen* v. *Jhapoo, 20 W. R., Cr. r. 37.* referred to. EMPEROR *v.* DHARAM RAJ . . . . **I. L. R. 42 All. 345**

——— *Accused convicted of offences under ss. 297 and 143,—Indian Penal Code, and ordered to furnish security to keep the peace—legality of such order.* Petitioner was found to have been one of a crowd of people who intimidated a burial party, abused them and threatened them with violence unless the body was taken to the Jama Masjid for a decision of the question whether the deceased was a *Mussalman or Kaffir.* He was convicted of offences under s. 297 and 143 of the Penal Code, and was also ordered to furnish security to keep the peace for one year. *Held,* that the order to furnish security under s. 106 of the Code of Criminal Procedure was illegal as the accused had not been convicted of the offence of criminal intimidation or of an offence involving a breach of the peace. An offence involving a breach of the peace is one in which a breach of the peace is an ingredient, and not merely an offence provoking or likely to lead to a breach of the peace. *Arun Samanta* v. *Emperor (I. L. R. 30 Calc. 366),* followed. An order under s. 106 of the Code cannot be passed on conviction for an offence under s. 143 or s. 297 of the Penal Code as these offences do not necessarily involve the use of force. *Raj Narain* v. *Bhagabat Chunder (I. L. R. 35 Calc. 315), and Kannookaran* v. *Emperor (I. L. R. 26 Mad. 469),* followed. ABDULLA *v.* CROWN . . . **I. L. R. 2 Lah. 278.**

——— **s. 106 (3)**—*Security to keep the peace—Powers of appellate court not limited by juris-*

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— s 106 (3)—*contd.*

diction of original court—Penal Code (Act XLV of 1860), ss. 71, 147, 149, 325—Separate sentences. The power conferred upon an appellate court by cl. (3) of s. 106 of the Code of Criminal Procedure is not limited in any way by the powers exercisable by the original court which tried the case. *Emperor* v. *Bhausing Dhumalsingh, I. L. R. 33 Bom 33,* followed *Muthiah Chetti* v. *Emperor, I. L. R. 29 Mad. 190; Paramasiva Pillai* v. *Emperor, I. L. R. 30 Mad. 48; Dorasami Naidu* v. *Emperor, I. L. R. 30 Mad. 182,* and *Emperor* v. *Momin Mallita, I. L. R 35 Calc. 434,* dissented from. *Held,* also, that where in the course of a riot grievous hurt was committed the accused might be lawfully convicted of separate offences under ss. 147 and 325 read with 149 of the Indian Penal Code and sentenced separately for each offence. *Queen-Empress* v. *Bisheshar, I. L. R. 9 All. 645,* followed. EMPEROR v. DHARAM DAS (1910) . . . . I. L. R. 33 All. 48

an appellate court is competent to pass an order *binding down an accused person to give security* even though the court of first instance was not competent to do so. BACHAN SINGH v EMPEROR.
2 Pat. L. J. 21

——— *Security for keeping the peace—Powers of appellate court to order security not limited by jurisdiction of trial court.* The power conferred on an appellate court by cl. (3) of s. 106 of the Code of Criminal Procedure is not limited by the fact that the court whose decision is under appeal had no power to direct security to be taken. *Emperor* v. *Dharam Das, I. L R. 33 All., 48,* followed EMPEROR v. TILAK RAI . . . . I. L. R. 43 All. 372

——— *On conviction for an offence punishable under s. 504 of the Indian Penal Code the accused was ordered to furnish security to keep the peace for a period of one year under s. 106 of the Criminal Procedure Code.* The accused having applied to the High Court to have the order set aside. *Held,* that the order was properly made as the expression "other offences involving a breach of the peace" in s. 106 of the Code included offences which were offences because a breach of the peace had occurred or was likely to occur. EMPEROR v. SAYAD YACOOB.
I. L. R. 43 Bom. 554

——— *Appellate Court, jurisdiction of, defined* The jurisdiction of an Appellate Court to order a person who has been convicted of one of the offences mentioned in sub-s. (1) of s. 106, Criminal Procedure Code, is not restricted to cases where the conviction was by one of the Courts specified in the sub-section. The words "an Appellate Court" are quite general and the word "also" indicates that the powers given by that section may be exercised by the Courts mentioned in sub-s. (1) and by an Appellate Court. The words "under this section" in sub-s. (3) have reference to the powers given by that section and not to the Courts by which these powers are in the first instance exercisable. *Muthiah Chetty* v. *Emperor, I. L. R. 29 Mad. 190,* overruled. SOLAI GOUNDEN *Re* (1914)
I. L. R. 37 Mad. 113

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— ss. 106, and 32—*Security to keep the peace—Powers of Sub-divisional Magistrate.* A Sub-divisional Magistrate is, as such, competent to pass an order under s. 106 of the Code of Criminal Procedure binding over a person to keep the peace for period exceeding six months, notwithstanding that, but for his being a Sub-divisional Magistrate, he would have only second class powers. EMPEROR v. RAJA SINGH (1915)
I. L. R. 37 All. 230

——— s. 107—

See SECURITY TO KEEP THE PEACE.
I. L. R. 38 All. 468

See TRANSFER I. L. R. 41 Calc. 719

——— *Security to keep the peace—Security demanded in respect of an act which was legal, although others might thereby have been led to break the peace.* To justify an order under s. 107 of the Criminal Procedure Code, the Magistrate must believe that the person against whom he makes the order is about to commit a breach of the peace or to disturb the public tranquillity or to do some *wrongful* act that may occasion a breach of the peace. The fact that a Mahomedan in the exercise of his legal right to kill cows may perhaps give offence to his Hindu neighbours and induce them to commit a breach of the peace is no ground for binding over the Mahomedan. *Shahbaz Khan* v. *Umrao Puri, I. L. R 30 All. 181,* referred to EMPEROR v. MUHAMMAD YAKUB (1910) . I. L. R. 32 All. 571

——— *Security to keep the peace—Circumstances in which the performance of religious ceremonies may amount to a wrongful act likely to occasion a breach of the peace. Held,* that persons who performed religious ceremonies in a place not set apart for the purpose and where no such ceremonies had been performed before, and who did so with the deliberate intention of triumphing over, insulting, and wounding the religious feeling of their neighbours, committed a wrongful act and one which might probably occasion a breach of the peace or disturb the public tranquillity within the meaning of s. 107 of the Code of Criminal Procedure EMPEROR v. MURLI SINGH (1911) . . . I. L. R. 33 All. 775

——— *Security to keep the peace—S. 403—Autrefois acquit—S. 495, withdrawal from prosecution, section inapplicable to security proceedings—No conviction or acquittal under s. 107—Ss. 112, 117, 118, 119, 253—S 145, order under, no bar to order under s. 107 on same facts.* A preliminary charge-sheet under s 107, Criminal Procedure Code, was withdrawn by the police before the parties mentioned therein were ordered to appear. The Magistrate endorsed the charge-sheet to the effect that the accused were acquitted A fresh charge under the same section was subsequently put by the police against certain of the same persons who had been previously charge-sheeted. *Held,* that the withdrawal of the first charge-sheet was no bar to proceedings under the second. "Neither an order of discharge nor of acquittal can properly be made in a case where the accused has not been directed to appear at all." S. 495, Criminal Procedure Code, is not applicable to security proceedings. An order passed by a Magistrate under s. 145, Criminal Procedure Code, is no bar to the same Magistrate binding over the same parties on the same facts

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— **s. 107**—*contd.*

under s. 107, Criminal Procedure Code. *In re* MUTHIA MOOPAN (1913) . **I. L. R. 36 Mad. 315**

——— *Security for keeping the peace—Action for damages for malicious prosecution.* *Held*, that an action for damages for malicious prosecution, may be founded upon the initiation against the plaintiff maliciously and without reasonable and probable cause of proceedings under s. 107 of the Code of Criminal Procedure, just as much as upon the institution of a criminal prosecution in the ordinary acceptation of that term. MUHAMMAD NIAZ KHAN *v.* JAI RAM (1919) **I. L. R. 41 All. 503**

——— *Security for keeping the peace—Whether person who does not go to the place where breach of peace is apprehended, can be bound down.* The petitioner and another both claimed the right to take offerings from pilgrims alighting at Gaya Railway Station. They both sent servants armed with *lathis* to the station to accost pilgrims, with the result that there were disturbances. The petitioner never went to the station himself. *Held*, that as he was in fact asserting a claim likely to cause a breach of the peace and making preparation for the enforcement of that claim through an armed servant, he was liable to be bound down to keep the peace. BALALAL MAHTON *v.* KING-EMPEROR . **1 Pat. L. J. 361**

——— *Security for keeping the peace—Action for damages for malicious prosecution.* An action for damages for malicious prosecution may be founded upon the initiation against the plaintiff maliciously and without reasonable and probable cause of proceedings under s. 107 of the Code of Criminal Procedure, just as much as upon the institution of a criminal prosecution in the ordinary acceptation of that term. *Muhammad Niaz Khan* v. *Jai Ram, I. L. R. 41, All. 503*, and *Crowdy* v. *Reilly, 17 C. W. N. 554*, followed. CHIRANJI SINGH *v.* DHARAM SINGH . . **I. L. R. 43 All. 402**

——— *Evidence Act (I of 1872), s. 74—Notice under s. 107, Criminal Procedure Code, if a public document—Proof necessary for admission of such document in evidence.* A notice under s. 107, Criminal Procedure Code, is a public document within the meaning of s. 74 of the Evidence Act, but it cannot come in without proof that the parties mentioned in it are the parties concerned in the question at issue about which it is produced as evidence. AMJAD *v.* LACHMI KANTA JHA (1914) **18 C. W. N. 644**

——— *Security to keep the peace—Evidence—Nature of findings required to justify a Magistrate in passing an order under s. 107.* In proceedings under s. 107 of the Code of Criminal Procedure it is not enough for the Magistrate to find that unless the persons before him are bound over to keep the peace, there is likely to be a breach of the peace or disturbance of the public tranquillity. He has to find in respect of each and all of such persons that they are likely to commit a breach of the peace or disturb the public tranquillity, or that they are likely to do some wrongful act which may occasion such a disturbance. *Queen Empress* v. *Abdul Qadir, I. L. R 9 All. 452*, and *Jagat Narain* v. *Emperor, 7 All. L. J. 161*, referred to. EMPEROR *v.* BRIJNANDAN PRASAD (1914) **I. L. R. 37 All. 33**

——— **ss. 107 and 117**—*Security to keep the peace—Evidence—Record of previous trial—Inquiry.* It is not competent to a Magistrate in proceedings under s. 107, *et seq.* of the Code of Criminal Procedure to dispense with the inquiry provided for by s. 117 of the Code and to base his order merely on the results of a riot case recently tried by him. EMPEROR *v.* MUL CHAND (1914) . . . . **I. L. R. 37 All. 30**

——— **ss. 107, 117, 118, 526**—*S[illegible] for keeping the peace—Transfe[illegible]* s. 526 of the Code of Criminal Procedure enables the High Court to transfer criminal proceedings initiated under s. 107 of the Code, once they have been properly instituted, to any other criminal court of equal or superior jurisdiction (and which otherise would have no jurisdiction) and the order of the High Court will give jurisdiction to the Court to which the case has been so transferred to make an inquiry under s. 117 and to pass an order under s. 118. *In the matter of the petition of Amar Singh, I. L. R. 16 All. 9*, not followed. EMPEROR *v.* WAHID ALI KHAN (1910) **I. L. R. 32 All. 642**

——— **ss. 107, 125**—*District Magistrate if means the Magistrate of the district to which proceedings transferred from another district.* Where a proceeding under s. 107, Cr. P. C., started in one district was transferred to another, the District Magistrate of the latter district has alone jurisdiction under s. 125 in respect of the said proceedings. GURUPRASAONNA ROY *v.* HARI KINKAR MUKHERJI (1919) . . **23 C. W. N. 958**

——— **ss. 107, 125, 438**—*Security to keep the peace—Revision—Jurisdiction of High Court and Sessions Judge.* A Magistrate of the first class ordered certain persons to give security for keeping the peace. The persons to be bound over applied to the Sessions Judge to revise the order. The Sessions Judge was of opinion that the applicants should not have been bound over and accordingly referred the case to the High Court with a recommendation that the order should be set aside. *Held*, the order having been passed by a Magistrate subordinate to the District Magistrate, the record should, under s. 125 of the Code of Criminal Procedure, have been laid before the District Magistrate to deal with the matter. Where a Code gives a particular Court jurisdiction to act in certain matters, it is that Court which should be applied to and not the High Court. *Banarsi Das* v. *Partab Singh, I. L. R. 35 All. 130*, referred to. EMPEROR *v.* LALJI (1917) **I. L. R. 40 All. 143**

——— **ss. 107 and 144**—*Renewal of expired order, validity of.* Where an order restraining the petitioners from entering certain land expired on the 28th April, 1917, and a similar order was passed against the same parties on the 6th June, 1917 : *held*, that the Magistrate should not have made the second order but should have proceeded under s. 107 if there was a likelihood of a breach of the peace by one clearly in the wrong. S. 144 should not be used for anything in the nature of a permanent expedient without the sanction of the Local Government. RASHBEHARI SINGH *v.* JAGNARAIN ROY . . . **3 Pat. L. J. 130**

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

———— ss. 107, 144, 145 and 146—*Dispute regarding possession of immovable property—Duty of Magistrate—Court's powers of superintendence* The use of s. 144 is a suitable method of avoiding a breach of the peace only if it is clear upon a reading of the police report that the claim of the party creating the disturbance is not a claim made in good faith. The practice of issuing notices purporting to be notices under s. 144 of the Criminal Procedure Code calling upon both parties to attend on a fixed date and submit statements is a mere evasion of the law. The notices are in effect notices under s 145 (*1*) and (*4*) of the Criminal Procedure Code, and, where such notices have been issued, the High Court will direct that the procedure prescribed in Chapter XII of the Code be followed KANIZ AMINA *v.* THE KING-EMPEROR 3 Pat. L. J. 243

———— ss. 107, 145, 146—

See JALKAR. . I. L. R. 39 Calc. 469

———— ss. 107, 145—

See DISPUTE CONCERNING LAND I. L. R. 39 Calc. 150

———— *Security to keep the peace—Dispute concerning land likely to lead to a breach of the peace—Procedure.* Where there exists a dispute relating to immovable property which is likely to lead to a breach of the peace, the magistrate concerned is not necessarily bound to proceed under s. 145, but can take action—and this may sometimes be the better course—equally under s 145 of the Code of Criminal Procedure *Sheoraj Roy* v. *Chatter Roy*, *I L. R 32 Calc.* 966, and *Emperor* v. *Ram Baran Singh. I L. R 28 All. 406*, followed *Mahadeo Kunwar* v *Bisu*, *I. L. R. 25 All. 537*, distinguished. *Balant Singh* v *Bhoju*, *I. L. R. 35 Calc. 117*, not followed EMPEROR *v.* THAKUR PANDE (1912) I. L. R. 34 All. 449

———— *Procedure — Appointment of chaudhri by traders using a market—Dispute as to chaudhri's dues between him and the servants of the zamindar.* The traders who fre-

pay him for his services by means of a small contribution for each beast of burden which brought goods to the market. The servants of the owner, on the other hand, wished to obtain these payments for themselves, and it was found that they were ready to commit a breach of the peace in order to make good their alleged right thereto · *Held*, that the circumstances were not such as would warrant the taking of action under s 145 of the Code of Criminal Procedure, but that s. 107 of the Code was the more appropriate section under which to proceed. EMPEROR *v.* RAM LOCHAN (1913) . . I. L. R. 36 All. 143

———— *Dispute over possession of fishery—likelihood of breach of the peace—Proceeding under s. 107 against one party—Application by that party for changing 107 proceedings into proceedings under s. 145, refusal of, by Magistrate—Discretion of Magistrate, High Court if competent to interfere with discretion of Magistrate and direct proceedings to be instituted under s. 145 instead of s. 107—Jurisdiction.* Where a dispute

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

———— ss. 107, 145—*contd*

likely to lead to a breach of the peace was over the possession of a fishery, and the Magistrate drew up a proceeding under s 107, Cr P. C.: *Held*—That the Magistrate had jurisdiction to proceed under s 107, Cr. P C and he having exercised his discretion it was not open to the High Court to direct that the Magistrate must proceed under s 145 and not under s 107, Cr. P C AMULYA CHARAN SIRKAR *v* AMRITALAL MUKERJI . . . 24 C. W. N. 1075

———— ss. 107, 192, 528—*Previous proceedings under s 107 and prosecution under the Penal Code—Discharge—Subsequent proceedings under s. 107 on the same facts, if maintainable—Jurisdiction of Magistrates—Transfer by District Magistrate, to a Magistrate without local jurisdiction before issue of notice to accused—Order of such Magistrate, validity of—Notice to accused, vague—Effect of notice.* A Magistrate is not entitled to institute proceedings under s. 107 of the Criminal Procedure Code upon facts and information which have already been the subject of enquiry under that section or in connexion with charges under the Penal Code brought against persons who have been discharged in those proceedings. A District Magistrate cannot be said to have taken cognizance of a case under s 107, in which he has not issued notice to the accused to show cause why they should not be proceeded against, and has no power under s 192 of the Criminal Procedure Code to transfer such a case to another Magistrate A District Magistrate has no power under s. 528 of the Criminal Procedure Code to make over the initiation of proceedings in a case under s. 107 of the Criminal Procedure Code to a Magistrate who has no local jurisdiction in the matter. A Magistrate who has no local jurisdiction to initiate proceedings in a matter under s 107, Criminal Procedure Code, acquires none by the transfer of a case to him from a Magistrate who [illegible]
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if the notice issued to the accused under that

———— ss. 107 and 250—*Frivolous or vexatious complaint—Compensation—Application to Magistrate to bind over certain persons to keep the peace.* A person in respect of whom information has been laid before a Magistrate to the effect that he is likely to commit a breach of the peace or is otherwise liable to the provisions of s. 107 of the Code of Criminal Procedure, is not a person accused of any "offence." An order for payment of compensation cannot, therefore, be made against a man who has petitioned a Magistrate to take action under s 107 of the Code. BINDHACHAL PRASAD RAI *v.* LAL BIHARI RAI (1914) I. L. R. 36 All. 382

———— ss. 107, 350—*Transfer of Magistrate—Trial de novo—Right of accused.* S. 350 (*1*), proviso (*a*), Criminal Procedure Code, applies to proceedings under s 107, Criminal Procedure Code

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

———— ss. 107, 350—*contd.*

and the accused is entitled in a security case to a trial *de novo* on the Magistrate being transferred. VENKATACHINNAYYA *v.* KING-EMPEROR (1920)
I. L. R. 43 Mad. (F. B.) 511

———— ss. 107 and 514—*Forfeiture of bond to keep peace—Person bound over having brought a Civil suit to enforce his right.* The Hindus and Muhammadans of Gharuanda were disputing about the location of the latter's slaughter-house. The District Magistrate selected a new site, but on appeal by the Hindus the Commissioner changed this for another place. Some of the Hindus had meanwhile been bound down to keep the peace in this connection. They were dissatisfied with the place chosen by the Commissioner and brought a civil suit claiming that the site was in the *shamilat deh*, and that it was chosen without the consent of all the proprietors and prayed for an injunction restraining the Muhammadans from building the slaughter-house. The District Magistrate then passed an order of forfeiture of their bonds holding that the institution of the civil suit was likely to cause a breach of the peace : *Held*, that it was not the intention of the Legislature to prevent persons, even though bound over under s. 107 of the Code of Criminal Procedure, from seeking to enforce their rights in the Civil Court and that the order of forfeiture was consequently illegal. SITAL *v.* THE CROWN . I. L. R. 1 Lah. 310

———— ss. 107, 445 and 435—

See REVISION. . . 3 Pat. L. J. 302

———— ss. 107, 496—Bail—*ss. 344 and 167, s. 107, cl. (4)* Criminal Procedure Code, makes an exception to the general rule laid down in s. 496 which enacts that bail shall be given in all cases in which a person is not charged with a non-bailable offence. S. 107, cl. (*4*), compared with s. 344 and 167, Criminal Procedure Code. *Re* NARAYANASAMI NAICKEN (1913)
I. L. R. 36 Mad. 474

———— ss. 107, 526 (8)—

See TRANSFER . I. L. R. 41 Calc. 719

———— s. 108 (b)—

See SECURITY FOR GOOD BEHAVIOUR.
I. L. R. 43 Calc. 591

———— ss. 108, 110, 114—

See SECURITY FOR GOOD BEHAVIOUR.
I. L. R. 46 Calc. 215

———— s. 109—

See OSTENSIBLE MEANS OF SUBSISTENCE.
I. L. R. 40 Calc. 702

See SECURITY FOR GOOD BEHAVIOUR.
I. L. R. 39 Calc. 456

———— *Security for good behaviour from vagrant and suspected person.* Petitioner, a *kaviraj* by profession and a dealer in cocoons, was found at midnight in association with two others who had in their possession house-breaking implements. On being discovered he fled and when arrested remained silent and the explanation he subsequently gave to the Magistrate of his presence at the time and place in question was false : *Held*, that the facts found did not bring the petitioner within either clause of

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

———— s. 109—*contd.*

s. 109 of the Code. *Per* SHAMS-UL-HUDA, *J.* That cl. (*a*) of s. 109 Criminal Procedure Code, refers to a continuous act and does not therefore apply to a case where there is a momentary effort at concealment to avoid detection or arrest nor can it apply to the case of a person brought under arrest for it cannot be said of such a person that he is taking precautions to conceal his presence. RESHU KAVIRAJ *v.* KING-EMPEROR (1917)
22 C. W. N. 163

———— ss. 109 and 110—*Binding over under both sections illegal.* A person cannot be bound over under both the ss. 109 and 110, Criminal Procedure Code (Act V of 1898). *Re* RANGASAMI PILLAI (1913) . . I. L. R. 38 Mad. 555

———— ss. 109, 123, 397—*Penal Code (Act XLV of 1860), s. 329—Concurrent sentences—Consecutive sentences.* The accused was proceeded against under s. 109 of the Criminal Procedure Code, and sentenced on the 6th July 1909, under s. 123 of the Code, to rigorous imprisonment for nine months, in default of security for good behaviour. He was then tried for an offence of theft committed by him in November 1908, and was, on the 17th August 1909, sentenced to suffer rigorous imprisonment for three months : the second sentence was directed to take effect on the expiry of the first sentence : *Held*, that the two sentences ought not to run consecutively ; but must run concurrently. EMPEROR *v.* ARJUN (1909)
I. L. R. 34 Bom. 326

———— s. 110—

See s. 55 . I. L. R. 35 All. 407

See SECURITY FOR GOOD BEHAVIOUR.
I. L. R. 43 Calc. 153, 1128
I. L. R. 46 Calc. 215

———— Order for security passed upon failure of charge of a substantive offence—*Against the persons bound over.* Eight persons were sent up for trial on a charge of dacoity and were acquitted, and an attempt to prove a case against them under s. 400 of the Indian Penal Code was also unsuccessful : *Held*, that these circumstances were not in themselves a bar to proceedings being shortly afterwards initiated against the person acquitted under s. 110 of the Code of Criminal Procedure. *Alep Pramanik* v. *King-Emperor, 11 C. W. N. 413*, distinguished. EMPEROR *v.* RAJ KARAN (1909) . . . . I. L. R. 32 All. 55

———— Evidence of general repute—*Inadmissible to prove charge under s. 117.* Where a person is solely charged under s. 110, cl. (*f*), Criminal Procedure Code, Act V of 1898, evidence of general repute is inadmissible to prove that he is a desperate and dangerous character. A provision of law which is an exception to the general rules of evidence must be only applied to the cases to which it is confined by the legislature. No argument can therefore be deduced from the admissibility of evidence of general repute under s. 117, Criminal Procedure Code. MUTHU PILLAI *v.* EMPEROR (1920) . . . . I. L. R. 34 Mad. 255

———— Fresh proceedings after expiration of an order under section—*if can be based on materials antecedent to the expiration of the previous order.* When after the expiration of the period of a bond for good behaviour taken under s. 110, Criminal

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

———— **s. 110**—*contd.*

P [illegible] aken against be confined against him RAM DEO PANDE *v.* THE EMPEROR (1912) **19 C. W. N. 223**

———— **Appeal**—*Judgment* A Court of Appeal dismissing an appeal summarily is not bound to write a judgment; but an appeal from an order requiring a person *to furnish security to* be of good behaviour is distinguishable from an appeal against a conviction in respect of an offence specifically charged. And in such cases a District Magistrate should not dispose of an appeal otherwise than by judgment showing on the face of it that he has applied his mind to a consideration of the evidence on the record, and of the pleas raised by an appellant, both in the Court below and in his memorandum of appeal. EMPEROR *v.* LAL BEHARI (1916)
I. L. R. 38 All. 393

———— **Bad livelihood case**—*Revision by High Court on merits.* The petitioners were bound over by a Sub-Divisional Magistrate under s. 110, Cr. P. C., to be of good behaviour for one year. In appeal the District Magistrate affirmed the order of the Sub-Divisional Magistrate. The High Court in revision set aside the order on a consideration of the evidence on the ground that as to some important evidence the lower Courts in their judgments failed to consider it at all, while as to others they were accepted and relied on without any critical examination. NIZAMUDDI *v.* KING-EMPEROR (1918) . **23 C. W. N. 488**

———— **"Within local limits" meaning of "Residence"** *of person proceeded against not material.* In order to give jurisdiction to a Magistrate to proceed under s. 110 of the Code of Criminal Procedure it is not necessary that the person proceeded against should be "residing" within the local limits of his jurisdiction. The meaning of the expression 'any person within the local limits' in s. 110 is 'any person who is within the local limits at the time the Magistrate takes action under the section.' *In re K. Rangan, I. L. R. 36 Mad. 96*, followed. *Ketabdi* v. *Queen-Empress, I. L. R. 27 Calc. 993*, dissented from. EMPEROR *v.* MUNNA (1916) **I. L. R. 39 All. 139**

———— The words "within the local limits of his jurisdiction" are not equivalent to "residing within the local limits." It is sufficient to give the Magistrate jurisdiction, if the evil habits of the accused were practised and evil reputation acquired within the local limits of his jurisdiction. KING-EMPEROR *v.* DURGA HALWA (1915) . **I. L. R. 43 Calc. 153**
19 C. W. N. 1022

———— *Residence within local limits of Magistrate's jurisdiction if necessary.* S. 110, Cr. P. C., does not require that the person proceeded against should reside within the local limits of the Magistrate empowered to take action under the section It is sufficient that the person should be within those limits at the time when proceedings are taken. LAKHI NARAIN DAS *v.* KING-EMPEROR (1918) . . **23 C. W. N. 100**

———— *Jurisdiction of Magistrate over outsiders found within local limits—Object of the section.* In order to give jurisdiction to a Magistrate to proceed under s 110, Criminal Procedure Code, it is not necessary that the person proceeded against should be 'residing' within the local limits of his jurisdiction. The meaning of the expression 'any person within the local limits' in s. 110 is 'any person who is within the local limits at the time the Magistrate takes action under the section.' *Ketabdi* v. *Queen-Empress, I. L. R 27 Calc. 993*, not followed A contrary view would defeat the object of the section, *viz.*, prevention of crime, as then it would be impossible to deal under the section, with wandering gangs of criminals having no fixed residence or with habitual thieves or desperate characters belonging to foreign territories, who infest British India. *In re* RANGAN (1913) . **I. L. R. 36 Mad. 96**

———— **Proceeding, if may be quashed by High Court at initial stage—Mala fidi,** *allegations that proceeding, police-report, if complete answer to —High Court, duty of to prevent abuse of provision of Statute—Scope and object of proceeding under s 110—Zemindar, mismanagement and bad relations with tenants, if justifies proceeding—Revival of proceeding once dropped if proper—proof of bad-character—Criminal proceedings, terminated by compromise or ending in acquittal, if admissible—District Gazetteer, extract from, admissibility of, to prove reporting officer's attitude towards accused.* MOOKERJEE, *J.*—*The object of s. 110 Cr. P. C.*, is preventive and not punitive, and the purpose the Legislature had in view was to afford protection to the public against the repetition of crimes in which the safety of property is menaced and not the security of persons alone is jeopardised. *Nawab* v. *Queen, I. L. R. 2 All. 835*, referred to. *Held* by MOOKERJEE, *J.* (agreeing with IMAM, *J.*), that extracts from the Magistrate's Administration Report appearing in the District Gazetteer and which contained reflections on the petitioner's conduct as landlord and upon which he relied to show that his treatment by the Magistrate leading up to the institution against him of proceedings under s. 110, Cr. P. C., was in harmony with the views expressed in the Administration Report were relevant and admissible in evidence. *Fanindra Deb* v. *Rajeswar Das, I. L. R. 11 Calc. 463, L. R. 12 I. A. 72*, referred to. A judgment of acquittal fully establishes the innocence of the accused, and a criminal proceeding which ended in the acquittal of the accused cannot be relied upon the Crown as evidence of bad character in a subsequent proceeding under s. 110, Cr P. C, against him. *King* v. *Plummer (1902), 2 K. B 339, Emperor* v. *Nani Gopal, 15 C. W. N. 593, Pulin Behari Dass* v. *King-Emperor, 15 C. L. J. 577 : 16 C. W. N. 1105*, referred to. No inference adverse to an accused ought to be *drawn from criminal proceedings which terminated* in compromise. RAJENDRA NARAIN SINGH *v.* EMPEROR (1912) . . . **17 C. W. N. 238**

———— **Court limiting the number of defence witnesses**—*to that of witnesses on the other side —Indian Evidence Act (I of 1872), s. 30—Applicability of, to bad livelihood proceedings—Admissibility of con* [illegible] *co-accused.* [illegible] Procedure C [illegible] to examine [illegible] the same number of witnesses as were examined

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— **s. 110**—*contd.*

for the prosecution and relied on the confession of one of the petitioners implicating himself and two other petitioners in a case of dacoity: *Held*, that it is not open to the trying Magistrate to put such an arbitrary limit on the witnesses whose evidence the defence desires to adduce. That the confession was inadmissible against the two co-accused, the provisions of s. 30 of the Evidence Act not being applicable to a case like the present. AMIRULLA PRAMANIK *v.* KING-EMPEROR (1917) **22 C. W. N. 408**

——— *Joint trial, Legality of.* The legality of a joint trial depends on what is alleged for the prosecution not on the facts actually found to be true. JOGENDRA KUMAR NAG AND ORS. *v.* KING-EMPEROR . **25 C. W. N. 334**

——— **ss. 110 and 112**—*Security for good behaviour—Procedure.* Two persons who had been arrested under s. 55 of the Code of Criminal Procedure were brought before a Magistrate on the 9th of September. On that date they were remanded in custody until the 19th of September, for the production of evidence, presumably with the object of issuing a notice under s. 112. On the 19th of September, the Magistrate, treating the evidence given by the Sub-Inspector as evidence at a hearing under s. 110, fixed a further date for the accused to produce their evidence: *Held*, that this procedure was erroneous. It is only after an order under s. 112 has been made that proceedings under s. 110 can take place. Nor should a magistrate detain a person in custody under s. 110 unless he has the information upon which he can make an order under s. 112. *King-Emperor* v. *Paimal Nai, 10 A. L. J. 351*, followed. EMPEROR *v.* RAJBANSI . **I. L. R. 42 All. 646**

——— **ss. 110, 112 and 117**—

See SECURITY FOR GOOD BEHAVIOUR. **I. L. R. 41 Calc. 806**

——— *Necessity of setting out substance of information received, in order under s. 112—Trial of accused on charges under cl. (a) and (f) of s. 110—Evidence of general repute—Inadmissibility to prove charge under cl. (f)—Evidence to prove charge under cl. (a).* Where an order under s. 112, Criminal Procedure Code, which does not clearly disclose the substance of the information received by the Magistrate, the proceedings cannot be regarded as legal. *Kripasindhu Naiko* v. *Emperor (1918), 47 I. C., 277*, followed. To prove a charge under cl. (*a*) to (*e*) of s. 110, Criminal Procedure Code, evidence of repute is admissible. *Per* SESHAGIRI AYYAR, *J.*—Such evidence must relate to particular instances which have come to the knowledge of the deponent and must be specific. Mere belief and opinions without reference to acts and instances which have induced the witnesses to form the opinion can hardly be regarded as evidence of repute within the meaning of s. 117, cl. 3. *Per* MOORE, *J.*—The evidence that is required is that of respectable persons who are acquainted with the accused and live in the neighbourhood and are aware of the accused's reputation. It must be the general opinion and not merely the repetition of what certain persons have said to the witnesses. To prove a charge under cl. (*f*) of s. 110, Criminal Procedure Code, evidence of repute is inadmissible. The evidence must be of definite acts and instances. Where a person is tried jointly under cl. (*f*) and any of the other clauses of s. 110, evidence of repute admitted with regard to the latter cannot be taken into consideration in deciding the charge under cl. (*f*). RANGA REDDI *v.* KING-EMPEROR (1920) **I. L. R. 43 Mad. 450**

——— **ss. 110 (b), 117**—*Security for good behaviour—Evidence for general repute not admissible when the case for the prosecution rests on s. 110 (f).* In a proceeding under s. 110 of the Code of Criminal Procedure, where the basis of the Court's order is cl. (*f*) of that section, the fact that the person against whom the proceeding is taken is so desperate and dangerous as to render his being at large without security hazardous to the community is not a fact which under s. 47 of the Code can be proved by evidence of general repute. EMPEROR *v.* INDAR (1918) . . **I. L. R. 40 All. 372**

——— **ss. 110, 117**—*Security for good behaviour—Joint inquiry—Statements made by parties concerned amounting to confessions and implicating other parties to the inquiry—Use of such statements as against the others—Evidence Act (I of 1872), s. 30.* On an inquiry which was being conducted against six persons jointly under ss. 110 and 117 of the Code of Criminal Procedure the case for the prosecution being that all six were habitually thieves and house-breakers and also were associated together in the matter under inquiry, two of such persons made statements to the magistrate amounting to confessions of the actual commission of a particular offence and containing incriminating matter as to the relations of two others out of the six persons before the Court with the other persons associated with them in the inquiry: *Held*, that these statements might be taken into consideration along with the other evidence in the case as against the other persons mentioned in them whose cases were being jointly inquired into, if not under s. 30 of the Evidence Act, at any rate under s. 117 (*3*) of the Code of Criminal Procedure. EMPEROR *v.* SARJU (1918) **I. L. R. 41 All. 231**

——— **ss. 110, 118, 367, 424**—

See PRACTICE . **I. L. R. 40 Calc. 376**

——— **ss. 110, 118 and 406**—An appeal lies to the District Magistrate against an order under s. 118 made in proceedings under s. 110 by an additional District Magistrate. MAHENDRA BHUMIJ & ORS. *v.* KING-EMPEROR **25 C. W. N. 383**

——— **ss. 110 and 120**—*Person once convicted—If fit for surety.* Where a Magistrate rejected a surety because he had once been convicted under 323 of the Penal Code: *Held*, that although the Magistrate had a discretion he had acted unreasonably. BUDHU AHIR *v.* KING-EMPEROR **25 C. W. N. 141**

——— **ss. 110 and 122**—*Security for good behaviour—Sureties to be solvent and respectable——Such sureties, when offered, rejected on the grounds that they could not exercise control and that certain outlaws were at large—Order rejecting sureties should be judicial order.* On a charge of habitually harbouring outlaws, certa[illegible] [illegible]ons were ordered to execute a[illegible] [illegible] and to furnish

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— **ss. 110 and 122**—*contd*

two solvent and respectable sureties for good behaviour for one year. When such sureties were offered they were summarily rejected on the strength of the Police report that the sureties were not living near enough to exercise control over the accused and that the outlaws were still at large : *Held*, that the sureties offered having been shown to be solvent and respectable, the reasons given were not sufficient to disqualify them to be sureties. *In re* JESA BATHA (1919) **I. L. R. 44 Bom. 385**

——— **ss. 110, 123**—

——— *Security for good behaviour—Security furnished—Record not required to be sent to the Sessions Judge for orders.* Under s. 123, cl. (2) of the Code of Criminal Procedure it is only necessary to lay the proceedings before the Sessions Judge or the High Court when security has not been given, not when it has been given. *Rai Isri Pershad* v. *Queen-Empress, I. L. R. 23 Calc 621*, referred to. EMPEROR v. RAM KISHAN (1917) . . . **I. L. R. 40 All. 39**

——— *Security for good behaviour—Nature of imprisonment to be awarded in default of finding security.* In cases under s. 110 of the Code of Criminal Procedure the imprisonment awarded in default of finding security should as a rule be simple rather than rigorous. It is in each case for the court concerned to exercise its discretion in deciding which class of imprisonment is called for. EMPEROR v. GANDARP SINGH . . **I. L. R. 42 All. 563**

——— **ss. 110 and 167**—*Proceedings under s. 110—Power to remand under s. 167.* In proceedings under s. 110 of the Code of Criminal Procedure (Act V of 1898), the Magistrate has no power to remand an accused person to custody. S. 167 of the Code applies to proceedings under Ch. XIV and not to those under s. 110 *Emperor* v. *Basya, 5 Bom. L. R. 27*, referred to. *Re* SUBBARAYA CHETTI (1915) . **I. L. R. 39 Mad. 928**

[illegible]

were not, however, released, but the Magistrate passed an order directing them to be detained in jail pending the result of a police inquiry with reference to their liability to be proceeded against under s. 110 of the Code of *Criminal Procedure.* Twelve days after the passing of this order information was laid before a Magistrate having jurisdiction under s. 110 and an order was duly framed under s. 112 and communicated to the persons concerned : *Held*, that the order for detention of such persons after the police had reported that there was no evidence against them on the specific charge of dacoity was illegal unless and until they were re-arrested by the police under s. 55.

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— **ss. 110, 167, 169 55**—*contd*

Emperor v. *Maiku, I. L. R. 41 All. 483*, referred to. EMPEROR v. RAHU . **I. L. R. 43 All. 186**

——— **ss. 110 (c) and 190 (c)**—*Security for good behaviour—Magistrate proceeding on his own knowledge, effect of—Joint trial—station diaries of police reports, entries in.* Although s. 190 (c) of the Code of Criminal Procedure, 1898, applies only to offences, the principle of that clause is also applicable to cases of miscellaneous character. Where, therefore, on the complaint of one J, the Magistrate instituted proceedings under s. 110 (c) of the Code of Criminal Procedure, 1898, but in the course of his judgment observed that it was impossible to remove from his mind the impression which had been produced upon seeing large tracts of land completely devastated by the ravages of cattle, and that in addition to the witnesses examined in the case a large number of persons had made complaints to him regarding the ravages of cattle, *held*, that the Magistrate should not have tried the case personally : *Held* (ordering a re-trial,) (*1*) that the accused were not liable to be tried jointly in a proceeding under s. 110 (c) unless there was evidence of something in the nature of conspiracy or of concert in respect of the various acts of habitual mischief deposed to by the witnesses ; (*2*) that there must be an investigation as to whether each of the accused had taken part in the various acts or otherwise acted in concert : *Held, further*, that entries in station diaries or police reports cannot be used without legal evidence of the acts alleged. GODHAN AHIR v. KING-EMPEROR . . **4 Pat. L. J. 7**

——— **ss. 110, 528**—*Security for good behaviour—Transfer—Jurisdiction—Powers of District Magistrate.* When proceedings under s. 110 of the Code of Criminal Procedure initiated before a Magistrate of the first class were transferred [illegible]

power to transfer such proceedings to a Magistrate of the second class. *King-Emperor* v. *Munna, I. L. R. 24 All. 151*, distinguished. EMPEROR v. GOVIND SAHAI (1914) . **I. L. R. 37 All. 20**

——— **s. 112**—

See s. 110 . **I. L. R. 42 All. 646**

See SECURITY FOR GOOD BEHAVIOUR. **I. L. R. 41 Calc. 806**

——— **ss. 112, 118**—*Order to show cause, terms of, if restricts scope of enquiry—Prejudice.* The enquiry provided by ss. 117 and 118 of the Code of Criminal Procedure is not strictly limited by the terms of the order drawn up under s. 112 calling upon the accused to show cause why he should not execute a security bond to keep the peace or for his good behaviour, though if the person eventually bound down can show that he was misled or prejudiced by the terms of the order, he would be entitled to relief. DEPUTY LEGAL REMEMBRANCER v. KADIR MIRZA (1912) **17 C. W. N. 331**

——— **ss. 112 and 167**—*Security—Remand—Jurisdiction of Magistrate.* Where a Magistrate, in a case sent up by the police or action to be taken by the Magistrate under Chapter VIII of the Code of Criminal Procedure, passed an order remanding

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— ss. 112 and 167—*contd.*

the persons concerned to police custody under s. 167, it was *held* that his action was *ultra vires.* Even if s. 167 applied at all to proceedings under Chapter VIII of the Code, no order could be passed under that section until the Magistrate had recorded an order under s. 112. *Empress* v. *Babua, I. L. R. 6 All. 132, In the matter of petition of Daulat Singh, I. L. R. 14 All. 45,* and *King-Emperor* v. *Paimal Nai, 10 All. L. J. 351,* referred to. EMPEROR *v.* RAMESHWAR (1914).

I. L. R. 36 All. 262

——— s. 114—

See SECURITY FOR GOOD BEHAVIOUR.

I. L. R. 46 Calc. 215

——— s. 117—

See s. 107 . I. L.R. 37 All. 30
I. L. R. 32 All.642

See s. 110. . I. L. R. 40 All. 372
I. L. R. 41 All. 231

See s. 526 . I. L. R. 32 All. 642

See LEGAL PRACTITIONERS ACT (XVIII OF 1879), s. 36. I. L. R. 40 All. 153

——— ss. 117 (4), 122, 123 (3), 367, 424

See SECURITY FOR GOOD BEHAVIOUR.

I. L. R. 37 Calc. 91
I. L. R. 41 Calc. 806

——— ss. 117, 242—*Bond to keep the Peace—Enquiry, sufficiency of.* A Magistrate proceeding under s. 117, Criminal Procedure Code (Act V of 1898), as nearly as practicable in the same way as under s. 242, Criminal Procedure Code, must state to the accused the particular of the matter against them and ask them if they can show cause why they should not be required to execute bonds: *Held,* that the question "are you willing to execute the bonds required or do you wish for further inquiry" answered by a statement that the accused would execute bonds is not a sufficient compliance with s. 117. PALANIAPPA ASARY *v.* EMPEROR (1910)

I. L. R. 34 Mad. 139

——— s. 118—

See s. 107 . . I. L. R. 32 All. 642
See s. 110 . . 25 C. W. N. 383
See s. 112 . 17 C. W. N. 331
See PRACTICE . I. L. R. 40 Calc. 376

——— ss. 118 and 123—*Security for good behaviour—Imprisonment in default not to include solitary confinement.* The imprisonment which a person may be ordered to undergo in default of furnishing security for good behaviour, cannot be made to include solitary confinement. EMPEROR *v.* KUNDAN (1914) . . I. L. R. 36 All. 495

——— s. 119—

See s. 437 . I. L. R. 33 Mad. 85

——— ss. 119, 200, 437—*Security for good behaviour—Discharge by Magistrate—District Magistrate ordering fresh inquiry—Accused—Discharge—Interpretation.* A District Magistrate can, under s. 437 of the Criminal Procedure Code, 1898, order fresh inquiry into the case of a person "discharged" by a Subordinate Magistrate under s. 119 of the Code. The phrase "any accused person" as used in s. 437 is not confined in its application to a person against whom a complaint has been made under s. 200 of the Code. It includes a person proceeded against under Chapter VIII of the Code. The term "discharged" is not defined in the Code, and there is no valid ground for departing in respect of it from the rule of construction that where in a Statute the same word is used in different sections it ought to be interpreted in the same sense throughout unless the context in any particular section plainly requires that it should be understood in a different sense. *Queen-Empress* v. *Mutasaddi Lal, I. L. R. 21 All. 107; King-Emperor* v. *Fyaz-ud-din, I. L. R. 24 All. 148; and Queen-Empress* v. *Mona Puna, I. L. R. 16 Bom. 661,* followed. *Queen-Empress* v. *Iman Mondal, I. L. R. 27 Calc. 662;* and *Velue Tayi Ammal* v. *Chidambaravelu Pillai, I. L. R. 33 Mad. 85,* not followed. *In re* BABA YESHWANT DESAI (1911)

I. L. R. 35 Bom. 401

——— ss. 119 and 437—*Security for good behaviour—"Release" or "discharge"—Competence of District Magistrate to order further inquiry under s. 437 against a person in whose favour an order under s. 119 has been passed. Held,* that a person who has been "released" or "discharged" under s. 119 of the Code of Criminal Pocedure is so far in the position of "an accused person who has been discharged" within the meaning of s. 437 of the Code that it is competent to the District Magistrate to take further action against such a person under the last named section. Where, however, proceedings had twice been taken under s. 110 without result, and the District Magistrate had not given the person concerned any opportunity of showing cause against the order which might be passed, the proceedings were set aside. *Queen-Empress* v. *Ahmad Khan, All. Weekly Notes (1900), 206, Sheo Din* v. *King-Emperor, 6 O. C. 262, Muhammad Khan* v. *King-Emperor, P. R., Cr. 102, Velu Tayi Ammal,* v. *Chidambaravelu Pillai, I. L. R. 33 Mad. 85, Queen-Empress* v. *Imam Mondal, I. L. R. 27 Calc. 662, Dayanath Taluqdar* v. *Emperor, I. L. R. 33 Calc. 8, Hopcroft* v. *Emperor, I. L. R. 36 Calc. 163, King-Emperor* v. *Fyaz-ud-din, I. L. R. 24 All. 148,* and *Queen-Empress* v. *Mutasaddi Lal, I. L. R. 21 All. 107, Queen-Empress* v. *Ratti, All. Weekly Notes (1899), 203,* referred to. EMPEROR *v.* KHARGA (1913)

I. L. R. 36 All. 147

——— s. 120—

See s. 110 . . 24 C. W. N. 141
I. L. R. 44 Bom. 385

——— s. 122—

See s. 110 . I. L. R. 44 Bom. 385

See SURETY FOR GOOD BEHAVIOUR.

I. L. R. 37 Calc. 446

See SURETY . I. L. R. 41 Calc. 764
I. L. R. 42 Calc. 706
I. L. R. 44 Calc. 737
I. L. R. 43 Calc. 1021

——— *Sureties in bad livelihood cases, refusal of—Reasons for the refusal—Testing reasons.* The Magistrate in rejecting sureties under s. 122, Criminal Procedure Code, has to record his reasons for doing so. Before recording the reasons he should carefully con-

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

———— s. 122—*contd.*

nder and test them. This could be best done by bringing them to the notice of the persons offered as sureties and allowing them an opportunity of controverting them. ELA BUKSH v. EMPEROR (1910) . . **14 C. W. N. 709**

———— s. 123—

See s. 109 . **I. L. R. 34 Bom. 326**

See s. 110 . . **I. L. R. 40 All. 39**
I. L. R. 42 All. 562

See s. 118 . **I. L. R. 36 All. 495**

See s. 397 . . **1 Pat. L. J. 212**
I. L. R. 37 Bom. 178

See SECURITY FOR GOOD BEHAVIOUR.
. **I. L. R. 37 Calc. 446**

———— **not applicable to proceedings under Punjab Act V of 1918—**

See RESTRICTION OF HABITUAL OFFENDERS (PUNJAB) ACT 1918.
I. L. R. 1 Lah. 614

———— *Order to furnish security—Reference by Magistrate to Sessions Judge—Sessions Judge to go into merits of the case.* In a proceeding under ss. 110 and 118 of the Criminal Procedure Code, 1898, the Magistrate ordered the accused to be bound over for a period of three years and referred the case to the Sessions Judge under cl. (3) of s. 123 of the Code. The latter confirmed the order without going into the merits of the case: *Held*, that the words of cl. (3) of s. 123 of the Criminal Procedure Code, 1898, were wide enough to give discretionary power to the Sessions Judge to deal with the case on the merits and pass such orders as the circumstances of the case might require. EMPEROR v. AMIR BALA (1911) . . . . **I. L. R. 35 Bom. 271**

———— s. 125—

See s. 107. . **23 C. W. N. 958**
I. L. R. 40 All. 143

See MAGISTRATE, POWER OF
I. L. R. 37 Calc. 72

———— *Security to keep the peace—Cancellation of bond—Power of Magistrate to send accused to jail.* Under s. 125 of the Code of Criminal Procedure a District Magistrate may cancel a bond for good behaviour, but he is not competent to send the person whose bond is so cancelled to jail. EMPEROR v. FAKIR-UD-DIN KHAN (1911) . . . **I. L. R. 33 All. 624**

———— *Power of the District Magistrate to cancel a security bond* The District Magistrate has jurisdiction under s 125, Criminal Procedure Code, to cancel a bond to keep the peace on the ground that on the facts its execution should not have been ordered. *Nabu Sardar v Emperor, I L. R 34 Calc 1*, followed. MARF GOWD, *Re* . . **I. L. R. 37 Mad. 125**

———— *Application to cancel order for security—Appeal—Revision.* An application made to the District Magistrate to cancel an order for security to keep the peace under s 125 of the Code of Criminal Procedure cannot be regarded in the same light as an appeal and the Magistrate's order thereon would not be vitiated by the fact alone that the applicant had not been heard. *Semble*: that on an application for revision of an order for security to keep the peace the High Court should not refuse to interfere *solely* on the ground that the applicant has not first applied to the District Magistrate under s. 125 EMPEROR v. SITA RAM (1917)
I. L. R. 39 All. 466

———— *Appeal—Jurisdiction.* A District Magistrate taking action under s. 125 of the Code of Criminal Procedure cannot treat an application made under that section as an appeal and reverse the order of a first class Magistrate on the facts If he considers the order to be wrong on the merits, he can exercise his revisional powers and submit the record to the High Court; but the cancellation of bonds contemplated by s. 125 can only be on the ground that the bonds are no longer necessary. BANARSI DAS v. PARTAB SINGH (1912) . **I. L. R. 35 All. 103**

———— *Revision—Jurisdiction.* A District Magistrate taking action on an application made ostensibly under s 125 of the Code of Criminal Procedure cannot treat such application as an appeal and reverse the order of a magistrate of the first class on the facts. If he considers the order to be wrong on the merits, he can, in the exercise of his revisional powers, submit the record to the High Court; but the cancellation of bonds contemplated by s. 125 can only be on the ground that the bonds are no longer necessary. *Banarsi Das v. Partab Singh, I. L. R. 35 All. 103*, followed. EMPEROR v. SHANKAR LAL (1919) . **I. L. R. 41 All. 651**

———— s. 133—

———— *Public nuisance—Construction of dam causing injury to village lands* A, B and C being contiguous villages, of which C lay at a lower level than A and B, the surplus water falling on A and B used to run off through certain natural channels over the lands of village C. The inhabitants of C erected a dam to keep the water from their lands and by so doing caused flooding of and damage to the lands of A and B. *Held*, that the area and number of persons affected by the action of the inhabitants of C were sufficient to justify a magistrate in treating their action as a public nuisance and taking steps to abate it under s 133 of the Code of Criminal Procedure. EMPEROR v. BHAROSA PATHAK (1912)
I. L. R. 34 All. 345

———— *Jurisdiction—Channel which may be lawfully used by the public—Field over which water from other fields at a higher level flows. Held*, that a field, which is on a lower level than the adjoining fields and over which the surplus water of those adjoining fields used to flow into a tank, even if it could be described as a channel, was not such a channel as had been or could lawfully be used by the public, and action could not be taken under s. 133 of the Code of Criminal Procedure, for the removal of any obstruction from it. [illegible]
All.
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988,
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SAHU v. PARMESHWAR NARAIN (1914)
I. L. R. 36 All. 209

CRIMINAL PROCEDURE CODE (ACT V OF 1893)—*contd.*

———— **s. 133**—*contd.*

———— *Claim of right, Magistrate's duty to decide* bonâ fides *of—Magistrate bound to refer parties to Civil Court if such claim is not mere pretence—Steps which Magistrate may take, if suit not instituted in Civil Court within reasonable time. Per* SHARFUDDIN, *J.* (TEUNON, J., *dubitant*). Sub-s. (*3*) of s. 133, Criminal Procedure Code, provides that no order duly made by a Magistrate under the section shall be called in question in any Civil Court. From this latter provision it is clear that the provision of s. 133 Criminal Procedure Code, should be sparingly used. Any order passed under the section cannot be questioned in any Civil Court. It is therefore necessary that if the party against whom the order is contemplated to be passed raises a question that the pathway is not a public property in the sense of the provision of this section, the Magistrate trying the case should be careful not only to decide as to whether the pathway in question is situated on a private land or if it is for public use, but he should, even when the claim of the objection is not substantiated, find whether the claim is *bonâ fide* or it is set up only to oust the jurisdiction of the Court. If the Magistrate finds that the claim which is set up is a mere pretence, he should then proceed to pass a final order and make the rule issued by him absolute. If, however, he finds that the claim, although not substantiated, is not a mere pretence and is not raised to oust the jurisdiction of the Court, but that it is raised *bonâ fide*, he should stay his hand and refer the party to Civil Court. And if the party within a reasonable time does not have recourse to Civil Court, the Magistrate may then proceed to make the rule absolute. MANIPUR DEY *v.* BIDHU BHUSAN SARKAR (1914) . . . **18 C. W. N. 1086**

———— *s. 133, scope of—Claim of right, Magistrate bound to determine* bonâ fides *of, before appointing jury—Case in which* bonâ fide *claim of right raised as also appointment of jury asked for—Duty of jury to hear parties and evidence.* S. 133, Criminal Procedure Code, contemplates only an enquiry as to the existence or non-existence of the obstruction complained of and not an enquiry into a disputed question of title, and where a *bonâ fide* claim of private right is raised, the Magistrate cannot make an order under the section, but should leave the determination of the question to the Civil Court. When once a party who raised a private right has asked for a jury and has had the case referred to the jury, the jury are bound to hear the parties and such witnesses as they may desire to be heard. When a second party to a proceeding under s. 133, Criminal Procedure Code, raises a question of private right and insists on having it decided, the Magistrate should look into the *bonâ fides* of that claim before submitting the case to a jury. Where, however, the second party raised the question of private right and also stated that if it was thought proper a jury might be appointed, and a jury was appointed who on evidence held that inasmuch as a question of title was involved, the proceeding could not be proceeded with and the Magistrate on perusing the materials placed before the jury decided that the matter was one for the Civil Court and dropped the proceedings: *Held*, that the Magistrate was justified in making the order passed by him. ASHRAFUDDIN *v.* KARIM BUKSH (1914) . . . **18 C. W. N. 1148**

CRIMINAL PROCEDURE (CODE ACT V OF 1893)—*contd.*

———— **s. 133**—*contd.*

———— *Jury—Applicant consulted by Magistrate as to appointment of jury.* In proceedings instituted under s. 133 of the Code of Criminal Procedure at the instance of *H* against *F*, *F* applied for the appointment of a jury, which was granted. He nominated two jurors. The Magistrate called upon *H*, to nominate two jurors. *H* nominated two jurors, and the Magistrate appointed a foreman. The jury by a majority made an order against *F*: *Held*, that it is not illegal on the part of a Magistrate to address any inquiry to the applicant with a view to ascertaining the names of respectable and independent residents of the neighbourhood, who would be willing to serve on the jury: but the Magistrate should see that he does not appoint friends or partisans of the applicant. The criterion in such cases is whether the person at whose instance the proceedings were instituted was allowed to exercise rights not conferred upon him by law as if he were a party to the litigation. *Upendra Nath Bhuttacharjee* v. *Khitish Chandra Bhuttacharjee, I. L. R. 23 Calc. 499, Kailash Chandra Sen* v. *Ram Lall Mittra, I. L. R. 26 Calc. 869*, and *Mir Imam Abdul Aziz* v. *Queen-Empress, Punj. Rec., 1897, Cr. J. No. 4*, referred to. FARZAND ALI *v.* HAKIM ALI (1914)

I. L. R. 37 All. 26

———— *Reasonable opportunity to show cause—Order, if can be made on result of local inspection—Vague and indefinite order.* A proceeding under s. 133, Cr. P. C., is in the first instance entirely *ex parte* and the report or the other information whereon the Magistrate has taken action before making the conditional order is no evidence against the opposite party. It is consequently desirable that reasonable opportunity should be given to the opposite party to show cause as contemplated by s. 135, cl. (*b*), and to adduce evidence as prescribed by s. 137 (*1*). An order under s. 133 cannot even by consent of parties be based upon information gathered at a local enquiry. When in a proceeding under s. 133, instituted against a number of persons it is alleged that various unlawful obstructions have been caused upon a public way, it is essential that the order should state accurately, with regard to each person, the specific obstruction made by him, which he is required to remove, unless it is alleged that all the persons are jointly responsible for all the obstructions mentioned. *Kalimohan* v. *Nakari Chandra, 11 C. L. J. 114*, followed. RAI MOHAN KARMAKAR *v.* KING-EMPEROR (1916) . . . **20 C. W. N. 1171**

———— *Public nuisance—illegality of order proceeding on grounds different from those set out in the notice—and relating to the manner of carrying on a trade and not to the trade itself, also referring to possible future results and not to existing facts.* On the complaint of the Principal of the Khalsa College situate in the suburbs of Amritsar a notice under s. 133 of the Code of Criminal Procedure was issued against the petitioners in the following terms "you have dug pits by excavating land around the Khalsa College The water stagnates in them and causes a bad smell This is a nuisance to the residents of the College-

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—contd.

——— **s. 133**—*contd.*

In future you should not dig pits around the Khalsa College. If you do not refrain from doing so, you will be dealt with according to law." The only evidence produced for complainant was to the effect that the health of the residents of the College was likely to suffer from the smoke from the kilns, and that the stagnant water in pits within half a mile of the College was likely to breed mosquitoes and cause malaria. But the Magistrate, disregarding the only issue raised by his notice, *i e*, the nuisance of bad smell, directed the present petitioners not to excavate in future any fresh pits within a radius of a mile of the College on the grounds given by the witness for the complainant. *Held*, that the order proceeding on grounds not covered by the notice issued was illegal, and that moreover it was not proved on the present record that the water in the pits dug by the petitioners have caused or can cause malaria or any injury to health *Held also*, that at most the objection was to be made in which petitioners carried on their occupation of manufacturing bricks, not against the occupation itself, and that this was not sufficient to bring the case within the purview of s. 133 of the Code. *Moti Shah* v. *The Crown* (*39 P R.* (*Cr.*) *1889*). *Mrs. Bareiro* v. *The Empress* (*47 P. R.* (*Cr.*) *1888*) and *Shadi* v. *The Empress* (*17 P. R.* (*Cr.*) *1888*), referred to. *Held further*, that s. 133 relates to an existing state of affairs and not to the possibility of future results. GOKAL CHAND *v.* THE CROWN **I. L. R. 1 Lah. 163**

——— Where a Magistrate finds that a claim of right set up in answer to a conditional order under s. 133, Criminal Procedure Code, is based on substantial grounds, the proper course for him to follow is to drop the proceedings; he has no jurisdiction to direct the party setting up the claim to go to the Civil Court within a specified time. PEARY LAL MULLICK *v.* SURENDRO KRISHNA MITTER . **24 C. W. N. 247**

——— Where four only of fixed jurors appointed in a proceeding under s. 133 of the Criminal Procedure Code inspected the locality and made their report in the absence of the other juror and the Magistrate acted thereon: *Held*—That the Magistrate should have appointed a fresh jury and allowed the proceedings to go on with the fresh jury. SRIMATI DASYA *v.* NIBARAN CHANDRA GHOSH **24 C. W. N. 928**

——— *Criminal Procedure Code, s. 133—Obstruction of way, used by Public—Claim of—right made in good faith in answer to conditional order does not oust Magistrate's jurisdiction—Magistrate if can allow objector time to establish claim by civil suit when such claim not well-founded though made in good faith—Proceedings if can be continued when objector does not go to Civil Court within time allowed or fails there.* Per CURIAM:—When in proceedings under s. 133, Criminal Procedure Code, arising out of an alleged obstruction of a way used by the public, the [illegible] which is found [illegible] good faith, the [illegible] thereby ousted. [illegible] strate finds that there is a real or substantial question to be tried out between the parties he ought, in the exercise of his discretion, to stay his hands and not proceed any further after making the conditional order under s. 133 *Per* SANDERSON, C. J.—The Magistrate, if he does not think the claim well-founded though he considers it made in good faith, may in his discretion allow the Defendant a reasonable time to assert the claim by a civil suit and if he does not go to the Civil Court within such time or fails there the Magistrate has jurisdiction to continue the proceedings under s. 133, Criminal Procedure Code. *Per* TEUNON, J.—In the exercise of his discretion the Magistrate may take the course indicated above Sub-s (2) of s. 133 does not however appear to favour any reference of parties to Civil Court. *Per* RICHARDSON and NEWBOLD, JJ.—The Magistrate may, if he does not think the claim well-founded though he considers it made in good faith, allow the Defendant a reasonable time to assert the claim by a civil suit. *Per* GHOSE, J.—The Magistrate is entitled to continue the proceedings where the objector shows nothing more than a mere belief in the claim of right put forward RAM SAYAR MONDALL *v.* ALEX NASKAR . . **26 C. W. N. 442**

——— **ss. 133, 135, 138 and 139**—*Issue of notice by Sub-divisional Magistrate—Option to appear and show cause before a Second-class Magistrate—Appointment of a jury—Verdict submitted to Sub-divisional Magistrate—Jurisdiction in Sub-divisional Magistrate to deal with verdict and dispose of case* [illegible] or to appear before another Magistrate to have the order set aside, is not deprived of his jurisdiction but has power to deal with the matter under s. 139, Criminal Procedure Code, on receiving the verdict of the jury appointed by him under s 138 The word 'Magistrate' in s. 139 (*1*) refers to the Magistrate who issued notice. ANGAPPA MUDALI *v.* PERUMAL CHETTY (1920) **I. L. R. 43 Mad. 316**

——— **ss. 133, 136, 137**—

See PUBLIC PATHWAY **I. L. R. 44 Calc. 61**

——— **ss. 133, 137**—

See PUBLIC NUISANCE. **I. L. R. 42 Calc. 158, 702**

——— *Order without any evidence—Determination of* bonâ fides *of claim absolutely necessary.* Where cause is shown against a conditional order under s 133, Criminal Procedure Code, an order absolute made without any evidence and without a determination of the *bonâ fides* of the claim set up is illegal. RAM MONDAL *v.* CHANDRA MONDAL (1916) . . . **21 C. W. N. 926**

——— Bonâ fide *claim of right—Order staying proceedings with direction to establish right in Civil Court within limited time, if should be made without evidence.* Where a claim of right raised in answer to a conditional order under s. 133 was found to be *bonâ fide* and it was ordered that unless the party sought to establish his right in the Civil Court within a limited time, his *bonâ fides* was again to be questioned by the Criminal Court: *Held*, that the Magistrate

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— **ss. 133, 137**—*contd.*

should not have made the order without taking evidence adduced by one side or the other. PEARY LAL MULLICK *v.* SURENDRO KRISHNO MITTER (1919) . . . . . **23 C. W. N. 774**

——— *Decision of case on local enquiry in the absence of parties.* Where in a proceeding under s. 133, Criminal Procedure Code the Magistrate after recording evidence under s. 137 went to the spot and held a local inspection and decided the case on the result thereof making the conditional order absolute: *Held*, that the Magistrate acted illegally and the order made was liable to be set aside. The Magistrate was not entitled to substitute the evidence recorded in the case by his own evidence. KALI SADAY GHOSH *v.* SIDDHESSUR BANNERJEE (1919) **23 C. W. N. 1054**

——— **s. 133, 138, 139**—*Obstruction of a pathway—Magistrate's power to refer the matter to a jury*—Bonâ fide *claim to the pathway as private —Magistrate's duty to decide.* In a proceeding under Chap. X, Criminal Procedure Code, relating to the obstruction of a way, it is the duty of the Magistrate before referring the matter to the jury to decide himself whether or not the claim of right to the land in question is made in good faith and whether the pathway is a public one or not, and it is only on deciding that there is no such claim that any matter can be referred to the jury. *Dulalram Deb* v. *Baishnab Charan Deb, 10 C. W. N. 845*, followed. DHARAM MANDAL *v.* GOSSAIN DAS MANDAL (1910) . . . **14 C. W. N. 544**

——— In proceedings under s. 133 before any reference can be made to the Jury it is incumbent on the Magistrate himself to investigate any claim for right that may be set up and not to leave that question to a Jury appointed under s. 138. SHEIKH IMRAT ALI *v.* SHEIKH AMJAD ALI . . . . **2 Pat. L. J. 67**

——— **ss. 133, 435, 438 and 439**—

See PRACTICE. . **I. L. R. 48 Calc. 534**

——— **ss. 135 to 137**—

See s. 133 . **I. L. R. 43 Mad. 316**

——— **s. 138**—

See s. 133. . **I. L. R. 43 Mad. 316**

——— **s. 144**—

See s. 107 . **3 Pat. L. J. 130, 243**

See PENAL CODE (ACT XLV OF 1860), ss. 332, 323 . **I. L. R. 40 All. 28**

See PROHIBITORY ORDER. **I. L. R. 38 Calc. 876**

——— *Proceedings under.* Advisability of taking proceedings under s. 144, Criminal Procedure Code, to prevent disturbance of peace considered. MANIK CHANDRA CHAKRAVARTI *v.* PREO NATH KUAR (1912) **17 C. W. N. 205**

——— *Renewed orders under —Jurisdiction of Magistrate—High Court's power of interference under Charter Act (24 & 25 Vict., c. 104), Art. 15.* Where a renewed order passed under s. 144, Criminal Procedure Code, did not state that there was again a temporary emergency and a continuing or existing insufficiency of the police force to protect the petitioners in their rights. *Held*, that the Magistrate gave himself a more extended jurisdiction than is covered by s. 144 and the order was revisable by the High Court under art. 15, Charter Act, 24 & 25 Vict., c. 104. Their Lordships declined to set aside the order as the two months during which the order would remain in force was almost expiring on the date of hearing. GOVINDA CHETTI *v.* PERUMAL CHETTI (1913) . **I. L. R. 38 Mad. 489**

——— *Scope of section—Hât, order restraining the holding of—Doing of a lawful act on one's own property if can be restrained under the section.* Where the only ground mentioned for the issue of an order under s. 144, Criminal Procedure Code, restraining the holding of a rival *hât* was that the Magistrate was satisfied from the report of the police that by opening a new *hât* at only half a mile from the old and long established *hât*, the petitioners were about to disturb the public tranquillity. *Held*, that an injunction cannot be issued not to do a lawful act upon a man's own property, and the order in the form in which it was issued was without jurisdiction. That the holding of a *hât* on a man's own property is not in itself a wrongful act, and therefore any ulterior consequence which may arise from it cannot give rise to any proceeding against the owner of the land for committing an act likely to cause a breach of the peace, unless those ulterior consequences are made the basis of the proceedings. The law as regards preservation of public peace is based upon an apprehension that either certain person or persons are likely to commit breach of the peace by their own acts or that they are likely to do wrongful acts which may occasion other people to commit breach of the peace. RAKHAL DAS SINHA *v.* THE KING-EMPEROR (1912) **19 C. W. N. 248**

——— *Successive orders, propriety of—Revision by High Court of order under section after expiration of two months.* A Magistrate should not by successive orders under s. 144, Criminal Procedure Code extend the period of two months prescribed by cl. (5) of the section. *Satish Chandra Ray* v. *Emperor, 11 C. W. N. 79*, referred to. Case in which the High Court set aside an order under s. 144, Criminal Procedure Code, after the expiration of two months from the date of the order. BISHESHUR CHAKRAVARTY *v.* EMPEROR (1916) . . . **20 C. W. N. 758**

——— *Circumstances justifying the exercise of jurisdiction by Magistrate, Criminal Procedure Code (Act V of 1898), s. 144—Circumstances justifying Magistrate exercising jurisdiction—Revision by High Court after expiration of two months from date of order.* Jurisdiction under s. 144, Criminal Procedure Code, primarily depends on the urgency of the case and the mere statement of the Magistrate that he conisdered the danger to be imminent is not sufficient to give him jurisdiction if the facts set out by him show that really there was no urgent necessity for action being taken. In this case the High Court set aside the order although two months had expired from the date thereof. CHANDRA NATH MUKHERJEE *v.* EAST INDIAN RAILWAY (1918) **23 C. W. N. 145**

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

———— s. 144—*contd.*

———————— *Holding of rival hât on same days as old hât, if can be prohibited under section.* A Magistrate is empowered to pass an order under s. 144, Criminal Procedure Code, prohibiting the holding of a rival *hât* on the same days with the old *hât*. Where for the disobedience of such an order the Magistrate granted sanction for prosecution for an offence under s. 188, Indian Penal Code, and the Sessions Judge revoked it on the ground that the order under s. 144, Criminal Procedure Code, was illegal: *Held*, that the order under s. 144, Criminal Procedure Code, was illegal and the order of the Sessions Judge revoking the sanction should be set aside and the sanction restored. NAGENDRA NATH BISWAS *v.* RAKHAL DAS SINHA (1918)

23 C. W. N. 141

———————— *Criminal Procedure Code (Act V of 1898), s. 144, if empowers a Magistrate to stop prayers in a mosque to avoid a breach of the peace—Magistrate's jurisdiction to interfere with a* mutwali's *administration of* wakf *property—Proper course for Magistrate, when there is likelihood of breach of peace.* A certain *mutwali* of a mosque appointed as *peshiman*, or the leader of prayers a certain person, with whom the congregation got dissatisfied. The people therefore refused to read their prayers with him and the matter went so far as to necessitate police interference Ultimately proceedings under s. 144, Criminal Procedure Code, were drawn up and the Magistrate passed orders forbidding people of either party to read prayers in the said mosque: *Held* that the order was a misconceived one. Unless the *mutwali* was displaced in due course of law, no one had a right to interfere with the management of the trust property. If the effect of the order of the Magistrate was that no Mahomedan would be allowed to say his prayer in the mosque, the order was not justified under s. 144, Criminal Procedure Code. Such an order is not proper and justified by the law. The proper course for the Magistrate is to find out which party is wrong

MUNSHI BARKATALI . . **26 C. W. N. 904**

———————— *Scope of—Jurisdiction of Magistrate to prohibit holding of* hât *on one's own land and on day other than the day on which old* hât *was held —Ex parte order, propriety of passing—Speedy disposal of objection to order necessary.* The petitioners started a new *hât* on their own property within a certain locality where

Petitioners shifted their *hât* to another place and the Magistrate again made a similar order: *Held*, that every person is ordinarily entitled to exercise all rights of ownership on his own property and the holding of a *hât* on one's property is not in itself a wrongful act. The Criminal Court assumes jurisdiction to interfere with the lawful exercise of a person's right to ownership when such exercise in its ulterior consequences and being directed primarily against the lawful exercise of another person's right of ownership is likely to cause a breach of the peace. That inasmuch as the Petitioners claimed exclusive possession of the land on which they wanted to hold the *hât* and intended to hold it on a day other than the day on which the *hât* of the Opposite Party assembled the Magistrate had no jurisdiction to make an order in the form in which it was made prohibiting the petitioners from holding their *hat* any day of the week and on every place within a large area. BANWARI LAL RAM *v.* PRONAB KRISHNA . . . **26 C. W. N. 663**

———— ss. 144 and 145—*Dispute regarding possession of immovable property—extent of District Magistrate's power to interfere with order of Subordinate Magistrate.* Cl. (*4*) of s. 144 of the Criminal Procedure Code contemplates only a change in the nature of the order made, not a change in the party against whom it is made. Where, therefore, in a proceeding under s. 144 the first court made an order absolute against the second party, and the District Magistrate, acting under cl. (*4*) of that section, cancelled the first Court's order and substituted an order of his own, forbidding the first party from cutting the crop in dispute *held*, that the District Magistrate's order was without jurisdiction. Where it is clear from a perusal of the police report that the claim of the disturber of the peace is a mere pretence a Magistrate is justified in acting under s. 144. In such circumstances the party entitled to possession, should not be harassed by proceedings under s. 145. GANPAT SINGH *v.* THE KING-EMPEROR . . . . **3 Pat. L. J. 287**

———— s. 145—

See s. 107 . **I. L. R. 34 All. 449**
I. L. R. 36 All. 143

See s. 195 . . **5 Pat. L. J. 135**

See s. 522 . . **18 C. W. N. 1068**

See DISPUTE CONCERNING LAND.
I. L. R. 37 Calc. 285
I. L. R. 38 Calc. 24, 889
I. L. R. 40 Calc. 982
I. L. R. 46 Calc. 1056
I. L. R. 39 Calc. 150

See GOVERNMENT OF INDIA ACT, 1915.
s. 107 **1 Pat. L. J. 336**

See HIGH COURT JURISDICTION OF.
I. L. R. 48 Calc. 522

See LIMITATION ACT (IX OF 1908), s. 28
ART. 47 . **I. L. R. 28 Mad. 432**

See SECURITY FOR GOOD BEHAVIOUR.

———— Compromise of a proceeding under—*Effect of.* Where in a proceeding under s. 145, the parties compromised and filed a petition of compromise and the trying Magistrate made an

cl. (*6*) of s. 145, but it fell under cl. (*5*) of s. 145.

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

———— s. 145—*contd.*

That as both parties came to Court and showed that no dispute likely to cause a breach of the peace existed inasmuch as they had compromised the Magistrate was precluded from passing an order under cl. (6). That the existence of this order did not bar a subsequent proceeding under s. 145 on a fresh dispute likely to cause a breach of the peace arising between the parties. SADHU BISWAS *v.* MAHAMAD ALI BISWAS (1910)
15 C. W. N. 568

———— Adjournment—*Property of—Witnesses, processes to enforce attendance of, when may be refused.* A Magistrate, acting under s. 145 of the Criminal Procedure Code, should take all the evidence that is produced before him on the day originally fixed by him for the disposal of the proceeding, and unless he considers it necessary for good reason to require further evidence, should decide then and there, if he can, which of the parties was in actual possession. Where the Magistrate, on the application of one of the parties, on the date originally fixed for the disposal of the proceeding under s. 145, granted an adjournment and issued summons on witnesses named by the party, some of whom did not appear on the adjourned date and some of those present were not examined by the party calling them, and the Magistrate on the application of the party issued fresh summons and warrants for the arrest of the absent witnesses, again adjourning the hearing, and none of these witnesses appeared on the date so fixed, and the party applied for fresh adjournment and the issue of fresh processes: *Held,* that having regard to the previous conduct of the party concerned and also to the circumstance that the witnesses mentioned could not be found, the Magistrate acted rightly in refusing to issue fresh process. *Held,* further, that the Magistrate should not have granted any adjournment after the date originally fixed for the disposal of the proceeding, as in the present case, no adequate reason appears to exist for granting such adjournment. HARIPADA MANDAL *v.* SANYASI CHARAN BISWAS (1912)
17 C. W. N. 144

———— Failure to file written statements in time—*Omission to adduce evidence on date fixed—Magistrate if may pass final order without granting time.* Where the parties to a proceeding under s. 145, Criminal Procedure Code, did not file their written statement or adduce evidence, though more than two months had expired from the date, the proceeding was drawn up, but applied for time to file the written statements: *Held,* that the Magistrate did not act without jurisdiction in refusing to grant time and in attaching the disputed land under s. 146, Criminal Procedure Code, on the failure of the parties to adduce evidence. *Sheikh Mansar Ali* v. *Matiullah, 12 C. W. N. 896,* distinguished. BEJOY MADHUB CHOWDHURY *v.* CHANDRA NATH CHUCKERBUTTY (1909) . . . . . 14 C. W. N. 80

———— Proceedings after final order—*Magistrate if may take proceedings by way of execution of the final orders in proceeding under*—Ultra vires—*Police putting party in possession—Legality.* After passing final order declaring a party to a proceeding under s. 145, Criminal Procedure Code, to be in possession, the Magistrate has no jurisdiction to take any proceedings in the nature of execution of that order. Where after the Magistrate in a proceeding under s. 145, Criminal Procedure Code, had declared the first and third parties to be in possession of the property in dispute, the police gave formal possession to those parties by planting bamboos but disputes still not ceasing, the Magistrate held a local enquiry and again declared the possession of the first and third parties and a further inquiry was held to determine whether the property of which possession had been declared was identical with the subject of the proceeding under s. 145, Criminal Procedure Code: *Held,* that all the proceedings after the final order passed by the Magistrate in the proceeding under s. 145, Criminal Procedure Code, were *ultra vires.* There is no specific provision in the Code authorising a Magistrate to take proceedings in the nature of execution after passing orders under s. 145. KUMAR RONENDRA NARAIN ROY *v.* KISHORI LAL ROY CHOWDHURY (1909) . . . . . 14 C. W. N. 73

———— Title proof of—*Evidence.* Evidence of title is admissible in an inquiry under s. 145 of the Code of Criminal Procedure (Act V of 1898) to enable the Court to decide the question of actual possession, but proof of title is not proof of actual possession. PANAGANTI PARTHASARATHY NAYANIM *v.* PALLIKAPPU VENKATASAMI REDDY (1910) . . . . I. L. R. 34 Mad. 138

———— Public claming easement if may be party—*to a proceeding under the section—Declaring the public to be in possession, effect of —Joint possession—Ousting of Jurisdiction of the Magistrate—Right of the public to be in possession for one day in the year to perform puja, nature of—Easement—Constructive conditional possession—Proceeding not directed to the decision of the absolute continuing possession of either party* ultra vires. If the public are declared under s. 145, Criminal Procedure Code, to be in possession of any piece of land then both parties to the dispute are included in that term and the possession therefore is joint possession and the jurisdiction of the Court under s. 145, Criminal Procedure Code is ousted. Where one of the parties to a proceeding under s. 145, Criminal Procedure Code, representing the public claimed only the right to worship on the disputed land on one day in the year and the right to make due and proper preparations for the holding of that worship by erecting huts for the purpose of holding puja: *Held,* the right of such party to be in possession for one day in the year or to take such steps as are necessary to prepare for the puja is in the nature of an easement and not in the nature of possession. Proceedings under s. 145, Criminal Procedure Code, are entirely without juri diction unless they are directed to the decision of the absolute continuing possession of either party until they are ousted by the order of the Civil Court. MANIK CHANDRA CHAKRAVARTI *v.* PREO NATH KUAR (1912) . 17 C. W N. 205

————*Disputed land—Pathways thereon—Possession of disputed land found with one party—Order directing pathways to remain intact and remainder of disputed land to remain in possession of successful party—Jurisdiction to make such order.* Where in a proceeding under s. 145, Criminal Procedure Code, the Magistrate found that the disputed land was in possession of the

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

——— s. 145—*contd.*

second party but directed that two pathways on the disputed land should remain intact and only the remainder of the disputed land should remain in possession of the second party: *Held*, that there is nothing in s. 145, Criminal Procedure Code, which gives a Magistrate power to pass an order of this kind ASIT MOHAN GHOSH *v.* SARAT CHANDRA GHOSH (1913) **17 C. W. N. 793**

——— *Jurisdiction of High Court to deal in revision with orders passed under s. 145—S. 139, meaning of words "otherwise comes to its knowledge"—Ss 438, 439, compared—S 145, Criminal Procedure Code—Defective preliminary order, effect of.* Ss. 143, 144, 145 and 146, Criminal Procedure Code, deal with proceedings which are not criminal or punitive but prohibitive and where cause is shown, the local magistracy has unfettered discretion to act under them. Therefore from the use of the word "otherwise" in s 438 a power in the Sessions Judge and the District Magistrate to interfere with such orders cannot be inferred when they are expressly forbidden by s 435 to call for records *Sequitter* · The words in s 439 "the record of which has called for by itself" are not limited to cases where the High Court acts *suo motu*. The history of the law relating to superintendence and revision by the High Court reviewed An omission to set forth in a preliminary order under s. 145, Criminal Procedure Code, the grounds of a Magistrate's opinion do not affect the jurisdiction of the Magistrate. *Khosh Mahomed Sirkar* v. *Nazir Mahomed, I. L. R. 33 Calc. 352*, discussed, and *Subrahmania Ayyar* v. *King-Emperor, I L. R 25 Mad 61*, distinguished The essential requisite to give a Magistrate jurisdiction under s. 145, Criminal Procedure Code, is that he must be satisfied from information of some sort that a dispute exists likely to cause a breach of the peace concerning land or water or the boundaries thereof in his jurisdiction. Once he is so satisfied his jurisdiction is complete and his subsequent action must be considered in relation to procedure not jurisdiction. KAMAL KUTTY *v* UDAYAVARMA RAJA VALI RAJA OF CHIRAKKAL (1913)
I. L. R. 36 Mad. 275

——— *Omission of Magistrate to give effect to presumption arising from recently published record-of-rights, if a question of jurisdiction.* The omission of the Magistrate in making an order under s. 145, Criminal Procedure [illegible]

Magistrate, and the High Court cannot interfere on that ground. CHINTAMONI JINA *v.* JAGANNATH RAMANUJA DAS (1914) . . **19 C. W. N. 123**

——— *Rent, collection of dispute regarding, between lakherajdar and putnidar —Decision in the absence of tenants—Produce rent, applicability of section to.* The disputed land in respect of which proceedings under s 145, Criminal Procedure Code, were instituted consisted of several plots all held by tenants on a yearly rent of half the produce. The parties to the proceedings were the *lakherajdar* and the *putnidar*, the dispute between whom was as to the right to collect rent It appeared that as regards some of the plots there was a dispute as to what tenants were

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— s. 145—*contd.*

in possession. *Held*, that as regards the plots about which there was a dispute as to the tenants in possession, the Magistrate should not have made any order in the absence of tenants who might be very seriously prejudiced by an order in favour of one or other of the parties to the proceedings. *Held* (as to the argument that s 145, Criminal Procedure Code, could not refer to a half-share of the produce), that it was true that if it was a question of dividing a hitherto-undivided share the section might not apply, but in the present case the section applied, as it was a question of rent and it so happened that the rent was half the share of the produce; but there was no question of shares as between the two parties to the proceeding. HARI DAS SAMANTA *v* ABDUL MOTLEB MULLICK (1915) . . **19 C. W. N. 959**

——— *Refusal of process against witness—Final order without jurisdiction.* Where in a proceeding under s 145, Criminal Procedure Code, the petitioner applied for summons against a witness, a Sub-Inspector of Police, and the Magistrate made an order that the Sub-Inspector was to appear with his diaries, but on the date on which the case was to be heard the witness did not appear, and on the petitioner again applying for summons against him the Magistrate rejected the application remarking that the application was vexatious and ultimately passed the final order under s 145, Criminal Procedure Code: *Held*, that the order under s 145, Criminal Procedure Code, was made without jurisdiction. GAIJUDDI HOWLADAR *v* AINUDDI HOWLADAR (1913) . . . **18 C. W. N. 94**

——— *Non-examination of witness on either side—Final order on documentary evidence dating back to ten years previous to date of proceeding—Magistrate's duty under cl (4)—Jurisdiction.* In a proceeding under s. 145, Criminal Procedure Code, no witness was examined on either side, but the Magistrate decided the case on the documents filed before him, the latest of those documents dating back to about ten years before the date of the proceeding. It appeared that one of the parties was present in Court but was not examined. *Held*, that the Magistrate was bound to take such further evidence as became necessary after a consideration of the documents, and the final order was without jurisdiction. Cl. (4) of s 145 clearly provides that the [illegible]

——— *Order under section contrary to decree of Civil Court* The petitioners, the second party to the proceeding under s 145, Criminal Procedure Code, obtained a decree against one of the first party and another person who were entitled to an undivided one-fourth share in the property in dispute. This share was sold in execution of the decree and purchase by the decree-holders, the petitioners, who obtained delivery of possession through the Court. The Magistrate finding that the petitioners were never in actual possession of the property and the crop was grown by the first party made an order in favour of the latter. *Held*, that the order was liable to be set aside. ATUL HAZRAH *v.* UMA CHARAN CHONGDAR (1916) . **20 C. W. N. 796**

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— s. 145—*contd.*

——— *Addition of parties —Sub-s. 4 (1)—Wrongful and forcible dispossession —Digging tank with sanction of Municipality—Party if must have had notice of the proceeding to be concerned in the dispute.* Where in a proceeding under s. 145, Criminal Procedure Code, it appeared that one of the parties within two months from the commencement of the proceeding obtained sanction from the Municipality and proceeded to dig a tank on the land in dispute to the exclusion of another party who was then found to be in possession: *Held*, that it was forcible and wrongful dispossession within the meaning of sub-s. 4, cl. (*1*), of s. 145. *Held*, further, that under the Full Bench Ruling in *Krishna Kamini* v. *Abdul Jubbar, I. L. R. 30 Calc. 155: s. c. 6 C. W. N. 737*, a party may be added provided he was concerned originally in the dispute which was the foundation of the proceeding and there is no necessity for a fresh proceeding. Further, if a party is added before the inquiry begins, there is no irregularity. That whether or not there was then an apprehension of a breach of the peace is a matter eminently for the exercise of the Magistrate's discretion. For a person to be concerned in a dispute relating to land, it is not necessary to be actually present near the land or to have had notice of the proceeding when started. MANMOTHA NATH CHATTERJI *v.* GANGA GIR GOSSAIN (1916) . . 20 C. W. N. 978

——— *Joint title to land, effect of, on the applicability of the section.* The mere fact that there may be a joint title to the land would not prevent the application of s. 145, Criminal Procedure Code. *Basanta Kumari Dassi* v. *Mohesh Chandra Saha, 17 C. W. N. 944*, followed. BAIJNATH MARWARI *v.* W. S. STREET (1916) . . . . 20 C. W. N. 518

——— *Order without recording oral evidence on either side.* Where a Magistrate made an order under s. 145, Criminal Procedure Code, without giving either party an opportunity of adducing oral evidence as to possession. *Held*, that the order was liable to be set aside. SAKHAYUR ALI *v.* ALHADI HAZI (1917)

21 C. W. N. 928

——— *Proceedings, if can be had after order under s. 107, Criminal Procedure Code—Jurisdiction.* There would be no want of jurisdiction on the part of a Magistrate to continue proceedings under s. 145, Criminal Procedure Code, after having made an order under s. 107, Criminal Procedure Code. NASIRUDDIN SARKAR *v.* GOFURUDDIN MAHAMED (1916)

21 C. W. N. 160

——— *Government of India Act, 1915, s. 107—Order under s. 145 by a Magistrate duly empowered to act under Chapter XII—Revision—Jurisdiction of High Court.* Where proceedings are in intention, in form, and in fact proceedings under Chapter XII of the Code of Criminal Procedure, and are taken by a Magistrate duly empowered to act under that chapter, the High Court has no power to send for the record of those proceedings either under the Code of Criminal Procedure or under the Government of India Act, 1915. There is no practical difference between s. 107 of the Government of India Act, 1915, and s. 15 of the Charter Act. *Jhingai Singh* v. *Ram Partab, I. L. R. 31 All. 150, Maharaj Tewari* v. *Har Charan Rai, I. L. R. 26 All. 144, Sayeda Khatun* v. *Dal Singh, I. L. R. 36 All. 233, Babban Singh* v. *Baldeo Singh, 4 All. L. J. 91, Har Prasad* v. *Pandurang, All. W. N., 1905, p. 260, Baldeo Baksh Singh* v. *Raj Ballan Singh, 2 All. L. J. 274*, and *Muhammad Suleman Khan* v. *Fatima, I. L. R. 9 All. 104*, referred to. *Nathu Ram* v. *Emperor* through Puran Mal, *15 All. L. J. 270*, and *in re Mathu Mal, I. L. R. 24 All. 315*, distinguished. *Parmeshwar Singh* v. *Kailaspati, 1 Patna, L. J. 336*, dissented from. MATUKDHARI SINGH *v.* JAISRI (1917)

I. L. R. 39 All. 612

——— *Magistrate's refusal to take documentary evidence when mineral rights claimed on leases and settlements, if material irregularity in procedure—Error of law and judgment—Interference of High Court.* Where the dispute was regarding the mineral rights in a certain area between the lessees under the *putnidars* and the *dar-putnidars* and the Magistrate declined to accept or consider documentary evidence on either side: *Held, per* CHITTY AND RICHARDSON, J.J. (TEUNON, J., *contra*), that whether or not it is possible to decide the question of actual possession on the materials before him, it is for the Magistrate to decide, and where he was found it possible to decide that question there is no material irregularity in procedure in rejecting evidence as to title and the High Court will not interfere if the Magistrate committed an error of law or of judgment. SUJAHDI MONDAL *v.* F. L. CORK (1917)

22 C. W. N. 499

——— *Supplementary order at the instance of one party without notice to the other.* Proceedings under s. 145, Criminal Procedure Code, were drawn up in respect of certain premises consisting of a *dalan*, a hotel and a privy and the Magistrate made his final order with regard to the first two. Subsequently the omission in respect of the privy being brought to his notice by one of the parties the Magistrate declared that party's possession of it without any notice to the other party. *Held*, that the order should not have been made without hearing the other party. NATABAR DUTT *v.* BIRESWAR RAKHIT (1917)

22 C. W. N. 552

——— *Whether applicable to a joint holding, separate portion of which is held by each co-owner—necessity for enquiry into possession—Revision by High Court.* *Mussammat M.*, complainant-petitioner, filed an application under s. 145, Criminal Procedure Code, alleging that she had been in possession of her husband's land since his death, and that certain reversioners of her husband's property had forcibly taken possession of it, and that she feared for her life. The Magistrate after a summary enquiry, issued notice to the opposite party calling upon them to file their written statements with regard to the actual possession of the land. In the statements filed they claimed to be entitled to the land in question alleging that *Mst.* M. had re-married and further alleging that the *khata* was joint. *Mst.* M. was examined and stated that she had been in possession of the land for many years; that she did not know whether there had been any partition, but

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— s. 145—*contd.*

that the various joint owners had held separate portions of the joint holding for themselves, each one b[illegible]
The [illegible]
enqui[illegible]
s. 14[illegible]
cable to disputes for possession of joint land. *Held*, that s. 145, Criminal Procedure Code, was applicable to a case where the dispute is betwen co-sharers, each claiming to be in possession of the disputed land to the exclusion of the others, and that the Magistrate should have inquired and decided whether or not the applicant had been recently in actual possession. *Musammat* MALAN *v.* MAKHAN SINGH . I. L. R. 2 Lah. 372

——— *Government of India Act, 1915, s. 107—Order under s. 145 of the Code of Criminal Procedure made by a Magistrate duly empowered to act under Chapter XII of the Code—Revision—Jurisdiction.* When proceedings are in intention, in form and in fact proceedings under chap. XII of the Code of Criminal Procedure, and are tal[illegible]
under [illegible]
to sen[illegible]
under [illegible]
Government of India Act, 1915. *Matukdhari Singh v. Jaisri, I. L. R. 39 All. 612,* followed. It is, however open to a party in such a case to satisfy the High Court that property of which he is entitled to possession has been dealt with by an order which has no legal authority at all, and he may do so by an affidavit or in any other reliable manner, and thereby invoke the superintending power of the Court. SUNDAR NATH *v.* BARANA NATH (1918) . . . I. L. R. 40 All. 364

——— *Symbolical possession, value of, and how far a determining factor—Magistrate's duty to decide actual possession where considerable time has elapsed since delivery of symbolical possession.* The second party's case was that they purchased the disputed property at a sale in execution of a money-decree against one N and his sons while the first party alleged that the property belonged to the whole body of villagers [illegible]

dence must vary inversely with the time that has elapsed since the date of the decree and the delivery of possession thereunder and it was incumbent on the Magistrate to consider the question of actual possession at the date of the proceedings on the evidence adduce on that point before he could make a final order. HAZARI KHAN *v.* NAFAR CHANDRA PAL CHAUDHURY (1917)
22 C. W. N. 479

——— *Civil Court decree against third parties when and how far binding on* [illegible]

first party previously brought a suit for rent against some persons not parties to the proceeding and purchased the disputed property at the sale in execution of an *ex parte* decree obtained therein and was put into possession without the knowledge of the second party and the Magistrate found that the rent suit was not a *bonâ fide* one brought by the landlord against tenants in possession and declared the second party to be in possession of the disputed land: *Held,* that in the circumstances of the case the order of the Magistrate was not erroneous and was not liable to be set aside. *Per* WALMSLEY, *J.*—That a previous order of the Civil Court relating to the property in dispute may throw light upon the matter but the evidentiary value to be attached to such a piece of evidence must depend upon the particular circumstances of the individual case. *Per* SHAMSUL HUDA, *J.*—That decrees of Court so far as third parties are concerned may have different values in different cases. Where for instance there has been a real contest between the parties to a suit and upon an adjudication regarding title or possession a party has been awarded a decree and has been put in possession in execution of such a decree it may not be enough for a party claiming adversely to such a decree to show that he was not a party to it. Cases of money decrees followed by sale of properties would stand on a different footing. In those cases the sale in execution only passes the right title and interest [illegible]

and there is an adjudication on such claim or where the delivery of possession leads to an investigation under O. XXI, rr. 97 to 100, Criminal Procedure Code In estimating the value of delivery of possession against third parties it is also material to see what is the true nature of the possession said to have been delivered. ATUL CHANDRA MANDAL *v.* SRINATH LAIK (1919)
23 C. W. N. 982

——— *Order declaring one party to be in possession of property in the joint possession of both parties.* Where it was found that the second party was in possession of the disputed land on behalf of the first party as also on behalf of himself, both parties being members of the same family, and the Magistrate declared the second party to be in possession of the disputed land: *Held,* that the order was without jurisdiction. *Tarujan Bibi v. Asamuddi Bepari, 4 C. W. N. 426,* followed. KINU MONDAL *v.* HAJI BAUL MONDAL (1919) . 21 C. W. N. 1051

——— *Omission to add proper parties—Jurisdiction of High Court—Government of India Act, 1915, s. 107—Difference of opinion in a Divisional Bench—Opinion of Senior Judge, when prevails—Letters Patent, s. 36—Criminal Procedure Code (Act V of 1898), ss. 429, 439.* Where in a proceeding under s. 145, Cr. P. C., the Petitioner applied to the Magistrate to be made a party on the ground that she was in pos[illegible] which
[illegible] ch she
[illegible] appli-
[illegible] omis-
sion to join a party in a proceeding under s. 145, Cr. P. C., is not an error of jurisdiction and there was no irregularity in the case resulting in such prejudice as would justify the interference of the

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

—— s. 145—*contd.*

High Court : *Per* SHAMSUL HUDA, *J.*—That there were reasonable grounds in the case for the apprehension that the action taken by the Magistrate resulted in a serious failure of justice which justified the interference of the High Court which was not confined to questions of jurisdiction alone. There being this difference the opinion of the senior Judge prevailed. MOIRAM BEWAH *v.* MRIJAN SARDAR . . . . 24 C. W. N. 97

—— *Likelihood of breach of the peace, basis of jurisdiction under the section—Correct specification of subject-matter of dispute in proceeding necessary.* Where in his order directing the issue of a proceeding under s. 145, Cr. P. C., the Magistrate was of opinion that there was no likelihood of a breach of the peace but as the dispute was one relating to possession, s. 145, Cr. P. C., was applicable : *Held*—That the Magistrate acted without jurisdiction inasmuch as the basis of jurisdiction in cases of this character is the likelihood of a breach of the peace. Absence of a clear specification of the subject-matter of dispute in the proceeding drawn up is a serious defect. SIR NARAIN MUKHERJEE *v.* SATISH CHANDRA GHOSAL . . . 24 C. W. N. 621

—— *Ex parte order—Written return of service by the peon—Affidavit proving service, if necessary—Allegation of non-service of notice of order under cl. (1) of s. 145—Application for rehearing, refusal of, by Magistrate—Magistrate's duty—High Court, power of, to order rehearing.* Where in a proceeding under s. 145, Cr. P. C., the first party having been absent though there was a written return of service on them, by the peon, the Magistrate passed an order in favour of the second party upon taking evidence of that party, and subsequently on the first party having filed an application to the Magistrate for rehearing of the case on the allegation of non-service of the notice of the order under cl. (*1*), s. 145, the Magistrate refused the said application on the ground that the case could not be revived, and thereupon the first party moved the High Court : *Held*—That the Magistrate should not have rejected the application for reopening of the case without satisfying himself about the truth or otherwise of the allegation of the first party as to the notice not having been served, and in these circumstances the High Court directed that the matter be reheared by the Magistrate. KALI CH. KAPALI *v.* ABDUL LASKAR . . 24 C. W. N. 902

—— *Proceeding under s. 145, relating to dispute concerning lac on trees standing on the lands of a part whether without jurisdiction—Lac whether comes within definition of land under s. 145.* Trees may come within the definition of land in s. 145, Cr. P. C., as being "produce of land," but lac which is not a part of the tree itself but is a parasitic growth on the tree is not "crop" or a "produce of land." Proceedings held under s. 145, Cr. P. C., in respect of lac are therefore without jurisdiction. The definition of "land" as including "crops" or the "produce" is for the purpose of s. 145 only and there is no such definition in connection with s. 147. ALI MOHAMMAD MONDAL *v.* FAKIRUDDI MUNSHI 24 C. W. N. 1039.

—— *Wrongful and forcible possession, meaning of.* Under sub-s. 4 of s. 145, Criminal Procedure Code, dispossession may be wrongful and yet not forcible. A dispossession otherwise than in due course of law is wrongful. It is not necessary that actual force or violence should have been used to some person or persons before a dispossession can be said to be forcible. When the dispossession is effected by a show of criminal force sufficient to intimidate those in possession and to deter them from resistance it is forcible within the meaning of the section. SITANATH SHAHA BHOUMIC *v.* A. HARVEY 25 C. W. N. 601

—— *Effect of sub-s. (5)—Duty of party to satisfy Magistrate as to non-existence of likelihood of breach of peace.* The effect of sub-s. (5), to s. 145, Criminal Procedure Code, is that unless a party is in a position to show to the Magistrate that there is no likelihood of a breach of the peace the Magistrate's order under sub-s. (1) stands. The mere absence of a finding of the Magistrate that there is likelihood of a breach of the peace where there are mere allegations by the parties to the contrary does not go to the root of the Magistrate's jurisdiction. RANADA-RANJAN BHATTACHARJEE *v.* BHARAT CHANDRA SHAHA . . . . 25 C. W. N. 215

—— *Reference to arbitration—acquiescence essence in award.* Where a dispute concerning the possession of land is referred to arbitration by consent of the parties, and the award of the arbitrators is acquiesced in by the parties, the Magistrate is entitled to proceed under cl. (*4*) of s. 145 of the Code of Criminal Procedure and he is not bound to insist upon the production of evidence. HALDHAR SINGH *v.* BULAKI SINGH 3 Pat. L. J. 248

—— Where in a proceeding under s. 145 the Magistrate without taking any evidence made the final order on the basis of a local enquiry of which no note or memorandum was seconded and on the basis further of a judgment in a Criminal Case under s. 448 of the Penal Code between a relation and some members. *Held*, that the final order was based upon no evidence and must be set aside. GAGAN HOWLADA *v.* KARIMUDDI CHOWKIDAR . 25 C. W. N. 1007

—— *Dispute regarding immovable property—Right to tap a tree.* The right to tap a tree is a question which may be the subject of proceeding under s. 145 of the Code of Criminal Procedure, 1898. Where, in a proceeding under s. 145, the Magistrate directed the second party to leave an opening in a wall which he was building for the purpose of allowing the first party to tap a tree : *Held*, that the order was without jurisdiction. JIB LAL MAHTO *v.* THE KING-EMPEROR . . 3 Pat. L. J. 316

—— *Dispute concerning possession of mica mines—order with regard to possession of mines and of mica stored in a godown validity of—whether order separable.* When the produce of land has been removed from and is wholly unconnected with and dissociated from the land in dispute a Magistrate has no jurisdiction to deal with it under s. 145 (2) of the Code of Criminal Procedure 1898. In a dispute concerning the possession of a mica mine the Magistrate made an order with regard not only to the possession

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— s. 145—*contd.*

of the mines, but also with regard to the possession of certain mica which had been taken out of the mines and stored in a godown belonging to a person unconnected with the parties and their dispute, in a village other than that in which the mine in dispute was situate. *Held,* that the order with regard to the possession of the mica in the godown was bad and must be set aside, but that the order being divisible the porton regarding possession of the mines would be maintained. SUNDER LALL *v.* JHARI LALL 2 Pat. L. J. 637

——— *Delegation of duties to arbitrators by Magistrate validity of—jurisdiction, wrongful delegation of duties is.* A Magistrate has no jurisdiction, even with the consent of the parties, to make over an enquiry under s. 145 of the Code of Criminal Procedure, 1898, to any other person. Sub-s. (*4*) of s. 145 makes it clear that the section contemplates only an enquiry by the person directed by the Act to hold it and by no one else. S. 145 read as a whole does not give the person charged with holding the enquiry under that section, the right or power to delegate the duties which have been vested in him to any other person to hold an enquiry or to ascertain the facts which the law requires the Magistrate to do himself. It is a question of jurisdiction whether a person has power to delegate his duties or not. A person who has no power to delegate his duties to another acts in excess of jurisdiction by delegating his powers to another. HAMIDUL HAQUE *v.* JHEISH ATAIT HUSSAIN . . . 2 Pat. L. J. 86

——— *Cancellation by District Magistrate of an order of his predecessor passed under sub-s. (1) of s. 145—Whether* intra vires—*Revision. Held,* that a Magistrate has jurisdiction to cancel an order passed under sub-s. (1) of s. 145, Criminal Procedure Code, and to stay proceedings, if he becomes satisfied, whatever the source of information may be, that the state of things does not exist, which alone would give him jurisdiction to proceed with the enquiry. The High Court cannot interfere in such cases as the Magistrate has not acted without jurisdiction. *Manindra Chandra Nandi* v. *Barada Kanta Chowdry (I. L. R 30 Calc. 112),* followed. SANTOKH SINGH *v.* RAM SINGH . . I. L. R. 2 Lah. 364

——— The absence of a likelihood of a breach of the peace deprives a Magistrate of Jurisdiction. RASICK LAL HORE *v.* JAGABANDHU ROY (1920) . . 25 C. W. N. 214

——— Where in a proceeding under s. 145 it appeared that a proper appreciation of the oral evidence was impossible in the absence of an important document. *Held,* that the Magistrate was wrong to refuse to grant an adjournment for the production thereof. BISWAMBHAR ROY BASHIA *v.* AMINUDDIN TALUKDAR 25 C. W. N. 602

——— Where is a case under the section the parties amicably made a reference of their dispute to 5 arbitrators and the Magistrate made his final order on an award given by 4 although both parties contested the validity. *Held,* that a reference is not contemplated in a proceeding under this section which directs the Magistrate himself to decide the question of actual possession thought if both parties had accepted the award he could have proceeded under sub-s. 5. JAMUNADAS KIJRIWALA *v.* HANUMAN BAKSH MARWARI . . . . . 25 C. W. N. 719

——— *Heirs of judgment-debtors remaining in possession notwithstanding delivery of possession to auction-purchaser by Civil Court—Such* [illegible]
and [illegible]
Disp [illegible]
actua [illegible]
decree against the predecessor of the first party possession was given to the auction-purchaser the second party, of a tank on the 17th November 1918 during the lifetime of the judgment-debtor and of a residential house on the 16th May 1920 after his death. On the 22nd January 1921 proceedings under s. 145 were taken in respect of the tank and the house. It was found that notwithstanding the delivery of possession by the Court, the first party who were the heirs and representatives of the original judgment-debtor continued all along to be in possession up to the date of the proceedings: *Held,* that the possession of the first party from the date of the death of the judgment-debtor to the date of the proceeding was adverse to the second party and in that view the order in favour of the second party in respect of the tank should be set aside. That having regard to the fact that the case of the second party was that actual possession was given to them of the house on the 16th May 1920 and having regard to the finding that the first party was in possession up to the date of the proceeding, it was clear that between the delivery of possession and the institution of the proceedings there was dispossession of the second party and the order in their favour in respect of the house was also liable to be set aside. SHAHABAJ MANDAL *v.* BHAJOHARI NATH . . 25 C. W. N. 743

——— *Collection of offerings at a Karbala, whether proceedings with regard to, are incompetent—Counsel, right of, to be heard.* A dispute with respect to the collection of offerings at a *Karbala* cannot be the subject-matter of a proceedings under s. 145 of the Code of Criminal Procedure, 1898. The words "*hear the parties*" in s. 145 (*4*) mean "hear the evidence of the parties and arguments of Counsel or Pleaders appearing on their behalf or arguments addressed by themselves," and if the Magistrate refuses to hear arguments he is not complying with the provisions of the law, which are imperative. GHULAM SIBTAIN *v.* MUSSAMMAT KANIZ KHATTON 5 Pat. L. J. 246

——— *Possession given under decree of Civil Court, whether bars proceedings—Code of Civil Procedure (Act V of 1908), O. XXI, rr. 35 and 36.* Where possession of immovable property has been delivered to an auction purchaser under O. XXI, r. 35 of the Code of Civil Procedure, 1908, a Magistrate acts without jurisdiction in proceeding under s. 145 of the Code of Criminal Procedure, 1898, and in making an order against the auction-purchaser under that section. The possession which is delivered to an auction-purchaser under O. XXI, r. 35, is actual possession and not symbolical formal possession as under r. 36 of that Order. BEHARI GIR *v.* RANI BHUBANESWARI KOER . . 5 Pat. L. J. 104

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— **s. 145**—*concld.*

——— A Magistrate should in the final order made by him under s. 145 sufficiently state the reasons therefore so that the High Court in revision may determine whether or not the Magistrate has complied with the provisions of sub-s. 4 of s. 145 and directed his mind to the consideration of the effect of the evidence adduced before him. BHUBAN CHANDRA HAZRA *v.* NIBARAN CHANDRA SANTRA . **25 C. W. N. 887**

——— **ss. 145, 146**—

See s. 107 . . **3 Pat. L. J. 243**

See JALKAR . **I. L. R. 39 Calc. 469**

See RECEIVER . . **14 C. W. N. 681**

——— *Disputed land under water rendering act of possession by either party impossible—Order in favour of one party on the ground of his possession in the previous year—Substitution by High Court of order undre s. 146 for order under s. 145.* Where in a proceeding under s. 145, Criminal Procedure Code, the Magistrate made the final order in favour of one party, finding that as there could not be any act of peaceful possession within two months of the date of the proceeding owing to the land being under water, the possession of the current year was to be presumed in favour of the man who was in possession during the previous years: *Held*, that the order was in direct contravention of s. 145, cl. (*4*), and the Magistrate should have passed an order under s. 146, Criminal Procedure Code. The High Court substituted an order under s. 146, Criminal Procedure Code, for the order under s. 145 made by the Magistrate. SATYENDRA NATH BANERJI *v.* KRISHNADHAN ADHECARY (1916) . **20 C. W. N. 1014**

——— *Inherent power of Magistrate to release property from attachment.* Khushi Ram, Petitioner, presented an application to the Magistrate praying for the release of a house which had been attached in a proceeding under s. 145, Criminal Procedure Code, on the ground that Shadi Ram, the other claimant, had died, and that he, Petitioner, was his heir. The Magistrate refused this application as no judgment of a competent Court was produced as required by s. 145, Criminal Procedure Code. *Held*, that s. 146, Criminal Procedure Code, is not exclusive, and that an attaching Magistrate has inherent power to release from attachment. When all likelihood of a breach of the peace has disappeared all necessity ceases for maintaining any orders passed on account of the dispute. *Sreeputty Churn* v. *The Empress*, (*24 W. R. 14* (*Cr.*). *The Queen* v. *Kaly Kishore Roy* (*25 W. R. 68* (*Cr.*), referred to. KHUSHI RAM *v.* THE CROWN . **I. L. R. 1 Lah. 451**

——— *Dispute as to immovable property—attachment of immovable property and movables found therein.* In a proceeding under s. 145 of the Criminal Procedure Code, the Magistrate, under clause (4), attached the subject-matter in dispute, *viz.*, a certain village and a *math* situate therein, and directed the Sub-Inspector of Police to take charge of them. The Sub-Inspector accordingly attached the property including some cattle that were found by him in the *math* at the time of attachment. Eventually the Magistrate directed the attachment of the village and *math* under s. 146 of the Code until the rights of the parties

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— **ss. 145, 146**—*concld.*

should be determined by a competent court. *Held*, that the attachment of the cattle was not illegal. The Sub-Inspector was bound to take charge of everything that was within the *math* including the cattle. After attachment no party had a right to enter the *math* or to take possession of the property moveable or immovable appertaining to and found within the *math*. MAHANT BHARAT DAS *v.* RAM CHAR TAR DAS

1 Pat. L. J. 356

——— **ss. 145 and 146**—*Dispute regarding immoveable property—ouster of party in possession by appointment of Receiver—validity of appointment.* A Magistrate cannot legally appoint a Receiver in proceedings under s. 145 of the Code of Criminal Procedure. It is only when the Magistrate finds that there is no one in possession of the disputed property, or the evidence is so conflicting that it is impossible to find who is in possession, that he is empowered under s. 146 to attach the property and appoint a Receiver. In proceedings under s. 145 the Magistrate must confirm the party who is in actual possession and he is not competent to dispossess such a party by appointing a Receiver. Persons who continue to remain on the property after the appointment of a Receiver appointed in such circumstances cannot legally be convicted under s. 448 of the Indian Penal Code. An order of attachment under the second proviso to sub-s. (4) of s. 145 has no greater effect than a Civil Court attachment. MIWA LALL *v.* KING-EMPEROR . . . **3 Pat. L. J. 147**

——— **ss. 145, 147**—

See JURISDICTION . **4 Pat. L. J. 154**

——— *Offerings made to a deity whether could be the subject-matter of proceeding under s. 145—Profits arising out of land, whether offerings—Ss. 145 and 147, analogy between.* In a proceeding under s. 145, Criminal Procedure Code, the Magistrate has no *jurisdiction* to make a declaration that a certain party is entitled to the possession of the offerings made to a deity in a temple. The offerings given by worshippers for the worship of any deity are not profits arising out of land, *e.g.*, the place of worship. These offerings arise out of the deity irrespective of the building or the land upon which he may happen to dwell. A case under s. 147, Criminal Procedure Code, is to be decided by the same procedure and on the same principles as a case under s. 145, Criminal Procedure Code. A dispute as to the possession of the offerings is a dispute about moveable property; and it is now settled law that s. 145, Criminal Procedure Code, has no concern with moveable property. RAM SARAN PATHUK *v.* RAGHUNANDAN GIR (1910)

16 C. W. N. 574

——— **ss. 145, 350**—

See MAGISTRATE, TRANSFER OF

I. L. R. 37 Calc. 812

——— **ss. 145, 356**(*1*), (*3*)—

See DISPUTE CONCERNING LAND

I. L. R. 42 Calc. 381

——— **ss. 145, 435 and 439**—*Government of India, Act, 1915, s. 107—Revision—Powers of High Court.* S. 107 of the Government of India Act, 1915, does not give to a High Court the

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— ss. 145, 435 and 439—*concld.*

power to interfere in revision, despite the provisions of s. 435 of the Code of Criminal Procedure, with orders passed under Chapter XII of the Code. *Ananda Chandra Bhuttacharjee* v. *Carr Stephen, I. L. R. 19 Calc. 127*, not followed. *Jhingai Singh* v. *Ram Pratap, I. L. R. 31 All. 150, Sunder Nath* v. *Barana Nath, I. L. R. 40 All. 364*, and *Syeda Khatun* v. *Lal Singh, I. L. R. 30 All. 333*, referred to. *Girdhari Singh* v. *Hurdeo Naruin Singh, L. R. 3 I. A. 230*, distinguished. EMPEROR *v.* SAKHAWAT ALI (1918)

I. L. R. 41 All. 302

——— ss. 145 and 435—*Revision—Jurisdiction—Powers of High Court. Held*, that the High Court has no power to interfere in revision with an order passed by a Magistrate under s. 145 of the Code of Criminal Procedure. *Jhingai Singh* v. *Ram Partab, I. L. R. 31 All. 150*, and *Maharaj Tewari* v. *Har Charan Rai, I. L. R. 26 All. 144*, followed. SAYEDA KHATUN *v.* LAL SINGH (1914)

I. L. R. 36 All. 233

——— *Revision—Powers of High Court—Order giving possession of immoveable property modified in effect by independent order as part of such property.* There being a dispute between two parties concerning the possession of a house, a magistrate of a first class took proceedings under s. 145 of the Code of Criminal Procedure and ordered that possession of the house should be made over to one of the parties. Inasmuch, however, as certain movable property concerning which the parties were disputing had been locked up in two rooms of the house in question by the orders of the police, the Magistrate passed a second and independent order that the two rooms in question were to remain locked until the rights of the parties to the movable property therein were determined by a Civil Court. *Held* that, whatever might be the case with the order as to [illegible]

I. L. [illegible]

——— ss. 145 and 522—*Possession—Ouster* [illegible]

power to oust one person and to place another in possession of a disputed property. Therefore the order of the District Magistrate in his capacity as the head of the police, declining to carry out such an order is not open to revision by the High Court. The only provision in the Code of Criminal [illegible]

——— ss. 145, 439——Where in proceedings under Ch. XII of the Code the initial order was defective in that it did not set forth the grounds for the Magistrate being satisfied of the existence of a dispute likely to cause a breach of the peace but on the other hand both parties were fully

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— ss. 145, 439—*concld.*

cognizant of the matter in dispute and there was in fact danger of a breach of the peace the High Court declined in *revision to interfere with the* Magistrate's Order. GANGA SARAN SINGH *v.* BHAGWAT PRASAD . . **I. L. R. 32 All. 132**

——— ss. 145, 526—*Transfer "Criminal case"—"Accused person." Held*, that the expression 'criminal case' as used in s. 526 of the Code of Criminal Procedure includes a proceeding initiated under s. 145 of the Code, and that the High Court under s. 526 has power to transfer such a proceeding under one Court to another Court subject to all the conditions under which a transfer can be made. *Arumuga Tegundan, I. L. R. 26 Mad. 188, Lolit Mohan Moitra* v. *Surja Kanta Acharjee, I. L. R. 28 Calc. 709*, and *Gurudas Nag* v. *Gaganandra Nath Tagore, 2 C. L. J. 614*, referred to. *In re Pandurang Govind Pujari, I. L. R. 25 Bom. 179*, dissented from. An 'accused person' is one over whom a criminal Court exercises jurisdiction. *Queen-Empress* v. *Mutasuddi Lal, I. L. R. 21 All. 107*, followed. JAGGU AHIR *v.* MURLI SHUKUL (1912)

I. L. R. 34 All. 533

——— ss. 145, 435, 526—*Proceeding under s. 145, 526 if applies to* A party to a proceeding under s. 145, Criminal Procedure Code, is not entitled to an adjournment of the case under sub-s. (8) of s. 526, Criminal Procedure Code. LAKHAN CHANDRA ROY *v.* FAKUR MANDAL (1913)

18 C. W. N. 393

——— s. 146—

See s. 107 3 Pat. L. J. 243

See s. 145 3 Pat. L. J. 147

See RECEIVER . I. L. R. 40 Calc. 862

——— *Dispute concerning land—Attachment of subject of dispute—Order of Settlement-Court in a proceeding between the same parties and relating to the attached lands—Effect of such order—Release of attachment by Magistrate—Bengal Survey Act (Beng. Act V of 1875), s. 41.* An order of the Survey and Settlement Court under the Bengal Survey Act, 1875, s. 41, is a determination by a competent Court of the rights of the parties entitled to possession of the land within the meaning of s. 146 of the Criminal Procedure Code. Where the Magistrate attached certain lands under s. 146 of the Code, and in a proceeding under s. 41 of the Bengal Survey Act, 1875, between the same parties, the same lands were found to be in the possession of the petitioner:—*Held*, that the Magistrate was bound to follow such order and to release the lands from attachment. AMBLER *v.* SAMI AHMED (1910)

I. L. R. 37 Calc. 33

——— *Possession during attachment, if possession for owner—Recovery of possession, suit for, if may be maintained on the mere fact of possession for 11 years where no title proved by defendant—Title of third party if may be set up in defence.* Although an attachment under s. 146, Criminal Procedure Code, interferes with physical possession, it does not affect the legal rights of the parties concerned and the property under attachment is held for the person ultimately shown to be entitled to possession. Where in a suit for recovery of possession of a *jallar* attached

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

———— s. 146—*contd.*

by a Criminal Court under s. 146, Criminal Procedure Code, the plaintiff was found to have held exclusive and undisturbed possession of the *jalkar* for eleven years prior to attachment: *Held*, that in the circumstances of the case such possession was evidence of a right to possess and unless a better title or antecedent possession was proved by the defendants, the plaintiff would be entitled to be maintained in possession against all but the true owner. *Nisa Chand Gaita* v. *Kanchiram, I. L. R. 26 Calc. 579: s. c. 3 C. W. N. 568*, doubted and distinguished. *Wise* v. *Amirunissa Khatun, L. R. 7 I. A. 73*, and *Sundar* v. *Parbati, L. R. 16 I. A. 186*, referred to. The rule laid down in the former case presupposes facts to which the provisions of s. 9, Specific Relief Act, apply. SHYAMA CHARAN RAY *v.* SURYA KANTA ACHARYA (1910)
15 C. W. N. 163

———— *Order under, effect on possession—Suit by one party against the other for declaration, if lies—Specific Relief Act (1 of 1877), s. 42.* Where in a proceeding under s. 145, Criminal Procedure Code, between the plaintiff and the defendants, the Magistrate being unable to decide which party was in possession passed an order under s. 146 of the Code, and appointed the Collector as Receiver to take possession of the land:—*Held*, that the plaintiff was justified in instituting a suit for declaration of title against the defendants and was not bound to ask for recovery of possession of the land. The suit was therefore not bad under s. 42 of the Specific Relief Act. ADMINISTRATOR-GENERAL OF BENGAL *v.* BHAGWAN CHANDRA RAY CHAUDRY (1911)
15 C. W. N. 758

———— *Attachment order under s. 146, without jurisdiction—Evidence, omission to take, when amounts to want of jurisdiction—Jurisdiction.* Where in a proceeding under s. 145, Criminal Procedure Code, the Magistrate without taking any evidence or making any local enquiry, made an order attaching the land in dispute under s. 146, Criminal Procedure Code: *Held*, that the order of the Magistrate was incompetent and without jurisdiction, as the Magistrate did not make the slightest effort to satisfy himself as to the *factum* of possession. *Sheikh Mansar Ali* v. *Matiullah, 12 C. W. N. 896*, relied upon. *Bejoy Madhab Chawdhury* v. *Chandra Nath Chuckerbutty, 14 C. W. N. 80*, referred to. SHEO BALAK RAI *v.* BHAGWAT PANDAY (1912) **16 C. W. N. 1052**

———— *Limitation—Attachment under s. 146 of the Criminal Procedure (Act V of 1898)—Limitation Act (XV of 1877), Sch. II, Art. 142 or 144—Arts. 47 and 120, applicability of.* Where a property was attached under s. 146 of the Criminal Procedure Code on the 7th March 1899, and it remained under attachment till the 26th February 1903 when, on the application of the purchaser of the holding of the opponent of the plaintiff in the proceedings under s. 145, who had been put in symbolical possession by the Civil Court, the Magistrate put him in possession of the same, and the plaintiff on the 28th February 1906 instituted a suit to recover possession: *Held*, that the limitation applicable would be that provided by Art. 142 or Art. 144 of Sch. II of the Limitation Act and the suit was not time-barred. *Goswami Ranchor* v. *Sri Gridhariji, I. L. R. 20 All. 120*, followed. *Rajah of Venkatagiri* v. *Isakapalli Subbiah, I. L. R. 26 Mad. 410*, dissented from. NISARALLI SHEIKH *v.* ADEBUDDI SHANA (1912) . . . . . **16 C. W. N. 1073**

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

———— s. 146—*concld.*

———— Suit to determine rights of parties to order under, period of limitation for. —Suit, if lies against Magistrate. BROJENDRA KISHORE ROY CHOWDHRY *v.* SAROJINI RAY (1915) . . . . . **20 C. W. N. 481**

———— *Section when to be applied—Order made in disregard of decision under s. 41 of Survey Act (V of 1875) B. S. and entry in record-of-rights—Rejection of material evidence on erroneous grounds—Order made without jurisdiction or after gross and material irregularities prejudicing party.* Where in a proceeding under s. 145, Criminal Procedure Code, the trying Magistrate, without giving effect to an order made under s. 41 of the Survey Act and the entry in the record-of-rights in accordance with the order regarding the disputed land which remained fallow up to the time when the present dispute arose, attached it under s. 146, Criminal Procedure Code: *Held*, that an order under s. 146, Criminal Procedure Code, can be made only when the Magistrate is unable to satisfy himself as to which of the contending parties is in possession and the trying Magistrate when he proceeded to determine the question of possession which arose between the parties should in the first instance have presumed that the possession of this fallow land was with the owners who had title as determined by the decision under s. 41 of the Survey Act which had the force of an order of the Civil Court and which title was further to be presumed from the entry in the record-of-rights. That the Magistrate not having done that, and discarded and rejected on erroneous grounds practically every piece of evidence that might have led him to a correct conclusion, made his final order either without jurisdiction or after such gross and material irregularities as seriously to prejudice the second party. PRAFULLA NATH TAGORE *v.* J. HUDDING (1917) . . . . . **21 C. W. N. 1059**

———— *Attachment when to be made—Imperative duty of Magistrate to consider evidence on record.* Under s. 146, Criminal Procedure Code, a Magistrate is entitled to make an order of attachment only when he is unable to satisfy himself as to which of the parties was in possession at the date of the proceeding. The section contemplates that the Magistrate should consider the evidence fairly and judicially for the purpose of arriving at a decision. The High Court set aside the order under s. 146, Criminal Procedure Code, on the ground that the Magistrate did not give to the case that judicial consideration which the law requires. AMBIKA NATH ROY *v.* MOULVI WAZIDALI KHAN (1919)
23 C. W. N. 910

———— ss. 146, 148—

See ATTACHMENT **I. L. R. 40 Calc. 105**

———— ss. 146, 196, 235, 239, 342, 364, 447, 454, 532—

See JURY, RIGHT OF TRIAL BY
I. L. R. 37 Calc. 467

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— ss. 146, 439—*Defect in form of written order—Jurisdiction—Revision.* Where in proceedings under Chapter XII of the Code of

the other hand, both parties were fully cognizant of the matter in dispute and there was in fact danger of a breach of the peace, the High Court declined in revision to interfere with the Magistrate's order. GANGA SARAN SINGH *v.* BHAGWAT PRASAD (1909) . . . I. L. R. 32 All. 132

——— s. 147—

See DISPUTE CONCERNING EASEMENT.
I. L. R. 39 Calc. 560

——— *Order of Police to remove a bundh thrown across a pyre—Conflict between orders of Civil and Criminal Courts.* A Magistrate

5 C. W. N. 67; Lalit Chandra Neogi v. *Tarini Persad Gupta, 5 C. W. N. 335*, distinguished. MOHUNT DALMIR PURI *v.* KHODADAD KHAN (1909) . . . I. L. R. 36 Calc. 923
14 C. W. N. 179

——— *Dispute concerning the right to act as pujari, and not the right of use of land—Easements.* S. 147 of the Criminal Procedure

Batcha v. *Kader Batcha Routhan, I. L. R. 29 Mad. 237*, not followed. GUIRAM GHOSAL *v.* LAL BEHARI DAS (1910) . . I. L. R. 37 Calc. 578

——— Jurisdiction—*Jurisdiction to pass order under s. 147 on a proceeding under s. 133.* No order can be passed under s. 147, Criminal Procedure Code, on a proceeding taken under s. 133. ABDUL RAHMAN MIA *v.* SAFAR ALI (1910) . . . . 15 C. W. N. 667

——— *Ferry, dispute as to*

started in respect of a disputed ferry in September 1908 were stayed owing to the dispute having been

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that the causes which existed in 1908 or 1909 still continue to exist. When the dispute was referred

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— s. 147—*concld.*

to arbitration, the trying Magistrate recorded an order "further proceedings are unnecessary and they are therefore stayed." *Held,* that the order

of attachment previously passed by him. KALANANDA SINGH *v.* RAMESHWAR SINGH (1910)
15 C. W. N. 271

——— *Dispute about right to collect tolas from hât, if comes within the section.* A dispute relating to a right to collect *tolas* from a *hât* is a dispute concerning the right of use of land within the meaning of s. 147, Criminal Procedure Code. The words "concerning the right of use of any land or water" in s. 147, Criminal Procedure Code, which have been substituted in the present Code in
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s. 145, Criminal Procedure Code. SARAT CHANDRA MADAK *v.* MABARAK MULLICK (1916)
21 C. W. N. 439

——— *Right of use of any land*

When a dispute exists concerning the right of use of any land or water each side claims some *positive right, the existence of which the other* side denies and the positive right claimed on either side involves the negative right of preventing the other party from exercising the right which he claims. The Magistrate has to deal with the opposing rights which cannot both exist at the same time. But the Legislature cannot have intended that the section should be one-sided in its operation or that the party which comes on the record as the 'first party' should have any advantage over the 'second party.' The Magistrate must *have* power *to make an* order whichever party establishes its right. In the clause 'if it appears to him that such right exists' the words 'such right' must be understood as *meaning* such right as is claimed by either party. When the Magistrate had found *that* one of the parties has the right which he claims the enabling clause which follows, 'may make an order permitting such thing to be done or directing that such thing should not be done as the case may be' is clearly intended to give him the power *to protect the right so found to* exist. The relative words 'such thing' have no true antecedent but the sense is not difficult. The protection is to be afforded by some appropriate order of permission or prohibition. PYARI MOHAN SHAHA *v.* HARISH CHANDRA SHAHA (1918)
23 C. W. N. 956

——— s. 148—

See s. 146 I. L. R. 40 Calc. 105

——— Costs under, if may be assessed after order—*High Court's power of revision as to the amount of costs awarded.* An order for assessment of costs under s. 148, Criminal Pro-

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— **s. 148**—*concld.*

cedure Code, does not become illegal simply because it was not made at the time of pronouncing judgment in the proceeding under ss. 145, 146 or 147, Criminal Procedure Code. The order will be good if it is made within a reasonable time while the same Magistrate who decided the proceeding is sitting and the parties are able to appear before him. *Benoda Sundari Chowdhurani* v. *Kali Kristo Paul Chowdhury, I. L. R. 22 Calc. 387, Queen-Empress* v. *Tomijuddi, I. L. R. 24 Calc. 757,* referred to and explained. When costs allowed by the Magistrate fall within the scope of s. 148, the High Court will not interfere on the ground that they are either excessive or deficient. BANSI SINGH *v.* SAYAD MOHAMED AKBAR ALI KHAN (1911)

15 C. W. N. 811

——— In a case under s. 145 an order for costs may be made subsequent to the passing of the judgment. All that the law requires is that the order should be made by the same Magistrate. An application for costs if not made at the time the judgment is delivered should be filed within a reasonable time. NAFAR CHANDRA PAL CHOUDHURY *v.* SIDHARTHA KRISHNA MAZUMDAR . . . . . . **24 C. W. N. 672**

——— **ss. 148, 202, 293, 294, 556 Expln.**—

See LOCAL INSPECTION

I. L. R. 37 Calc. 340

——— **s. 154**—

See s. 14. **3 Pat. L. J. 291**

——— *First information, if evidence.* First information is not evidence in the case. It is tendered by the Crown for such use as the defence may be able to make of it and to test the consistency of the prosecution evidence. ASFAR SHEIKH *v.* THE KING-EMPEROR (1910)

15 C. W. N. 198

——— *First information, proper recording of, by Police.* A careful and accurate record of the first information has always been considered as a matter of the highest importance by the Courts in India, the object of the first information being to show what was the manner in which the occurrence was related when the case was first started. *Emperor* v. *Kampu Kuki, 11 C. W. N. 554,* referred to. As the first informaton can be used in evidence under ss. 157 and 158 of the Evidence Act to corroborate or impeach the testimony of the person lodging the first information, such a document becomes valueless if drawn up by some person other than the proper informant. As the first information in this case which related to a charge of criminal conspiracy at Midnapore was drawn up by a police-officer employed in the Criminal Investigation Department in Calcutta and settled by an attorney: *Held,* that it was of no value. PEARY MOHAN DAS *v.* D. WESTON (1911) **I. L. R. 40 Calc. 898**

16 C. W. N. 145

——— *First information if substantive evidence.* Six persons were convicted of murder and sentenced to death. The Sessions Judge treated the first information in the case as a piece of substantive evidence. The accused appealed to the High Court. There was a difference of opinion between the Judges who first heard the appeal necessitating a reference to a third Judge

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— **s. 154**—*concld.*

and nearly six months elapsed before the appeal was finally disposed of. *Held, per* STEPHEN AND CARNDUFF, JJ.—The first information, although a document of great importance which is in practice always and very rightly produced and proved in criminal trials, is not a piece of substantive evidence, and it can be used only as a previous statement admissible to corroborate or contradict the author of it. AUTOR SINGH *v.* EMPEROR (1913) . . . . **17 C. W. N. 1213**

——— **ss. 154 and 155**—

See PENAL CODE (ACT XLV OF 1860), s. 499 . . **I. L. R. 41 All. 311**

——— **ss. 154, 155, 157, 162, and 551**—

See EVIDENCE ACT (I OF 1872) ss. 25 AND 114 . . **I. L. R. 35 Mad. 247**

——— **ss. 154, 173, 190 (1) (b)**—

See CRIMINAL PROCEEDINGS, INSTITUTION OF . . . . **I. L. R. 37 Calc. 49**

——— **ss. 157, 159, 476**—*Police report by Sub-inspector—Further investigation by Superintendent—Subsequent inquiry by Magistrate—Order for prosecution of witnesses examined in the Magistrate's inquiry—Penal Code (Act XLV of 1860), s. 193.* On the strength of a police report, the District Magistrate ordered the Superintendent of Police to investigate a certain case. The Superintendent made an investigation and came to the conclusion that the case was not a true one: but at the same time suggested that a Magistrate might be sent to inquire into it. The District Magistrate accordingly deputed a Magistrate of the first class to inquire. He made an inquiry, which resulted in an order for the prosecution of certain witnesses who had given evidence before him. *Held,* that there was no legal authority for the inquiry held by the Magistrate, and his order for the prosecution of the witnesses was therefore invalid. *In the matter of the petition of Kandhaiya Lal, All. Weekly Notes (1899) 87,* and *Mouli Darzi* v. *Nauranji Lal, 4 C. W. N. 351,* referred to. EMPEROR *v.* ABDUL RAHMAN (1909)

I. L. R. 32 All. 30

——— **s. 161**—

See s. 14. **3 Pat. L. J. 291**

——— *Statement recorded by the police, consideration of, by Court—Criminal trial—Duty of Judge to record independent finding as to truth or otherwise of evidence.* Where the Sessions Judge in his judgment gave no finding as to the truth or falsity of each witness's statement, but relied entirely on the difference, in what they said in Court and what they said or were alleged not to have said before the police: *Held,* that it is exceedingly dangerous to appeal from evidence judicially recorded under the sanction of cross-examination to alleged statements made to the police which are not judicially recorded. It is the Judge's duty to make up his mind, while the witness is before him, whether he is a witness of truth or falsehood, and it is only when the Judge sees any reason to distrust his evidence that omission in a police record can become of any importance. JUNG RAI *v.* THE KING-EMPEROR (1912) . . . . **19 C. W. N. 217**

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

———— s. 162—

See s. 154 **I. L. R. 35 Mad. 247**

See POLICE DIARIES **3 Pat. L. J. 568**

———— *Statements made to police during investigation—Proof of the statement by oral deposition of the police officer to whom it is made—Indian Evidence Act (I of 1872), s. 157.* During an investigation a witness stated to the police that she had seen a boy at the scene of murder soon after the offence was committed. When examined before the committing Magistrate, she denied the presence of the boy at the scene of the offence. At the trial before the Court of Sessions, she admitted the presence of the boy. The statement that the witness had made in the ... was sought to be proved at the trial ...

tion on the provisions of s. 162 of the Criminal Procedure Code. The Sessions Judge overruled the objection and let in the evidence. The accused having appealed. *Held, that the police officer could be allowed to* depose to what the witness had stated to him in the investigation, for the purpose of corroborating what she had said at the trial EMPEROR *v.* HANMARADDI (1914) . . **I. L. R. 39 Bom. 58**

———— ss. 162, 154, 155, 157 and 551—

See EVIDENCE ACT, ss. 25, 114, 133, 157 **I. L. R. 35 Mad. 397**

———— ss. 162, 288—*Indian Evidence Act (I of 1872), ss. 21, 157—Evidence—Admissibility of evidence—Statements made by witness to Police and Panch—Statements made by the witness as accused before Committing Magistrate—Witness deposing to different story before Sessions Court—Corroboration of the deposition before the Committing Magistrate by statements made before the Police and the Panch—Investigating Police Officer—De-* ...

ments made by a witness to the Police implicating the accused, (2) the same witness' statement to the Panch, (3) and his statement as an accused person made before a Magistrate, and (4) statements made by the co-accused to the Police. The witness, when he was examined before the Committing Magistrate, gave a consistent story, but he deposed to quite a different version when he was examined in the Sessions Court. The learned Judge disbelieved the changed story, and he used the witness' statements to the Police and his statements as an accused person and his statements to the Panch, by way of corroboration of what the witness had stated to the Committing Magistrate. The accused was convicted and sentenced. On appeal:—*Held,* (i) that it was an error to admit statements Nos. 1 and 2 for the purpose of corroborating statement No. 3, for only the statements of witnesses made to the trying ... recorded in the manner contem- ... dence Act, 1872. ... d to corroborate ... t the trial; not ... rior to the trial.

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

———— ss. 162, 288—*contd.*

(ii) *That statements No. 2 were altogether inadmissible* as evidence of the accused's guilt, or they could at most be regarded as admissons by the co-accused *which could possibly be used against himself*, but could not be proved and used against the accused. The Investigating Police Officer ought not to be allowed to depose in examination-in-chief to what the witnesses stated to him. It opens up an undesirably wide field for cross-examination and leads to the attention of the Court being diverted and distracted from the true issues. Moreover, it is contrary to the plain intention of s. 162 of the Code of Criminal Procedure, which is that such statement should be used, if at all on behalf of and not against the person under trial. EMPEROR *v.* AKBAR BADOO (1910) **I. L. R. 34 Bom. 599**

———— s. 164—

See s. 14 **3 Pat. L. J. 291**

See CONFESSION **I. L. R. 40 Calc. 873**
2 Pat. L. J. 80

... between state- ...

but not re... cordance ... is no bar ... the complainant on a charge of perjury. *Semble*. Whether a statement is to be regarded as a *confession* or not depend on the connection in which and the *prupose for which it was made*. A statement recorded as such cannot be used as a confession; nor a confession, as a statement. *Re* RAMANUJAMMA (1916) . **I. L. R. 39 Mad. 977**

———— *Warrant for search of house—Resistance to police—Legality of warrant.* In the course of an *investigation into a dacoity* which had occurred in the Agra district a circle inspector of the Mainpuri district sent a sub-*inspector to the circle inspector concerned with a* suggestion that the house in which one Nihal Singh lived, in the Mainpuri district, might be searched. The Agra circle inspector thereupon gave, as he said, ... to the sub-inspector who had ... the effect that, ... searched it ... connection with the dacoity at ... Murh, that ... Nihal Singh ... the dacoity ... lice in pur... ch the house ... belonged to Brikhbhan Singh *his father-in-law, they* were assaulted by Brikhbhan Singh and his relations and friends and prevented from conducting the *search or arresting* Nihal Singh. *Held,* that the authority under which the police had attempted to make the search was invalid and the persons

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

—————— **s. 164**—*concld.*

resisting them could not be convicted under s. 332 of the Indian Penal Code. Whether or not these persons might have been found guilty under other sections of the Indian Penal Code, as, *e.g.*, ss. 107, 395 or 142, was discussed as a matter arising on the evidence in the case. EMPEROR *v.* BRIKHBHAN SINGH (1915) . . . **I. L. R. 38 All. 14**

—————— **Portion of a statement admitted**—When the first information was given by the accused himself in which he admitted committing the offence but when he made a statement subsequently before the Deputy Commissioner he did not make a confussion and this statement was not recorded. *Held,* that the first information was only admissible as far as it gave a narrative of events before the occurrence but accused could demand that it be considered in its entirety. SUPERINTENDENT AND LEGAL REMEMBRANCER, BENGAL *v.* LALIT MOHAN SINGHA ROY **25 C. W. N. 788**

—————— **ss. 164, 298**—

See MISDIRECTION **I. L. R. 45 Calc. 557**

—————— **ss. 164 (3) and 342**—*Confessions recorded by Magistrate—Without making a memorandum of the enquiry made to satisfy himself that the confession is made voluntarily—Examination of accused by the Court—improper questions. Held,* that although it is most advisable that a Magistrate recording a confession under s. 164 of the Code of Criminal Procedure should make a memorandum of enquiry showing what steps he has taken to fully satisfy himself that the accused person is confessing voluntarily, a confession otherwise duly recorded is not inadmissible in evidence merely because no such memorandum has been made. *Nga Shwe Sin* v. *Emperor (4 Cr. L. J. 385), and Queen-Empress* v. *Narayan, (I. L. R. 25 Bom. 543),* distinguished. *Held also,* that although a Court may under section 342 of the Code at any stage of any enquiry or trial put such questions to the accused as the Court considers necessary, it is not competent to the Court to cross-examine the accused or to ask him question with the object of trapping him into some sort of admission. UMAR DIN *v.* CROWN . **I. L. R. 2 Lah. 129**

—————— **ss. 164 (1) and 533**—*Held,* that it is imperative for the Magistrate before recording a confession made to him in the course of a police investigation to question the person making it as to whether it was made voluntarily and that the defect being one of substance was not cured by s. 533, and the confession was not admissible in evidence. FARID *v.* THE CROWN

I. L. R. 2 Lah. 325

—————— **s. 165**—

See s. 4 (*p*). . **I. L. R. 42 Mad. 446**

See s. 94 . . **17 C. W. N. 1209**

See SEARCH BY POLICE OFFICER.

I. L. R. 41 Calc. 261

—————— **General search without warrant**—*Private defence, right of, against police search.* S. 165, Criminal Procedure Code, does not authorise a general search by the police for stolen property in the house of an absconding offender. It speaks of a specific document or thing which may be the subject of summons or order under s. 94. *Ishwar*

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

—————— **s. 165**—*concld.*

Chandra Ghosal v. *The Emperor, 12 C. W. N. 1016,* referred to. Where the police without a search warrant under s. 98, Criminal Procedure Code, entered the house of the accused and searched for stolen articles :—*Held,* that the search was illegal and the occupiers of the house who were also part-owners had the right of private defence against the searching officers. BAJRANGI GOPE *v.* EMPEROR (1910) **I. L. R. 38 Calc. 304**
15 C. W. N. 343

—————— A search made by a Sub-Inspector of Police under following directions From a circle inspector "House of Nihal Singh be searched in connection with the dacoity at Naglu Muli and that he might be assisted for sake of identification and that houses of those persons should be searched who were suspected by Sub-inspector of receiving stolen property" held invalid. EMPEROR *v.* BRIKHBHAN SINGH

I. L. R. 38 All. 14

—————— **s. 167**—

See s. 110 . **I. L. R. 39 Mad. 928**

See s. 112 . . **I. L. R. 36 All. 262**

—————— **s. 167, 169**—

See s. 110 . . **I. L. R. 39 Mad. 928**
I. L. R. 43 All. 186

—————— **s. 170**—Whether the discretion vested in the investigating police officer by s. 170 can be controlled by the Superintendent of Police. UMESH CHANDRA ROY *v.* SATISH CHANDRA ROY (1917)
22 C. W. N. 69

—————— **s. 172**—

See PRIVY COUNCIL, PRACTICE OF.
I. L. R. 44 Calc. 876

—————— "*Case Diaries," proper recording of by investigating officer.* The object of recording "case diaries" under s. 172, Criminal Procedure Code, is to enable Courts to check the method of investigation by the Police, and this object was defeated in this case as the provisions of the law for recording "case diaries" from day to day had been deliberately disobeyed by the Police during the most important period of the investigation. *Queen-Empress* v. *Mannu,* referred to. PEARY MOHAN DASS *v.* D. WESTON (1911)
16 C. W. N. 145

—————— **ss. 173, 190 (1) (b)**—

See s. 4 . . **25 C. W. N. 357**

See COGNIZANCE OF OFFENCE
I. L. R. 40 Calc. 854

See CRIMINAL PROCEEDINGS.
I. L. R. 37 Calc. 49

—————— **s. 177**—

See s. 476 . . **4 Pat. L. J. 298**

See EMIGRATION **I. L. R. 37 Calc. 27**

—————— *Jurisdiction—Effect of place where offence was committed ceasing to be British territory.* An offence was committed in March 1910, at a place which was then part of the Mirzapur District. Subsequently one of the persons alleged to have taken part in the commission of such offence was arrested in Bengal and sent to Mirzapur, when he was committed by the Joint Magistrate to take his trial before the Court

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— s. 177—*concld.*

of Session. In the meanwhile the place where the offence was committed had ceased to be British territory. *Held,* that this fact did not oust the jurisdiction of either the Magistrate or the District Judge of Mirzapur. EMPEROR *v.* GANGA (1912)

I. L. R. 34 All. 451

——— ss. 177 to 187, 526, 531—*Murder committed outside Madras—Inquiry by Chief Presidency Magistrate and commitment to High Court Sessions—Jurisdiction of Magistrate, Original Criminal Jurisdiction of High Court—Letters Patent, cl. 24—Jurisdiction, whether conferrable under s. 526, Criminal Procedure Code.* The petitioners were charged before the Chief Presidency Magistrate of Madras with having kidnapped a child from his guardian in Madras, [illegible]

on the abovesaid charges. On an application to the High Court on its appellate side to set aside the commitment so far as the charge of murder was concerned on the grounds that (*a*) the Magistrate had no local jurisdiction to inquire into the case, and (*b*) the High Court had no local jurisdiction to try the charge of murder : *Held,* (i) that the irregularity or illegality, if any, in the Magistrate's proceedings was cured by s. 531, Criminal Procedure Code; (ii) that even if the High Court had no jurisdiction on its Original Side to try the case, an order could be made under s. 526, Criminal Procedure Code, directing the trial at the High Court Sessions. Ordered accordingly. *Semble:* The High Court has power under cl. 24 of the Letters Patent in the exercise of its original criminal jurisdiction to try persons for offences committed outside the City of Madras. *Queen-Empress* v. *James Ingle, I. L. R. 16 Bom. 200,* and *Queen-Empress* v. *Ram Dei, I. L. R. 18 All. 387,* referr[illegible] *North Arcot* v. [illegible] listinguished.

I. L. R. 42 Mad. 791

——— ss. 177, 531—

See PENAL CODE, ss. 463, 471.

I. L. R. 36 Mad. 387

——— s. 179—*Criminal misappropriation—Jurisdiction—"Place where consequences of act ensued."* The word 'consequence' in s. 179 of the Criminal Procedure Code means a conse- [illegible]

[illegible] ... been sent to the head office at Cawn- [illegible]

v. *Ghansham Das,* [illegible] referred to. GANESHI LAL *v.* NAND KISHORE (1912)

I. L. R. 34 All. 487

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— s. 179—*concld.*

——— *Jurisdiction—Place where consequence of act ensued—Act No. XLV of 1860 (Indian Penal Code), s. 406—Criminal breach of trust. Held,* that the loss caused to the person beneficially entitled to property through a criminal breach of trust, is a consequence which completes the offence and a prosecution will therefore lie at the place where such loss occurred. *Queen-Empress* v. *O'Brien, I. L. R. 19 All. 111. Emperor* [illegible] followed. *Babu La*[illegible] *115, Gane*[illegible] *487,* and [illegible] *Bom. L. R. 513,* distinguished. *Nirbhe Ram* v. *Kallu Ram, 4 O. C. 376,* dissented from. LANGRIDGE *v.* ATKINS (1912) I. L. R. 35 All. 29

——— ss. 179, 181 (2)—

See JURISDICTION I. L. R. 44 Calc. 912

——— *Complainant in Madras town, doing business in mofassil by agent—Agent's duty to remit principal's money to Madras—Misappropriation by agent in mofassil—Jurisdiction to try offences under Indian Penal Code (Act XLV of 1860), s. 406 or 409.* A firm in the town of Madras dealing in kerosine oil authorized an agent in a mofassil station to sell their oil and remit to them at Madras the sale proceeds less his commission. The agent sold the oil in the mofassil and without sending the proceeds misappropriated the same: *Held,* (*a*) that the proceeds were the property of the Madras firm, (*b*) that the case was governed by s. 181 and not s. 179 of the Criminal Procedure Code; and (*c*) that as the misappropriation and consequent loss occurred to the Madras firm primarily only in the mofassil station, the Magistrate at that station and not the one in Madras had jurisdiction to try the offences under s. 406 or 409, Indian Penal Code. Cases on the subject reviewed. KRISHNAMACHIRI *v.* SHAW WALLACE & Co. (1915) . I. L. R. 39 Mad. 576

——— ss. 179 and 182—

See PENAL CODE (ACT XLV OF 1860) s. 405 . . I. L. R. 38 Mad. 639

——— ss. 179 to 188—*Entrustment to native Indian subject in India—Conversion outside British India—Loss in India—Jurisdiction of Indian Courts to charge and try without certificate under s. 188.* A entrusted some jewels at Vellore, to the accused, a native Indian subject, for sale. The accused pledged them in Bangalore and misappropriated the proceeds at Madras. *Held,* that the British Court at Vellore had jurisdiction to try the accused for breach of trust or dishonest misappropriation without a certificate under s. 188, Criminal Procedure Code. *Sessions Judge, Tanjore* v. *Sundara Singh (1910), Mad. W. N. 143, Imperator* v. *Tribhun, 13 Cr. L. J. 630,* dissented from. ASSISTANT SESSIONS JUDGE, NORTH ARCOT *v.* RAMASWAMI ASARI (1914)

I. L. R. 38 Mad. 779

——— s. 180—*Indian Penal Code (Act XLV of 1860), s. 411—Theft within British territory—Retention of stolen articles outside British territory—British Courts, if have jurisdiction to try accused for such retention of stolen articles.* The accused was found in possession of stolen articles at a place outside British territory. The theft

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— s. 180—*concld.*

of the articles took place within British territory. The accused was placed on his trial before the Court in British territory having jurisdiction over the place where the theft took place. *Held*, that the British Courts had no jurisdiction to try the accused for an offence under s. 411, Indian Penal Code, committed at a place beyond British territory with regard to the stolen properties. MOHESHWARI PROSAD SINGH *v.* THE KING-EMPEROR (1914) . . . . . **18 C. W. N. 1178**

——— s. 181—

See JURISDICTION **I. L. R. 44 Calc. 912**

——— *Kidnapping committed outside British India—Jurisdiction of British Courts "when person kidnapped" detained within British India—Moyurbhunj not in British India.* A person charged with having committed the offence of kidnapping in Moyurbhunj which is outside British India, cannot be tried by a Court in British India within the local limits of which the person kidnapped may be conveyed or concealed or detained. BHUTA SANTAL *v.* DAMA SANTAL (1915) . . . . . **20 C. W. N. 62**

——— *Penal Code (Act XLV of 1860), s. 406—Criminal breach of trust, in respect of monies received at Singapore for which the accused was liable to account in Calcutta—Court in Calcutta, if has jurisdiction to take cognisance of the complaint —Jurisdiction.* Where a firm carrying on business in Calcutta employed A as agent at Singapore and prosecuted him in Calcutta for criminal breach of trust in respect of monies received at Singapore for which he was to render accounts in Calcutta: *Held*—That the Court in Calcutta had jurisdiction to take cognisance of the complaint. ABDUL LATIFF YUSUFF *v.* ABU MUHAMED KASSIM **26 C. W. N 175**

——— s. 182—

See PENAL CODE, s. 405. **I. L. R. 38 Mad. 639**

——— ss. 182, 531—

See COMPANY . **I. L. R. 45 Calc. 490**

——— *Jurisdiction—Place at which consequence of act ensued—Criminal breach of trust—Penal Code (Act XLV of 1860), s. 408.* One *M* was employed as an agent by a firm in Mirzapur. Goods were entrusted to him for sale in various districts in Lower Bengal, and from time to time, as he sold goods, he remitted money to his employers at Mirzapur. When called upon to furnish accounts, he offered to furnish Rs. 500 as a deposit, but did not submit any account. *Held*, that the Courts of Mirzapur had jurisdiction to try *M* for whatever offence he had committed arising out of the above transactions. *Queen-Empress v. O'Brien, I. L. R. 19 All. 411*, followed. EMPEROR *v.* MAHADEO (1910) **I. L. R. 32 All. 397**

——— s. 185—

See JURISDICTION **I. L. R. 41 Calc. 305**

See JURISDICTION OF HIGH COURT. **I. L. R. 44 Calc. 595**

——— *Power of the High Court under the section to transfer case pending in Court not subject to its jurisdiction—Stay of further proceeding to enable accused to bring Civil action—*

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— s. 185—*contd.*

Proceeding which discloses no offence, if to be quashed. Where the nominee of a policy-holder claiming payment in respect of a life policy effected at Chittagong, and resident within the District of Chittagong, brought a charge of cheating in the Court of the District Magistrate of Chittagong against the Secretary and other officers of an Insurance Company having its head office at Gujranwalla in the Punjab and a branch office at Chittagong, and the Insurance Company brought a charge of cheating against the nominee and others in the Court of the District Magistrate of Gujranwalla, both charges relating to the payment of the amount secured on the policy: *Held* (on an application by the nominee under s. 185, Cr. P. C.), that the High Court could properly make an order under s. 185, Cr. P. C., to the effect that the offence should be enquired into and tried at Chittagong and transfer the case from the Court of the District Magistrate of Gujranwalla to that of the District Magistrate of Chittagong. Proceedings in the case were, however, stayed for two months to enable the accused to institute a Civil suit. *Held* (on the application of the officers of the Insurance Company), that as, on the face of the record, no offence had been disclosed against them, the proceeding against them should be quashed. HIRAN KUMAR CHOWDHURY, *v.* MANGAL SEN (1912) **17 C. W. N. 761**

——— *High Court if can interfere merely on the ground of convenience.* Where the petitioners were prosecuted in the Court of the Additional District Magistrate of Lahore under ss. 409, 420, 467, 447, Penal Code, and on the allegations of the prosecution the Courts at Chittagong and Lahore were equally competent to exercise jurisdiction in the case: *Held*, that s. 185, Cr. P. C., does not warrant interference by the High Court merely upon the ground of convenience. The decision of the High Court within the local limits of whose appellate jurisdiction the offender actually is, can only be sought where a doubt arises as to the Court by which an offence should be enquired into or tried. RAJANI BINODE CHAKERBURTTY *v.* THE ALL INDIA BANKING AND INSURANCE CO., LD., LAHORE (1913) **17 C. W. N. 1297**
I. L. R. 41 Cal 305

——— *Doubt as to Court having jurisdiction to try a case, decision of High Court in case of.* In a case under s. 408, Indian Penal Code, instituted in the Court of one of the Presidency Magistrates of Calcutta, it being doubtful whether the Courts in Calcutta or in the District of 24-Parganas had jurisdiction, the High Court in exercise of its jurisdiction under s. 185 of the Code of Criminal Procedure decided that the case should be inquired into and tried by the Court within the District of 24-Parganas. BENODE BEHARY MAL *v.* GANESH CHANDRA MISTRI (1916) **21 C. W. N. 434**

——— *Transfer of case—Case pending in a Court outside the jurisdiction of High Court—Power of High Court to transfer to a Court within its jurisdiction or to decide by which Court such case shall be tried.* S. 185 of the Criminal Procedure Code (Act V of 1898) does not empower a High Court to transfer to a Court subordinate to its own jurisdiction a case pending in a Court subordinate to the jurisdiction of another High

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— **s. 185**—*concld.*

Court, nor does it empower a High Court to decide by which Court such a case shall be tried. RAHMAN SAHIB *v.* VELLABJI (1916) **I. L. R. 40 Mad. 835**

——— **ss. 188, 122**—

See SURETY . **I. L. R. 42 Calc. 706**

——— *Effect of illegal arrest on trial of accused—Extradition.* Where a man is in the country and is charged before a Magistrate with an offence under the Penal Code, it will not avail him to say that he was brought there illegally from a foreign country. The principle upon which English cases to this effect are based underlies also s. 188 of the Criminal Procedure Code (Act V of 1898). EMPEROR *v.* VINAYAK DAMODAR SAVARKAR (1910) . . . . **I. L. R. 35 Bom. 225**

——— *Offence committed on high seas—Native Indian subject of His Majesty—*

beyond the low-water mark. They were convicted by a Magistrate for offences punishable under ss. 426, 143 of the Indian Penal Code (Act XLV of 1860). On appeal, it was contended that the Magistrate had no jurisdiction to try the case without the sanction of the Local Government under s. 188 of the Criminal Procedure Code (Act V of 1898) for the offences, if any, were committed on the high seas. *Held,* overruling the contention, that the Magistrate had jurisdiction to try the case, inasmuch as the first proviso to s. 188 of the Criminal Procedure Code, 1898 was limited to territorial jurisdiction and had no bearing upon the question of jurisdiction to try an offence committed on the high seas. EMPEROR *v.* MANUEL PHILIP (1917) . . . **I. L. R. 41 Bom. 667**

——— *Penal Code, s. 363—Kidnapping from lawful guardianship—Offence committed outside British territory—Jurisdiction—Certificate of Political Agent.* The absence of the certificate of the Political Agent required by s. 188 of the Code of Criminal Procedure is an absolute bar to the trial of a case to which the provisions of that section apply. *Queen Empress* v. *Ram Sundar, I. L. R. 19 All. 109,* followed. EMPEROR *v.* NARAIN (1919) . . **I. L. R. 41 All. 452**

——— *Certificate of Political Agent not obtained—Agreement between Darbar of Native State and the neighbourhood authorities in British India not a substitute therefor.* The existence of an agreement between the Darbar of a Native State and the authorities of the neighbouring

required by section 188 of the Code of Criminal Procedure. EMPEROR *v.* NANDU

I. L. R. 42 All. 89

——— **ss. 188, 227**—*Offence committed in Nepal territory—Certificate granted by Political Officer specifying a particular section of the Indian Penal Code—Trying Magistrate not debarred from convicting under another section if within the facts stated.* A certificate granted by a Political Officer under s. 188 of the Code of Criminal Procedure in respect of a certain set of facts will cover every charge which the facts disclosed in the proceedings will suffice to sustain. The certificate is granted on the allegation of certain facts which constitute the charge against the accused, and the trying Magistrate is not restricted to the section which is mentioned in the certificate, but at the utmost to the facts. EMPEROR *v.* KRISHNA NATH TIWARI (1911) . . . . **I. L. R. 33 All. 514**

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— **ss. 188, 227**—*concld.*

——— **s. 190**—

See s. 4. **1 Pat. L. J. 592**

See s. 54. **I. L. R. 44 Calc. 76**

See s. 110. **4 Pat. L. J. 7**

See s. 154. **I. L. R. 37 Calc. 49**

See COGNIZANCE **I. L. R. 40 Calc. 854**

See COMPLAINT **I. L. R. 41 Calc. 1013**

See FALSE INFORMATION.

I. L. R. 46 Calc. 807

See JURISDICTION OF CRIMINAL COURT

I. L. R. 40 Calc. 71

See JURISDICICTON OF MAGISTRATE

I. L. R. 37 Calc. 221

——— *Complaint not disclosing facts—Validity when may be questioned.* The complaint in this case did not set out the facts which constituted the alleged offence but stated that the persons named had committed offences punishable under certain sections of the Penal Code: *Held, (per* MOOKERJEE, *J.)* That a complaint of this description constituted a merely colourable compliance with the provisions of s. 190, Criminal Procedure Code. *Per* HARINGTON, *J.*—There was a complaint which the Magistrate had jurisdiction to entertain. Where a trial has been concluded the proceedings cannot be attacked on the ground that the materials the Magistrate had before him at the time he issued process, were meagre or even insufficient if the Magistrate had jurisdiction to issue process. To make the whole proceeding void it is necessary to show that there was no complaint before the Magistrate and the Magistrate had no other course but to refuse to issue process on the ground that he had no jurisdiction under the law to issue process. When the accused took no steps at the initial stage to set aside the Magistrate's order issuing process on the ground that on the face of it the materials on which it was made were insufficient, and proceeded to trial: *Held (per* HARINGTON, *J.)* that no objection could be allowed to be taken to the issue of the process upon an appeal from the conviction had at the trial, the point not being one affecting the fairness of the trial in any way. *Per* MOOKERJEE, *J.* The case was covered by cl. (*a*) of s. 537 of the Criminal Procedure Code. PULIN BEHARI DAS *v.* KING-EMPEROR (1911)

16 C. W. N. 1105

——— *Information before police reported to be false—Judicial enquiry ordered by Deputy Magistrate disposing of police-report—Case made over to another Magistrate—Issue of process by latter after enquiry—Competency of such Magistrate to try accused.* Where the police reported an information of theft lodged against the peti-

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— s. 190—*contd.*

tioners by one S to be false and recommended the prosecution of S, and the Deputy Magistrate in charge on receipt of the police-report ordered a judicial enquiry although there was no complaint by S and subsequently recalled that order and made over the case for disposal to another Deputy Magistrate, who after taking evidence issued summons against the petitioners: *Held*, that the Deputy Magistrate, who issued process against the petitioners, did not act either upon a police-report or upon a complaint, and although s. 190, cl. (c), may not strictly apply, the petitioners ought to be allowed to have the case tried by another Magistrate. ANANTA RAM TEWARY v. SHEIKH ALTAB SARKAR (1913) . . . **17 C. W. N. 795**

——— *Trial by second class Magistrate as case under s. 408, Indian Penal Code of complaint disclosing offences under s. 409, 477A, Indian Penal Code, and acquittal by him—District Magistrate's jurisdiction to take cognizance of further complaint.* A complaint was filed against the petitioner disclosing offences under ss. 409 and 477A, Indian Penal Code. The case was by mistake made over to and tried by a Magistrate exercising second class powers and not invested with the power of making commitment to the Court of Sessions who treated the case as one under s. 408, Indian Penal Code, and acquitted the accused. The complainant subsequently presented a further complaint under ss. 409 and 477A, Indian Penal Code, to the District Magistrate, who took cognizance of the same: *Held*, that the District Magistrate was competent to take cognizance of the second complaint. KRISHNA DHON GHOSH v. MOHENDRA NATH DUTT (1918) **23 C. W. N. 518**

——— *Omission of one Magistrate to take cognizance on suspicion, effect of, on subsequent proceedings.* WOODROFFE, J. (BEACHCROFT, J., concurring). Where the Police searched a hut on suspicion and incriminating evidence was found and after the search was over the Additional District Magistrate came to the spot and saw what had been found and a search list was prepared which the Additional District Magistrate signed and the accused were subsequently placed before another Magistrate who held an enquiry and committed the accused to the Court of Sessions for trial: *Held*, that the fact that the Additional District Magistrate did not take cognizance of the case at once did not render the subsequent proceedings before another Magistrate bad, nor could such subsequent proceedings be held to be prejudicial to the accused. That it was not the duty of the Additional District Magistrate to take cognizance of the case on the basis of what he found at the spot. RAMESH CHANDRA BANERJEE v. EMPEROR (1913) . . . . . **18 C. W. N. 498**
I. L. R. 41 Calc. 350

——— *District Magistrate receiving information of offence, as President of District Board—Right to take cognizance under s. 190 (c).* The fact that a District Magistrate, who happens to be also the President of a District Board, receives in the latter capacity information as to the commission of an offence by a servant of the Board, does not debar him from taking cognizance of the offence under s. 190 (c) of the Criminal Procedure Code. *Thakur Pershad Singh v. The Emperor (1906) 10 C. W. N. 775*, dissented from. SUNDARASAN v. KING-EMPEROR (1920) **I. L. R. 43 Mad. 709**

——— *Cattle Trespass Act (I of 1871), s. 20—Magistrate—Cognizance of offences—Special authority to try cases under the Cattle Trespass Act.* A Magistrate, who is authorized under s. 190 of the Code of Criminal Procedure, 1898, to take cognizance of offences upon receiving complaints, can take cognizance of complaints under s. 20 of the Cattle Trespass Act, 1871, although he is not specially authorised in that behalf. EMPEROR v. VISHVANATH VISHNU (1919) **I. L. R. 44 Bom. 42**

——— ss. 190 and 200—*Complaint, failure to examine complainant.* M, the defendant in a civil suit, filed a petition before the District Magistrate stating that he had no certain knowledge of the fact, but he had heard that the plaintiff had taken steps to abstract from another court, where a number of papers had been filed in a previous suit, papers in connection with the present suit, and had employed K, J, and B to introduce, by forgeries, entries therein which would support the plaintiff's case. He did not ask the Magistrate to issue summonses or warrants against the accused but desired that a confidential enquiry should be made by the Criminal Investigation Department. The Magistrate ordered the inquiry to be made and, on receipt of the report of the inquiry, issued warrants against the three accused. The High Court stayed further proceedings pending the disposal of the civil suit. When that suit had been decided the Magistrate, without making any further enquiry, ordered the proceedings against K to be continued. *Held*, that the petition filed by M was a complaint within the meaning of s. 190 (1) (*a*) of the Code of Criminal Procedure, 1898, and that the Magistrate should have examined M on oath under s. 200. *Held further*, that on receipt of the report of the enquiry by the Criminal Investigation Department the Magistrate should either have called upon M to lodge a further complaint and examined him on oath, or should have directed the officer of the Criminal Investigation Department to file a complaint. The power of a Magistrate to proceed upon information is intended to be used in cases in which the Magistrate has good reason to believe that there has been a serious infringement of the law, but is unable to take action in the ordinary way for the reason that the party aggrieved is unwilling or unable to prosecute. It is not open to a Magistrate, under s. 190 (1) (c), to take cognizance upon complaint, without examining the complainant, or upon the report of a police officer. JHUNA LAL SAHU v. THE KING-EMPEROR . . . **2 Pat. L. J. 657**

——— ss. 190, 200 and 403—There is nothing in the code to prevent a Magistrate from entertaining a second complaint after an order of discharge by another Magistrate. BIJOO SINGH v. KING-EMPEROR . . . . . **2 Pat. L. J. 34**

——— ss. 190, 295 (e), 309, 530 (k), 531—
See MAGISTRATE **I. L. R. 39 Calc. 119**

——— ss. 190, 497, 498—
See BAIL . . **I. L. R. 37 Calc. 412**

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

—— **ss. 190 (1), 202, 203—**

See Complaint . I. L. R. 41 Calc. 1013

—— **s. 191—**

See Defence of India Act (IV of 1915) s. 2 . . I. L. R. 41 All. 164

—— **s. 192—**

See s. 107 . I. L. R. 41 Mad. 246

See Magistrate, Power of I. L. R. 38 Calc. 68

—— *Transfer—Case transferred by District Magistrate to the Court of a Sub-divisional Magistrate—Further transfer by Sub-divisional Magistrate* ultra vires. *Held,* that when a District Magistrate has referred a case for trial to a Sub-divisional Magistrate the latter has no power to transfer it to any other Magistrate subordinate to him. Bashir Husain *v.* Ali Husain *(1913)* . . I. L. R. 36 All. 166

—— **ss. 192, 200 to 203, 476, 537—**

See False Information. I. L. R. 43 Calc. 173

—— **s. 193**—*Transfer—Appeal—" Case "—Powers of Sessions Judge. Held,* that the word ' cases ' as used in s. 193 (2) of the Code of Criminal Procedure does not include appeals. In re *the petition of Mansa Asmal, I. L. R. 9 Bom. 165* and *Chatter Pal Singh* v. *Raja Ram, I. L. R. 7 All. 621,* followed. *Allah Dei Begam* v. *Kesri Mall I. L. R. 28 All. 93,* referred to. Emperor *v.* Abdur Razzak (1915) . I. L. R. 37 All. 286

—— ***s. 195—***

See s. 4 . . I. L. R. 35 All. 8
I. L. R. 43 Calc. 1152

See s. 197 . I. L. R. 2 Lah. 305

See s. 236 . I. L. R. 45 Bom. 834

See Appeal to Privy Council I. L. R. 41 Calc. 734

See Appeal, right of I. L. R. 44 Calc. 804

See Appraisement I. L. R. 48 Calc. 1086

See Calcutta Rent Act, 1920, s. 24, 25 C. W. N. 661

See Civil Procedure Code, 1908, s. 115 I. L. R. 33 All. 512

See Criminal Jurisdiction I. L. R. 37 Calc. 714
14 C. W. N. 896

See Criminal Procedure Code, s. 476. 1 Pat. L. J. 293, 583, and 607

See Penal Code (Act XLV of 1860) ss. 182, 211 . I. L. R. 34 All. 522
ss. 192 and 193. I. L. R. 45 Bom. 668

See Perjury . I. L. R. 36 Mad. 471

See Sanction for Prosecution.

See Using a forged document I. L. R. 39 Calc. 463

—— **Further evidence**—*Superior Court has no jurisdiction to order further inquiry by Subordinate Court.* A superior Criminal Court

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

—— **s. 195**—*contd.*

[illegible] ...d to appeals ... v. Emperor ... 33 Mad. 90

—— **Sanction by Presidency Small Cause Court**—*Order granted by single Judge—Powers of Full Court to revoke the sanction—Full Court not an Appellate Court—Presidency Small Cause Courts Act (XV of 1882), ss. 37, 38.* Where a sanction to prosecute has been granted by a Judge of the Presidency Small Causes Court at Bombay, the Full Court of that Court has no power to revoke the sanction. *Per* Chandavar- [illegible]

[illegible] ferred by s 38 of the Act is not appellate, but revisional only. Shivlal Padma, *In re* (1909) I. L. R. 34 Bom. 316

—— **False information to police, prosecution for**—*Sanction to prosecute—Cognizance of offence without the complaint of the public* [illegible]

[illegible] 182, Indian Penal Code, and the Magistrate took cognizance of the offence. *Semble:* That without the complaint of the public servant to whom the alleged false information was given, the Magistrate was not right in taking cognizance of the offence. Isser *v.* King-Emperor (1910) 14 C. W. N. 765

—— **Appeal**—*Held,* that when sanction to prosecute has been granted or refused by a Court under the provisions of s. 195 of the Code of Criminal Procedure, only one appeal from such order will lie under that section. *Kanhai Lal* v. *Chhadammi Lal, I. L. R. 31 All. 48,* followed. *Muthusuami Mudali* v. *Veeni Chetti, I. L. R. 30 Mad. 382,* referred to. Mata Prasad *v.* Baran Barhai (1914) I. L. R. 36 All. 469

—— **Perjury**—*Not desirable in public interest.* In granting sanction to prosecute for perjury, Courts should not merely see whether there is a good prospect of conviction, but should also consider whether the circumstances are such as to render prosecution desirable in the public interests. Where the petitioner, a girl of fifteen in a statement before a Magistrate under s. 164, Criminal Procedure Code, said that her mother and one Bushayya used to talk and fight with each other and as a witness before another Magistrate stated that they never quarrelled with each other: *Held,* that a prosecution for perjury was not desirable. Nattava Parankusam, *Re* (1914) I. L. R. 37 Mad. 584

—— **Omission to record deposition as on solemn oath**—*Or affirmation—Presidency Court of Small Causes, enquiry by Registrar, as to proper service of summons, if judicial proceedings—Sanction to prosecute, for false personation in service*

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

———— **s. 195**—*contd.*

of summons. Before the Registrar of the Presidency Court of Small Causes at Calcutta whose duty it is to enquire into the proper service of summons and to take evidence in this behalf, it transpired that the petitioner in this case by false representation had returned the summons as properly served and the Public Prosecutor at the instance of the Chief Judge made an application for sanction to prosecute the petitioner under s. 205 of the Indian Penal Code, which was granted by the said Registrar under s. 195 of the Criminal Procedure Code and upon a rule being obtained to question the propriety of the sanction: *Held,* that the proceedings before the Registrar were judicial proceedings and he was a judicial officer, that the sanction given by him to prosecute was properly given and the fact that it was not stated in the depositions recorded by the Registrar that they were taken on solemn oath or affirmation was a matter covered by s. 13 of the Oaths Act. *Queen* v. *Sewa Bhogta, 14 B. L. R. 294,* and *Queen-Empress* v. *Shava, I. L. R. 16 Bom. 359,* referred to. BALCHAND *v.* TARAK NATH SADHU (1914) . . . . **18 C. W. N. 1323**

—**cl. 1 (b)—False endorsement on a promissory note**—*Indian Penal Code (Act XLV 1860), s. 193, complaint under—Sanction—Necessity.* Where a complaint of false endorsement on a promissory note to prove a payment of Rs. 1,500 was preferred to a Second Class Magistrate but was transferred to a First Class Magistrate and where between the date of filing of the complaint and its transfer, a civil suit on the promissory note was filed: *Held,* that the sanction of the Civil Court under s. 195 (*1*) (*b*) was necessary before the Court could take action on the complaint. *Held,* also, that the date of the presentation of the complaint before a Magistrate having no jurisdiction to entertain it was not the date of the institution of the Criminal Proceedings. *Re* PARAMESWARAN NAMBUDRI (1915) . . **I. L. R. 39 Mad. 677**

———— **Sanction, to be granted on legal evidence**—*S. 195 (b), High Court hearing an appeal under—Judges divided equally in opinion—Whether an appeal lies under cl. 15 of the Letters Patent.* A Magistrate received a complaint of criminal breach of trust, examined the complainant on oath under s. 200, Criminal Procedure Code, but suspecting the complaint to be false referred it under s. 202, Criminal Procedure Code, to a Police Inspector for investigation and on receiving the report of the Inspector to the effect that the case was entirely false, dismissed the complaint under s. 203, Criminal Procedure Code. On an application being made for sanction to prosecute the complainant for preferring a false complaint, the Magistrate asked the complainant to show cause why sanction should not be given but as no witnesses were examined by him to show the truth of his complaint, the Magistrate granted sanction. *Held,* affirming the decision of SUNDARA AYYAR J., that the above materials did not constitute legal evidence for the Magistrate to grant the sanction and that hence the sanction given should be set aside. *Quære:* Whether an appeal under c. 15 of the Letters Patent lies against an order of a Division Bench of the High Court when one of the Judges differs from his colleague, on hearing an application under s. 195 (*b*), Criminal Procedure Code, to revoke a sanction granted by a lower Court. BAPU *v.* BAPU (1913) **I. L. R. 39 Mad. 768**

———— **Scope of section**—*Proceedings in relation to which sanction of Court necessary—Information to police followed by complaint in Court.* Where the information to the Police was followed by a complaint to the Court based on the same allegations and on the same charge as that contained in the information to the police and the complaint was investigated by the Court, sanction or a complaint of the Court itself under s. 195 (*b*), Criminal Procedure Code, would be necessary before the Court could take cognizance of an offence punishable under s. 211, Indian Penal Code, alleged to have been committed by making a false charge to the police, on the ground that it was an offence committed in relation to a proceeding in Court. BROWN *v.* ANANDA LAL MULLICK (1916) . . . . **20 C. W. N. 1347**

———— **Sanction against witness for forgery, if must be taken**—No sanction is necessary for the prosecution of any person who is not a party to the suit or proceeding for offences under s. 467 or abetment thereof. *Giridhari Marwari* v. *Emperor, 12 C. W. N. 822,* distinguished. DEBI LAL *v.* DHAJADHARI GASHAI (1911). **15 C. W. N. 565**

cl. 1 (b & c)—Jurisdiction—*Sanction to prosecute Subordination of Courts—Transfer of case out of local jurisdiction, power to.* A petition asking for sanction to prosecute for certain offences under s. 195 (*b*) and (*c*), Criminal Procedure Code, Act V of 1898, should not be transferred to a Court to which the Court before which the petition for sanction was pending is not subordinate, as the sanction of such a Court would be ineffective. The High Court cannot transfer a case under s. 110, Criminal Procedure Code, to any Magistrate other than one within whose local jurisdiction the person is found against whom proceedings are instituted. In the matter of the petition of *Amar Singh, I. L. R. 16 All. 9. Held,* that the same principle applies to s. 195, Criminal Procedure Code. EKAMBARASWARA IYER *v.* VEERAVADRA THEVAN (1910) **I. L. R. 34 Mad. 186**

—— **cl. 6— False evidence**—*Prosecution stayed at the instance of the party to be proceeded against, pending the disposal of the appeal by the Appellate Court—Expiry of six months' time—Power of the High Court to extend time nunc protunc.* Under s. 195, cl. (*6*) of the Criminal Procedure Code of 1898, the High Court has the power to extend the time of a sanction to prosecute, even after the expiry of the original period of six months from its date. *Karuppana Servagaram* v. *Sinna Gounden, I. L. R. 26 Mad. 480,* followed. *Kali Kinkar Sett* v. *Dinobandhu Nandy, I. L. R. 32 Calc. 379, dissented from.* KRISHNA KERRING & Co. *v.* MILLER (1916) . **I. L. R. 41 Bom. 631.**

———— **Appeal**—*Letters Patent, s. 10. Held,* that an order made by a single Judge of the High Court granting sanction for a prosecution under s. 195 of the Code of Criminal Procedure is not a "judgment" within the purview of s. 10 of the Letters Patent and is not appealable under that section. Neither can such an order be called in question under sub-s. (*6*) of s. 195 of the Code of

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

———— **s. 195**—*contd.*

Criminal Procedure, inasmuch as a Judge of the High Court *sitting singly is not subordinate to a* Division Bench of the Court. *Hurrish Chunder Chowdhury* v. *Kalisunderi Debi, I. L. R. 9 Calc. 482,* referred to. RAMJAS *v.* MAHADEO PRASAD (1916) . . . . **I. L. R. 39 All. 147**

———— **Sanction granted by a Court of Small Causes**—*Application to revoke sanction Jurisdiction—District Judge.* When an order *granting or refusing sanction to prosecute is* made by a Court of Small Causes under s. 195 of the Code of Criminal Procedure, the Court to which an application for the reversal of such order lies is the Court of the District Judge. *Sundar Lal* v. *King-Emperor, 6 All. L. J., 796, Wazir Muhammad* v. *Hub Lal, I. L. R. 31 All. 313, In re Ram Prasad Malla, I. L. R. 37 Calc. 13,* and *Budhu Lal* v. *Chhatu Gope, I. L. R. 43 Calc. 597,* referred to. *Ajudhia Prasad* v. *Ram Lal, I. L. R. 34 All. 197,* distinguished. *Ambika Tewari* v. *King-Emperor, 1 Patna L. J. 206,* and *Sukhdeo Singh* v. *The District Magistrate of Muzaffarpur, 2 Patna L. J. 1,* dissented from. CHIDDA LAL *v.* BHAJAN LAL (1917). **I. L. R. 39 All. 657**

———— On the hearing an application to the High Court against the order of the Presidency Small Cause Court refusing sanction to prosecute, a vakil has right of audience before Bench appointed by the Chief Justice to dispose of it. BUDHU LAL *v.* CHATTU GOPE (1917). **21 C. W. N. 654**

———— **cl. 7—Prosecution of witness pending disposal of suit in which he deposed**—*Propriety of sanctioning—Cl. (7)—Revocation of sanction granted by Subordinate Judge if to be applied ... District Judge or High Court.* In a suit

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... petitioner moved the High Court. *Held,* that generally speaking it is not desirable that witnesses should be prosecuted while the case in which they have deposed or are about to depose, is still pending and in the circumstances of the present case (the plaintiff being dependent on the petitioner for the prosecution of her case) the order ...

High Court set aside the order ...
RAJ KUMAR DEOTY *v.* SATISH CHANDRA GHOSH (1917) . . . . **21 C. W. N. 753**

———— **Abetment of perjury**——*Before a Committing Magistrate—Application for sanction made to the Committing Magistrate—Transfer of the Magistrate pending inquiry—The Magistrate succeeded by another Magistrate who had no power to commit—Sanction proceedings sent to District Magistrate—Grant of sanction by District Magistrate.* It was alleged that the applicant, who was a pleader, had during the course of an inquiry before a Committing Magistrate, abetted perjury. An application for sanction to prosecute the applicant was, ...

another Magistrate who had only second class powers and had no power to commit. The outgoing Magistrate accordingly submitted the sanction proceedings to the District Magistrate, who conducted the inquiry and granted the sanction. ...

I. L. R. 42 Bom. 195

———— **Appeal**—*Against order refusing sanction—Munsif of Jaunpur—Additional Sessions and Subordinate Judge of Jaunpur—Bengal Agra and Assam Civil Courts Act (XII of 1877), s. 21(4). Held,* that an application to revoke or grant a ... for a prosecution granted or refused by the ...
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EMPEROR *v.* JAGRUP SHUKUL (1917)
I. L. R. 40 All. 21

——**cl. 6— Period for which sanction remains in force**—*Terminus a quo.* Under cl. (6) of s. 195 of the Code of Criminal Procedure, the date on which sanction is given is the date of the order of the Court which originally granted sanction and not the date of any subsequent order refusing to set it aside. *In re Muthukudam Pillai, I. L. R. 6 Mad. 190,* followed. TILAK RAM *v.* DALIP SINGH (1916) **I. L. R. 40 All. 338**

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was given by the ... ... rmed on appeal by the District Court on the 23rd October 1916. An application to the High Court under its revisional jurisdiction against the grant of sanction was summarily rejected on the 1st February 1917. A complaint under the sanction was filed on the 10th July 1917. Upon an objection being raised that the complaint was time-barred under s. 195, cl. (6), of the Criminal Procedure Code, 1898, as more than six months had elapsed since the grant of sanction. *Held,* upholding the objection, that the complaint was time-barred for the summary rejection of the application by the High Court did not constitute a date from which the period of six months began to run. PARVATRAO MHASKOJIRAO, *In re* (1917) **I. L. R. 42 Bom. 281**

———— **Of Receiver appointed by Court**—*Without sanction—Agent of firm* ...

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— **s. 195**—*contd.*

and acting for it, position of. The accused was a partner and sole representative in Calcutta of a firm to which some moneys were due from a firm of which the complainant was a partner. The firm of the accused brought a suit in the High Court and by virtue of an order for attachment before judgment, took delivery of some bales of jute belonging to the firm of the complainant in respect of which the firm of the accused was appointed Receiver. Subsequently an order was made by the High Court with the consent of the parties that on the complainant's firm furnishing security the firm of the accused would give delivery of the jute to the complainant's firm which however on taking delivery of some bales alleged that the jute had been tampered with. A charge was then laid under s. 406, Indian Penal Code, against the accused. *Held,* that although, strictly speaking, the firm of the accused was appointed Receiver, the accused as representing the firm must be deemed to be the Receiver appointed by the High Court and the prosecution did not lie without the sanction of the Court. SANTOKE CHAND *v.* SUGAN CHAND MUNAWAT (1918) . **22 C. W. N. 910**

——— **Appellate Court to which appeals do not ordinarily lie, hearing appeal by transfer**—*Jurisdiction of, to grant sanction for perjury, whether as original or as Appellate Court.* The offence of perjury is complete when the false statement is made in the Court of first instance and it is not re-committed in the Appellate Court by the production of the record or otherwise in appeal, so as to entitle the Appellate Court to grant sanction as an Original Court. And a Joint Magistrate to whose Court appeals from convictions by a Third-class Magistrate do not ordinarily lie but who hears an appeal from such Court by transfer from the District Magistrate cannot grant sanction for perjury committed before the Third-class Magistrate either as a Court of first instance or as an Appellate Court. *Eroma Variar* v. *Emperor, I. L. R. 26 Mad. 656,* referred to. *Bhadesar Tiwari* v. *Kamta Prasad, I. L. R. 35 All. 90,* not followed. ANANTHARAMAYA *v.* TUKKADU (1918)
I. L. R. 41 Mad. 787

——— **Disobedience to an order of a public servant**—*Under s. 144. Criminal Procedure Code—Public servant, whether a Court—Sanction for disobedience, whether a judicial or administrative order—Appeal.* An order under s. 144 of the Criminal Procedure Code is a judicial and not an administrative order and an order of a Sub-Magistrate refusing to sanction the prosecution of a person for an offence under s. 188 of the Indian Penal Code in respect of an order made by him under s. 144 of the Criminal Procedure Code is the order of a Court to which the appeal provisions in s. 195 (7) of the Criminal Procedure Code are applicable. *Sankaram Aiyar* v. *Sakkarappa Mudaliar, 2 Weir 155,* considered. ARUNACHALM PILLAI *v.* PONNUSAMI PILLAI (1918)
I. L. R. 42 Mad. 64

— **cl. 6** — **Arms Act**—*(XI of 1878), ss. 25 and 28—False information to District Magistrate—Sanction by District Magistrate—Application to Sessions Court to revoke sanction, whether competent —District Magistrate granting sanction, whether a Court.* Where a District Magistrate receives information of illicit possession of arms and issues a search warrant in conseqeuence of the information, he acts as a Court, though the information may have been given under s. 28 and the search warrant issued under s. 25 of the Indian Arms Act, and an application lies to the Sessions Court under s. 195 (6) of the Criminal Procedure Code to revoke a sanction given by him for the prosecution of the informant for an offence under s. 182 of the Indian Penal Code. *Sankaram Aiyar* v. *Sakkarappa Mudaliar, 2 Weir, 155,* dissented from. *Clarke v. Brajendra Kishore Chowdhury, I. L. R. 39 Calc. 953,* referred to. PANCHALU REDDI *v.* CHINNA VENKATA REDDI (1918). . **I. L. R. 42 Mad. 96**

——— **Probability of proceedings being abortive**—*abortive.* Where it appeared to the High Court that in the peculiar circumstances of the case if proceedings for the prosecution of the Petitioners were taken, there was a strong probability of their being abortive: *Held*—That the sanction granted by the lower Court should be revoked. Observations of Jenkins, C. J., *In re Attorney, I. L. R. 41 Calc. 446 s. c. 19 C. W. N. 593,* approved of. CHAUDHURI MIA *v.* ABDUL RAHAMAN . . . . **24 C. W. N. 102**

——— **Appellate Court**—An application under s. 195, cl. (6), of the Code of Criminal Procedure stands on a different footing from an application in revision and is analogous to an appeal. The intention of the Legislature is that a Court of superior jurisdiction whose jurisdiction is invoked under the above section should consider the entire matter on the merits upon a complete review of all the facts. RAM RAJA DAT *v.* SHEO DAYAL (1915) . . **I. L. R. 37 All. 439**

—**cl. 1 (b & c)**— **Income-Tax Collector**—*Revenue Court—Sanction to prosecute—Indian Penal Code (Act XLV of 1860), ss. 193, 196, 199, 471—Offences committed before the Income-Tax Collector.* An Income-Tax Collector is a Revenue Court within the meaning of that term as used in clauses (*b*) and (*c*) of s. 195 of the Criminal Procedure Code, 1898. PUNAMCHAND MANEKLAL, *In re* (1914)
I. L. R. 38 Bom. 642

——— **Insolvency Proceedings**—Where alleged forged documents were filed in the Insolvency Court: *Held,* that the sanction of the Insolvency Court to prosecute for offences relating to the making and using of the said documents is necessary although the offence of forgery was complete before the commencement of the Insolvency Proceedings. Where the documents were produced before the Official Assignee: *Held,* that the sanction of the Court and not of the Official Assignee was necessary. The Official Assignee does not become a civil Court merely because he has a wide discretion in deciding on claims of persons alleging themselves to be creditors of the insolvent, or because persons aggrieved by decisions of his can appeal to the Court from those decisions. BEARDSELL AND CO. *v.* ABDUL GUNNI SAHIB (1914) . . . **I. L. R. 37 Mad. 107**

—**cl. 1 (c)**— **In respect of a document produced in a Civil Court**—*By a party, but before the person producing it had become a party to any suit.* The words used in s. 195 (*1*) (*c*) "when such offence has been committed by a party to any proceeding in any Court," refer not to the date of the commission of the alleged offence, but to the date on

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

———— **s. 195**—*contd.*

which the cognizance of the Criminal Court is invited. Hence when once a document has been produced or given in evidence before a Court the sanction of that Court or of some other Court to which that Court is subordinate, is necessary before a party to the proceedings in which the document was produced or given in evidence can be prosecuted, notwithstanding that the offence alleged was committed before the document came into Court, at a time when the person complained against was not a party to any proceedings in Court. *Girdhari Merwari* v. *King-* [illegible] *Raja* [illegible] *ror* [illegible] to. *Noor Mahommad Cassum* v. [illegible] *jee, 4 Bom. L. R. 268,* not followed EMPEROR *v.* BHAWANI DASS (1915) . **I. L. R. 38 All. 169**

—**cl. 1 (c)— Mamlatdar's Court**—*Enquiry into Record-of-Rights—Mamlatdar's Court is Revenue Court—Land Revenue Code (Bombay Act V of 1879), Chapter XII.* A Mamlatdar holding an enquiry relating to Record-of-Rights, under Chapter XII of the Land Revenue Code (Bombay Act V of 1879), is a Revenue Court within the meaning of s 195 (1) (c) of the Criminal Procedure Code (Act V of 1898). EMPEROR *v.* NARAYAN GANPAYA (1914) . . **I. L. R. 39 Bom. 310**

cl 1 (b)—Election petition—*Penal Code (Act)* [illegible] s. 22 of the Bombay [illegible] t (Bombay Act III of 1901), is a "Court" within the meaning of s. 195, clause (*b*) of the Criminal Procedure Code, 1898. No prosecution for attempting *to fabricate false evidence* (ss. 193 and 511 of the Indian Penal Code) before the District Judge can be instituted without having obtained sanction as required by s. 195 of the Criminal Procedure Code, 1898. *Raghoobuns Sahoy* v. *Kokil Singh, I. L. R. 17 Calc. 872,* followed. *In re* NANCHAND SHIVCHAND (1912) . **I. L. R. 37 Bom. 365**

—**cl. 1 (a)— Disobedience of the order of a public servant**—*Application for sanction if necessary—Police-report.* Where sanction for a prosecution under s. 188, Penal Code, for disobedience of an order under s 144, Cr. P. C., was granted by the Magistrate on a police-report setting forth the facts of the disobedience of the order and also containing a request that the petitioner should be prosecuted under s. 188, Penal Code: *Held,* that the order was clearly made under s. 195 (*1*) (*a*), Cr. P. C *Per* CHAPMAN, J. So far as the provisions of s. 195 (*1*) (*a*) are concerned, there is no necessity of any application for sanction. PANCHU MONDAL *v.* THE KING-EMPEROR (1913) . . . **17 C. W. N. 976**

—**cl. 1 (b)— Falsicating False evidence**—*Penal Code (Act XLV of 1860), s. 193—Fabricated document—Certified copy filed with plaints as proof—Charge of fabricating false evidence, sanction if necessary.* The petitioner was said to have fabricated a *kabinnama* which was registered and he subsequently brought a suit in the Munsif's Court for restitution of conjugal rights and filed a certified copy of the *kabinnama* along with the plaint as proof of marriage and asked the Court to cause the original to be produced: *Held,* under s. 195, cl. (*b*), Cr. P. C, no Court could take cognizance of an offence under s. 193, Penal Code, imputed to the petitioner except with the previous sanction or on a complaint of the Munsif's Court or of some other Court to which the Munsif's Court was subordinate, such offence being committed in relation to a judicial proceeding in the Munsif's Court. ABDUL MAJID KHAN *v.* MUNSHI NARUL HUQ (1913). **17 C. W. N. 937**

——**cl. 6— Appeal**—*Revision. Held* that the Appellate Court, equally with the Court of first instance, has power to grant sanction for a prosecution in respect of a document filed or evidence recorded in the suit. *Held,* also, that a petition under s. 195 (*6*) of the Code of Criminal Procedure seeking the cancelment of an order under s, 195 (*1*), should be classed as a criminal appeal. BHADESWAR TIWARI *v.* KAMTA PRASAD, (1912).
I. L. R. 35 All. 90

—**cl. 1 (c)— Forgery**—*Offence alleged not in connection with any proceeding before any Court—Sanction unnecessary.* By s 195, cl. (*c*) of the Code of Criminal Procedure Courts are prohibited from taking cognizance of an offence described in s. 463 of the Indian Penal Code when such offence has been committed by a party to any proceeding in any Court in respect to a document produced or given in evidence in any such proceeding. The section does not remove from the cognizance of Criminal Courts an offence described in s. 463 when such an offence has been committed by an ordinary individual. So long as the prosecution is confined to offences connected with a document committed prior to its production in Court, such prosecution is within the law and requires no sanction. EMPEROR *v.* LALTA PRASAD (1912)
I. L. R. 34 All. 654

— **cl. 6— Application to District Judge to revoke sanction**—*To prosecute granted by Munsif—Transfer to Subordinate Judge, if valid —Civil Courts Act (XII of 1887), s. 22, cls. (1) and (4).* An application under sub-s. 6 of s. 195, Criminal [illegible] for the revocation of a sanction to prosecute granted by a Munsif cannot therefore be transferred by him for disposal to a Subordinate Judge, HARI MANDAL *v.* KESHAB CHANDRA MANNA (1912).
16 C. W. N. 903

— **cl. 7 — Sanction refused—Further application**—"*Case*"—"*Principal Court of original jurisdiction.*" In a suit for arrears of rent exceeding Rs. 100, a decree was passed in favour of the appellant. In course of execution proceedings the respondents made certain statement which, according to the appellant were false. The appellant applied for sanction to prosecute them under s. 195, cl. (7) of the Code of Criminal Procedure. The sanction was refused by the Assistant Collector. *Held,* on application made to the District Judge to grant sanction, that no such application lay. The "*case*" in connection with which an offence was alleged to have been committed was the proceedings in execution, from

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— s. 195—*contd.*

which no appeal lay, and the District Judge was not in relation to such proceedings the "principal Court of original jurisdiction." AJUDHIA PRASAD *v.* RAM LAL (1911) . . I. L. R. 34 All. 197

——— **Appeal**—*Order granting sanction by Presidency Small Cause Court—Appeal to High Court—Jurisdiction to Appellate and not Original Side—'Principal Court of Original Jurisdiction,' meaning of.* From an order of the Presidency Small Causes Court giving or refusing sanction, an appeal lies to the High Court generally and not to any particular branch of it. But the jurisdiction it exercises being Appellate and not Original, it is the Appellate side alone that can dispose of s ch matters. The effect of clause (7) (c) of s. 195, Criminal Procedure Code, is merely to designate the Court to which an appeal lies under that clause and not to describe the nature of the jurisdiction which it exercises in dealing with orders of the Small Cause Court. Its effect is only to make the High Court the appellate tribunal. *Sew Bollock Singh* v. *Ramdhan Bania, 14 C. W. N. 806*, followed. *Per* CURIAM: When one Court deals with a judgment of another Court having power to confirm or to set it aside, the jurisdiction it exercises is appellate jurisdiction. Original jurisdiction is the jurisdiction in original proceedings instituted in the Court, whether suits, petitions or other proceedings. The Original Side of the High Court is not a different *Court* from the Appellate Side: the Court is one; but it exercises both original and appellate jurisdiction. JAMNA DOSS *v.* SABAPATHY CHETTY (1913).

I. L. R. 36 Mad. 138

——— *Provincial Small Cause Court, sanction to prosecute granted by—appeal to District Judge, if lies.* A Provincial Small Cause Court is under sub-cl. (c) of cl. (7) of s. 195, Criminal Procedure Code, to be deemed to be subordinate for the purposes of that section to the Court of the District Judge. NIBARAN CHANDRA CHAKRAVARTI *v.* AKSHOY KUMAR BANERJI (1917)

21 C. W. N. 948

——— **Police report based on a judgment of Court**—*Sufficient legal basis for grant of sanction.* Though a Court should not accord a sanction to prosecute under s. 195, Criminal Procedure Code (Act V of 1898), for bringing a false complaint, merely on the strength of a police report, yet if the report is based upon a judgment of the Court in a counter-case brought against the complainant, in connection with the same matter wherein his defence which was exactly the same as his complaint was found to be false, such report is sufficient legal material for the Court to accord its sanction for false complaint. *Queen-Empress* v. *Sheikh Beari, I. L. R. 10 Mad. 232*, referred to. S. 195, Criminal Procedure Code, does not prescribe any rule as to upon what materials a Court should accord its sanction nor does it say that a fresh or preliminary enquiry should be held before granting sanction. *Per* SADASIVA AYYAR, J. The complainant's sworn statement, which was disbelieved by the Magistrate, was another legal material to form the basis for the grant of sanction against him. A sanction given by the lower Court ought not to be lightly revoked by a Court of Appeal. A third appeal to the High Court to revoke a sanction, though legally made in the form of a petition under s. 195, Criminal Procedure Code, ought not to be encouraged in practice. *Re* NARAYANA NADAN (1914).

I L. R. 38 Mad. 1044

——— **Undue delay in passing order thereon**—Upon an application by the decree-holder for sanction to prosecute the judgment-debtors and certain other persons for wrongful resistance to execution, the trying Court after adjourning the case from time to time for the examination of witnesses, ultimately disposed of the matter after examining the peon only. Sanction to prosecute was given, but nearly six months from the date of the application. In the circumstances of the case, the High Court strongly condemned the delay which had taken place in disposing of the application. MAKHAN LAL SAHA *v.* SAROJENDRO NATH SAHA CHOWDHURI.

24 C. W. N. 743

——— **Court hearing an appeal application for sanction to taking additional evidence**— An appellate Court, hearing an application to revoke or grant a sanction granted or refused by a Lower Court under s. 195, Criminal Procedure Code, has power itself to take additional evidence before disposing of the application. *Rama Aiyar* v. *Venkatachella Padayachi, (1907) I. L. R. 30 Mad., 311* and *Krishna Reddy* v. *Emperor, (1910) I. L. R., 33 Mad., 90*, distinguished. SUBBASARI *v.* EMPEROR (1921) . . I. L. R. 44 Mad. 47

——**cls. 1 & 13—Abetment of offences of forgery and personation**—*Committed not in the course of judicial proceedings.* The offence or offences in which s. 195, cl. (*1*), sub-cl. (*c*), read with cl. (*3*) of the Code of Criminal Procedure requires that sanction should be given by a court with respect of documents produced in Court must be offences committed by parties to the proceeding, whether the offence be one of the substantive offences described in s. 463 or punishable under ss. 471, 475 or 476 of the Indian Penal Code, or only amounts to abetment of any such offences. EMPEROR *v.* GHANSHAM SINGH (1909) . I. L. R. 32 All. 74

——**cl. 6— Refusal of sanction by First Class Magistrate**—*Additional Sessions Judge can grant it on appeal—Jurisdiction.* Under s. 195, cl. 6 of the Criminal Procedure Code, 1898, an Additional Sessions Judge has jurisdiction to hear an application or an appeal from an order passed by a First Class Magistrate refusing or granting sanction. *In re* SIKANDARKHAN (1920).

I. L. R. 44 Bom. 877

——**cl. 7— Appellate Court**—*What is—Sanction to prosecute made to District Court after refusal in Small Cause Court.* A District Judge has no power to sanction a prosecution under s. 209 of the Indian Penal Code in respect of a case instituted in Small Cause Court and with regard to which sanction has already been refused by the Small Cause Court Judge. The words "that is to say" in cl. (7) of s. 195 of the Code of Criminal Procedure do not indicate that a supplementary provision is to be found in cl. (c) but they are merely an explanation of the word "to which appeals ordinarily lie." The words "original jurisdiction" in sub-cl. (c) of cl. (7) of s. 195 mean "original jurisdiction over the class to which the case in question belongs." A Small Cause Court is itself

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— s. 195—*contd.*

a principal court of original jurisdiction with regard to suits cognizable only by a Small Cause Court. SUKHDEO SINGH *v.* THE DISTRICT MAGISTRATE OF MUZAFFARPUR. 2 Pat. L. J. 1

——— **Duty of Court granting**—*Claim before Official Assignee, whether a 'proceeding in Court' and claimant whether a 'party'—Insolvency Court, sanction by for offences under ss. 193 and 465, Indian Penal Code, committed before Official Assignee.* A Court granting sanction under s. 195, Criminal Procedure Code, ought to abstain from analysing the evidence or expressing any opinion as to the probability or otherwise of a conviction.

files a false affidavit and a forged document, in support of a claim before the Official Assignee, and thereby commits offences under ss. 193 and 465, Indian Penal Code. *Held*, that the offences are committed in a 'proceeding in Court' and the claimant is a 'party' within the meaning of s. 195, Criminal Procedure Code; and that the

I. L. R. 43 Mad. 1

granted to the original decree-holder and not to

I. L. R. 43 Bom. 538

——— **Alteration in a document filed before an Assistant Collector**—*In his administrative capacity—Certificate of age produced by candidate for post of patwari.* Applicant, who was a candidate for the post of patwari, produced before an Assistant Collector a certificate of the "upper primary class," dated the 16th May, 1917, with the apparent object of showing (though it did not do so) that at the date of his application he was of full age. One of the zamindars filed a complaint with regard to the certificate in question alleging it to be a forgery and the applicant was committed to the Court of Session. *Held* that the order of committal was not bad for want of the sanction required by s. 195 of the Code of Criminal Procedure. The document upon which the charge was based was not produced before the Assistant Collector in a judicial capacity, but in his administrative capacity under Chapter III of the Land Revenue Act. EMPEROR *v.* SANTI LAL I. L. R. 42 All. 130

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— s. 195—*contd.*

—**cls. 6 & 7**— **Small Cause Court Judge, appeal from order of**—*Provincial Small Cause Courts Act (XI of 1887), ss. 4, 24, 27 and 33—Code of Civil Procedure (Act V of 1908), s. 115—Government of India Act 1915, s. 107. Held*, by the *Full Bench* (Jwala Prasad, J., *dissentiente*), that an application for revocation or grant of a sanction given or refused by a Small Cause Court, or by a Munsif or Subordinate Judge, exercising the powers of a Small Cause Court, under s 195, of the Code of Criminal Procedure, 1898, lies only to the District Court, and not to the High Court. Per *Atkinson, J.*—Sanction granted or refused by a Small Cause Court may come before the High Court in its revisional jurisdiction under s. 115 of Code of Civil Procedure, 1908, or possibly under s. 107 of the Government of India Act, 1915, but not under the provisions of s. 195 of the Code of Criminal Procedure, 1898. S. 195 is self-contained and provides its own procedure. Sub-s. (6) does not give an unqualified right of appeal to the person against whom an application for sanction has been decided. It is an enabling clause authorising a superior anthority to review an order of a subordinate authority granting or refusing sanction. The word "authority" in sub-s (6) applies both to "public servants" in sub-s. 1 (a) and to "Court" in sub-s. 1 (b) and (c). When the authority granting or refusing sanction

lute and unqualified right of appeal, and, although it enables the High Court in the exercise of its discretion and power of superintendence, to review the proceedings of a Small Cause Court with a view to seeing that justice is done, and that the law is properly applied and administered, it does not constitute the High Court a Court to which appeals from Small Cause Courts ordinarily lie in the sense contemplated by s. 195 (7) of the Code of Criminal Procedure. There is no Court to which an appeal ordinarily lies from a Small Cause Court, and therefore an appeal against an order of a Small Cause Court granting or refusing sanction is governed by cl. (c) of sub s (7) and not by cl. (a) or (b). *Obiter dictum.*—The District Magistrate is the principal Court of original jurisdiction in Criminal cases and the Collector is the principal Court of original jurisdiction in Revenue cases. A Small Cause Court is a Court of civil jurisdiction. Per *Jwala Prasad, J.* An application against an order passed by a Small Cause Court Judge granting or refusing sanction may be made either to the District Court or to the High Court, but as a matter of procedure an application should first be made to the District Court. Neither sub-s. (7) nor any of its sub-clauses applies to Courts of Small Causes. The High Court at Patna has no ordinary original civil jurisdiction. LALJI TEWARI *v.* THE KING-EMPEROR

4 Pat. L. J. 609

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

———— **s. 195**—*contd.*

———— **After a considerable lapse of time**—Points for consideration (*e.g.*) subsequent conduct as regards granting sanction for prosecution discussed. In the circumstances of this case it was held that after so long a lapse of time since the offence alleged the ends of Justice did not require that there should be a prosecution. TRAILOKYA NATH BANERJEE *v.* RADHARANJAN ALIAS BONOMALI BHATTACHARJI . . . . **25 C. W. N. 886**

——**cl. 6**— **"Sanction given or refused"**—*Order by Munsif refusing sanction to prosecute—Order affirmed by District Judge—whether High Court has power to grant the sanction—Perjury, when sanction to prosecute for, should be given—Penal Code (Act XLV of 1860), s. 193.* It is only when a sanction to prosecute given by the first court is revoked by the appellate authority referred to in cl. (6) of s. 195 of the Code of Criminal Procedure, 1898, or when a sanction refused by the first court is granted by such appellate authority, that the order of the appellate authority can be said to be an order refusing or giving sanction, as the case may be. And, therefore, it is only when the appellate authority gives or refuses a sanction which has been refused or given by the first court that the appellate order is appealable under cl. (6). But the Patna High Court following the practice in the Calcutta High Court will interfere in proper cases with an order of a District Judge confirming a sanction to prosecute granted by a Munsif. No person should be convicted under s. 193 of the Penal Code unless it be proved that it is impossible that the statements of the party accused, made on oath, can be true. Sanction to prosecute for perjury should not be lightly given in cases where the court would have to determine the question by merely weighing the evidence on both sides. PADARATH SINGH *v.* RATAN SINGH

5 Pat. L. J. 23

——**cl. 7(*a*)**— **Munsif Court to what subordinate**—An application was made for sanction to prosecute a witness for a false statement alleged to have been made by him in a civil suit before a Munsif. The Munsif had been transferred from the district and sanction could therefore be given only by the Court to which the Court of the Munsif was subordinate and the question was referred to the High Court whether the application was cognizable by the Subordinate Judge or the District Judge. *Held*, that having regard to cl. (*a*) of sub-s. (7) of s. 195 of the Code of Criminal Procedure, 1898, the Munsif must, for the purposes of the section, be deemed to be subordinate only to the Court of the Subordinate Judge of the 1st class. *Bure Khan* v. *Queen-Empress (16 P. R. (Cr.) 1898), Labhu Ram* v. *Nand Ram (29 P. R. (Cr.) 1918)* and *Boddu Ramayya* v. *Chitturi Surayya (29 Indian Cases 71)*, followed. *Sunder Singh* v. *Phuman Singh (56 Indian Cases 591)*, disapproved. DINA NATH *v.* MUHAMMAD ABDULLA

I. L. R. 2 Lah. 57

———— *Sanction to prosecute—Jurisdiction of Additional District Judge to revoke Sanction granted by Munsif— Sanction where an appeal in the suit has been assigned to him by the District Judge.* An Additional District Judge having all the powers of the District Judge in respect of cases assigned to him by the District Judge, is competent to revoke a sanction to prosecute granted by a Munsif in a case which is before him in appeal. *Mutsaddi Lal* v. *Mulu Mal, 9 A. L. J., 95*, referred to. RAM CHARAN *v.* MEWA RAM . . . . . **I. L. R. 43 All. 409**

————**cl. 6**— **Application under not An appeal**—*No revision intended after order passed under s. 195 (6)—Jurisdiction to grant sanction not ousted by transfer of magistrate from one sub-division to another in the same district. Held*, that an application under 195, cl. (*6*), of the Code of Criminal Procedure to revoke or grant a sanction given or refused by a Subordinate authority is not an appeal. *Bhadesar Tiwari* v. *Kamta Prasad, I. L. R. 35 All., 90*, not followed. *Held* also that it was not the intention of the Legislature that when a question of granting or refusing sanction to prosecute has already been before two courts it should be brought by way of revision before a third. *Mata Prosad* v. *Baran Barhai, I. L. R., 36 All., 469*, followed. *Held*, further that, where an application for sanction is properly before a Magistrate of the first class in charge of sub-division of a district, his jurisdiction to pass orders on such application is not taken away by the fact of his being transferred to another sub-division of the same district. *Mithani* v. *King-Emperor, 9 A. L. J., 448*, referred to. It is objectionable for a court dealing with a sanction case under s. 195, cl. (*6*), of the Code of Criminal Procedure to confine itself to merely writing the word "Rejected" on the application without giving any reasons for the rejection thereof. CHHOTE *v.* KHACHERU

I. L. R. 42 All. 64

———— **Appeal what is**—*Application to higher Court for grant of sanction to prosecute, refused by Lower Court—whether an "appeal" for purposes of limitation.* The petitioner applied under s. 195 of the Code of Criminal Procedure for sanction to prosecute. The first Court refused to grant sanction. An application was made to the Lower Appellate Court under sub-s. (*6*) of the same section. The application being put in on the 2nd day was dismissed as time-barred under art. 154 of the Limitation Act. Against this decision the petitioner preferred the present application for revision to the High Court. *Held*, that, although applications under s. 195 (*6*), Criminal Procedure Code, are a kin to appeals and may be treated as appeals, yet they are not appeals for the purposes of the Limitation Act and the application to the Lower Appellate Court was therefore not time-barred. *Hardeo Singh* v. *Hanuman Dat (I. L. R. 26 All. 214 F. B.)* and *Bapu* v. *Bapu (I. L. R. 39 Mad. 750 F. B.)*, followed. PUNNA LAL *v.* JAMITA MAL. . . . **I. L. R. 1 Lah. 602**

———— *Appeal from an order of a Judge of the late Chief Court granting sanction for the prosecution of the appellant in respect of allegations made by him in an* affidavit *presented to that Judge. Held*, that no appeal is competent from an order of a Judge of the late Chief Court of the Punjab under s. 195 of the Code of Criminal Procedure granting sanction for the prosecution of the appellant in respect of allegations made by him in an *affidavit* presented to that Judge. RAMJI DAS *v.* THE CROWN. . . **I. L. R. 1 Lah. 259**

———— *Sanction to prosecute—Costs, if may be ordered by civil Court in proceedings*

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— s. 195—*contd.*

CHANDRA BANERJEE . . 25 C. W. N. 661

———cl. 1 c)——— In a dispute as to the possession of immovable properties between an auction-purchaser and another claimant to the land the latter produced a certain document before the police officer who was inquiring into the dispute. The officer filed it with his report and subsequently referred to it in his deposition. The party who had produced the document withdrew from the proceedings and the Magistrate, without referring to the document, recorded a finding that possession was with the auction-purchaser. The latter moved the Magistrate to impound the document and to sanction the prosecution of his opponent. The latter resisted the application on the ground that sanction was not necessary. The auction-purchaser thereupon filed a complaint against him under ss. 463, 471 and 476 of the Penal Code. The accused pleaded that sanction was necessary, but process was issued. The accused moved the High Court without having moved the Sessions Court. *Held*, (1) that although the conduct of the accused was open to criticism the High Court was bound to decide whether the prosecution was such as the law admitted; (2) that it would be a strain of ordinary language to say that the document which came into court merely because it was attached to the Police Report prior to the proceedings was "produced" in the proceeding; (3) assuming, however, that it was "produced" the prosecution of the accused, who had no hand in its production, was not barred by reason of the absence of sanction; (4) that the accused had not in any way abused the authority of the court and therefore the sanction of the court was not necessary. The words "has been committed by a party" in s. 195 (1) (c) can only mean "is alleged to have been committed by a party." JANARDHAN THAKUR *v.* BALDEO PRASAD SINGH

5 Pat. L. J. 135

——— ss. 195 (6) and 439—*Sanction to prosecute—Revision—Powers of High Court.* S. 195 of

dure can always be exercised in order to prevent a gross and palpable failure of justice, it should not be exercised in such a way as to practically give a right of appeal in cases where such right is definitely excluded by the Code. AHSAN-ULLAH KHAN *v.* MANSUKH RAM (1914) . I. L. R. 36 All. 403

——— *Civil Procedure Code (Act V of 1908), s. 115—24 & 25 Vict., c. 104, s. 15—Order by Civil Court refusing sanction—Jurisdiction of High Court to revise such order—Delay in applying for sanction.* The opposite party brought a suit for the recovery of money in the Court of the Munsif which was dismissed, the claim being found to be false and malicious. An application for sanction to prosecute the opposite party

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— ss. 195 (6) and 439—*contd.*

was however rejected by the Munsif as also by the District Judge in appeal on the ground of delay in making the application. *Held* (on an application by the Local Government against the order refusing sanction), that it was clear from the decision of the Full Bench in *Emperor* v. *Har Prasad, I. L. R. 40 Calc. 477, s. c. 17 C. W. N. 647*: that the orders of the Munsif and the Judge are not orders of a Criminal Court and cannot therefore be revised under s. 439, Criminal Procedure Code. The High Court however in the exercise of its powers under s. 115, Criminal Procedure Code, and s. 15 of the Charter Act granted sanction for the prosecution of the opposite party holding that the case being in substance a prosecution undertaken by Government, mere delay could not be taken as suggesting *mala fides*. DEPUTY LEGAL REMEMBRANCER *v.* RAM UDAR SINGH (1914) . . . . . 19 C. W. N. 447

——— ss. 195 (6) and 476—*Sanction to prosecute—Lapse of sanction—substitution of proceedings under s. 476, legality of.* The period of six months provided by s. 195 (6) of the Code of Criminal Procedure, 1898, can only be extended by the High Court, and it is not competent to any other court, when that period has expired without any action having been taken, to draw up proceedings under s. 476. LALJI TEWARI *v.* KING-EMPEROR

5 Pat. L. J. 58

——— *Indian Penal Code, ss. 471, 474—Using as genuine a forged document—Filing a forged document as coming from the custody of the person by whom it purported to be held, if constitutes 'user'—Offence committed by such act, sanction if necessary for prosecution for—Possession of forged document, knowing it to be forged and*

cution story was that the accused who was the plaintiff in a rent suit himself filed a *kobuliyat* and an *amalnama* which were forged and which purported to be filed by the complainant, the defendant in the rent suit: *Held*, that the act constituted user within the meaning of s. 471, Indian Penal Code, and the offence committed was one under that section and in respect of that offence sanction under s. 195 or an order under s. 476, Criminal Procedure Code, was necessary. That no sanction is necessary for a prosecution under s. 474, Indian Penal Code. That the decision of the issues in the rent suit being largely dependent on the question whether the documents in question

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——— ss. 195 (6) and 509—

See SANCTION TO PROSECUTE.

4 Pat. L. J. 374

——— ss. 195 (6), (7) (c), 435, 439—

See SANCTION FOR PROSECUTION.

I. L. R. 44 Calc. 816

——— ss. 195, 476—

See JURISDICTION OF CRIMINAL COURT.

I. L. R. 37 Calc. 250

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

———— s. 195—*contd.*

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——cl. 6— "Sanction given or refused"—*Order by Munsif refusing sanction to prosecute—Order affirmed by District Judge—whether High Court has power to grant the sanction—Perjury, when sanction to prosecute for, should be given—Penal Code (Act XLV of 1860), s. 193.* It is only when a sanction to prosecute given by the first court is revoked by the appellate authority referred to in cl. (*6*) of s. 195 of the Code of Criminal Procedure, 1898, or when a sanction refused by the first court is granted by such appellate authority, that the order of the appellate authority can be said to be an order refusing or giving sanction, as the case may be. And, therefore, it is only when the appellate authority gives or refuses a sanction which has been refused or given by the first court that the appellate order is appealable under cl. (*6*). But the Patna High Court following the practice in the Calcutta High Court will interfere in proper cases with an order of a District Judge confirming a sanction to prosecute granted by a Munsif. No person should be convicted under s. 193 of the Penal Code unless it be proved that it is impossible that the statements of the party accused, made on oath, can be true. Sanction to prosecute for perjury should not be lightly given in cases where the court would have to determine the question by merely weighing the evidence on both sides. PADARATH SINGH *v.* RATAN SINGH 5 Pat. L. J. 23

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————cl. 6— Application under not An appeal—*No revision intended after order passed under s. 195 (6)—Jurisdiction to grant sanction not ousted by transfer of magistrate from one sub-division to another in the same district.* *Held*, that an application under 195, cl. (*6*), of the Code of Criminal Procedure to revoke or grant a sanction given or refused by a Subordinate authority is not an appeal. *Bhadesar Tiwari* v. *Kamta Prasad, I. L. R. 35 All., 90*, not followed. *Held* also that it was not the intention of the Legislature that when a question of granting or refusing sanction to prosecute has already been before two courts it should be brought by way of revision before a third. *Mata Prosad* v. *Baran Barhai, I. L. R., 36 All., 469*, followed. *Held*, further that, where an application for sanction is properly before a Magistrate of the first class in charge of sub-division of a district, his jurisdiction to pass orders on such application is not taken away by the fact of his being transferred to another sub-division of the same district. *Mithani* v. *King-Emperor, 9 A. L. J., 448*, referred to. It is objectionable for a court dealing with a sanction case under s. 195, cl. (*6*), of the Code of Criminal Procedure to confine itself to merely writing the word "Rejected" on the application without giving any reasons for the rejection thereof. CHHOTE *v.* KHACHERU I. L. R. 42 All. 64

———— Appeal what is—*Application to higher Court for grant of sanction to prosecute, refused by Lower Court—whether an "appeal" for purposes of limitation.* The petitioner applied under s. 195 of the Code of Criminal Procedure for sanction to prosecute. The first Court refused to grant sanction. An application was made to the Lower Appellate Court under sub-s. (*6*) of the same section. The application being put in on the 2nd day was dismissed as time-barred under art. 154 of the Limitation Act. Against this decision the petitioner preferred the present application for revision to the High Court. *Held*, that, although applications under s. 195 (*6*), Criminal Procedure Code, are a kin to appeals and may be treated as appeals, yet they are not appeals for the purposes of the Limitation Act and the application to the Lower Appellate Court was therefore not time-barred. *Hardeo Singh* v. *Hanuman Dat* (*I. L. R. 26 All. 214 F. B.*) and *Bapu* v. *Bapu* (*I. L. R. 39 Mad. 750 F. B.*), followed. PUNNA LAL *v.* JAMITA MAL. . . . I. L. R. 1 Lah. 602

———— *Appeal from an order of a Judge of the late Chief Court granting sanction for the prosecution of the appellant in respect of allegations made by him in an* affidavit *presented to that Judge. Held*, that no appeal is competent from an order of a Judge of the late Chief Court of the Punjab under s. 195 of the Code of Criminal Procedure granting sanction for the prosecution of the appellant in respect of allegations made by him in an *affidavit* presented to that Judge. RAMJI DAS *v.* THE CROWN. . . . I. L. R. 1 Lah. 259

———— *Sanction to prosecute—Costs, if may be ordered by civil Court in proceedings*

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

—————— s. 195—*contd.*

under the section. Proceedings for sanction under s. 195, *Criminal Procedure Code, though taken* in a civil Court relate to a *criminal matter* and the Court has no power to direct payment of costs in such cases. BHOLANATH KHANRA *v.* PURNA CHANDRA BANERJEE . . 25 C. W. N. 661

——————cl. 1 c)—————— In a dispute as to the possession of immovable properties between an auction-purchaser and another [illegible]

deposition. The party who had produced the document withdrew from the proceedings and the Magistrate, without referring to the document, recorded a finding that possession was with the auction-purchaser. The latter moved the Magistrate to impound the document and to sanction the prosecution of his opponent. The latter resisted the application on the ground that sanction was not necessary. The auction-purchaser thereupon filed a complaint against him under ss. 463, 471 and 476 of the Penal Code. The accused pleaded that sanction was necessary, but process was issued. The accused moved the High Court without having moved the Sessions Court. *Held,* (1) that although the conduct of the accused was open to criticism the High Court was bou[illegible] such as [illegible] strain of [illegible] ment which came into court merely because it was attached to the Police Report prior to the proceedings was "produced" in the proceeding; (3) assuming, however, that it was "produced" the prosecution of the accused, who had no hand in its production, was not barred by reason of the absence of sanction; (4) that the accused had not in any way abused the authority of the court and therefore the sanction of the court was not necessary. The words "has been committed by a party" in *s. 195 (1) (c) can only mean "is* alleged to have been committed by a party." JANARDHAN THAKUR *v.* BALDEO PRASAD SINGH 5 Pat. L. J. 135

Judge, refusing under cl. (6) to grant a sanction to prosecute which was refused by the *Magistrate,* [illegible] the revisional jurisdiction of the High [illegible] Criminal Proce- [illegible]

excluded by the Code. AHSAN-ULLAH KHAN *v.* MANSUKH RAM (1914) . I. L. R. 36 All. 403

—————— *Civil Procedure Code (Act V of 1908), s. 115—24 & 25 Vict., c. 104, s. 15—Order by Civil Court refusing sanction—Jurisdiction of High Court to revise such order—Delay in applying for sanction.* The opposite party brought a suit for the recovery of money in the Court of the Munsif which was dismissed, the claim being found to be false and malicious. An application for sanction to prosecute the opposite party was however rejected by the Munsif as also by the *District* Judge in appeal on the ground of delay in making the application. *Held* (on an application by the Local Government against the order refusing sanction), that it was clear from the decision of the Full Bench in *Emperor v. Har Prasad, I. L. R. 40 Calc. 477, s. c. 17 C. W. N.* 647: that the orders of the Munsif and the Judge are not orders of a Criminal Court and cannot therefore be revised under s. 439, Criminal Procedure Code. *The High Court however in the exercise* of its powers under s. 115, Criminal Procedure Code, and s. 15 of the Charter Act granted sanction for the prosecution of the opposite party holding that the case being in substance a prosecution undertaken by Government, mere delay could not be taken as suggesting *mala fides.* DEPUTY LEGAL REMEMBRANCER *v.* RAM UDAR SINGH (1914) . . . . . 19 C. W. N. 447

—————— ss. 195 (6) and 476—*Sanction to prosecute—Lapse of sanction—substitution of proceedings under s. 476, legality of.* The period of six months provided by *s. 195 (6) of the Code* of Criminal Procedure, 1898, can only be extended by the High Court, and it is not competent to any other court, when that period has expired without any action having been taken, to draw up proceedings under s. 476. LALJI TEWARI *v.* KING-EMPEROR 5 Pat. L. J. 58

—————— *Indian Penal Code, ss. 471, 474—Using as genuine a forged document—Filing a forged document as coming from the custody of the person by whom it purported to be held, if constitutes 'user'—Offence committed by such act,* [illegible]

cution story was that the accused who was the [illegible]

tuted user within the meaning of s. 471, Indian Penal Code, and the offence committed was one under that section and in respect of that offence sanction under s. 195 or an order under s. 476, Criminal Procedure Code, was necessary. That no sanction is necessary for a prosecution under s. 474, Indian Penal Code. That the decision of the issues in the rent suit being largely dependent on the question whether the documents in question were or were not genuine, it was expendient that [illegible] should be deferred pend- [illegible] ASRABUDDIN [illegible] [illegible] C. W. N. 125

—— ss. 195 (6) and 509—
See SANCTION TO PROSECUTE.
4 Pat. L. J. 374

—————— ss. 195 (6), (7) (c), 435, 439—
See SANCTION FOR PROSECUTION.
I. L. R. 44 Calc. 816

—————— ss. 195, 476—
See JURISDICTION OF CRIMINAL COURT.
I. L. [illegible] Calc.

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— ss. 195, 476—*contd.*

——— *Sanction to prosecute—Sanction set aside by superior Court and order for prosecution under s. 476 substituted—Jurisdiction. Held*, that a Court hearing an application under s. 195 of the Code of Criminal Procedure to revoke sanction for a prosecution granted by a subordinate Court, has jurisdiction to set aside the order of the subordinate Court and direct a prosecution under s, 476 of the Code. *In the matter of the petition of Mathura Das, I. L. R. 26 All. 80*, overruled. CHADAMMI *v.* LALTA PRASAD (1912)

I. L. R. 34 All. 602

——— ss. 195, 476, 532, 537—

See JURISDICTION OF CRIMINAL COURT.

I. L. R. 40 Calc. 360

——— ss. 195, (1) 478—*Sanction to prosecute—Subsequent order to prosecute passed under s. 478.* The grant of a sanction to prosecute to a private individual under s. 195 of the Criminal Procedure Code, 1898, is no bar to the subsequent institution of proceedings by the Civil Court itself under s. 478 of the Code. *Queen-Empress* v. *Shankar, I. L. R. 13 Bom. 384*, followed. EMPEROR *v.* NAGJI GHELABHAI (1909)

I. L. R. 34 Bom. 88

——— ss. 195, (6) 537—*Sanction to prosecute—Irregularity of illegality—Complaint filed after expiry of the time allowed by s, 195 (6). Held*, that the taking cognizance of a complaint in respect of which sanction had been obtained under s. 195 of the Code of Criminal Procedure after the expiry of the six months' period allowed by clause (6) of the section and when objection was taken at the earliest opportunity by the accused was more than an irregularity and was not covered by the provisions of s. 537 of the Code. EMPEROR *v.* ZAHIR SINGH (1915) . **I. L. R. 37 All. 283**

——— s. 196—

See CONTEMPT OF COURT.

I. L. R. 41 Calc. 173

See JURY, RIGHT OF TRIAL BY.

I. L. R. 37 Calc. 467

See SANCTION FOR PROSECUTION.

——— Sanction vagueness—*Objection that Local Government illegally constituted if may be taken.* Where a conviction under s. 121A of the Penal Code at a trial which was sanctioned under s. 196, Criminal Procedure Code, by the Local Government was challenged on appeal to the High Court on the ground that the Local Government was not legally constituted and had no authority to sanction the prosecution: *Held* (*per* HARRINGTON, *J.*) That it was not open to persons who had been convicted to question the right of the *de facto* Government of the Province to exercise any of those powers which a Government may lawfully exercise, no such point having been taken as an early stage of the trial by motion to the High Court, and the fairness of the trial and the merits of the case being in no way affected. *Per* MOOKERJEE, *J.*—The acts of one who although not the *de jure* holder of a legal office was actually in possession of it under some colour of title or under such conditions as indicated the acquiescence of the public in his actions cannot be collaterally impeached in any proceeding in which such person is not a party. *Parker* v. *Kett, 1*

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— s. 196—*contd.*

Lord Raymond, 658 ; 12 Mad. 467 : R. v. *Redford Level Corporation, 6 East, 659*, followed. When the persons sought to be prosecuted were all named in the sanction and the sections of the Code under which they were alleged to have committed offences as also the period of their activity were specified, the mere fact that those persons were not described as members of a revolutionary society (the existence of which was sought to be established at the trial) did not affect the validity of the sanction. The sanction was neither vague nor did it amount to a delegation of authority vested in the Local Government. *Barindra Kumar Ghose* v. *Emperor, 14 C. W. N. 1114 : I. L. R. 37 Calc. 467*, distinguished. PULIN BEHARI DAS *v.* KING-EMPEROR (1911)

16 C. W. N. 1105

——— *Authority by Government for filing complaint—Telegram by Government to District Magistrate—Authority to Public Prosecutor—Discretion given to District Magistrate as to filing complaint immediately—Complaint to be submitted to Government for supplemental sanction—Authority, whether valid.* Where the Government sent a telegram to a District Magistrate expressly authorizing the Public Prosecutor to file a complaint against a person for an offence under s. 124-A, Indian Penal Code, but the telegram added that the Public Prosecutor might act on this authority immediately if the District Magistrate on consultation should think it desirable and that the complaint prepared should be submitted at once to the Government for issue of supplemental sanction : *Held*, that the authority given by the Government was valid under s. 196 of the Criminal Procedure Code. *Per* NAPIER, J.—S. 196, Criminal Procedure Code, is a disenabling section, and should not therefore be construed with the strictness applicable to an enabling section. *Chidambaram Pillai* v. *Emperor, I. L. R. 32 Mad. 3*, followed. *Queen Empress* v. *Samavier, I. L. R. 16 Mad. 468*, distinguished. *Barindra Kumar Ghose* v. *Emperor, I. L. R. 37 Calc. 467*, dissented from. VARADARAJULU NAIDU, P. *v.* PUBLIC PROSECUTOR, MADURA (1918)

I. L. R. 42 Mad. 180

——— *Held* that the sanction of the Local Government required by s. 196 must be conveyed by the Chief Secretary. Any order signed by a Deputy Secretary is not in proper form. MD. OZULLAH *v.* BENI MADHAB CHOWDHERY.

26 C. W. N. 878

——— *Held* that although the allegation of the prosecution supports a case of conspiracy to forge documents for which sanction to prosecute is required under s. 196 there is no reason why the accused should not be tried for offences in respect of which no sanction is required (*e.g.*) conspiracy to cheat and cause delivery of property. ABDUL SALEM *v.* KING EMPEROR . . . . . **26 C. W. N. 660**

——— ss. 196, 235, 342, 360 (1), 417—

See CHARGE . **I. L. R. 42 Calc. 957**

——— ss. 196, 428—*Prosecution for offence under s. 124-A, Indian Penal Code—Sanction by whom to be given—Local Government—Sanction by one Member of Government alone, whether sufficient*

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

———— ss. 196, 428—*contd.*

—*Sanction after complaint, whether valid—Sanction by telegram—Proof of sanction—Telegram purporting to be sent by Government—Presumption as to sender—Evidence Act, s. 88—Objection overruled by Magistrate—Conviction—Appeal—Additional evidence on appeal as to proof of sanction, if can be permitted—Policy in granting sanction under s. 196, Criminal Procedure Code.* Sanction, given *after the filing* of the complaint, does not fulfil the requirements of s. 196, Criminal Procedure Code. *Barindra Kumar Ghose* v. *King-Emperor, I. L. R. 37 Calc. 467,* followed. Sanction granted under s. 196 of the Code must, in order to satisfy the section, have been the act of the Local Government and not of a single member of such Government. S 88 of the Evidence Act forbids the raising of any presumption as to the person by whom a telegram is sent, and the Act does not contain any special provision as to telegrams purporting to emanate from Government. Where therefore a telegram containing a sanction to prosecute a person under s. 124-A, Indian Penal Code, purported to be despatched from Ootacamund and to be signed 'Madras,' which is the telegraphic name of the Chief Secretary to the Government of Madras, there was no presumption as to the person by whom it was sent, and, in the absence of proof, it could not be held that the telegram was sent by the authority of the Madras Government. The powers given by s. 428, Criminal Procedure Code, to an appellate Court to take additional evidence are perfectly general and are subject only to the condition that the Court should record its reasons. Where a conviction on a serious charge such as sedition, if otherwise sustainable, would have to be upset for want of formal proof of sanction, owing to a misconception as to the proper mode of proving it on the part of the prosecution, a misconception which was shared by the trial magistrate, *Held* (by WALLIS, *C. J.*, and AYLING, *J.*, SADASIVA AYYAR, *J.*, dissenting) that it was a fit case for the appellate Court to admit additional evidence to supply the defect in formal proof of the sanction; but on its being elicited in Court that the sanction sought to be proved was not the act of all the members of the Local Government, the Court declined to order fresh evidence to be taken, and set aside the conviction and sentence. *Per* SADASIVA AYYAR, *J.*,—Under s. 428, Criminal Procedure Code, an Appellate Court should permit additional evidence to be taken only where it feels a reasonable doubt whether on the evidence as it stands the conviction is justified, and not where being convinced that the prosecution fails on the evidence on record it considers that the negligence of the prosecutor might be excused; the discretion to be exercised under the section is not an arbitrary one and should not be exercised, especially against the accused in a criminal

sanction under s. 196, Criminal Procedure Code, in the first instance or after failure of a prosecution on technical grounds, pointed out, by SADASIVA AYYAR, J. VARADARAJULU NAIDU *v.* KING EMPEROR (1919) . . I. L. R. 42 Mad. 885

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

———— ss. 196, 532—*Penal Code, ss. 121 to 124*—

plicable to the case," and the examination of the complainant also referred to the same sections:—*Held,* that no complaint under s 121 of the Penal Code was thereby authorized by the Local Government or in fact preferred, that the Magistrate had no power to commit thereunder, and that the defect was not cured by a subsequent order obtained while the case was before the Sessions Court, authorizing a complaint under the section which was not in fact made thereafter; nor did s 532 of the Criminal Procedure Code apply in such a case *Sham Khan's case, (1890) Punj. R. Cr. J. No. 16,* approved of *Queen-Empress* v. *Morton, I. L. R. 9 Bom. 288,* distinguished; and *Queen-Empress* v. *Bal Gangadhar Tilak, I. L. R. 22 Bom. 112,* dissented from. The Local Govern-

Procedure Code, and its judgment must be specifically directed to the particular section, and no other, under which the prosecution is to be carried on, and the order or authority should be proceeded by a deliberate determination in this respect. An order authorizing a complaint under certain specified sections "*or under any other sections found applicable,*" if it means found by any one other than Government, involves a delegation which cannot be sustained. BARINDRA KUMAR GHOSE *v.* EMPEROR (1909) I. L. R. 37 Calc. 467

———— s. 196A—

See PENAL CODE (ACT XLV OF 1860), s. 120B . . I. L. R. 40 All. 41

———— s. 197—

See SANCTION FOR PROSECUTION.

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and if in doing such an act he commits any offence sanction under this section is necessary before a complaint can be lodged against him. RAISNAB CHARAN TARAN *v.* SUKHOMOY CHOWDHURY
25 C. W. N. 956

———————— *Order passed by a District Judge under s. 197—whether open to revi-*

Penal Code in connection with an incident which occurred while the petitioner was hearing a case in his Court. The District Judge ordered a notice to issue to the petitioner to show cause why sanction should not be granted, and petitioner then filed an application to the High Court for the revision of that order. *Held,* that t

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

————— s. 197—*contd.*

for revision was not maintainable as the order complained of was an executive and not a judicial order. The distinction between the provisions of s. 197 and those of s. 195 of the Code explained. *Nando Lal Basak* v. *Mitter* (*I. L. R. 26 Calc. 852*), followed. *Grey* v. *North-Western Railway Administration* (*13 P. R.* (*Cr.*). *1891*), referred to. ALI HUSSAIN KHAN *v.* HARCHARAN DASS.

I. L. R. 2 Lah. 305

————— **ss. 197, 210, 215**—*Committal proceeding—Evidence taken in absence of sanction to prosecute—Sanction produced before Magistrate on the day he passed an order committing the case—Committal order passed in view of the wishes of the parties and a Government Resolution—Order of committal not valid.* The accused, a Vatandar Patil, was charged with the offences of harbouring an offender and taking a bribe from him. Enquiry into the case was instituted and the whole of the evidence was taken in absence of a sanction to prosecute. The Magistrate committed the case to the Court of Session, relying on a Government Resolution and yielding to the wishes of the parties. The sanction was produced before the Magistrate on the day he committed the case. The Sessions Judge referred the case to the High Court as he was of opinion that the commitment was illegal. *Held,* quashing the order of commitment, that owing to the absence of sanction the whole of the proceedings before the Magistrate were without jurisdiction and totally invalid. *Held,* further, that the Magistrate was not competent to commit the case to the Court of Session solely by the wish of the parties and the terms of a Government Resolution. EMPEROR *v.* BHIMAJI ENKAJI (1917) . **I. L. R. 42 Bom. 172**

————— **ss. 197, 239 and 532**—*Sanction to prosecute public servants—Form of sanction—Public servants conspiring to cheat three persons—Joint trial—Commitment, quashing of, after the trial has once commenced—Practice and procedure.* The two accused, the Kulkarni and the Patil of a village, conspired to cheat certain ryots of their money. Sanction to prosecute them was given by the Collector "for cheating or for such other offence with which it may be necessary to prosecute them in connection with obtaining money from ryots." They were tried at one trial by the Additional Sessions Judge, who heard the whole case and recorded the opinions of the assessors. The case then stood over for judgment. But the learned Judge being of opinion that the sanction was invalid and that the joint trial of the two persons for distinct offences of the same kind was not permissible, quashed the commitment and directed a fresh inquiry under s. 532 of the Criminal Procedure Code, On review. *Held,* that the sanction was not invalid, inasmuch as the sanctioning authority had applied its mind to the facts of the case and sanctioned the prosecution of the accused, and had also sufficiently designated the offence or offences which might be established in connection with obtaining money from ryots. *Held,* also, that the joint trial of the accused was regular, because the offences charged against them were committed in the same transaction within the meaning of s. 239 of the Criminal Procedure Code, there having been clear proximity of time and space, clear continuity of action and sufficiently specific community of purpose. *Held,* further, that under the circumstances the lower Court had no power to quash the commitment and direct a fresh inquiry under s, 532, the proper procedure being to move the High Court for a quashing of the commitment under s. 215 of the Criminal Procedure Code, 1898. EMPEROR *v.* MADHAV LAXMAN (1918) . . **I. L. R. 43 Bom. 147**

————— **s. 198**—

See PENAL CODE (ACT XLV OF 1860), s. 494 . . **I. L. R. 32 All. 78**

————— **ss. 198, 200, 503**—

See COMPLAINT . **I. L. R. 42 Calc. 19**

————— **s. 199**—

See PENAL CODE, s. 498. **I. L. R. 38 All. 276**

————— **s. 200**—

See s. 4 . . . **1 Pat. L. J. 592**
25 C. W. N. 357

See s. 119 . . **I. L. R. 35 Bom. 401**

See s. 190 . . **2 Pat. L. J. 34, 657**

See s. 439 . **I. L. R. 33 Mad. 48**

See COMPLAINT . **I. L. R. 42 Calc. 19**

See FALSE INFORMATION.
I. L. R. 43 Calc. 173
I. L. R. 46 Calc. 807

—————*Complaint by a purdanashin lady signed and presented by agent holding general power to present complaints—Absence of special power—Duty of Magistrate to satisfy himself if complaint really by person by whom it purports to be—Magistrate bound to examine complainant before issuing process—Complaint not presented in person proper course for Magistrate on receipt of—Words "at once," effect of, in s. 200—S. 198, compliance with the requirements of—S. 503, scope of—Examination of complainant on commission—Indian Penal Code (Act XLV of 1860), s. 500—Defamation.* A complaint was filed before the Chief Presidency Magistrate under s. 500, Indian Penal Code, purporting to be made by a purdanashin lady and signed by a person in whose favour there was a general power of attorney authorising the presentation of criminal complaints, but no power-of-attorney authorising the presentation of the specific complaint. The Chief Presidency Magistrate issued process against the accused and transferred the case to another Magistrate. *Held* (on a reference under s. 432, Criminal Procedure Code), that the Chief Presidency Magistrate was wrong in issuing process against the accused. It is perfectly well-settled that a process cannot be issued against an accused person either by the Magistrate first taking cognizance of an offence or by the Magistrate to whom the case is transferred under the proviso to s. 200, Criminal Procedure Code, unless and until the Magistrate issuing process has first examined the complainant. And this is more necessary in the case of a purdanashin lady than in other cases to enable the Magistrate to satisfy himself that the complaint is really her own action. That the Magistrate should be very loth to take cognizance of any complaint which is not presented in person. The words "at once" in s. 200 of the Code clearly

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

———— s. 200—*contd.*

indicate that ordinarily a complaint must be presented in person and a complaint should not be accepted which is not signed by the complainant and is not preferred by a person duly authorised to prefer that specific complaint. That whether the requirements of s. 198, Criminal Procedure Code, were satisfied in the present case depended upon whether or not the complaint was the complaint of the lady. [The High Court quashed the proceedings, giving liberty to the lady to file a fresh complaint and directed her examination, if fresh complaint was made, by a commission issued to a Magistrate.] *Held*, that the terms of s. 503, Criminal Procedure Code, are very wide. They refer not only to an enquiry and a trial, but to any other proceedings The section authorises the examination of any witness, and the complainant is a witness. ABHOYESWARI DEVI *v.* KISHORI MOHAN BANERJEE (1914)
I. L. R. 42 Calc. 19
18 C. W. N. 1020

———— ss. 200, 203, 435, 437 and 528—*Complaint, petition of objection to dismissal of counter-case, whether amounts to—Dismissal of counter-case without examining complainant, whether the District Magistrate has power to review order of—Penal Code (Act XVL of 1860), ss. 379 and 457. A instituted a criminal case against B under s. 457* of the Penal Code and *B* lodged an information against *A*, alleging that he had committed an offence under s. 379, *B* was acquitted of the charge under s. 157 and in the counter-case the Magistrate recorded the order "Enter false under s. 379, Indian Penal Code." *B* thereupon filed a petition of objection before the Sub-Divisional Officer asking that an investigation might be made and *A* summoned He also moved the District Magistrate who set aside the order dismissing the counter-case and sent the case to the Sub-Divisional Magistrate for orders. *A* applied in revision to the High Court to set aside the District Magistrate's order: *Held*—(1) that the petition of objection was a complaint within the meaning of the Code of Criminal Procedure, [illegible] order directing [illegible] was in [illegible] s. 203; [illegible] order of [illegible] jurisdic- [illegible] xercised even though the complainant has not been examined on oath; (4) that s. 437 contemplates that where a complaint has been dismissed under s. 203 the revisional jurisdiction of the District Magistrate can be invoked irrespective of the consideration whether the dismissal is legal or illegal. SADHU CHARAN RAY *v.* BALEI SWAIN **3 Pat. L. J. 346**

———— ss. 200, 254—*Procedure—Accused* [illegible] *plainant being examined* [illegible]

Magistrate, who sent for the police [illegible] summoned the accused without examining the complainants. On the date fixed the complainants were absent and the accused were discharged.

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

———— ss. 200, 254—*contd.*

Later in the day the complainants appeared and explained their delay, and the Magistrate again gave them time to produce evidence. He summoned the accused, found them guilty and sentenced them to imprisonment. *Held*, that the course the Magistrate adopted was irregular but did not vitiate the entire proceedings. *Held*, further, that where different persons are injured, grievous hurt being caused in one case and simple hurt in others, it is competent to the Court to impose separate and accumulated sentences. EMPEROR *v.* BATESHAR (1915) . **I. L. R. 37 All. 628**

———— s 201—

See FALSE INFORMATION.
I. L. R. 43 Calc. 173

———— s. 202—

See s. 437 . . **4 Pat. L. J. 456**

See COMPLAINT . **I. L. R. 46 Calc. 854**

See FALSE INFORMATION TO POLICE.
I. L. R. 46 Calc. 807

See LOCAL INSPECTION.
I. L. R. 37 Calc. 340

See MAGISTRATE, POWER OF.
I. L. R. 38 Calc. 68

See MALICIOUS PROSECUTION.
I. L. R. 37 Mad. 181

———— *Local enquiry by pleader—Consideration of new ground at hearing of rule.* A Magistrate has no jurisdiction to order a local enquiry by a pleader in the nature of a commission in a civil case Case in which the High Court considered a ground other than those on which the rule was issued. MOHAR KHAN *v.* GAYZUDDIN SHEIKH (1913) **18 C. W. N. 399**

———— *Magistrate's duty to record reasons before directing local investigation—Accused, if should be allowed to be represented when Magistrate considers the report of the local investigation.* It is most desirable that Magistrates should follow the procedure which is quite clearly laid down in Chap. XVI dealing with complaints to Magistrates. Under s. 202, if the Magistrate on examining the complainant, distrusts the statement of the complainant, he must record his reasons before directing a local investigation. It is irregular and quite inconsistent with the scheme of the Code of Criminal Procedure to allow the accused to be represented by a lawyer to argue the case for the defence when the Magistrate is [illegible]

———— ss. 202, 203—

See COMPLAINT . **I. L. R. 41 Calc. 1013**
I. L. R. 46 Calc. 854

See FALSE INFORMATION.
I. L. R. 43 Calc. 173

See MAGISTRATE, JURISDICTION OF.
I. L. R. 39 Calc. 1041

See MALICIOUS PROSECUTION.
I. L. R. 38 Calc. 880

———— *Complaint, dismissal of, without giving opportunity to the*

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— ss. 202, 203—*contd.*

to prove his case. After the examination of the complainant the Magistrate should dismiss the complaint at once or elect to hold inquiry under s. 202, Criminal Procedure Code, before issuing process. Where the Magistrate examined the complainant on the 28th April and without dismissing the complaint then and there adjourned the case to the 26th May, and then on that date after making certain enquiries from the solicitor of the accused and looking into papers which had been filed by the defence before the police, dismissed the complaint: *Held,* that the procedure adopted by the Magistrate was irregular and that having virtually elected to hold an enquiry under s. 202, Criminal Procedure Code, he should not have dismissed the complaint without giving an opportunity to the complainant to adduce evidence in support of his case, and if upon such opportunity being given, he still failed to produce his witness, then his case might have been dismissed upon that ground. SANDYAL *v.* KUNJESWAR MISRA (1911) . . **16 C. W. N. 143**

——— ss. 202, 203, 204, 437, 192—Complaint was dismissed by the Sub-Divisional Magistrate to whom it was made and on the motion of the complainant the Sessions Judge ordered "Further inquiry to be made into the complaint." The record of the case and the order were forwarded to the District Magistrate "for information and compliance." The latter ordered "that the Judicial enquiry directed by the Sessions Judges will be held at Arrah by Mr. S. K. Kaviraj" a Magistrate with 1st class powers. *Held* that Mr. Kaviraj had jurisdiction to hold an enquiry as to whether a *prima facie* case had been made out against the accused and if so to try him. RAM BARAI SINGH *v.* RAM PRATAP RAI . **5 Pat. L. J. 47**

——— ss. 202, 203, 476—*Order of Magistrate taking cognizance making over case to another Magistrate for disposal after a local enquiry, if legal—Dismissal of complaint—Order for prosecution.* Where the petitioner laid a complaint before the Magistrate against a police-officer charging him with various offences of wrongful confinement, extortion, mischief, etc., and the Magistrate who took cognizance of the case made it over to another Magistrate with a direction that the latter would make a local enquiry and then dispose of the case, and the Magistrate to whom the case was so made over made a local enquiry and after examining witnesses dismissed the complaint under s. 203, Criminal Procedure Code, and made an order under s. 476 for the prosecution of the petitioner under s. 211, Indian Penal Code: *Held,* that the order of the Magistrate before whom the complaint was laid was bad in directing the latter Magistrate to hold a local enquiry inasmuch as the Code of Criminal Procedure does not make any provision for such a course by a Magistrate to whom a case is made over for disposal. On a consideration of the circumstances of the case the High Court set aside the orders under ss. 203, 476, Criminal Procedure Code, and directed a further enquiry into the case. IMAMUDDIN *v.* DEBENDRA NATH (1913) . . . . **18 C. W. N. 95**

——— ss. 202, 528, 556—

See COMPLAINT . **I. L. R. 46 Calc. 854**

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— ss. 202, 476—

See COMPLAINT, DISMISSAL OF. **I. L. R. 40 Calc. 444**

——— s. 203—

See s. 200 . . **3 Pat. L. J. 346**

See s. 437 . . **4 Pat. L. J. 456**

——— *Held,* that when a further enquiry is ordered into a complaint dismissed under s. 203 the Magistrate can again dismiss the complaint under that section. NIBARAN CHANDRA MUKHERJI *v.* SITAL CHANDRA BAG **25 C. W. N. 312**

See CRIMINAL REVISIONAL JURISDICTION. **I. L. R. 40 Calc. 41**

——— *Dismissal of complaint under s. 203 without taking sworn statement of complainant.* A Presidency Magistrate may dismiss a complaint under s, 203 of the Criminal Procedure Code on a police report without examining the complainant. The verification on oath of a complaint before a Magistrate is a sufficient compliance with the provisions of s. 203. The omission to examine will, at the most, amount to an irregularity of the description covered by s. 537, Criminal Procedure Code. *Re* VELU NATTAN (1912) . . . . **I. L. R. 35 Mad. 606**

——— *Complaint—Dismissal of complaint—Second complaint in pari materiâ—"Same Court"—Jurisdiction.* Where the question is as to the competence of a Magistrate to entertain a second complaint *in pari materiâ* with a former complaint which has been dismissed under s. 203 of the Code of Criminal Procedure, it is not necessary that both complaints should be before the same person, but before the presiding officer of the same Court. *King-Emperor* v. *Adam Khan, I. L. R. 22 All. 106,* distinguished. *King-Emperor* v. *Umedan, All. Weekly Notes* (1905), *86,* and *Emperor* v. *Keymer, I. L. R. 36 All. 53,* referred to. RAM BHAROS *v.* BABAN (1914) **I. L. R. 36 All. 129**

——— *What are "no sufficient grounds"—Jurisdiction of High Court under Charter Act (24 & 25 Vict., c. 104), Art. 15.* Where a Magistrate without summoning the accused dismissed a complaint under s. 203, Criminal Procedure Code, for the reasons that there was gross delay in filing it and that the charges seemed to be made for ulterior and improper motives: *Held,* that such considerations were not relevant to the decision of the question as to whether there were not sufficient grounds for proceeding. In the absence of a finding that the complaint was false or unsustainable on the evidence likely to be available, the order of dismissal is irregular and liable to be set aside by the High Court under article 15 of the Charter Act, 24 & 25 Vict., c. 104. GANGA REDDY *v.* SAMARAPATTY MUDALY (1913) **I. L. R. 38 Mad. 512**

——— ss. 203, 437—*Complaint summarily rejected—Further inquiry—Notice to person complained against not necessary.* A notice to a person against whom a complaint is made is quite unnecessary where it is sought to set aside the summary order rejecting the complaint in a proceeding to which he was actually no party. ANGAN *v.* RAM PIRBHAN (1912) . **I. L. R. 35 All. 78**

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— ss. 215 and 478—*Letters Patent, cl. (15)—Order of commitment by a Judge of the High Court on the Original Side—Appeal on questions of fact only whether permissible.* A witness in a Civil suit before the High Court was committed to the High Court Sessions for trial on charges of perjury. On appeal against the order of commitment, *held,* that assuming such an appeal could be preferred under the general words of cl. (15) of the Letters Patent, s. 215, Criminal Procedure Code, which enacts that an order of commitment made by any Civil Court can be quashed only on a point of law, modifies to that extent the general provisions of cl. (15) of the Letters Patent, and that as no point of law is involved in the appeal the order of commitment cannot be quashed. *Quære,* whether an appeal lies under cl. (*15*) of the Letters Patent from an order of commitment by a High Court Judge trying a Civil suit. VENKATAGIRI AYYAR *v.* N. M. FIRM (1920) . . . I. L. R. 43 Mad. 361

——— ss. 221, 223, 350—

See RIOTING . I. L. R. 39 Calc. 781

——— ss. 221, 222, 223—*Forgery charge of —Omission to set out intention.* Where the charge under s. 467, Penal Code, did not set out the intention of the accused: *Held,* that this vitiated the charge. HAIDAR ALI PRADHANIA *v.* EMPEROR (1912) . . . . 17 C. W. N. 354

——— s. 222 (2)—

See PENAL CODE, s. 409.

I. L. R. 33 All. 36

———*Indian Penal Code (Act XLV of 1860), s. 406—Criminal breach of trust —Gross sum specified in charge—Particulars as to time—Defect in charge amounting to illegality— Applicability of s. 537, Cr. P. C., to cure such defect—Retrial if may be ordered where charge fails for want of evidence.* Where the appellant, who was an executor to the estate of one D. M. R. under his will and who was finally called upon on the 15th August 1910 to deliver over to the complainant all money, valuables and papers belonging to the testator's estate, was placed on his trial on two charges under s. 406, Penal Code, and was charged in the first charge with having committed criminal breach of trust in respect of or having dishonestly misappropriated the gross amount specified in the charge between 17th August 1909 and 15th August 1910, and in the second charge with having committed the same offence in respect of the account books of the estate between 11th July 1910 and 15th August 1910, and it appeared that most of the sums making up the gross amount charged were received before the period specified in the charge, and the evidence did not disclose any completed act of breach of trust between the dates mentioned in the charge and there was no evidence of any dishonest dealing with the account books before the 15th August 1910: *Held,* as to the first charge, that the error in the charge and the discrepancy between the dates specified therein and the actual dates on which the offence appeared to have been committed, were not a mere irregularity which might be cured by the provisions of s. 537, Cr. P. C. It vitiated the whole trial and the appellant was entitled to an acquittal, *Subramanya Ayyar v. King-Emperor, 5 C. W. N. 866: I. L. R. 25 Mad. 61,* followed. It was not enough

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— s. 222 (2)—*contd.*

to know that there was embezzlement at some time, before during, or after the period charged, because the charge was framed under the special provisions contained in cl. (2) of s. 222, Cr. P. C., and the provision thereto, and it was at any rate necessary to show an act or acts of embezzlement in respect of the gross sum named in the charge or some part of it committed within the space of one year. *Held,* as to the second charge, that the same objection applied to the second charge which however was not bad on the ground that there was a separate offence as regards each account book and the appellant could not be tried for more than three of such offences, the books forming one set of account books of the estate and having been found together in two locked boxes, the keys of which were with the accused. No retrial was ordered in this case as the charges failed not because they were not deficient in point of form, but because they were not supported by the evidence adduced. PROMOTHA NATH RAY *v.* KING-EMPEROR (1912) . . . 17 C. W. N. 479

——— *Act No. XLV of 1860 (Indian Penal Code), s. 408—Criminal breach of trust—Charge of general deficit in accounts, where agent had not only to receive, but also to expend, moneys of his principal.* S. 222, sub-s. (2), of the Code of Criminal Procedure was meant to provide for the case of an agent or subordinate whose duty it might be merely to receive sums of money from time to time and to account for them. It is not suitable to the case of an agent whose employment involves the expenditure of money belonging to the principal as well as its receipt. *Emperor* v. *Ibrahim Khan, I. L. R., 33 All., 36,* referred to. Although transactions which involve civil liabilities may amount to criminal offences, and often do, so that the dividing line between the two in a discussion of the case is almost indistinguishable, the use of the criminal law, not for the purpose of punishing an offender or in the public interest, but as a means of exerting pressure to extract money from an agent, is to be discouraged. EMPEROR *v.* MOHAN SINGH. I. L. R. 42 All. 522

——— ss. 222 (2) and 233—*Penal Code, ss. 409 and 477A—Misjoinder of charges—Criminal breach of trust and falsification of accounts—Illegality.* An accused person was charged with and tried at the same trial for offences under s. 409 and s. 477A of the Indian Penal Code. In respect of the former offence he was charged with criminal breach of trust respecting a lump sum of money composed of numerous items. In respect of the latter offence he was charged with suppressing a large number of documents showing the tender to him of sums of money by the persons liable to pay the same, and with putting false numbers on three of such documents. These documents (called *arzirsals*) related as well to other sums of money as to the sums which the accused was alleged to have embezzled. *Held,* that the principle of s. 222 (2) of the Code of Criminal Procedure could not apply to s. 477A of the Indian Penal Code, and that the framing of the charges against the accused in the manner described was an illegality which vitiated the trial. EMPEROR *v.* KALKA PRASAD (1915)

I. L. R. 38 All. 42

——— ss. 222 (2), 233, 234—

See CHARGE . I. L. R. 41 Calc. 722

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

—— ss. 203, 437—*contd.*

—— *Complaint—Summary dismissal of complaint—Order for further inquiry made without notice to show cause being given to accused. Held,* that it is not necessary to the setting aside of an order under s. 203 of the Code of Criminal Procedure, where the person against whom the complaint was made has never been called on to appear, that notice to show cause should be given to such person. *Angan* v. *Ram Pirbhan, I. L. R. 35 All. 78,* and *Hari Dass Sanyal* v. *Saritulla, I. L. R. 15 Calc. 608,* followed. EMPEROR v. LIAQUAT HUSAIN (1917) **I. L. R. 40 All. 138**

—— *Further enquiry—Complaint dismissed under s. 203, if can be again dismissed under the said section, when further enquiry ordered under s. 437.* Where a further enquiry having been ordered into a complaint dismissed under s. 203, Criminal Procedure Code, the Magistrate, after taking some evidence, again dismissed the complaint under s. 203, Criminal Procedure Code, and the Sessions Judge, being again moved.

25 C. W. N. 312

—— s. 204—

See s. 437 . . **4 Pat. L. J. 456**

—— s. 205—*Indian Penal Code (Act XLV of 1860), s. 326—Purdanashin lady, dispensing with personal attendance in Court—Transfer.* The peti-

High Court in revision made an order allowing the petitioners to appear by pleader before the Magistrate as also in the Court of Session in case

17 C. W. N. 1248

—— ss. 206—*et seq.—Practice—Power and duties of Magistrate inquiring into case triable by Court of Sessions.* When a Magistrate has heard the evidence of the prosecution with entire disbelief, when he considers himself in a position to show that the prosecution witnesses are totally unworthy of credit, and *a fortiori* when, after examining certain witnesses named on behalf of the accused, he has come to the conclusion that evidence given by them is reliable and disproves that given by the prosecution he is well within his discretion in discharging the accused. *Fattu* v. *Fattu, I. L. R. 26 All. 564, Sheo Bux* v. *King-Emperor, 9 C. W. N. 829,* and *In re Bai Parvati, I. L. R. 35 Bom. 163,* referred to. DHARAM SINGH v. JOTI PRASAD (1915) . **I. L. R. 37 All. 355**

—— s. 208—

See COMMITMENT **I. L. R. 42 Calc. 608**

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

—— s. 208—*contd.*

—— *Witnesses, refusal of Magistrate to summon before commitment—Magistrate's discretion.* A Magistrate has a discretion for reasons to be recorded by him to refuse to summon witnesses under s. 208, Criminal Procedure Code (Act XLV of 1898), prior to his making a commitment. Sub-s. (*1*), s. 208, Criminal Procedure Code, contemplates the production of evidence by the prosecution or by the accused without the aid of the Magistrate. Sub-s. (*3*) contemplates the intervention of the Magistrate to secure the attendance of witnesses and in regard to the evidence the Magistrate has a discretion for reason to be recorded by him to refuse to issue process. When therefore s. 210 requires the evidence referred to in s. 208, sub-ss. (*1*) and (*3*), to be recorded before a charge is drawn up, it does not require the Magistrate to record the evidence of witnesses whom in the exercise of the discretion given by sub-s. (3), he has deemed it unnecessary to summon. SESSIONS JUDGE OF COIMBATORE v. KANGAYA MANTRADIYAR (1913) **I. L. R. 38 Mad. 321**

—— s. 209—*Magistrate—inquiry—The case not committed to the Court of Session for want of sufficient grounds—Appeal against the order—Order reversed by the Sessions Judge—Commitment when to be made—Discharge of accused.* When a Com

under s. 209 of the Criminal Procedure Code (Act V of 1898) to discharge the accused. Where the Magistrate entertains any real doubt as to the weight or quality of the evidence, the task of resolving that doubt and assessing the evidence should be left to the Court of Session *Emperor* v. *225,* follow- *I. L. R. 11* ...n v. *Juala, I. L. R. 5 All. 161,* approved. *In re* BAI PARVATI (1910) . . . **I. L. R. 35 Bom. 163**

—— s. 210—

See s. 197 . **I. L. R. 42 Bom. 172**

—— s. 213—

See s. 206 . . **I. L. R. 37 All. 355**

See JURISDICTION OF MAGISTRATE.

I. L. R. 39 Calc. 885

—— *Committal of a case to the Court of Session—Reasons for committal to be given where the case can be tried by the Magistrate—Indian Registration Act (XVI of 1908), s. 83, cl. (2)—Irregularity—Illegality.* Where a Magistrate, who could have tried the case himself under cl. (2) of s. 83 of the Indian Registration Act (XVI of 1908), committed it to the Court of Session without giving any reasons for committal: *Held,* that the reasons for committal must include not merely reasons for not discharging the accused, but reasons for sending him to the Court of Session as the trial could be had either by the Magistrate himself or by the Court of Session; and that the omission to give the reasons was an illegality. EMPEROR v. NANJI SAMAL (1913) **I. L. R. 38 Bom. 114**

—— s. 215—

See s. 197 . **I. L. R. 42 172**

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— **ss. 215 and 478**—*Letters Patent, cl. (15)—Order of commitment by a Judge of the High Court on the Original Side—Appeal on questions of fact only whether permissible.* A witness in a Civil suit before the High Court was committed to the High Court Sessions for trial on charges of perjury. On appeal against the order of commitment, *held*, that assuming such an appeal could be preferred under the general words of cl. (15) of the Letters Patent, s. 215, *Criminal* Procedure Code, which enacts that an order of commitment made by any Civil Court can be quashed only on a point of law, modifies to that extent the general provisions of cl. (15) of the Letters Patent, and that as no point of law is involved in the appeal the order of commitment cannot be quashed. *Quære*, whether an appeal lies under cl. (*15*) of the Letters Patent from an order of commitment by a High Court Judge trying a Civil suit. VENKATAGIRI AYYAR *v.* N. M. FIRM (1920) . . . **I. L. R. 43 Mad. 361**

——— **ss. 221, 223, 350**—

See RIOTING . **I. L. R. 39 Calc. 781**

——— **ss. 221, 222, 223**—*Forgery charge of —Omission to set out intention.* Where the charge under s. 467, Penal Code, did not set out the intention of the accused: *Held*, that this vitiated the charge. HAIDAR ALI PRADHANIA *v.* EMPEROR (1912) . . . . . **17 C. W. N. 354**

——— **s. 222 (2)**—

See PENAL CODE, s. 409.

I. L. R. 33 All. 36

———*Indian Penal Code (Act XLV of 1860), s. 406—Criminal breach of trust —Gross sum specified in charge—Particulars as to time—Defect in charge amounting to illegality—Applicability of s. 537, Cr. P. C., to cure such defect—Retrial if may be ordered where charge fails for want of evidence.* Where the appellant, who was an executor to the estate of one D. M. R. under his will and who was finally called upon on the 15th August 1910 to deliver over to the complainant all money, valuables and papers belonging to the testator's estate, was placed on his trial on two charges under s. 406, Penal Code, and was charged in the first charge with having committed criminal breach of trust in respect of or having dishonestly misappropriated the gross amount specified in the charge between 17th August 1909 and 15th August 1910, and in the second charge with having committed the same offence in respect of the account books of the estate between 11th July 1910 and 15th August 1910, and it appeared that most of the sums making up the gross amount charged were received before the period specified in the charge, and the evidence did not disclose any completed act of breach of trust between the dates mentioned in the charge and there was no evidence of any dishonest dealing with the account books before the 15th August 1910: *Held*, as to the first charge, that the error in the charge and the discrepancy between the dates specified therein and the actual dates on which the offence appeared to have been committed, were not a mere irregularity which might be cured by the provisions of s. 537, Cr. P. C. It vitiated the whole trial and the appellant was entitled to an acquittal, *Subramanya Ayyar v. King-Emperor, 5 C. W. N. 866: I. L. R. 25 Mad. 61*, followed. It was not enough to know that there was embezzlement at some time, before during, or after the period charged, because the charge was framed under the special provisions contained in cl. (*2*) of s. 222, Cr. P. C., and the provision thereto, and it was at any rate necessary to show an act or acts of embezzlement in respect of the gross sum named in the charge or some part of it committed within the space of one year. *Held*, as to the second charge, that the same objection applied to the second charge which however was not bad on the ground that there was a separate offence as regards each account book and the appellant could not be tried for more than three of such offences, the books forming one set of account books of the estate and having been found together in two locked boxes, the keys of which were with the accused. No retrial was ordered in this case as the charges failed not because they were not deficient in point of form, but because they were not supported by the evidence adduced. PROMOTHA NATH RAY *v.* KING-EMPEROR (1912) . . . **17 C. W. N. 479**

——— *Act No. XLV of 1860 (Indian Penal Code), s. 408—Criminal breach of trust—Charge of general deficit in accounts, where agent had not only to receive, but also to expend, moneys of his principal.* S. 222, sub-s. (2), of the Code of Criminal Procedure was meant to provide for the case of an agent or subordinate whose duty it might be merely to receive sums of money from time to time and to account for them. It is not suitable to the case of an agent whose employment involves the expenditure of money belonging to the principal as well as its receipt. *Emperor* v. *Ibrahim Khan, I. L. R., 33 All., 36*, referred to. Although transactions which involve civil liabilities may amount to criminal offences, and often do, so that the dividing line between the two in a discussion of the case is almost indistinguishable, the use of the criminal law, not for the purpose of punishing an offender or in the public interest, but as a means of exerting pressure to extract money from an agent, is to be discouraged. EMPEROR *v.* MOHAN SINGH. **I. L. R. 42 All. 522**

——— **ss. 222 (2) and 233**—*Penal Code, ss. 409 and 477A—Misjoinder of charges—Criminal breach of trust and falsification of accounts—Illegality.* An accused person was charged with and tried at the same trial for offences under s. 409 and s. 477A of the Indian Penal Code. In respect of the former offence he was charged with criminal breach of trust respecting a lump sum of money composed of numerous items. In respect of the latter offence he was charged with suppressing a large number of documents showing the tender to him of sums of money by the persons liable to pay the same, and with putting false numbers on three of such documents. These documents (called *arzirsals*) related as well to other sums of money as to the sums which the accused was alleged to have embezzled. *Held*, that the principle of s. 222 (*2*) of the Code [illegible] Criminal Procedure could not apply to s. 47[illegible] the Indian Penal Code, and that the framin[illegible] charges against the accused in the m[illegible] cribed was an illegality which viti[illegible] EMPEROR *v.* KALKA PRASAD (1915) [illegible]

——— **ss. 222 (2),** [illegible]

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

———— s. 235—*contd.*

original design accomplished so far as that act is concerned. Where a company is formed with the object of defrauding the public, it cannot be said that distinct acts of embezzlement committed in the course of several years form part of the same transaction by reason of such general object CHORAGUDI VENKATADRI *v.* EMPEROR (1910)
I. L. R. 33 Mad. 502

———— *Charges—Misjoinder—Same transaction.* The accused by means of personating a Police Officer obtained from *A* several sums of money on different occasions and on one occasion attempted to obtain another sum: *Held*, that the trial of the accused on a charge under s. 170, Indian Penal Code, and on three charges of extortion in respect of three sums and in the alternative on three charges of cheating in respect of those three sums and on a charge of an attempt at extortion in respect of another sum was not illegal by reason of misjoinder of charges as the offences charged were committed in the same transaction. *Queen-Empress* v. *Wazir Jan, I. L. R. 10 All. 58*, referred to and followed. JAGDISH KUMAR SINHA *v* ATMA RAM (1911)
15 C. W. N. 732

———— *Whether charges under Bihar and Orissa Excise Act, 1915 (B. and O. Act II of 1915), s. 47 (a) and the Opium Act (I of 1878), s. 9 (c) can be tried together—Separate sentences, legality of—General Clauses Act (X of 1897), s. 26.* Where the accused was charged and convicted of having sold opium to a certain person on two occasions, and of being in possession of opium, and was separately sentenced for each conviction: *held*, that neither the joint trial for the two offences nor the separate sentences imposed was illegal. BALI SAHU *v.* KING-EMPEROR
3 Pat. L. J. 433

———— ss. 235 (1) and 537—*Misjoinder of charges at one trial—vitiates whole trial and is not a mere irregularity—meaning of "same transaction" explained.* Accused (appellant) was anxious to marry the daughter of one Jagan Nath, but her father objected and arranged to marry her to another man in February 1920 and on 31st January the ceremony of *lagan*, which precedes the actual marriage by a few days, was celebrated. On 2nd February, between noon and 1-30 P.M., accused gave some sweetmeat poisoned with arsenic to Amir Singh, aged 9 years, and on the same day about 5 P.M. he gave a similar sweetmeat to Dalip Singh, aged 12 years, both being sons of Jagan Nath. After eating the sweetmeats the 2 boys were taken ill. Dalip Singh recovered but Amir Singh died the next day. The Sessions Judge

vitiates the whole trial, and the mere fact that the accused has not been prejudiced by the procedure is not a valid ground for condoning the defect. *Subramania Ayyar* v. *King-Emperor*, (*I. L. R. 25 Mad. 611 P. C.*), followed. *Held further*, that no hard and fast rule can be laid down for

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

———— ss. 235 (1) and 537—*contd.*

determining the question whether the charges in a particular case constitute one "transaction." The answer to the question depends, to a large extent, upon the peculiar circumstances of each

of action and purpose. It is not necessary that the acts constituting the crimes should have been committed on the same occasion; but it is sufficient that, though separated by a distinct interval of time, they are closely connected by continuity of purpose and progressive action towards a single object. *Emperor* v. *Sherufali Allibhoy* (*I. L. R. 27 Bom. 135*) and *Emperor* v *Datto Hanmant* (*I. L. R. 30 Bom. 49*), referred to: *Held also*, that upon the facts of the present case the trial did not transgress the rules as to the joinder of charges because the charges in this particular case did constitute one transaction. PAHLAD *v.* THE CROWN . . . . **I. L. R. 1 Lah. 562**

———— ss. 236, 195, 537 (*b*)—*Indian Penal Code (Act XLV of 1860), s. 193—Perjury arising from contradictory statements—Alternative charge—Series of acts consisting of contradictory statements—Judicial proceeding—Statement taken under s. 164—Contradictory statements made before different Courts—Sanction of each Court essential—No interference in revision unless want of sanction occasions failure of justice.* A statement recorded by a Magistrate in the course of a police investigation under s. 164 of the Criminal Procedure Code is not evidence in a stage of a judicial proceeding within the meaning of Explanation 2 to s. 193 of the Indian Penal Code, 1860. *Held*, by MACLEOD, C. J., and

in any other case" used in s. 193 of the Indian Penal Code, it can be linked with a statement which is evidence in a stage of the judicial proceeding following on the investigation, so that the two can be said to be a series of acts on which an alternative charge can be framed under s. 236 of the Criminal Procedure Code of intentionally

under s. 195 of the Criminal Procedure Code, 1898, before the Court can take cognizance of the charge. If, however, want of sanction has not occasioned a failure of justice it cannot be made the basis of interference in revision. *Sundar Dasadl* v. *Sital Mahto* (1900) *28 Cal. 217*, referred to. EMPEROR *v.* PURSHOTTAM ISHWAR (1920)
I. L. R. 45 Bom. 834

———— ss. 236, 237—

See AUTREFOIS ACQUIT **I. L. R. 45 Calc. 727**

See COCAINE **I. L. R. 41 Calc. 537**

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

———— ss. 236, 237—*contd.*

———————— *Indian Penal Code (Act XLV of 1860), ss. 147, 323—s. 237, Criminal Procedure Code, when applies—Conviction of rioting without any charge under s. 423, Indian Penal Code—Conviction under s. 323, Indian Penal Code, by Appellate Court after setting aside conviction of rioting, legality of.* The petitioners were convicted by the Magistrate, under s. 147, Indian Penal Code. On appeal, the Sessions Judge set aside the conviction and sentence under s. 147, Indian Penal Code, and convicted the petitioners under s. 323, Indian Penal Code. No charge had been framed against the petitioners under s. 323, Indian Penal Code : *Held,* that s. 237 has to be read with s. 236. If the facts of the case do not fall under s. 236, s. 237 has got no application. There was no charge framed against the petitioners for an offence of causing hurt, and they had therefore no opportunity to defend themselves on this charge and the conviction and sentence must be set aside. GENU MANJHI *v.* THE KING-EMPEROR (1914)

18 C. W. N. 1276

———— s. 237—

See PENAL CODE, SS. 417, 420 AND 511.

1 Pat. L. J. 391

———————— *Conviction of rioting with common object of assault—Acquittal by Appellate Court on charge of rioting and conviction of assault, if proper—Necessity of finding against individual accused on charge of assault.* The petitioners were charged under s. 147, Indian Penal Code, the common object of the alleged unlawful assembly as stated in the charge being to assault the police. No charge under s. 353 or s. 323 was framed. The Magistrate convicted the petitioners under s. 147, Indian Penal Code. The Sessions Judge in appeal acquitted the petitioners of the offence of rioting and convicted them under s. 353, Indian Penal Code, in respect of the assault committed upon the several police officers. The Sessions Judge did not find which police officer was assaulted by which petitioner: *Held,* that the Sessions Judge was wrong in convicting the petitioners of an offence under s. 353, Indian Penal Code, the petitioners not having been called upon to answer any such charge. That in the view taken by the Sessions Judge of the case, a finding as to which police officer was assaulted by which petitioner was essential. HAR NARAN SARDAR *v.* THE EMPEROR (1914) . . . **18 C. W. N. 1274**

———————— *Charge under s. 457, Indian Penal Code, of house-breaking by night with the object of committing theft, conviction under s. 456, for house-breaking by night with the object of carrying on intrigue with the complainant's wife —Propriety of conviction, without amendment of charge—Indian Penal Code (Act XLV of 1860), ss. 456, 457.* The accused was tried on a charge under s. 457 of the Penal Code of breaking open at night the door of the complainant's house with the object of committing theft and was convicted under s. 456 for having committed the offence of house-breaking by night with the object of carrying on an intrigue with the complainant's wife : *Held,* that though it cannot be laid down as a general rule that in all cases a prosecution for house-trespass with the alleged object of theft must fail if that object is not proved, when a charge has been definitely framed in which theft is alleged as the object the accused cannot be convicted of house-trespass with some other object without an amendment of the original charge unless the Court is satisfied that he has not been in any way prejudiced. HAJARI SONAR *v.* KING-EMPEROR.

26 C. W. N. 344

———— ss. 237, 238, 423—*Person convicted of an offence cannot on appeal be convicted of abetment of such offence.* The power of an Appellate Court under s. 423 of the Code of Criminal Procedure to alter a finding must be used in accordance with the provisions of ss. 237 and 238 of the Code. Where a person who has been convicted of an offence has appealed, the Appellate Court cannot, after acquitting him of such offence, convict him of the abetment of such offence. PADMANABHA PANJIKANNAYA *v.* EMPEROR (1909)

I. L. R. 33 Mad. 264

———— s. 238—

See LURKING HOUSE-TRESPASS.

I. L. R. 44 Calc. 358

See PENAL CODE, s. 498.

I. L. R. 38 All. 276

———————— *Trial with the aid of assessors—Conviction of the accused for a minor offence which is triable only by a jury—Trial regular —Practice and procedure.* The accused was tried for an offence punishable under s. 302 of the Indian Penal Code by the Sessions Judge of Belgaum with the aid of assessors. At the close of the trial and after the opinions of the assessors were recorded, the learned Judge was of opinion that though the accused was not guilty of the offence charged, he was still guilty of the minor offence punishable under s. 326 of the Code. Accordingly, in the same trial he convicted the accused of the minor offence, though it was triable in that District only by a jury. On appeal :— *Held,* that the Sessions Judge was competent to convict the accused of an offence punishable under s. 326 of the Indian Penal Code, even though it was triable by a jury. PER CRUMP J. :—S. 238 of the Criminal Procedure Code, 1898, invests the Court trying the offence (however constituted) with authority to find as an incident to such trial that certain facts only are proved in the trial which facts constitute a minor offence though such minor offence is not triable by the Court as constituted. PER SHAH, J. :—The necessary implication of s. 238 appears to be that there need be no separate trial with reference to the minor offence. According to the section even the charge is not required to be made. *Pattikadan Ummaru* v. *Emperor (1902) 26 Mad. 243,* referred to. EMPEROR *v.* CHANGOUDA (1920)

I. L. R. 45 Bom. 619

———— s. 239—

See s. 197 . **I. L. R. 43 Bom. 147**

See s. 222 . . **16 C. W. N. 600**

See JOINT TRIAL . **1 Pat. L. J. 65**

See JURY . **I. L. R. 37 Calc. 467**

See MISJOINDER. **I. L. R. 38 Calc. 453**

I. L. R. 42 Calc. 760, 1153

I. L. R. 46 Calc. 741

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— s. 239—*contd.*

——— *Joint trial of principal and abettor—Prejudice—Re-trial by another Judge.* Where there were three charges under ss. 408 and 408—109, Indian Penal Code, against two accused persons in respect of three sums said to have been defalcated on three different dates, and the Sessions Judge tried the two accused

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cipal offender and the abettor either iointly or separately and the manner in which this discretion should be exercised must depend on the facts of each case. The High Court, on a consideration of the circumstances of the case, held that the accused should not have been tried on the charges jointly, and set aside the convictions and sentences, and directed that the re-trial, if any, should take place before another Sessions Judge. DWARKA SING *v.* KING-EMPEROR (1913) **19 C. W. N. 121**

——— *"Same transaction," determining factor as to.* In deciding whether offences are so connected as to form one and the same transaction the determining factor is not so much proximity in time as continuity and community of purpose and object. S. 239, Criminal Procedure Code is only an enabling section and does not in any way trammel the discretion of the Court. LEGAL REMEMBRANCER, BENGAL *v.* MON MOHAN ROY (1914) . **19 C. W. N. 672**

——— *Procedure—Joint trial —Thief and receiver triable together. Held,* that, in the absence of evidence clearly disassociating the act of receiving the stolen property from the theft thereof, the theft and the receipt of the stolen property may be considered as parts of the same transaction. It would not, therefore, be illegal to try thief and the receiver jointly. *Emperor v. Balabhai Hargovind, 6 Bom. L. R. 517,* followed. EMPEROR *v.* BHIMA (1916)

I. L. R. 38 All. 311

——— ss. 239, 233 and 235—*"In the same transaction"—joint trial.* Where the first accused seized a woman with the intention of forcibly having sexual intercourse with her and was attacked by her husband, and the second and third accused thereupon appeared and assaulted the husband, *held,* that in the absence of proof that the three accused were acting for a common purpose in execution of a common design a joint trial in which the first accused was charged under s. 354 of the Penal Code and the second and third accused under s. 323, was illegal. TEPANIDHI GOBINDRA CHANDRA BHARATI *v.* THE KING-EMPEROR

5 Pat. L. J. 11

Ac [illegible]
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per [illegible] *interpreted to him before his signing it—Record whether admissible in proof—Irregularity or illegality—P*[illegible] *liminary* [illegible] *accused* [illegible] *Judge to* [illegible] *and 193,* [illegible] of a witness is not read over and interpreted to him before it is signed by him, he cannot be prosecuted for perjury on such deposition under s. 193 of the Indian Penal Code. Omission to interpret and read over the deposition to the witness is not a mere irregularity but renders the record inadmissible in proof of the deposition under s. 91 of the Evidence Act, as the guarantee provided by the law for its accuracy has been substantially ignored and it is dangerous and against public policy to make a witness liable on such a wholly unsafe record. *Bogra* v. *Emperor, I. L. R. 34 Mad. 141,* distinguished. *Meango* v. *Baiah, 45 I. C. 507,* dissented from. A Sessions Judge, acting under ss. 435 and 436 of the Criminal Procedure Code, cannot direct committal to the Sessions Court of an accused who has been discharged by a Sub-Magistrate in a preliminary enquiry into offences under ss. 193 and 471 of the Indian Penal Code for forgery of a promissory-note not being a Government of India Promissory-note, as such offences are not exclusively triable by a Court of Sessions. S. 239 of the Criminal Procedure Code prohibits only a joint trial and not a joint preliminary inquiry into a case against several persons for the purpose of committal to the sessions. CHENCHIAH *v.* KING-EMPEROR (1919)

I. L. R. 42 Mad. 561

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— ss. 239, 435, 436, 439—*contd.*

——— s. 241—

See s. 14 . . **3 Pat. L. J. 291**

——— s. 242—

See s. 117 . **I. L. R. 34 Mad. 139**

See CHARGE . **I. L. R. 42 Calc. 957**

——— ss. 246, 247—*Examination of complainant if absolutely necessary—Examination of witnesses on date of hearing in the absence of complainant, if vitiates trial.* S. 244 of the Code of Criminal Procedure does not make the examination of the complainant himself in a summons case absolutely necessary. S. 247, Cr. P. C, gives the Magistrate a discretion to adjourn the hearing on any day when the complainant is absent and the examination of witnesses on any such day in the absence of anything to show that the accused was in any way prejudiced does not vitiate the trial. SARAFDI HAZI *v.* KING-EMPEROR

24 C. W. N. 199

——— ss. 244 and 540—*Right of accused to summon witnesses—Second application by accused to Magistrate not seised of the case—Procedure—Affidavit.* When an accused person has been called upon to make his defence and has applied

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dure. The accused has no right to put in a second application *simpliciter* for the summoning of more witnesses, nor has the Court any power

[illegible]

——— s. 247—

See s. 244 . . [illegible]

See ACQUITTAL . I. [illegible]

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

———— s. 250—*contd.*

of discharge or acquittal—Proviso, meaning of—Imprisonment in default of payment of fine, when to be ordered. Where in discharging the accused under s. 253, Criminal Procedure Code, the Magistrate in his order of discharge declared the case to be vexatious and directed the complainant under s. 250, Criminal Procedure Code, to pay compensation to the accused subject to any cause being shown by him, and no cause being shown by the complainant the Magistrate the day after made his previous order absolute and further directed the complainant to suffer simple imprisonment for 30 days in default of payment of the compensation: *Held*, that the Magistrate's order directing the payment of compensation was in strict compliance with s. 250, Criminal Procedure Code. It is sufficient that the Magistrate fixed the compensation in his order of discharge. The proviso to s. 250 clearly contemplates that the direction in the first paragraph of the section shall be considered as in the nature of a rule and that that rule shall not be made absolute until the complainant has shown cause. *Haru Tanti* v. *Satish Roy, I. L. R. 38 Calc. 302*, distinguished. So far as the sentence of imprisonment in default of payment was concerned, the High Court held that there was an obvious error and ordered it to be amended in terms that the compensation shall be recovered as if it were a fine and in the event of its not being so recovered there shall be simple imprisonment. LALIT MOHAN SINGHA *v.* KUNJA BEHARY GHOSH (1913) **18 C. W. N. 702**

———— *Compensation order for payment of, by complainant—Opportunity to show cause.* The Magistrate after acquitting the accused made the following order:—"Accused acquitted, complainant to pay compensation to each of the accused under s. 250, Criminal Procedure Code, and show cause why he should not pay. Complainant is absent. His brother verbally shows cause which is insufficient; order made absolute." *Held*, that the complainant was in fact given no opportunity of showing cause and the order should be set aside. SUBANS SINGH *v.* MOHABIR PROSAD SINGH (1914)

18 C. W. N. 1277

———— *Compensation—Accused tried on two charges and acquitted on one, but convicted on the other.* S. 250 of the Code of Criminal Procedure is only applicable where the trying court discharges or acquits the accused altogether. It cannot be made use of where the accused, being tried on two charges is acquitted on one, but convicted on the other. *Mukti Bewa* v. *Jhotu Santra, I. L. R. 21 Calc. 53*, followed. MUHAMMAD ALI KHAN *v.* RAJA RAM SINGH (1918)

I. L. R. 40 All. 610

———— *Frivolous or vexatious accusation—Compensation—Against whom order for compensation can be made.* It is not necessary that the person against whom an order for compensation under s. 250 of the Code of Criminal Procedure is made should be the person who himself gives information to a Magistrate in consequence of which another is accused of an offence, provided that he is the person upon whose information an accusation is made. EMPEROR *v.* BAHAWAL SINGH (1917) **I. L. R. 40 All. 79**

———— *Complaint or information given to police officer.* Where a criminal proceeding was started, not upon the petitioner's complaint or upon information given by him to a police officer or to a Magistrate, as required by the Criminal Procedure Code, 1898, s. 250, but upon evidence obtained by the police upon enquiry instituted by them: *Held*, the petitioner could not be said to have instituted the proceedings, even though his statement was taken, with that of others during the enquiry by the police. SARJU PRASAD SINGH *v.* THE KING-EMPEROR

1 Pat. L. J. 106

———— *Compensation for frivolous or vexatious complaint—Bombay Public Conveyances Act (Bom. Act VI of 1863), s. 28—Proceeding to recover legal fare, not complaint for an offence.* A proceeding to recover legal fare, under s. 28 of the Bombay Public Conveyances Act, 1863, is not a complaint for an offence; and even if frivolous or vexatious, no order for compensation can be passed under s. 250 of the Criminal Procedure Code, 1898. *In re* VALLI MITHA (1919)

I. L. R. 44 Bom. 463

———— *Order for compensation without examining all the witnesses of complainant, legality of.* In a case of rioting and intimidation, the Magistrate, after examining only some of the witnesses of the complainant, discharged the accused and, after asking the complainant to show cause why he should not be ordered to pay compensation to the accused, passed an order for compensation without examining the remaining witnesses in spite of his request to do so: *Held*, that the order was not illegal but one that should only be made in very exceptional circumstances. APPALANARASAYYA BHUKTA *v.* EMPEROR

I. L. R. 44 Mad. 51

———— ss. 250, 423—*Compensation, order for—Appeal—Notice to the accused, order without improper but not illegal—Complaints, false as well as frivolous or vexatious.* In appeals under s. 250 of the Code of Criminal Procedure, notice should ordinarily be given to the accused even though failure to give notice may not render the proceedings of the Court illegal. *Emperor* v. *Palaniappavelan, I. L. R. 29 Mad. 187* approved. *Ambakkagari Nagi Reddy* v. *Basappa of Medimakulapalli, I. L. R. 33 Mad. 89*, followed. *Guruswami Naicken* v. *Tirumurthi Chetty, 27 Mad. L. J. 629* explained. *Alagirisami Nayudu* v. *Balakrishnasami Mudaliar, I. L. R. 26 Mad. 41, Imperatrix* v. *Sadashiv, I. L. R. 22 Bom. 549, In the matter of the petition of Umrao Singh* v. *Fakir Chand, I. L. R. 3 All. 749*, and *In the matter of Teacotta Shekdar, I. L. R. 8 Calc. 393*, referred to. S. 250 not only refers to false complaints but to frivolous and vexatious complaints as well. *Emperor* v. *Bindesri-Prasad, I. L. R. 26 All. 512*, and *Beni Madhab Karim* v. *Kumud Kumar Biswas, I. L. R. 30 Calc. 123*, referred to. *Ram Singh* v. *Mathura, I. L. R. 34 All. 354*, doubted. *Per* SPENCER, J. S. 250 does not declare what the powers of an Appellate Court are in disposing of appeals under clause (3) of the section. It is therefore unnecessary to invoke the aid of s. 423 for the purpose. *Per* SESHAGIRI AYYAR, J. The powers of the Appellate Court to grant redress have to be gathered from s. 423. S. 250 is not self-contained as are sections relating to grant of sanction and to convictions for contempt (ss. 195 and 486).

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

———— ss. 250, 423—*contd.*

Chapter XXXI of the Criminal Procedure Code applies to appeals against orders under s. 250 of the Code. VENKATARAMA v. KRISHNA (1915)

I. L. R. 38 Mad. 1091

———— ss. 250, 537—*Frivolous or vexatious complaint—Compensation—Procedure—Irregularity.* A Magistrate, after recording the evidence for the prosecution and the statement of the accused, came to the conclusion that the complaint was unfounded and discharged the accused, and in the same order called upon the complainant to show cause, under s. 250 of the Code of Criminal Procedure, why he should not pay compensation to the accused. Four days later, after hearing the

537. *Jugal Kishore* v. *Abdul Karim, All. Weekly Notes, (1905) 214*, and *Emperor* v. *Punamchand Hirachand, 8 Bom. L. R. 47*, followed. *In re Safdar Husain, I. L. R. 25 All. 315*, not followed. GHURBIN KOERI v. KHALIL KHAN (1914)

I. L. R. 36 All. 132

———— ss. 253, 369—

See REVIEW.

I. L. R. 38 Calc. 828

———— ss. 253 (2), 350 and 437—

See AUTREFOIS ACQUIT.

I. L. R. 38 Mad. 585

———— ss. 253, 259—*Warrant case—Discharge of accused for absence of complainant.* In a warrant case an order discharging an accused person on account of the absence of the complainant cannot be made under s. 253, Criminal Procedure Code. Such an order can only be made under s. 259 and in a case where the offence may be lawfully compounded. ALEXANDER v. CONNORS (1916)

20 C. W. N. 698

———— s. 254—

See s. 200 . . I. L. R. 37 All. 628

———— *Commitment of case which Magistrate was competent to try—Commitment quashed—Indian Penal Code, s. 222.* It is not competent to a Magistrate to commit a case which it is within his jurisdiction to try, unless he is of opinion that the accused, if guilty, cannot be adequately punished by him. EMPEROR v. BINDESHRI GOSHAIN (1919)

I. L. R. 41 All. 454

———— ss. 254, 347—*Commitment to Sessions by Magistrate competent to try and adequately punish, legality of.* The terms of s 347 of the Criminal Procedure Code are general and give a Magistrate who is empowered to commit a discretion in committing cases for trial which is not limited by s. 254 so as to make it obligatory on him to try every case which he can adequately punish. *Queen-Empress* v. *Kayemullah Mandal, I. L. R. 24 Calc. 429, King-Emperor* v. *Dharam Singh, 1 M. L. T. 61*, and *Emperor* v. *Jaymohan, 11 Cri. L. J. 54*, not followed. *In the matter of Chinnamariyadu, I. L. R. 1 Mad. 289*, applied. CROWN PROSECUTOR, THE v. BHAGAVATHI (1918)

I. L. R. 42 Mad. 83

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd*

———— ss. 255, 256, 271, 272 and 428—

See EVIDENCE ACT (I OF 1872) s. 21.

I. L. R. 36 Mad. 457

———— ss. 255, 342—*Evidence Act (I of 1872), s. 30—Confession of co-accused, admissible under—Separate trials not necessary where confession made during trial.* When before a Magistrate in a statement under s. 347, Criminal Procedure Code, certain accused confessed the crime and implicated their co-accused and further under s. 255 (*1*), pleaded guilty to the charges: *Held*, that it was not necessary to try the co-accused separately to enable the confessions to be used against them under s. 30, Indian Evidence Act. *Queen-Empress* v. *Lakshmayya Pandaram, I L. R. 22 Mad, 491*, dissented from. *Queen-Empress* v. *Pirbu, I. L. R. 17 All. 524*, and *Queen-Empress* v. *Pahuji, I. L. R. 19 Bom. 195*, distinguished. *Re* BATI REDDI (1913) . I. L. R. 38 Mad. 302

See CROSS EXAMINATION.

I. L. R. 37 Calc. 236

———— *Compensation for making a frivolous or vexatious complaint—Consequential order—S. 423, sub-s, 1, cl. (d)—Power of Appellate Court under.* An Appellate Court can pass an order against the complainant awarding compensation to the accused under s. 250, Criminal

v. *Chittan, I L. R. 28 All. 625*, dissented from. KARI SINGH v. TUFANI DHANUK (1909)

14 C. W. N. 212

———— s 256—

examine prosecution witnesses—Magistrate, refusal of, illegal—Prejudice—Onus on prosecution. When a summons-case and warrant-case are tried together, the procedure to be followed is that pre-

a warrant-case is not proceeded with, but a charge be framed only in respect of the offence triable as a summons-case, the accused is entitled to recall and cross-examine the prosecution witnesses under s. 256 of the Code of Criminal Procedure, as he

thereby. *Re* SOBHANADRI (1915)

I. L. R. 39 Mad. 503

———— ss. 256 and 257—

———— *Right of accused after charge to recall prosecution witness for further cross examination—Absolute or qualified right—Applicability of s. 256 to witnesses not present before Court—Waiver by counsel, whether binding on accused—Entering upon defence, meaning of—Evidence Act (I of 1872), sec. 33—Deposition of prosecution witness cross-examined before charge—No opportunity for further ...*

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

———— **ss. 256 and 257**—*contd.*

—*Deposition whether admissible at the trial.* S. 256, Criminal Procedure Code, confers an absolute and unqualified right on the accused to recall for further cross-examination only such of the witnesses as are still before the Court and have not been discharged from further attendance. After the charge had been framed the accused pleaded not guilty and mentioned to the Court that he had witnesses to examine: *Held*, that he had entered upon his defence and an application for further cross-examination of a witness discharged from attendance must be deemed to have been made under s. 257. Waiver by counsel of further cross-examination in case a charge is framed cannot prejudice the right of the accused under ss. 256 and 257, Criminal Procedure Code. A deposition of a prosecution witness is admissible in evidence if the accused had an opportunity of cross-examining him before the charge and there was no opportunity for further cross-examination after charge. LOCKLEY *v.* KING-EMPEROR (1920)
I. L. R. 43 Mad. 411

———— *witness, right of accused to cross-examine—duty of court to secure attendance.* After a charge had been framed against the accused he applied for four of the prosecution witnesses to be re-summoned for cross-examination. The Magistrate ordered him to pay Rs. 20 as process fees to secure the attendance of the four witnesses and this was done. One of them did not obey the summons and the accused applied to the court to re-summon him. The Magistrate ordered this to be done on condition that a further sum of Rs. 20 was deposited. The accused did not comply with this condition and the witness was not re-summoned: *Held*, that in the absence of a recorded finding that the application to re-summon the witness was frivolous and vexatious and would defeat the ends of justice, the Magistrate was bound to secure the attendance of the witness. RAMYAD SINGH *v.* THE KING-EMPEROR
5 Pat. L. J. 94

———— **ss. 256, 258, 417**—*Penal Code (Act XLV of 1860), s. 406—Appeal by Local Government against acquittal—Powers and duties of the High Court—Order of acquittal passed after cross-examination of prosecution witnesses subsequent to framing of charge.* The accused was placed on his trial for having committed criminal breach of trust in respect of some bales of jute. The accused admitted his liability. The trying Magistrate framed a charge under s. 406, Indian Penal Code, and after cross-examination of the witnesses for the prosecution acquitted the accused under s. 258, Criminal Procedure Code, holding that the case was one of civil dispute: *Held* (on an appeal by the Local Government under s. 417, Criminal Procedure Code), that in an appeal from an acquittal the High Court could not interfere unless the judgment of the Court below was wrong and perverse or without jurisdiction and based upon obvious errors in procedure, and there being nothing of the kind in the case, the High Court should uphold the decision of the Magistrate, even though wrong, because it would be based at the most on a doubtful weighing of facts and not on any irregularity or negligence or other matter owing to the jurisdiction or the regularity of the trial. That the order of acquittal having been passed subsequent to the framing of the charge and after the cross-examination of the witnesses for the prosecution, was not irregular or without jurisdiction. DEPUTY LEGAL REMEMBRANCER OF BENGAL *v.* AMULYA DWAN (1913)
18 C. W. N. 666

———— **s. 258**—

See s. 248 . **I. L. R. 37 Bom. 369**

See s. 439 . . **18 C. W. N. 1244**

———— **s. 259**—

See s. 247 . **I. L. R. 41 Mad. 727**

See s. 253 . . **20 C. W. N. 698**

———— **s. 260**—

See COMPANIES ACT (VI OF 1882), s. 74.
I. L. R. 35 All. 173

See WORKMAN'S BREACH OF CONTRACT ACT 1859 . **I. L. R. 43 All. 281**

———— **cl. (1)**—*Bengal Tenancy Act (VIII of 1885), s. 71—Paddy cut and carried away by landlord from tenant's land, value of, for summary trial for theft.* Since a tenant is entitled to the exclusive possession of the whole produce until it is divided under s. 71 of the Bengal Tenancy Act, his complaint against landlord for theft for having cut and carried away paddy worth Rs. 88 of which the latter was only entitled to one half, cannot be summarily tried by a Magistrate as the value of the property in this case must be regarded as Rs. 88 and not Rs. 44 only. HABOO *v.* SHEIKH KARIMAN (1916)
20 C. W. N. 1212

———— *Summary procedure adopted in the middle of a trial, if legal—Such change of procedure causing prejudice to accused—Illegality of conviction—Trial before new Magistrate.* The petitioners were summoned under ss. 186 and 206, Indian Penal Code. After the examination in chief of the witnesses for the prosecution in the regular manner the Magistrate being of opinion that no offence under s. 206 was made out changed the procedure to that applicable to summary trials and ultimately convicted the petitioners under s. 186, Indian Penal Code: *Held*, that the procedure adopted by the Magistrate was not authorised by law and caused prejudice to the accused and the conviction was therefore liable to be set aside. GOSTA BEHARY BASU *v.* BAISTUM DAS DEURA . . . . **26 C. W. N. 831**

———— **s. 263**—*Hearing and recording of evidence—Complainant and his witnesses, examination of—Procedure—Practice.* S. 263 of the Criminal Procedure Code does not excuse the Magistrate from hearing the evidence of all witnesses. In all criminal cases the complainant and such witnesses as he may produce must be examined, whether their evidence is required to be recorded or not, and the case must be decided upon the effect of their evidence. JABBAR SHAIK *v.* TAMIZ SHAIK (1912) **I. L. R. 39 Calc. 931**

———— **ss. 263, 342**—

See SUMMARY TRIAL.
I. L. R. 41 Calc. 743

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

———— ss. 263 and 355—

See SUMMARY TRIAL.

I. L. R. 48 Calc. 280

———— ss. 268 and 537—*Trial by Sessions Judge with the aid of assessors—Evidence recorded by the Judge alone after the assessors had been discharged—Illegality.* Where a Sessions Judge is trying a case with the aid of assessors, it is the Judge plus the assessors who constitute the Court, not the Judge alone. Where, therefore, a Sessions Judge recorded evidence after the assessors had been discharged, it was held that this was a material irregularity which vitiated the trial. *Queen-Empress* v. *Ram Lal, I. L. R. 15 All. 136,* followed. EMPEROR *v.* JAISUKH

I. L. R. 43 All. 125

———— ss. 271, 272—

See EVIDENCE ACT, s. 21.

I. L. R. 36 Mad. 457

———— ss. 271, 272, 308, 403—

See AUTREFOIS ACQUIT.

I. L. R. 41 Calc. 1072

———— s. 282—*Jury—Juror discharged during trial and fresh juror substituted—Trial not recommenced—Invalidity of proceedings.* On trial by a jury, after two witnesses had been examined, one of the jurors was discovered to be deaf and was discharged and another juror sworn in his place. The trial, however, was not commenced afresh, but the evidence given by the two witnesses was read over to and admitted by them: *Held,* that this procedure was inadmissible and the trial so held invalid. EMPEROR *v.* NARAIN (1914)

I. L. R. 36 All. 481

———— s. 284—*Assessors—Trial with only one duly appointed assessor—Trial illegal.* Of two assessors assisting the Sessions Judge in the trial of a sessions case, one only had been duly sum-

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Magistrate: *Held,* that in these circumstances there was no lawful trial before a lawfully constituted tribunal, and that a new trial must be ordered. *Queen-Empress* v. *Badri, All. W. N. (1894), 201,* followed. EMPEROR *v.* MAN SINGH (1913) . . . *I. L. R.* 35 All. 570

———— ss. 284 and 285—*Trial with assessors—one assessor absent—person not on official list of assessors acting as assessor—validity of trial.* Where one of two assessors who had been summoned to assist the Sessions Judge in a trial for forgery was absent on the day when the trial opened, and the Judge ordered another person who was not on the official list of assessors to act as assessor: *held,* that the trial was illegal. BALAK SINGH *v.* THE KING-EMPEROR

3 Pat. L. J. 141

———— s. 285—

See s. 14 . . 3 Pat. L. J. 291

———— s. 287—

See PRACTICE . I. L. R. 40 Bom. 220

———— ss. 287 and 310—*previous conviction, when evidence of, may be tendered—Evidence Act (I of 1872), ss. 14 and 54.* S. 287 of the Code of

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

———— ss. 287 and 310—*contd.*

Criminal Procedure, 1898, permits a previous statement of the accused to be read as a part of the case for the prosecution only so far as such statement refers to the offence for which the accused is being tried and not so far as it relates to a previous conviction. The latter portion cannot be read out to the jury or assessors under s 310 until they have given their verdict. Evidence of the previous conviction of an accused person amounts to evidence of bad character and is not admissible under s. 54 of the Evidence Act, 1872, unless and until the accused produces evidence of good character. TEKA AHIR *v.* THE KING-EMPEROR . . . 5 Pat. L. J. 706

———— ss. 289, 292—

See RIGHT OF REPLY.

I. L. R. 43 Calc. 426

———— s. 291—

See WITNESS . I. L. R. 47 Calc. 758

———— ss. 293, 294—

See LOCAL INSPECTION

I. L. R. 37 All. 340

———— s. 295—

See s. 14 . . 3 Pat. L. J. 291

See MAGISTRATE I. L. R. 39 Calc. 119

———— s. 297—*Charge to jury—Misdirection—Omission to tell the jury that they could draw inference against the prosecution, when material*

[illegible]

cies in the prosecution evidence—Retrial—Indian Penal Code (Act XLV of 1860), s. 304. Where certain material witnesses named in the first

[illegible]

Nath Banerjee
s. c. 13 C. W.
. RAM MONDAL *v.*
C. W. N. 142

———— ss. 297, 298—*Duty of Judge in charging jury—Judge in charging jury if bound to explain law on exceptions reducing murder to culpable homicide when no exception pleaded and when there is no evidence of that—Withdrawal of case under s. 304, Indian Penal Code, if necessarily follows from*

[illegible]

meaning [illegible] *tion—Evidence Act (I of 1872), s. 105—Letters Patent, 1865, s. 26—Review of Criminal case decided by High Court in Original Criminal Jurisdiction on certificate of Advocate-General—Statement by presiding Judge as to what was* [illegible]

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

—— ss. 297, 298—*contd.*

trial—Jurisdiction of High Court to consider case when errors alleged in certificate not established. The accused was tried and convicted in the Criminal Sessions of the High Court. He was placed on his trial on charges under ss. 302, 304 and 326, Indian Penal Code, to which he pleaded not guilty. He was defended by counsel who argued that the case against the accused was one of murder or nothing and the jury could not convict him of murder on the meagre and unsatisfactory testimony before the Court. Grave and sudden provocation was no part of the defence case. The Judge in charging the jury laid down the law under s. 302, Indian Penal Code, but not that under s. 304 or the exceptions contained in s. 300. He observed that he did not see that there was any evidence of any of the exceptions provided for in s. 300. He did not explain to the jury the application of the exception of provocation to the facts of the case. The jury found the accused guilty under s. 302 by a majority of 8 to 1 and the Judge agreeing with the verdict gave judgment in accordance therewith. No verdict was taken on the charges under ss. 304 and 326, Indian Penal Code. The case came up before a Full Bench on a certificate granted by the Advocate-General under s. 26 of the Letters Patent. *Held*, that a statement by the Trial Judge as to what took place at the trial is conclusive. That there was no illegality in not taking the verdict of the jury on the charge under s. 304, Indian Penal Code. That where there is no misdirection or other error as certified by the Advocate-General under s. 26 of the Letters Patent his certificate is misconceived and the High Court has no power to interfere. It is not within its power to reopen the case and express any opinion on the merits. That in the present case in the absence of any direct evidence of grave and sudden provocation or of facts from which this exception could be legitimately inferred the Judge was correct in excluding enquiry into the exception. That under s. 105 of the Evidence Act the Court has to regard the absence of grave and sudden provocation as proved until the contrary is proved by the accused on whom the onus lies. *Per* JENKINS, *C. J.* That it is not impossible under the law to leave the case to the jury under s. 304, Indian Penal Code, after holding that the exceptions enumerated in s. 300 do not apply to the circumstances of the case. That under ss. 297 and 298, Criminal Procedure Code it comes within the duty of the Judge to determine whether any evidence has been given on which the jury can properly find the question for the party on whom the onus of proof lies. It is not enough to say that there was some evidence. There must be evidence on which the jury might reasonably and properly conclude the fact to be established. That the duty of the Judge in charging the jury is to lay down the law in reference to the case presented to the Court and the facts of the case and not to perplex the minds of the jury with considerations that are outside the legitimate scope of the enquiry. That the conduct of a case by counsel is not a negligible factor even in a criminal suit though it may not conclude the accused and in approaching the question whether the Judge rightly decided as a matter of law that there was no evidence of any of the exceptions it is relevant to consider how the accused's case was placed before the Court. *Per* STEPHEN, *J.* That the propriety and not the possibility of an inference is the test by which a Judge should decide whether or not he should suggest a case for the consideration of the jury on his own initiative. It is the duty of a Judge to make a case for the accused on which he thinks that a verdict of not guilty may be properly returned though the case has not been suggested by or on behalf of the accused. It is the duty of defending counsel to make the Judge aware of any case that he considers may be made on behalf of the accused though he has not made it himself. *Per* WOODROFFE, *J.* It cannot be laid down as a general proposition of universal applicability that a Court cannot and should not consider a case in favour of the accused which he has not raised. If such a case arises on the prosecution evidence, it should be put to the jury for their consideration whatever line might have been taken by the accused or his counsel. But on the question whether an inference does arise in favour of the accused the fact that a particular defence has or has not been taken, may affect the significance of the evidence given. *Per* MOOKERJEE, *J.* The expression "lay down the law" in s. 297, Criminal Procedure Code, does not signify "lay down the whole law on the subject irrespective of the facts of the particular case before the Court." The reasonable construction of s. 297, Criminal Procedure Code is that the Judge should lay down the law only in so far as it bears upon the evidence adduced in the particular case. The mere fact that counsel for the accused has failed to present to the Court a particular aspect of the case cannot justify an omission on the part of the Judge to draw the attention of the jury to what appears to be a possible answer to the charge against the accused even on the prosecution evidence: Mere non-direction is not necessarily misdirection: those who allege misdirection must show that something wrong was said or that something was said which would make wrong that which was left to be understood. Every summing up must be regarded in the light of the conduct of the trial and the questions which have been raised by the counsel for the prosecution and for the defence respectively. *Per* HOLMWOOD, *J.* No error of law is committed by a Judge who refrains from directing the jury as to exceptions which have neither been raised nor relied upon by the accused and have no basis in evidence on the record. Where there is no evidence bringing the case directly within any such exception, it would be misdirection to ask the jury to come to a finding of fact on a hypothetical state of circumstances which do not bring the case within the exception as a matter of fact. KING-EMPEROR *v.* UPENDRA NATH DAS (1914) . . **19 C. W. N. 653**

—— ss. 297, 303—

See JURY, TRIAL BY.

I. L. R. 40 Calc. 367

—— ss. 297, 303, 304—*Trial by Court of Sessions—Verdict, how to be taken, where many accused and both jury and assessors charged.* S. 297, Criminal Procedure Code (Act XIV of 1898) specifically enacts that the Judge shall only charge

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

———— **ss. 297, 303, 304**—*contd.*

the jury "when the case for the defence and the prosecution reply are concluded." Where therefore the Judge heard arguments and took verdicts as regards certain accused and subsequently went on to hear arguments and take verdicts as regards other accused: *Held, that the procedure adopted* was irregular. The verdict of a jury must be taken collectively upon charges triable by jury even where the jury may be sitting as assessors to try other charges triable by assessors. A jury having delivered a verdict may not be again asked to consider that verdict. It may only be questioned to find out what in fact the verdict is. Criminal Procedure Code, ss. 303 and 304, discussed and explained. PUBLIC PROSECUTOR *v.* ABDUL HAMED (1913) . **I. L. R. 36 Mad. 585**

———— **s. 298**—

See s. 297 . . **19 C. W. N. 653**

See MISDIRECTION

I. L. R. 45 Calc. 557

———— **ss. 298 (1) (c), 337**—

See PARDON . **I. L. R. 42 Calc. 856**

———— **s. 300**—

See VERDICT . **I. L. R. 43 Calc. 207**

———————— *Person other than a juror holding communication with a juror after charge without Court's leave.* Where it was proved that after the charge had been delivered, a person other than a juror spoke to or held communication with a member of the jury without the leave of the Court, *Held*, that that was sufficient to upset the verdict, and it was not relevant to consider whether the irregularity had in fact prejudiced the accused. *It is a matter of great* importance that s. 300 of the Criminal Procedure Code which is explicit in its terms should be observed. *R.* v. *Ketteridge, (1915) 1 K. B. 467*, referred to. BENI MADHAB KUNDU *v* KING-EMPEROR (1913) . . **22 C. W. N. 740**

———— **s. 301**—*Trial by jury—Verdict settled by casting lots—Enquiry thereabout—Evidence of individual jurors if admissible.* Where it was alleged that the verdict of the jury was arrived at by casting lots and the Sessions Judge held an enquiry into the matter in the course of which he examined besides other persons, all the jurors: *Held*, that the statement of a juror as to what happened in the jury room is inadmissible. KING-EMPEROR *v.* HIRXOMAR BURMAN ROY (1913)

17 C. W. N. 737

———— **ss. 303, 304**—

See s. 29 . **I. L. R. 36 Mad. 535**

———— **ss. 303 and 307**—*Verdict of jury—Reasons for their verdict—Power of Sessions Judge to question jury as to their reasons for their verdict—Question, if permissible, for determining whether reference to High Court necessary.* A Sessions Judge is not entitled under s. 303 of the Criminal Procedure Code, to question the jury as to the reasons for their verdict, even if he intended to make a reference to the High Court under s. 307 of the Code. Reference No. 30 of 1913, dissented from: *Emperor* v. *Sirasuli (1907) I. L. R. 30 Mad. 43*, and *Public Prosecutor* v. *Abdul Hamed (1913) I. L. R. 37 Mad. 58?*, followed.

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

———— **ss. 303 and 307**—*contd.*

Though a Sessions Judge is neither bound nor entitled to put such questions to the jury, still his having done so for the purpose of determining whether he should make a reference is *not improper* or a sufficient ground for not accepting the reference. SUBBIAH THEVAN *v.* THE ASSISTANT SESSIONS JUDGE OF TINNEVELLY (1920)

I. L. R. 43 Mad. 711

———— **s. 307**—

See CRIMINAL TRESPASS.

I. L. R. 41 Calc. 662

See REFERENCE **I. L. R. 42 Calc. 786**

1. ———————— *Disagreement between Judge and jury—Reference to High Court—Sub-s. (3)—Opinion of the jury if equivalent to verdict—Verdict, grounds of, when desirable to ascertain.* The expression "opinion of the Sessions Judge and the jury" in sub-s. (3) of s. 307 of the Criminal Procedure Code, is equivalent to "opinion of the Sessions Judge and verdict of the jury" and it is not necessary for a Sessions Judge before making a reference to the High Court to ascertain the opinion of the jurors apart from their verdict. *Emperor* v. *Chellan, I. L. R. 29 Mad. 91*, not followed. *After the jury have returned* their verdict and after the Judge has stated that he will not accept the verdict, it may be desirable to ascertain the grounds of their verdict, but there is no express provision in the Code for ascertaining the opinion of the jury. EMPEROR *v.* TARAPADA NASKAR (1913) **18 C. W. N. 615**

2 ———————— *Jurisdiction of High Court to convict of offence under s. 326, Penal Code (Act XLV of 1860).* The High Court is empowered on a reference under s. 307, Criminal Procedure Code, to convict the accused of an offence under s. 326 of the Penal Code. *Sir V. Bhashyam Ayyangar, J.*, in *Pattikadan Ummaru* v. *Emperor, I. L. R. 26 Mad. 243*, followed. BENSON, *J.*, in *Pattikadan Ummaru* v *Emperor, I. L. R. 26 Mad. 243*, dissented from. MUTYALU, *Re* (1914) . . . **I. L. R. 37 Mad. 233**

3. ———————— *Reference to High Court on disagreement between Judge and Jury—Acceptance by Judge of verdict on some charges, reference to High Court on others—High Court if can consider evidence on charges in relation to which verdict accepted by trial Judge—Course to be followed by High Court on such reference in testing verdict referred.* Where the accused was tried on several charges and the Sessions Judge accepted the verdict of the jury as to some and disagreed as to others and referred the verdict to the High Court as to the latter. *Held*, that by this limited form of reference the High Court was precluded from considering the entire evidence on the record and on such reference all that the High Court had to decide was whether the verdict of the jury on the charges as to which there was dis-

[illegible]

referred the whole case leaving it to the High Court to consider the whole of the evidence that was placed before the jury. KING-EMPEROR *v.* ANNADA CHARAN ROY (1913) . . **21 C. W. N. 435**

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

———— s. 307—*contd.*

4. ———— *Jury, verdict of—Interference of High Court on reference when verdict not perverse.* Where the accused were tried on several charges, and the jury unanimously found them not guilty on all the charges but the Sessions Judge not accepting the verdict as to some of the charges referred the case to the High Court: *Held*, that in the circumstances of the case the verdict could not be said to be perverse or erroneous and the accused should be acquitted. ASGAR MONDAL *v.* KING-EMPEROR (1918) 22 C. W. N. 811

5. ———— *Reference to High Court by Sessions Judge on disagreement with jury—Scope of High Court's interference.* The accused was tried on charges under ss. 395, 411, 412, Indian Penal Code, and found not guilty by a majority of the jury. The Sessions Judge disagreeing with the jury referred the case to the High Court under s. 307, Criminal Procedure Code. The High Court on a consideration of the evidence held that the guilt of the accused was not proved beyond reasonable doubt and acquitted the accused. EMPEROR *v.* CHANOO LAL BANIA (1918) . . . 22 C. W. N. 1028

6. ———— *Reference to High Court when can be made.* The accused were found guilty under s. 366 and s. 376, Indian Penal Code, by the verdict of a majority of the jury. The Sessions Judge though not agreeing with it accepted it on the ground that he could not call it perverse: *Held*, that it is no longer the law that before making a reference the Judge must be satisfied that the verdict is perverse. It is sufficient that he should be clearly of opinion that it is necessary for the ends of justice. The High Court set aside the verdict on the ground of misdirection and acquitted the accused. ISMAIL SARKAR *v.* KING-EMPEROR (1918) . . . . . 23 C. W. N. 747

7. ———— *Judge and jury, disagreement between—Duties of High Court on reference.* In the case of a reference to the High Court on a disagreement between the Sessions Judge and the jury, under s. 307, cl. (3), *Cr. P. C.* the High Court is to give due weight not to the opinion of the jury alone but to that of the Sessions Judge as well. EMPEROR *v.* SHEIKH NIAMATULLA (1913) . . . . . 17 C. W. N. 1077

8. ———— *Reference to High Court on disagreement with jury—Matters which must be stated by Sessions Judge in making reference—Incompetent reference, effect of—Misdirection to jury—Duty of Sessions Judge to present case to jury dispassionately and impartially—Statement in charge to jury not borne out by record.* The accused were placed on their trial all on charges under ss. 302, 147 and 326/149, Indian Penal Code, and one of them under s. 148, Indian Penal Code, in addition thereto. The jury returned a verdict of guilty under ss. 147 and 326/149, Indian Penal Code, against some and found the others not guilty on all the charges. The Sessions Judge disagreeing with the verdict of the jury made a reference to the High Court under s. 307, Criminal Procedure Code, stating that the verdict was erroneous and inconsistent and could not be accepted, that a murder had been committed and if the evidence was believed all the accused should have been found guilty under s. 302: *Held*—That the reference was not a proper reference as there was not a sufficient compliance with the provisions of s. 307, Criminal Procedure Code. It is only if the Judge has made a proper reference that the High Court can deal with the matter. In dealing with the matter the High Court has to give due weight to the opinions of the Sessions Judge and the Jury and in making a reference the Judge is bound to state the grounds of his opinion and in the case of an acquittal the offences which he considers to have been committed. The record was sent back to the Sessions Judge for a proper reference which having been made the case was heard. The Sessions Judge in charging the Jury said that those of the accused who pleaded *alibi* were bound to prove the plea and if the Jury were of opinion that they had failed to establish the plea there would arise a presumption against them as to their complicity in the crime. *Held*—That the Judge was clearly wrong and there was no authority for the statement that such a presumption would arise. Matters which must be stated by a Sessions Judge in making a reference and a Judge in his summing up under this section discussed. KING-EMPEROR *v.* TARIBULLAH SHEIKH 25 C. W. N. 682

———— s. 308—

See AUTREFOIS ACQUIT. I. L. R. 41 Calc. 1072

———— s. 309—

See DACOITY . I. L. R. 41 Calc. 350

See MAGISTRATE I. L. R. 39 Calc. 119

———— ss. 309, 403, 423, 439—

See ASSESSORS I. L. R. 40 Calc. 163

———— s. 310—

See s. 287 . . 5 Pat. L. J. 706

———— s. 337—

See PARDON. I. L. R. 42 Calc. 756, 856

———— *Tender of pardon—Approver—Breach of the conditions of pardon—Discharge of accused—Forfeiture of pardon—Trial of approver—Approver committed to Sessions Court—Re-trial of the discharged accused—Accused to be committed, if primâ facie case made out to Sessions Court for joint trial with the approver—Joint trial—Practice and procedure.* In an inquiry into a charge of dacoity against five accused persons, the Magistrate granted a conditional pardon to one of them. The approver was examined as a witness in the inquiry against the four remaining accused persons; but he denied all knowledge of the alleged dacoity and the accused persons were discharged by the Magistrate under s. 209 of the Criminal Procedure Code (Act V of 1898). The pardon granted to the approver was next withdrawn and the case as against him with regard to dacoity was proceeded with under s. 339 of the Criminal Procedure Code. It ended in his being committed for trial to the Court of Sessions. The material piece of evidence to be adduced against the approver was his confessional statement which implicated both himself and the four accused persons. The Sessions Judge referred the case to the High Court for an order quashing the commitment and directing the

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— **s. 337**—*contd.*

re-trial of the approver along with the discharged accused persons. *Held*, that the High Court had the power to direct that the accused persons, who had been discharged, should be subjected to a re-trial jointly with the approver, for, under s. 437 of the Criminal Procedure Code, the High Court had the power in the case of those accused persons to direct that there should be a fresh inquiry, and if that inquiry ended in the framing of a charge that they should be committed to a particular Court of Sessions. *Held*, further, that inasmuch as the provisions of sub-s (*3*) of s. 337 of the Criminal Procedure Code were fully carried out at the time when they were applicable, namely, during the pendency of the Magisterial proceedings, they would not constitute any bar against the High Court's ordering that if the inquiry against the discharged persons ended in a commitment, they should be committed to trial jointly with the approver. *Per* CURIAM: Sub-s. 3 of s. 337 of the Criminal Procedure Code contemplates only a case where there has been a commitment made by the Magistrate to the Court shall not be set at large until the judicial proceedings pending against the accused are finished. For the purposes of the section it is immaterial whether the proceedings are finished by a Magisterial order of discharge before trial, or by a Judge's order of acquittal after trial. In the case of the Magisterial discharge, the sub-section would be satisfied if the approver were detained in custody or on bail until the order of discharge was made. EMPEROR *v.* INTYA SALABAT KHAN (1912)

I. L. R. 37 Bom. 146

——— *Accomplice—statement on oath by an accused person who has accepted a pardon, but has not been discharged—whether evidence against the other accused—case not exclusively triable by Sessions Court. M.*, one of the accused persons, was offered a pardon on 6th June 1918. On the 11th June the case was *challaned* by the Police and *M.* was entered as one of the accused persons in the *chalan* as well as in the opening sheet of the Magistrate's proceedings. *M's* evidence was recorded by the Magistrate on the 4th July. The case was not one exclusively triable by the Court of Session or High Court. *Held*, that as the case was one not exclusively triable by a Court of Session, s. 337 of the Code was inapplicable. *Held, also*, that as there had been accused. *Bannu Singh* v. *Emperor* (*I. L. R. 33 Calc. 1353*), referred to. *Sardar Khan* v. *Emperor* (*21 P. R.* (*Cr.*) *1904*, distinguished. MAHANDU *v.* THE CROWN . . **I. L. R. 1 Lah. 102**

——— Under the present Code of Criminal Procedure no formal withdrawal of a pardon and no formal declaration that a pardon has been forfeited are required before proceeding against a person who accepted a conditional pardon but violated the condition thereof. THE EMPEROR *v.* SABER AKUNJI.

10 C. W. N. 179

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— **s. 337**—*contd.*

——— *No true and full disclosure where witness subsequently recants his previous statement—On trial after withdrawal of pardon, if pardon pleaded in bar, jury to determine whether pardon forfeited.* A person who has accepted a tender of pardon under s. 337 of the Criminal Procedure Code and made a true and full disclosure before the inquiring Magistrate may be recalled and examined by such Magistrate; and his pardon will be forfeited if he resiles from such former statement. It is not necessary in order to forfeit the pardon that he should be examined as a witness in the Court of Sessions. He is examined in the case when he is examined by the Magistrate and the prosecution is not bound to examine before the sessions an untrustworthy witness. When such person is tried after withdrawal of pardon for the original offence and pleads the pardon as a bar, the jury must determine whether the pardon was forfeited or not. In default of such determination, a conviction will be bad. *Kullan* v. *Emperor, I. L. R. 32 Mad. 173*, referred to. *Emperor* v. *Kothea, I. L. R. 30 Bom. 611*, referred to. ALAGIRISAMI NAICKEN *v.* EMPEROR (1910) . **I. L. R. 33 Mad. 514**

——— **ss. 337, 339**—

See PARDON . **I. L. R. 37 Calc. 845**
I. L. R. 42 Calc. 756

——— **s. 339**—

——— *Pardon—Forfeiture of pardon—Procedure—Witness giving evidence at a sessions trial on a conditional pardon disbelieved by Judge.* A conditional pardon was given to *G* and he was tendered as a witness in a Sessions trial. The Judge before whom he was examined was of opinion that *G* had not spoken the truth, and, acquitting the accused, directed the prosecution of *G*. *G* did not plead his pardon before the committing Magistrate, but did plead it before the Sessions Judge, who set aside the commitment and discharged the accused. *Held*, that *G* was entitled to raise the plea before the Sessions Judge though he had not raised it before the committing Magistrate. *Held*, also, that the Sessions Judge in the former trial had no authority to direct the prosecution of *G* on any specific charge, but if he thought that *G* had wilfully concealed anything essential or given evidence on any point which was positively false, he was entitled to record an opinion to that effect and to invite the attention of the District Magistrate to his opinion or possibly to suggest the propriety of *G's* prosecution. *Emperor* v. *Kothia, I. L. R. 30 Bom. 611, Kullan* v. *Emperor, I. L. R. 32 Mad. 173, Alagirisami* v. *Emperor, I. L. R. 33 Mad. 514, Emperor* v. *Abani Bhusan, I. L. R. 37 Calc. 845*, referred to. EMPEROR *v.* GANGUA (1915)

I. L. R. 37 All. 881

——— *Withdrawal of pardon—Procedure.* Where an accomplice who has accepted a tender of pardon made under s. [illegible] of the Code of Criminal Procedure fails to make a full and true disclosure of the whole [illegible] circumstances within his knowledge [illegible] offence under inquiry, there is [illegible] record any formal order [illegible] if the accomplice has forfeit[illegible] put on his trial for the [illegible]

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— s. 339—*contd.*

the pardon was tendered, it is open to him to plead his pardon in bar of trial, and it will then be for the prosecution to show in what manner the pardon has been forfeited. *Kullan* v. *Emperor I. L. R. 32 Mad. 173,* followed. EMPEROR *v.* KHIALI (1917) . . **I. L. R. 39 All. 305**

——— *Pardon tendered by District Magistrate—Sessions Judge ordering commitment of approver—legality of commitment—Jurisdiction.* The case in connection with which the pardons were tendered by the District Magistrate was heard by the Sessions Judge, who at the conclusion of the trial directed the commitment of both the approvers to the Sessions for trial on the original charge. *Held,* following *Crown* v. *Kadu* (*176 P. L. R. 1905*) that the Sessions Judge had jurisdiction to pass the order and at their trial the petitioners could plead their pardon and it would be for the trial Court to decide whether or not the pardon had been forfeited. CHANAN SINGH *v* THE CROWN .

I. L. R. 1 Lah. 218

——— s. 340—

See MUKHTEAR **I. L. R. 38 Calc. 488**

——— s. 341—

——— *Deaf and dumb accused—Procedure and practice.* Though great caution and diligence are necessary in the trial of a deaf and dumb person, yet if it be shown that such person had sufficient intelligence to understand the character of his criminal act, he is liable to punishment. EMPEROR *v.* A DEAF AND DUMB ACCUSED (1916) .

I. L. R. 40 Bom. 598

——— *Accused who does not understand proceedings—case reported to High Court—proper action. Held,* that the usual practice in cases reported to the High Court under s. 341 of the Code of Criminal Procedure, is to refer the matter to the Local Government, but where the offence is a minor one the Court may sentence the accused to a term of imprisonment or discharge him. *Empress* v. *Gahna* (*37 P. R.* (*Cr.*) *1889*), *Crown* v. *Dost Muhammad* (*13 P. R.* (*Cr.*) *1911*), *Queen* v. *Bowka Hari* (*22 W. R. 35* (*Cr.*), *Atu Ram* v. *Empress* (*34 P. R* (*Cr.*) *1885*) and Criminal Revision No. 1501 of 1915 (unpublished), referred to. CROWN *v.* RAHMAN

I. L. R. 1 Lah. 260

——— s. 342—

See s. 146	. **I. L. R. 37 Calc. 467**
See s. 255	. **I. L. R. 38 Mad. 302**
See s. 263	. **I. L. R. 41 Calc. 742**
See s. 164	. **I. L. R. 2 Lah. 129**
See s. 435	. **25 C. W. N. 609**
See CHARGE	. **I. L. R. 42 Calc. 957**
See WITNESS	. **I. L. R. 45 Calc. 720**

1. ——— *Cross-examination of accused, propriety of.* Cross-examination of the accused by putting questions with a view to induce him to incriminate himself condemned. HAIDAR ALI PRADHANIA *v.* EMPEROR (1912)

17 C. W. N. 354

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— s. 342—*contd.*

2. ——— Necessity for examination by the Court in certain cases discussed. GANGADHAR GOALIA *v.* REGINAL WILLIS LEOMON REED . . . . . **25 C. W. N. 609**

3. ——— *Criminal Law Amendment Act* (*XIV of 1908*), *case under, Court if may examine accused in.* It is within the competence of the Court in a case under Act XIV of 1908 to examine the accused in order to give him an opportunity of explaining the circumstances appearing on the evidence against him. EMPEROR OF INDIA *v.* NAGENDRA NATH GUPTA (1915) . . . . . **19 C. W. N. 923**

4. ——— *Right of the Magistrate or Sessions Judge to put questions or take statements from accused when no evidence given by prosecution to implicate them—Answers taken from accused in contravention of s. 342, not admissible in evidence.* If in a criminal case the prosecution had not let in any evidence implicating the accused or some of the accused in the crime charged, the Magistrate is not entitled under s. 342 of Criminal Procedure Code to put questions to such accused or to invite them to make a statement; and this rule equally applies to trials before the Sessions Court. Answers to questions received by the committing Magistrate in contravention of s. 342 of the Criminal Procedure Code are not admissible in evidence against the accused in the subsequent trial before the Sessions Court. *Mohideen Abdul Kader* v. *Emperor, I. L. R. 27 Mad. 238* and *Reg.* v. *Berriman, 6 Cox. Cr. C. 388,* followed. *Re* ABIBULLA RAVUTHAN (1915) . . **I. L. R. 39 Mad. 770**

5. ——— *Power to examine accused—Summons case—Practice and procedure.* Under s. 342 of the Criminal Procedure Code, 1898, a Magistrate is bound in a summons case to examine the accused before convicting him. EMPEROR *v.* FERNANDEZ (1920) .

I. L. R. 45 Bom. 672

6. ——— Under s. 342 the Court must examine the accused after the witnesses for the prosecution have been examined. Therefore an examination of the accused after the prosecution witnesses have been examined in chief but before they have been cross-examined is not in compliance with the section. MITARJIT SINGH *v.* THE KING-EMPEROR. **6 Pat. L. J. 645**

——— ss. 342, 244, 245, 253 and 283—s. 342 of the Code applies to summons warrant and sessions trials and an omission to examine accused in accordance with it, vitiates such a trial. A prosecution under s. 218 of the Bengal Municipal Act 1884 of s. 202 and 203 is within time if instituted within 6 months from the expiry of the time allowed for compliance with the order under the latter section. GULAM RASUL *v.* THE KING-EMPEROR . . . **6 Pat. L. J. 175**

——— ss. 342, 289, 364 and 533—*Sessions trial—omission to examine accused, effect of—Statement by accused person, effect of omission to record—Confession, effect of, retracted. Per* JWALA PRASAD AND SULTAN AHMAD, *JJ.* (MULLICK, *J.*, dissenting): The provisions of s. 342 of the Code of Criminal Procedure, 1898, are mandatory and the omission to examine the accused after the witnesses for the prosecution have been exa-

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

———— **ss. 342, 289, 364 and 533**—*contd.*

mined and before the accused is called on for his defence vitiates the trial. *Per* JWALA PRASAD, *J.*—The filing of a written statement by the accused does not take the place of an examination under s. 342. It is doubtful whether the omission to prepare a record of the examination of an accused person under s. 364 can be cured by s. 533. A confession which is not supported

applying the proper tests, the Judge is convicted of its truth. While the High Court is dealing

the conviction. *Per* SULTAN AHMED, *J.*—It is unsafe to convict an accused person on a retracted conviction alone. RAGHU BHUMJI *v* THE KING-EMPEROR . . . . 5 Pat. L. J. 430

———— **ss. 342, 362**—

See EXCISE OFFICERS.
I. L. R. 46 Calc. 411

———— **s. 344**—

———— *Case taken upon police* ... *ted by vakil— by informant for*

of costs by
a case was
charge-sheet
person who
the trial and
ment made by the police officer on the ground of the vakil's absence: *Held*, that it was competent to the Magistrate under s. 344 of the Code of Criminal Procedure to grant an adjournment conditional on the payments of costs by such

SUNNASI KUDUMBAN *v.* SIVASUBRAMANIA KONE (1917) . . . **I. L. R. 40 Mad. 1130**

———— *Order of adjournment*

at the
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instance
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under s
1898, or
and where for some reason ...
method of conducting criminal cases must be departed from. *In re* ABDUL RAHIMAN (1917)
I. L. R. 42 Bom. 254

———— **s. 345**—

See s. 248 . **I. L. R. 37 Bom. 369**
20 C. W. N. 1209

See COMPROMISE **I. L. R. 45 Calc. 816**

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

———— **s. 345**—*contd.*

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), s. 439.
I. L. R. 39 Mad. 604

———— *Compromise effected out of Court by parties, pending hearing of rule issued by High Court, if can be given effect to under s. 345, Criminal Procedure Code.* The petitioner was the complainant in a case and the accused in the counter-case. The petitioner's complaint was dismissed by the Magistrate and in the other case he was convicted under s. 352 of the Penal

one coming under s. 345, Criminal Procedure Code ADHAR CHANDRA DEY *v.* SUBODH CHANDRA GHOSH (1914) . . . **18 C. W. N. 1212**

of its revisional jurisdiction. EMPEROR *v.* RAM CHANDRA (1914) . . **I. L. R. 37 All. 127**

———— *Compounding an offence—Complainant resiling before hearing, effect of Per* ABDUR RAHIM *J* (AYLING *J*, *dubitante*).—A composition arrived at between the parties of a *compoundable offence is complete as soon as it is* made; a
accused
respect
later on,
ment or petition recording the compromise is filed in Court by the parties. *Murray* v. *Queen-Empress, I. L. R. 21 Calc. 103,* referred to. KANNI ROWTHER *v.* INAYATHALLA SAHIB (1915)
I. L. R. 39 Mad. 916

———— *Compounding of an*

is filed in respect thereof in a Court and once a composition has been arrived at, it has the effect of an acquittal under the section so as to bar the trial of the offence. KUMARASAWMI CHETTI *v.* KUPPUSWAMI CHETTY (1918)
I. L. R. 41 Mad. 685

———— *Composition of an offence with one of several accused persons, effect of.* The composition of an offence under s. 345 of the Criminal Procedure Code with one of several accused persons does not effect an acquittal of the others. *Chandra Kumar Das* v. *The Emperor, 7 C. W. N. 176,* dissented from. MUTHIA NAICK *v.* THE KING-EMPEROR (1917)
I. L. R. 41 Mad. 323

———— *Compounding of offences—Composition with one accused does not mean acquittal of others.* The comp
offence with one out of many ac

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— s. 345—*contd.*

the effect of acquittal of the remaining accused persons between whom and the complainant no satisfactory settlement has been arrived at. *Chandra Kumar Das* v. *The Emperor (1902) 7 C. W. N. 176*, dissented from. *Muthia Naick* v. *The King-Emperor (1917) 41 Mad. 323*, followed. EMPEROR *v.* ALIBHAI ABDUL (1920)

I. L. R. 45 Bom. 346

——— *Compounding offence with some of several accused—whether case can proceed against the other accused.* The complainant in a hurt case compounded the offence with two of the accused before the Court who were therefore acquitted, while the other accused was convicted and sentenced. *Held*, that the compounding of the offence against two of the accused did not in law have the effect of an acquittal of the remaining accused, and that the conviction was not therefore illegal. *Muthia Naick* v. *King-Emperor (I. L. R. 41 Mad. 323)*, followed. *Chandra Kumar Das* v. *Emperor (7 Calc. W. N. 176)*, discussed, and *Imperator* v. *Mulo (14 Cr. L. J. 292)*, distinguished. RAM KISHEN *v.* THE CROWN . **I. L. R. 1 Lah. 169**

——— *Compounding with one of several accused—Effect as regards the others.* The complainant charged four persons with having combined in committing the offence of grievous hurt against him. Subsequently, on its appearing that the offence was not grievous but simple hurt, he compounded the case as regards one of the four accused. *Held*, that this did not necessitate the case being compounded as regards the other three. *Muthia Naick* v. *The King-Emperor, I. L. R. 41 Mad. 323*, followed. EMPEROR *v.* CHANDAN . . . **I. L. R. 43 All. 483**

——— ss. 345, 403 (2)—*Several offences alleged in complaint—Accused summoned for one of such offences—Compromise of such offence with leave of Court—Further prosecution for the other offences if lies—Case if revivable on the ground of non-payment of compensation for compromise.* The petitioner was accused of committing house trespass, causing grevious hurt and being member of an unlawful assembly but was summoned only under s. 325, Penal Code, and the offence under that section was compromised with the leave of the Court. The complainant subsequently filed another complaint and sought to revive the case alleging that the terms of the compromise had not been carried out: *Held*, that the petitioner could not be again prosecuted either for grievous hurt or house trespass or for being member of an unlawful assembly, the common object being to commit offences which had been compromised. BASIRUDDI *v.* KHAIRAT ALI (1913).

17 C. W. N. 948

——— ss. 345 (5), 423 (*1*) (*d*), 439—

See CRIMINAL TRESPASS.

I. L. R. 43 Calc. 1143

——— ss. 345, 438 and 439—*Compounding of offences—Revision—Court exercising revisional jurisdiction not empowered to allow an offence to be compounded.* It is not competent to a court exercising revisional jurisdiction to allow an offence to be compounded. *Emperor* v. *Ram Piari*, I. L. R. 32 All. 153, not followed. *Emperor* v. *Ram Chandra*, I. L. R. 27 All., 127, referred to. EMPEROR *v.* RAM BARAN SINGH.

I. L. R. 42 All. 474

——— ss. 345 (2), 439—*Revision—Power of High Court in revision to give leave to compound.* *Held*, that the High Court can, in the exercise of its powers of revision under s. 439 of the Code of Criminal Procedure, give leave for the composition of an offence under s. 325 of the Indian Penal Code. EMPEROR *v.* RAM PIYARI (1909)

I. L. R. 32 All. 153

——— ss. 345, 439—*Compromise—Assault in the course of which the person assaulted received fatal injury—High Court's revisional jurisdiction.* Four persons assaulted one *P* with the result that *P* died. *Held*, that it was not competent to the widow of *P* to compound the case with *P's* assailants in respect of the injuries caused to *P*. *Held*, further, that when several persons were acquitted by the Sessions Judge and on being moved by the Government, the High Court issued warrants for their arrest, only one was arrested but the others were absconding, the High Court in the exercise of its revisional jurisdiction is competent to set aside the order of their acquittal. EMPEROR *v.* RAHMAT (1915)

I. L. R. 37 All. 419

——— s. 347—

See s. 254 . . **I. L. R. 42 Mad. 83**

——— s. 348—*Indian Penal Code (Act XLV of 1860), Chaps. XII and XVII—Procedure of Magistrate who cannot adequately punish.* In this case the accused who had been previously convicted of an offence under s. 394, Indian Penal Code, was charged before the Sub-Magistrate of Salem with an offence under s. 411, Indian Penal Code. The Sub-Magistrate tried and convicted him of the offence and ordered his commitment to the Court of Sessions for the purpose of awarding him enhanced punishment. *Held*, that the conviction and commitment were illegal. The correct procedure to be followed in such a case is for the Magistrate either as a preliminary matter or before framing a charge to determine whether he has power to pass a sufficient sentence. If he thinks he has not such power he should frame a charge and commit the accused. *Re* SELLANDI (1913) . . . . **I. L. R. 38 Mad. 552**

——— s. 349—

——— *'Shall pass such order as he thinks fit,' meaning of.* The words 'such order as he thinks fit' in s. 349, Criminal Procedure Code, do not empower the Superior Magistrate to send the case back to the Sub-Magistrate for disposal but only empower him to pass such final order disposing of the case as he may think fit. *Re* PONNUSAMY NADAN (1913)

I. L. R. 36 Mad. 470

——— *Trying Magistrate sending up a case to the Sub-divisional Magistrate on the ground that he cannot pass adequate sentence—Sub-divisional Magistrate sending up the case to another Magistrate—Committal of the case by such Magistrate to Court of Session—Commitment not valid—Practice and Procedure.* A Magistrate of the Second Class trying a case sent up the case to the Sub-divisional Magistrate on the ground that

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

———— **s. 349**—*contd.*

he could not pass an adequate sentence. The latter transferred the case to a Magistrate of the First Class who committed it to the Court of Session. A question having arisen if the commitment was legal: *Held*, quashing the commitment, that under s. 349 of the Criminal Procedure Code (Act V of 1898) it was the Sub-divisional Magistrate alone who was competent to deal with the case. EMPEROR *v.* VINAYAK NARAYAN (1914) . . . . **I. L. R. 38 Bom. 719**

———— **s. 350**

See s. 15 . **I. L. R. 41 All. 116**

See s. 107 . **I. L. R. 43 Mad. 511**

See s. 145 . **I. L. R. 37 Calc. 812**

See s. 253 . **I. L. R. 38 Mad. 585**

See s. 367 . **I. L. R. 40 Mad. 108**

See MAGISTRATE, TRANSFER OF.
I. L. R. 37 Calc. 812

See RIOTING . **I. L. R. 39 Calc. 781**

———— *Procedure—Jurisdiction—Magistrate ceasing to have jurisdiction by reason of the transfer of a case pending before him to another Court—Evidence not necessarily to be reheard.* S. 350 of the Criminal Procedure Code applies as much to cases in which a Magistrate ceases to exercise juisdiction so far as the particular case in question is concerned by reason of its transfer to another Court as to cases in which the Magistrate ceases to exercise jurisdiction by reason of his own death or transfer to another post. *Mohesh Chandra Saha* v. *Emperor, I. L. R. 35 Calc. 457, Kudrutulla* v. *Emperor, I. L. R. 39 Calc. 781*, and *Palaniandy Goundan* v. *Emperor, I. L. R. 32 Mad. 218*, followed. EMPEROR *v.* RAM DAS (1918) . . **I. L. R. 40 All. 307**

———— *Transfer—Jurisdiction—Power of Court to which a case is transferred to act on evidence taken by the Court from which it came.* S. 350 of the Code of Criminal Procedure is not limited to cases in which Magistrates succeed each other in offices but applies also to all cases transferred from the file of one Magistrate to that of another under s. 528 of the Code. An order of commitment to the Court of Session passed by a Magistrate on evidence recorded by a bench of Magistrates from whose Court it was transferred, is not an illegal order. *Queen-Empress* v. *Bashir Khan, I. L. R. 14 All. 346*, distinguished. *Emperor* v. *Angnu, All. Weekly Notes, (1889) 136*, not followed. *Mohesh Chandra Saha* v. *Emperor, I. L. R. 35 Calc. 457*, and *Palaniandy Goundan* v. *Emperor, I. L. R. 32 Mad. 218*, followed. EMPEROR *v.* NANHUA (1914)
I. L. R. 36 All. 315

———— *Trial by Bench of Honorary Magistrates who have not heard the whole of the evidence, whether legal.* The petitioner was tried and convicted for an offence under s. 323, Penal Code, by a Bench of Honorary Magistrates, only one of whom had heard the entire evidence. *Held*, that all criminal cases should be decided by Magistrates who have heard the whole of the evidence, and that s. 350 of the Code of Criminal Procedure does not apply to cases tried by Benches of Magistrates; consequently the conviction of the petitioner must be set aside. *Sufferuddin* v. *Ibrahim (I. L. R. 3 Calc. 754), Ram Sunder De* v. *Rajab Ali (I. L. R. 12 Calc. 558), Shumbu Nath* v. *Ram Kamal (13 Calc. L. R. 212), Hardwar Singh* v. *Khega Ojha (I. L. R. 20 Calc. 870), Damri Thakar* v. *Bhowani Sahoo (I. L. R. 23 Calc. 194), Queen-Empress* v. *Bassappa (I. L. R. 18 Mad. 394)*, Re *Subramania Ayyer (I. L. R. 31 Mad. 304), Nga Paik* v. *Nga Saw (50 Indian Cases 672), Emperor* v. *Mathura (I. L. R. 41 All. 116), Abdul Aziz* v. *Emperor (15 All. L. J. 237)*, followed. GIRDHARI *v.* THE CROWN . **I. L. R. 2 Lah. 237**

———— **s. 355**—

See SUMMARY TRIAL.
I. L. R. 48 Calc. 280

———— **s. 356**—

See DISPUTE CONCERNING LAND.
I. L. R. 42 Calc. 381

———— **s. 360**—

See CHARGE . **I. L. R. 42 Calc. 957**

See DEPOSITION . **14 C. W. N. 83**

———— **ss. 360 (1), 476**—

———— *Handing over record of deposition to witness for being read by him if sufficient compliance with law—Such deposition if admissible and assignment of perjury if can be made thereon—Examination of witnesses in enquiry under s. 476, Criminal Procedure Code—Duty of Magistrate to make a record of statements.* An order under s. 476, Criminal Procedure Code, was made against the petitioner directing his prosecution under s. 193 of the Penal Code, with reference to a deposition given by him as a witness at a criminal trial. It appeared that after the deposition had been recorded, the record was handed over to the petitioner who proceeded to read it over himself. The Magistrate held a preliminary enquiry under s. 476, Criminal Procedure Code,
tion, and ex.
that enquiry,
ments: *Held*, [illegible]
(*1*), Criminal Procedure Code, were not sufficiently complied with inasmuch as *that sub-section requires* that the evidence should be read over in the presence, that is, in the hearing, of the accused, in order that the accused should have an opportunity of correcting any mistake in it. That the deposition was inadmissible and the order for prosecution must be set aside. That
[illegible]
a summary of the statements of the witnesses examined. KING-EMPEROR *v.* JOGENDRO NATH GHOSH (1914) . . **I. L. R. 42 Calc. 240**
18 C. W. N. 1242

———— **s. 362**—

See s. 342 . . **5 Pat. L. J. 430**

See EXCISE OFFICER.
I. L. R. 46 Calc. 411

———— *Record of evidence recorded by Presidency Magistrate.* It is the duty of the Magistrate in a case which comes within

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— s. 362—*contd.*

s. 362, Criminal Procedure Code, to take a note of all the material facts whether they appear in the course of the examination-in-chief or in the course of cross-examination. AH FOONG CHINAMAN *v.* KING-EMPEROR (1918) 22 C. W. N. 834

——— s. 364—

See s. 14 . . 3 Pat. L. J. 291

See s. 146 . I. L. R. 37 Calc. 467

See s. 342 . . 5 Pat. L. J. 430

——— *Statement made by accused person—Refusal of accused to sign record—Indian Penal Code, s. 180.* When the statement of an accused person has been recorded under the provisions of s. 364 of the Code of Criminal Procedure and admitted by the accused to be correct, the accused is bound to sign the record of such statement, and his refusal to sign it amounts to an offence within the meaning of s. 180 of the Indian Penal Code. *Imperatrix* v. *Sirsapa, I. L. R 4 Bom. 15,* distinguished. EMPEROR *v.* UMAR KHAN (1917) . . . I. L. R. 39 All. 399

——— ss. 364, 533—

See EVIDENCE ACT (I OF 1872), s. 91. I. L. R. 35 All. 260

——— ss. 366 and 367—

See s. 195 . . 25 C. W. N. 887

——— s. 367—

See CHARGE TO JURY. 1 Pat. L. J. 317

See PRACTICE . I. L. R. 40 Calc. 376

——— *Transfer of a Magistrate who has written but not delivered judgment—Demand for a new trial before successor under s. 350 of Criminal Procedure Code—Legality of order granting new trial—Successor not bound to pronounce his predecessor's judgment.* A Magistrate who had tried a case wrote a judgment, dated and signed it on the day fixed for judgment. Owing to the absence of one of the accused he did not pronounce it on that day, but adjourned the case to a later date. In the meanwhile the Magistrate was transferred to another station and succeeded by another Magistrate, before whom all the accused demanded on the adjourned date a *de novo* trial. On a reference under s. 438, Criminal Procedure Code: *Held,* that the action of the new Magistrate in according a *de novo* trial under s. 350, Criminal Procedure Code, was not illegal and that he was not bound to deliver his predecessor's written judgment. *Obiter:* In the absence of a demand for a new trial it would be in the discretion of the successor to date, sign and pronounce his predecessor's judgment. *Quære:* Whether it is legal for him to pronounce his predecessor's judgment in the face of a demand for a new trial. *In re Sankara Pillai, 18 Mad. L. J. 197,* considered. *Re* SAVARIMUTHU PILLAI (1916) . . . . I. L. R. 40 Mad. 103

——— ss. 367 and 421—*Appeal—Appeal summarily dismissed—How far Court bound to record reasons for dismissal.* A Court of criminal appeal is not bound, when dismissing an appeal summarily under s. 421 of the Code of Criminal Procedure, to write a judgment as defined in s. 367 of the Code. It is, however, advisable that

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— ss. 367 and 421—*contd.*

it should give reasons for rejecting the appeal in view of the possibility of its order being challenged by an application for revision. *Queen-Empress* v. *Warubai, I. L. R. 20 Bom. 540,* followed. *Rash Behari Das* v. *Balgopal Singh, I. L. R. 21 Calc. 92, Queen-Empress* v. *Narain, I. L. R. 8 All. 514, Queen-Empress Nannhu, I. L. R. 17 All. 241,* and *Queen-Empress* v. *Pandeh Bhat, I. L. R. 19 All. 506,* referred to. EMPEROR *v.* KUNDAN (1914) . . . I. L. R. 36 All. 496

——— ss. 367, 418, 423—*Trial by Jury—Charge to Jury—Record of heads of charge—Misdirection—Appeal—Powers of Appellate Court.* Nine persons were tried by a jury on a charge of dacoity, the case for the prosecution being that the dacoity charged was committed by these nine persons together with the approver. The jury, however, found a verdict of not guilty in favour of seven out of the nine accused. *Held,* that no conviction for dacoity, which implies the participation of five or more persons, could be had against the remaining accused. *The King* v. *Plummer, (1902) 2 K. B. 339,* referred to. In a trial by jury before a Session Court the record of the Judge's charge to the jury ought to show in what manner the law applicable to the case has been explained to the jury; the mere statement that the law was explained is not sufficient. It ought also to show that the evidence relied upon by the defence was properly put before the jury. *Emperor* v. *Baij Nath, All. W. N., 1903, p. 232,* followed. In appeal from the verdict of a jury it is not open to the Appellate Court to substitute its own finding for that of the jury, and to convict the accused of the offence of which the jury have acquitted them or of some cognate offence substantiated by the evidence which was before the jury, and in this respect an appeal under s. 418 of the Code of Criminal Procedure must be distinguished from a reference under s. 307. *Wafadar Khan* v. *Queen-Empress, I. L. R. 21 Calc. 955,* referred to. EMPEROR *v.* IKRAM-UD-DIN (1917) . . . I. L. R. 39 All. 348

——— ss. 367, 424—

See JUDGMENT . I. L. R. 37 Calc. 194

——— ss. 367, 424—*Judgment in appeal.* Where the reason for upholding a conviction in a judgment in appeal was that the evidence for the prosecution was slightly stronger and the story as regards probability was far more likely *Held,* that this was not sufficient for a conviction in a criminal case. KABBAT ALI *v.* KING-EMPEROR (1916) . . . . 21 C. W. N. 550

——— s. 368 and 369—

See REVIEW (CRIMINAL).
I. L. R. 46 Calc. 60
I. L. R. 38 Calc. 828

——— *Review of judgment—Power of High Court to review its own order on the criminal side—Rules of Court, Ch. VII, r. 8—Finality of order.* *Held,* that the High Court has no power to review an order dismissing an application for revision made by an accused person. *In the matter of the petition of F. W. Gibbons, I. L. R. 14 Calc. 42,* and *Queen-Empress* v. *Durga Charan, I. L. R. 7 All. 672,* followed. But so long as an order is not sealed as required by the Ch. VII,

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— **ss. 368 and 369**—*contd.*

r. 8 of the Rules of Court, it is not final, and it is open to the Judge who passed it to alter it. *Queen-Empress* v *Lalit Tiwari, I. L. R. 21 All. 177,* and *Emperor* v. *Kallu, I. L. R 27 All. 92* followed. EMPEROR *v.* GOBIND SAHAI (1915)
I. L. R. 38 All. 134

——— **s. 369**—

See REVIEW IN CRIMINAL CASES.
I. L. R. 38 Calc. 828

final order in any such proceeding is in effect a
in s. 369,
judgments
minal Pro-
cedure Code, and a Magistrate has no power to review a final order passed in such a proceeding. NANDA NARAIN NEWAR *v.* MANMAYA KAMINI (1916) . . . . **21 C. W. N. 341**

——— *Trial completed and sentence passed for offence under s. 379 of the Indian Penal Code—Trial continued on another charge under ss. 75 and 379 of the Indian Penal Code in the same case—Further trial is bad.* The accused was committed to a Court of Session on two charges, one under s. 379, and another under ss. 75 and 379 of the Indian Penal Code. The trial went on the first charge and ended in conviction and sentence. The second charge was next taken up in the same trial and a sentence was passed on the accused again. The accused having appealed: *Held,* that the subsequent proceedings on the second charge were not valid and should be set aside for when the judgment including the sentence was pronounced in the trial on the first charge, there was no power under s. 369 of the Criminal Procedure Code, to alter or review the same. EMPEROR *v.* MARI PARSU (1917)
I. L. R. 42 Bom. 202

——— **s. 374**—

See PRIVY COUNCIL, PRACTICE OF.
I. L. R. 44 Calc. 876

——— *Capital sentence—Circumstances to be considered by the High Court in confirming sentence of death—Delay between passing of sentence in the Sessions Court and final orders in the High Court, if sufficient ground for not confirming sentence of death. Per* CARNDUFF, *J.*—As the law stands in India where the alternative sentences of death and transportation are prescribed for murder, the fact that the accused had the capital sentences suspended over their heads for
considerati
who finally
not to con
have been rightly passed by the Sessions Judge in the first instance, unless he personally thinks that such sentence should be carried out at the time final orders are passed by him, and delay such as in the present case, is a sufficient reason for refraining from imposing the extreme penalty. AUTOR SINGH *v.* EMPEROR (1913)
17 C. W. N. 1213

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— **s. 386**—

See TRANSFER OF PROPERTY ACT (IV OF 1882), s. 69 . **I. L. R. 40 Mad. 767**

——— **s. 397**—

See s. 109 . **I. L. R. 34 Bom. 326**

——— *"Sentence of imprisonment" whether imprisonment for failure to give security is—Sentence of imprisonment on person already* . . t
under s. ,
1898, on r
good behaviour is not a "sentence of imprisonment" within the meaning of s. 397 of the Code. When a person is convicted of an offence and sentenced to a term of imprisonment, such term cannot, under s. 397, be made to commence on the expiry of the period for which he has been committed to prison under s. 123. MARKANDAR GENDA *v.* THE KING-EMPEROR **1 Pat. L. J. 212**

——— **ss. 397, 123**—*Sentence—Postponement of sentence—Person undergoing imprisonment for failing to give security—Penal Code (Act XLV of 1860), s. 379—Theft—Practice and procedure.* The accused was convicted of an offence of theft and sentenced to suffer rigorous imprisonment for six months. At that date he was undergoing imprisonment for failing to give security for good behaviour. The Magistrate directed that the sentence passed in the theft case should take effect after the expiry of imprisonment inflicted in the security proceedings: *Held,* that the sentence passed in the theft case could not be postponed to the expiry of imprisonment in the security proceedings inasmuch as the latter was not a "sentence of imprisonment" as used in s. 397 of the Criminal Procedure Code, 1898. *Emperor* v. *Kanji, 5 Bom. L. R. 26, Emperor* v. *Durga, 6 Bom. L. R. 1098,* and *Emperor* v. *Arjun I. L. R. 34 Bom. 326,* followed. EMPEROR *v.* VISHNU BALKRISHNA (1912)
I. L. R. 37 Bom. 178

——— **s. 403**—

See s. 190 . . **2 Pat. L. J. 34**
See s. 247 . **I. L. R. 34 Mad. 253**
I. L. R. 40 Mad. 976
See s. 271 . **I. L. R. 41 Calc. 1072**
See s. 345 . . **17 C. W. N. 948**
See s. 413 . **I. L. R. 39 All. 293**
See ACQUITTAL **I. L. R. 37 Calc. 604**
See ASSESSOR, EXAMINATION OF.
I. L. R. 40 Calc. 163
See AUTREFOIS ACQUIT.
See DEFAMATION **I. L. R. 48 Calc. 383**
See RIOTING . **I. L. R. 48 Calc. 78**

——— *Previous acquittal, plea of—Acquittal of some accused charged with rioting, grievous hurt and murder—Liability of others to be tried for the same offences—Prosecution story found to be false as to the grievous hurt and murder.* An acquittal of some of the accused on charges of rioting armed with deadly weapons, grievous hurt and murder, is no bar, under s. 403 of the Criminal Procedure Code, to the trial of others concerned in the same offences. Where the Sessions Judge was of opinion, at the original

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— s. 403—*contd.*

trial, that the prosecution story as to the manner in which the deceased met his death, did not represent the truth and acquitted the accused, though he did not disbelieve the fact of a rioting having occurred, while one of the Assessors, believed the whole story: *Held,* that the High Court would not interfere with a pending prosecution against others for the same offences. *Bishun Das Ghose* v. *King-Emperor, 7 C. W. N. 493,* distinguished. KOKAI SARDAR *v.* MEHER KHAN (1910) . . . I. L. R. 37 Calc. 680

——— *(1) Autrefois acquit—s. 403 (4), scope of—Sanction to prosecute, s. 195—Indian Penal Code (Act XLV of 1860), ss. 182 and 211.* Sanction was obtained by the complainant to prosecute the accused for an offence under s. 211, Indian Penal Code. Accused was tried and convicted; but the conviction was quashed by the High Court in revision on the ground that the accused had not committed an offence under that section but under s. 182, Indian Penal Code, for which no sanction had been granted. Complainant thereupon obtained sanction to prosecute the accused under s. 182, Indian Penal Code. On accused pleading in bar of prosecution s. 403 (*1*), Criminal Procedure Code, the Magistrate overruled the objection and his order was confirmed by the Court of Session. Accused petitioned the High Court. *Held,* that the prosecution was barred by s. 403 (*1*), Criminal Procedure Code. *Held,* further, that s. 403 (*4*) refers to the character and status of the tribunal when it refers to competency to try an offence and that a sanction under s. 195, Criminal Procedure Code, is not a condition of the competency of the tribunal but only a condition precedent for the institution of proceedings. *In re* GANAPATHI BHATTA (1913) . I. L. R. 36 Mad. 308

——— *Previous acquittal—"Court of competent jurisdiction"—Sanction.* Where the law requires a previous sanction to be given before a charge can be entertained by a Court, that Court is not a Court of competent jurisdiction until the sanction has been obtained. *In re Samsudin, I. L. R. 22 Bom. 711,* followed. The fact, therefore, that a person has been tried for and acquitted of offences under the Indian Penal Code in respect of certain transactions in connection with the registration of a document is no bar to his trial for an offence under s. 82 of the Registration Act arising out of the same transactions. EMPEROR *v.* JIWAN (1914)

I. L. R. 37 All. 107

——— *Previous acquittal—Subsequent trial how far barred—Penal Code (Act XLV of 1860), ss. 467, 109, 471.* The accused was tried before a Court of Session for abetment of forgery in relation to a document under ss. 467 and 109 of the Indian Penal Code; and was acquitted. He was again tried before the Court of Session for using as genuine the same forged document, under s. 471 of the Indian Penal Code. It was objected that the previous acquittal was a bar to the second trial under s. 403 of the Criminal Procedure Code. *Held,* overruling the contention, that sub-s. *1* of s. 403 of the Criminal Procedure Code did not apply to the case, inasmuch as the case was not one contemplated by s. 236, that is to say, a case where, upon the facts proved, it was doubtful what should be the true view of the offence constituted. *Held,* further, that the case fell under sub-cl. (*2*) of s. 403, for the series of acts beginning with the forgery and ending with the user of the forged document in the Civil Court to support the civil claim must be regarded as so connected together as to form the same transaction, or carrying through of a single predetermined plan, so that under s. 235 (*1*) it would have been competent to try the accused for both offences at the same trial. *Held,* also, that the case fell under sub-s. *4* of s. 403, because the Court which acquitted the prisoner on the charge of abetment of forgery was not competent to try the offence under s. 471 of the Indian Penal Code, inasmuch as at the time of the earlier trial no sanction for the prosecution under s. 471 had been given under s. 195 of the Criminal Procedure Code. EMPEROR *v.* JIVRAM DANKARJI (1915)

I. L. R. 40 Bom. 97

——— *Autrefois acquit—Duty of Court before which plea in bar is taken to decide on evidence.* The petitioner charged the opposite party before the Presidency Magistrate of Calcutta with cheating and criminal breach of trust. The preliminary objection was taken that the accused had been tried on the same facts in the Court at Burdwan and acquitted. The Magistrate on hearing both parties and looking into the papers of the previous trial discharged the accused holding that no further trial could go on: *Held,* that whether the facts in the present case were the same as those in the previous case has to be determined after hearing the evidence and ascertaining what the facts are in this case and what were the facts found in the previous case. The case was sent back to the Magistrate for due enquiry. M. N. MUKHERJI *v.* MATANGI CHARAN PALIT (1918) . . 23 C. W. N. 599

——— *Autrefois acquit—as to bar must be based on investigation of facts.* A Court ought not to decide that a charge pending trial before him is barred under s. 403 of the Criminal Procedure Code without an investigation of the facts put forward on behalf of the complainant. RADHA KISHEN GOENKA *v.* FATEH CHAND BORAH (1918) . . 23 C. W. N. 543

——— *Discharge of complaint by one Magistrate, whether fresh complaint can be entertained by another Magistrate.* There is nothing in the Code of Criminal Procedure, 1898, to prevent a Magistrate from entertaining a second complaint after an order of discharge by another Magistrate. BIJOO KING *v.* KING-EMPEROR 2 Pat. L. J. 34

——— *Autrefois acquit—Legality of trial person previously acquitted, for offence for which a separate charge might have been framed in the former trial—Indian Penal Code (Act XIV of 1860), ss. 52, 79 and 147.* The petitioners who were police constables were convicted of rioting in the course of which they took several persons in custody. Two of the petitioners were previously tried on a charge under s. 342, I. P. C., in respect of the arrests made by them and were acquitted: *Held,* that the present trial of these two petitioners for rioting was not vitiated by contravention of the rule embodied in section ? sub-s. (*1*), Cr. P. C. The case was covered by sub-s. (*2*) which provides that a person ac-

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— s. 403—*concld.*

quitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under s. 235 (1), Cr P. C. *Held*, on a consideration of the circumstances of the case, that the petitioners were not entitled to the benefit of s. 79. J. P. C. RAM SAHAY RAM *v.* KING-EMPEROR . **24 C. W. N. 763**

——— *Autrefois acquit.* The petitioners were tried on charges of kidnapping a minor girl and rioting with the common object of kidnapping the girl. The trying Magistrate acquitted them of the said charges but convicted them of being members of an unlawful assembly with the common object of causing assault and wrongful restraint. In appeal the Sessions Judge set aside the conviction and ordered a retrial on charges of abducting the girl in order to confine her secretly and of rioting with that common object: *Held*, that retrial on the charges mentioned was barred by s 403, Cr. P C KALANATH BARMAN *v.* KING-EMPEROR **24 C. W. N. 856**

——— ss. 403, 423, 439—*Previous acquittal on a charge of causing simple hurt—Subsequent death of person injured—Commitment of the persons acquitted of the minor offence under s. 304 of the Penal Code—Revision. S* and *R* were charged with causing simple hurt to *K*. The case was compounded and both the accused were acquitted. *K* later on, died of the injury caused by *S* and *R*.

s. 304 of the Indian Penal, and to his conviction under that section if the evidence enabled the Court to apply either s. 34 or 114 of the Penal Code to the case. A commitment can only be set aside on a point of law and as no such point arose in this case, High Court did not interfere. EMPEROR *v.* SAILANI (1913) . **I. L. R. 36 All. 4**

——— s. 406—

See s. 110 . . **25 C. W. N. 383**

See APPEAL . **I. L. R. 48 Calc. 874**

——— s. 407—*Sanction to prosecute—Application to Magistrate of the first class—Appeal to District Magistrate—Transfer—Jurisdiction.* S. 407 of the Criminal Procedure Code does not entitle

——— s. 408—

See s. 35 . . **3 Pat. L. J. 138**

See s. 413 . **I. L. R. 40 Mad. 591**

See SEDITION . **I. L. R. 38 Calc. 214**

——— *Assistant Sessions Judge—One accused sentenced to imprisonment for more than four years—Others to a lesser period—Appeal.* When an Assistant Sessions Judge sentences one of several accused to more than

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— s. 408—*contd.*

four years' rigorous imprisonment and others to lesser terms the appeals of all lie to the High Court even though the accused who is sentenced to more than four years does not appeal. EMPEROR *v.* HAR DAYAL (1915)

I. L. R. 37 All. 471

——— ss. 408, 413—*One of several co-accused in the same trial sentenced to one month's imprisonment, others to a longer period—Appeal. Held,*

convicted at the same trial, even though that particular person may have received a sentence which, if it stood alone, would not have been appealable. EMPEROR *v.* LAL SINGH (1916)

I. L. R. 38 All. 395

——— ss. 408, 413 and 439—*Joint trial of several accused—one only awarded appealable sentence—whether Appellate Court may deal with case of all accused—Revision, power of High Court—Construction of Statutes. K* and 14 others were jointly tried for theft and were all convicted.

In revision the High Court went into the merits of the case of all the accused and affirmed the finding of the Sessions Judge. *Per* ATKINSON, J. (JWALA PRASAD, J., dissentiente) —If two or more persons are tried jointly and some are convicted and awarded non-appealable sentences, and others are convicted and awarded appealable sentences, and the latter alone appeal, the Appellate Court is not entitled in that appeal to deal with the cases of those who have been awarded a non-

PRASAD, J.—S. 413 controls s. 408 only in cases in which there is no sentence upon any convicted person above the limit prescribed by s 413, so that if any of the persons convicted in the same case has received a punishment above that limit the right of appeal given in s. 408 enables a person to appeal whose sentence is otherwise unappealable. *Per* ATKINSON, J.—The word "cases" in s. 413 applies to all cases whether they be summons cases, warrant cases, or trial cases. The word is used in its widest and most extensive sense to cover the trial of all cases in respect of which an accused person may be convicted. *Per* JWALA PRASAD, J.—The High Court has power in a proper case to set aside the conviction and sentence passed on an accused person who has not appealed while considering the case of the co-accused who did appeal, and the High Court has [illegible]
the [illegible]
Cour [illegible]
add [illegible]
has [illegible]
words would curtail an undoubted and substantial right given by the statute in clear and unambiguous terms, such as the right of appeal given by s. 408 of the Code. It is consonant with the rules of construction of a statute that the i[illegible]

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

———— ss. 408, 413 and 439—*contd.*

pretation favourable to the right expressly conferred upon a subject should be accepted and acted upon as being the true intention and meaning of the Legislature. PHEKU JHA *v.* THE KING-EMPEROR . . . . 4 Pat. L. J. 435

———— ss. 408, 415—*Appeal—Sentence.* Where certain persons were tried by a Magistrate of the first class, convicted of an offence under s. 325, Indian Penal Code, and sentenced to a day's imprisonment and a fine of fifty rupees: *Held*, that the circumstances that the accused were in fact neither sent to jail nor actually imprisoned would not prevent their being entitled to appeal to the Sessions Judge. EMPEROR *v.* ALAM (1911) . . . I. L. R. 33 All. 510

———— s. 409—

See SANCTION TO PROSECUTE. 4 Pat. L. J. 374

———— s. 410—

See EXCISE . I. L. R. 41 Calc. 694

———— s. 413—

See s. 408 . . 4 Pat. L. J. 435

See APPEAL . I. L. R. 40 Calc. 631

———— Concurrent sentences—*Two sentences of one month running concurrently—Appeal.* Where the accused were convicted on two separate charges and sentenced to one month's rigorous imprisonment on each of the charges by a first class Magistrate, the sentences to run concurrently: *Held*, that an appeal lay to the Sessions Court. BEPIN BEHARY DEY *v.* THE EMPEROR (1911) . . . 15 C. W. N. 734

———— Practice—Sentence—*Magistrate passing non-appealable sentence—Adding to sentence to make it appealable—Appeal to Sessions Judge—The Sessions Judge to entertain the appeal and to decide it on merits.* The Magistrate trying a case passed at first a non-appealable sentence on the accused, but at the request of the accused, made an addition to the sentence passed so as to make it appealable. When the accused appealed to the Sessions Judge his appeal was dismissed on the ground that no appeal lay inasmuch as the sentence first passed by the Magistrate was not appealable and the addition to the sentence could not be made legally. In revision: *Held*, that the Sessions Judge had committed an error in holding that he had no jurisdiction to hear the appeal; for though the Magistrate had no jurisdiction to alter the sentence once passed by him, yet for the purposes of the Sessions Judge's jurisdiction, so far as the appeal was concerned, that was the very mistake which he was called upon to correct by way of appeal. When the appeal was heard again by the Sessions Judge he struck out the addition made by the Magistrate in the sentence, and having done that, dismissed the appeal on the ground that the sentence appealed from was not appealable. In revision: *Held*, that when the Magistrate had passed a sentence beyond one month, an appeal lay to the Sessions Judge, under s. 413 of the Criminal Procedure Code whether that sentence was passed legally or illegally. *Held*, also, that the Sessions Judge being once seized of the appeal, the whole appeal became open to his Court, even on merits. EMPEROR *v.* KESHAVLAL VIRCHAND (1911) . . . . I. L. R. 35 Bom. 418

———— *Appeal—Concurrent sentences aggregating to more than one month, by a Magistrate of the first class—Whether appeal lies.* For the purpose of appeal, concurrent sentences passed by the trying Magistrate on an accused must be taken in the aggregate. The petitioner and others were found guilty by a Magistrate of the first class, under ss. 143 and 365, read with s. 114, Penal Code, and each of them was sentenced to one month's rigorous imprisonment under each of the sections, the sentences to run concurrently: *Held*, that an appeal lay to the Court of Sessions. ABDUL KHALEK *v.* THE KING-EMPEROR (1912) . . 17 C. W. N. 72

———— *Appeal—One of two co-accused given a non-appealable, the other an appealable, sentence—Indian Registration Act (XVI of 1908), s. 83—"Permission"—Criminal Procedure Code, s. 403—Previous convictions.* *Held*, that a person who has received a non-appealable sentence does not derive any right of appeal from the fact that a co-accused tried jointly with him has received a sentence which is appealable. *Emperor* v. *Lal Singh, I. L. R. 38 All. 395*, and *Sheopal* v. *King-Emperor, 15 Oudh Cases 386*, dissented from. *Reg.* v. *Kalubhai Meghabhai, 7 Bom. H. C Rep. (Crown Cases) 35*, and *Aiyar* v. *Venkatakrishnayya, 31 Mad. L. J. 837*, followed. *Held*, also, that according to s. 83 of the Indian Registration Act, 1908, all that is required for the initiation of a prosecution under the Act is the "permission," of the Registration officer. This is not the same as a "sanction," which word has received a technical meaning owing to its use in Chap. XV of the Code of Criminal Procedure. *Held*, further, that where a conviction and sentence are set aside merely for want of jurisdiction this does not bar a fresh trial on the same facts. EMPEROR *v.* HUSAIN KHAN (1916)

I. L. R. 39 All. 293

———— ss. 413, 408—*Joint trial of several accused—Appealable sentence on some and non-appealable sentence on others—No right of appeal for the latter—S. 408 of Criminal Procedure Code, no guide to the interpretation of s. 413 of Criminal Procedure Code.* S. 413 of Criminal Procedure Code prohibit an appeal by a person against whom a non-appealable sentence has been passed even though appealable sentences have been passed against others jointly tried with him. Though for convenience a joint trial of several accused persons under certain circumstances is allowed, on conviction each accused must be deemed to have been convicted in a separate case of his own for the purposes of s. 413 of Criminal Procedure Code. The analogy of s. 408, Criminal Procedure Code, cannot be extended to s. 413 of Criminal Procedure Code. PIGGOT, *J.'s* view in *Emperor* v. *Lal Singh, I. L. R. 38 All. 395*, not followed. *Palani Koravan* v. *Emperor, 17 Mad. L. J. 248*, distinguished. *Reg.* v. *Muliya Nana, 5 Bom. H. C. R. 24 (Cr. C.)*, and *Reg.* v. *Kalubhai Meghabhai, 7 Bom. H. C. R. 35 (Cr. C.)*, referred to. It does not follow as a matter of course that because some of the accused tried along with others are acquitted on the merits on appeal by them, others should necessarily

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

—————— ss. 413, 408—*contd.*

have th[illegible] Court. of Burm[illegible] (1916) . . . . I. L. R. 40 Mad. 591

—————— s. 417—

See CHARGE . I. L. R. 42 Calc. 957

See PUBLIC PROSECUTOR.
I. L. R. 41 Calc. 425
I. L. R. 46 Calc. 544

See STATUTE 24 & 25 VICT., C. 104, ss. 1 AND 2 . . I. L. R. 36 All. 168

cases—Appellate Court's duty to give due weight to decision of lower Court. An appeal from an acquittal does not stand on a different footing with regard to the consideration of evidence to an appeal from a conviction. No distinction is drawn in the Code of Criminal Procedure between an appeal from an acquittal and an appeal from a conviction. There are no special rules for dealing with the evidence in an appeal from an acquittal which, it is expressly provided in the Code, may lie on a question of fact. Due weight must of course be given to the decision of the Court below and the reasons advanced for that decision. Only one broad rule can be laid down with regard to the consideration of evidence in all criminal cases and that is that the innocence of the accused person must be presumed and the burden lies upon the prosecution of completely rebutting that presumption. If after the consideration of the whole evidence any doubt is felt by the Court as to the guilt of any accused person he is entitled to the benefit of that doubt and the verdict must be in his favour. DEPUTY LEGAL REMEMBRANCER, BIHAR AND ORISSA *v.* MATUKDHARI SINGH (1915) . . 20 C. W. N. 128

—————— ss. 417, 435, 438—

See ACQUITTAL . I. L. R. 44 Calc. 703

—————— ss. 418 to 423—

See s. 367 . I. L. R. 39 All. 348

—————— s. 421—

See s. 367 . I. L. R. 36 All. 496

See APPEAL . I. L. R. 38 Calc. 307
I. L. R. 41 Calc. 406

—————— *Appeal—summary dismissal.* In dealing with an appeal under s. 421 of the Code of Criminal Procedure, 1898, the Appellate Court should give some reason for dismissing the appeal summarily although not required by law to write a judgment. GURUBHAI BEHARA *v* THE KING-EMPEROR 2 Pat. L. J. 695

—————— ss. 421, 423—

See APPEAL . I. L. R. 41 Calc. 406

—————— ss. 421, 233, 537—*Criminal appeal—presentation of, to an officer of the Court, or to one of the Judges—Appellate Side Rules, R. 1 (1) (f)—Divisional Court for the disposal of criminal business, powers of, to admit criminal appeals, when Admission Court is sitting—Notes to the Weekly Sitting List—Charter Act (24 & 25 Vict., Cap. 104),*

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

—————— ss. 421, 233, 537—*contd.*

issued to the Public Prosecutor to appear at the further hearing of the revision and also to inform the Court whether Government intended to appeal against the acquittal. He appeared and handed in the appeals by the Government to the learned Judges who perused them and ordered notice forthwith. On that date an Admission Court constituted by a single Judge was sitting: *Held,* that there was a valid presentation of the appeals. The fact that a single Judge sitting in the Admission Court is entrusted with the duty of admitting criminal appeals does not deprive the Divisional Court constituted for the disposal of criminal business of the right to exercise its power of admitting criminal appeals. It is by reference to the rules made by the High Court that the respective powers of Judges sitting alone and of Divisional Courts must be ascertained and not *by reference to the notes to the "Sittings List"*

sit alone and which in Divisional Courts. *Per* OLDFIELD, J.—*As regards presentation, no special* method is enjoined in the Code of Criminal Procedure; and therefore the question is one of administrative convenience alone. So long as there is an actual presentation to an officer of the Court such as a Bench Clerk or to one of the Judges. its members, the presentation is not invalid, Where, on the presentation of a single complaint against the accused containing all the allegations necessary *for the establishment of two cases,* those allegations being shortly that accused had cheated the Bank of Madras in connection with certain bills of exchange and also by a false representation contained in a document as to the amount of his assets, the Magistrate after recording the prosecution evidence continuously without discriminating between that which was relevant on each of these two charges, framed separate *charges and also numbered them as* different calendar cases, but when the witnesses came to be cross-examined, he lost sight of the necessity for keeping the two trials separate and allowed the witnesses to be cross-examined promiscuously in respect of both the charges. *Held,* that the joint trial of the two cases was illegal inasmuch as it contravened the provisions of s. 233, Criminal Procedure Code, and that the *legality could not be cured by s. 537, Criminal* Procedure Code. *Subramania Ayyar* v. *King-Emperor, I. L. R. 25 Mad. 61,* followed. Where, in an appeal preferred by the High Court against the acquittal of an accused after an illegal trial, the Court is of opinion that the acquittal is wrong on the merits, the accused cannot be convicted and sentenced by the High Court; the only course open is to order that the accused be tried a second time. *Per* NAPIER, J.—The decision of the Privy

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— ss. 421, 233, 537—*concld.*

Council in *Subramania Ayyar* v. *King-Emperor, I. L. R. 25 Mad. 61,* does not compel the Court to hold that in no case can a misjoinder of charges or a failure to try charges separately be an irregularity within the meaning of s. 537, Criminal Procedure Code. THE PUBLIC PROSECUTOR *v.* KADIRI KOYA (1915) . **I. L. R. 39 Mad. 527**

——— s. 422—

See APPEAL . **I. L. R. 41 Calc. 406**

——— ss. 422, 423—

See s. 439 . **I. L. R. 39 Mad. 505**

——— s. 423—

See s. 237 . **I. L. R. 33 Mad. 264**

See s. 250 . **I. L. R. 38 Mad. 1094**

See s. 403 . **I. L. R. 36 All. 4**

See s. 421 . **I. L. R. 39 Mad. 527**

See APPEAL . **I. L. R. 42 Calc. 374**
I. L. R. 41 Calc. 406

See APPELLATE COURT.
I. L. R. 38 Calc. 293

See ASSESSORS . **I. L. R. 40 Calc. 163**

See CRIMINAL TRESPASS.
I. L. R. 43 Calc. 1143

See DACOITY . **I. L. R. 41 Calc. 350**

See DEPOSITION . **I. L. R. 46 Calc. 895**

See EVIDENCE ACT, s. 167.
14 C. W. N. 493

See JURY, TRIAL BY.
I. L. R. 46 Calc. 635

See RIOTING . **I. L. R. 39 Calc. 896**

See TRADING WITH THE ENEMY.
I. L. R. 42 Calc. 1094

——— *Appeal—Power of Appellate Court to alter finding of acquittal into one of conviction.* An Appellate Court can, under s. 423 of the Criminal Procedure Code in an appeal from a conviction, alter the finding of the lower Court, and find the appellant guilty of an offence of which the lower Court has declined to convict him. *Queen-Empress* v. *Jabanulla, I. L. R. 23 Calc. 975,* followed. EMPEROR *v.* SARDAR (1911)
I. L. R. 34 All. 115

——— *Sentence—Alteration of sentence whether amounting to an enhancement or not.* A Magistrate on a conviction under s. 379 of the Indian Penal Code sentenced the accused to one month's rigorous imprisonment and a fine of Rs. 5 each and in case of a default in payment of the fine, to one week's further imprisonment. The District Magistrate on appeal by the accused altered the sentence to one of three days' imprisonment and a fine of Rs. 100, and in default of payment of fine, to a further imprisonment of one month. *Held,* that in the absence of any evidence that the accused were unable to pay the fine or regarded the sentence passed on appeal as more severe than the original sentence, it could not be said that the sentence had been enhanced. *Queen-Empress* v. *Chagan Jagannath, I. L. R. 23 Bom. 439,* and *Bakthavatsalu Naidu* v. *Emperor, I. L. R. 30 Mad. 103,* doubted. *Rakhal Raja* v. *Khirode Pershad Dutt, I. L. R. 27 Calc. 175,* approved. EMPEROR *v.* MEHAR CHAND (1914)
I. L. R. 36 All. 485

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— s. 423—*contd.*

——— *Honorary Magistrates—Judgment of Bench signed by one member only—Appeal—Order returning judgment to be signed by the other member of the Bench which had heard the case.* A District Magistrate, on an appeal from the decision of a Bench of Honorary Magistrates, found that, although the case had apparently been heard by a Bench of two Magistrates, the judgment was signed by only one member of the Bench, and accordingly returned the judgment to be signed by the other Magistrate who had heard the case. *Held,* that this procedure was in no way opposed to s. 423 of the Code of Criminal Procedure. EMPEROR *v.* GOPAL DAS (1918) . . . . **I. L. R. 41 All. 217**

——— *Alteration of finding under—Penal Code (Act XLV of 1860), s. 325—Conviction under, may be altered to conviction under s. 144—Appellate Court, power of.* Under s. 423 (*b*) (2), Criminal Procedure Code, the Appellate Court may alter the finding maintaining the sentence and there is nothing to restrict the finding which may be altered to a finding of conviction. A conviction under s. 325, Indian Penal Code, may be altered by the Appellate Court into a conviction under s. 147, Indian Penal Code, the sentence under s. 325 being maintained. *Abhi Misser* v. *Lakhmi Narain, I. L. R. 27 Calc. 566,* distinguished. APPANNA *v.* PITHANI MAHALAKSHMI (1910) . . **I. L. R. 34 Mad. 545**

——— *Power of Appellate Court to alter finding of acquittal to a finding of conviction—Penal Code (Act XLV of 1860), ss. 147, 353 and 358.* Under s. 433 of the Code of Criminal Procedure, 1898, an Appellate Court has power to alter a finding of acquittal to a conviction either on a point of law or on a point of fact. Where the accused were charged with the offence of being members of an unlawful assembly with the common object of resisting arrest, and the trial Court acquitted them on this charge and convicted them under s. 323 of the Penal Code: *Held,* that the Appellate Court, having found that one of the common objects of the assembly was to resist arrest, was entitled to alter the conviction to one of rioting with the said common object. MAHANGU SINGH *v.* KING-EMPEROR
3 Pat. L. J. 565

——— ss. 423 and 428—*Order setting aside conviction and ordering trying Magistrate to retry the case, take additional evidence and decide the case on both original and additional evidence, legality of.* Sub-Divisional Magistrate convicted the petitioners of offences under the Indian Penal Code, ss. 147 and 148. The Sessions Judge, on appeal, sent the case back for further evidence to be recorded with a direction to the Magistrate to record a fresh decision on the evidence already recorded and on the additional evidence. By his order the Sessions Judge set aside the conviction and sentence and ordered a retrial from the point at which the additional evidence should have been taken. After taking the additional evidence the Magistrate again convicted the petitioners who again appealed. By this time the Sessions Judge who heard the first appeal had been

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

—— ss. 423 and 428—*contd.*

succeeded by another. At the request of both parties the Appellate Court disregarded the additional evidence and decided the case on the original evidence. He upheld the convictions. *Held,*

a new trial by the Magistrate. Ordinarily the proper cou

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for that purpose. But as both sides had asked the Sessions Judge to disregard the additional evidence, and as the Sessions Judge had already recorded his finding on the original evidence, it was unnecessary to return the case to him in order that he might record a fresh judgment. *Held, per* JWALA PRASAD, *J.*, that the Sessions Judge's order setting aside the convictions and sentences, ordering a retrial of the accused, and directing the Magistrate to take additional evidence was wholly illegal. *Held,* further, however, that under the circumstances of the case the accused had not been prejudiced. GAJANAND THAKUR *v.* KING-EMPEROR . . . 1 Pat. L. J. 99

—— ss. 423, 439—

See s. 403 . . I. L. R. 36 All. 4

See JURISDICTION OF HIGH COURT. I. L. R. 38 Calc. 786

—— *High Court, power of, to alter finding of acquittal into conviction and enhance sentences in Revision—Penal Code (Act XLV of 1860), s. 300, explained.* S. 423, cl. (*b*), Criminal Procedure Code, 1898, gives power to the High Court when hearing an appeal against a conviction to alter the finding and s. 439 gives power to enhance the sentence so as to make it appropriate to the altered finding. S. 439, sub-s. (*4*), which enacts that "nothing in this section shall be deemed to authorise a High Court to convert a finding of acquittal into one of conviction" must be construed as referring to cases where the trial has ended in a complete acquittal; any other constructi— would be inconsistent with the power to "a

Court as a Court

to exercise the

Appeal by s. 42

Court, having

rioting into one

from five years' rigorous imprisonment to transportation for life. In the course of a riot the accused attacked and killed a man with dangerous weapons: *Held,* that the acts of the accused having caused the death of the man and there being nothing to suggest that they were not sufficient to cause death as their ordinary and natural result in the absence of proof of circumstances sufficient to give the accused the benefit of any of the exceptions to s. 300 of the Penal Code, they must be taken to have intended to kill the man and are guilty of murder. BALI REDDI, *Re* . . . I. L. R 37 Mad. 119

—— ss. 424—

See s. 367 . 21 C. W. N. 550

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

—— s. 424—*contd.*

See JUDGMENT OF APPELLATE COURT. I. L. R. 37 Calc. 194

See PRACTICE . I. L. R. 40 Calc. 376

in appeal by the Sessions Judge. *Held,* that there ought to be sufficient materials in the appellate judgment itself to enable the High Court to form a conclusion as to the propriety of the conviction of each of the accused having regard to the various offences with which he was charged, and to enable it to come to a conclusion as to the correctness of the sentence which has been passed upon each of the accused having regard to the nature of the offence with which each of the accused was charged. The High Court directed a re-hearing of the appeal by the same Sessions Judge. ABINDRA RAJBUNSHI *v.* KING-EMPEROR (1916) . . . . 20 C. W. N. 1296

—— s 428—

See s. 196 . I. L. R. 42 Mad. 885

See s. 423 . . 1 Pat. L. J. 99

See EVIDENCE ACT, s. 21. I. L. R. 36 Mad. 457

—— *Re-trial, power of High Court to order, after obtaining additional evidence—Government of India Act (5 and 6 Geo. V. c. 61), s. 107—Witnesses, duty of Court to secure attendance of—Petitions filed by parties, duty of* ... High Court has power ... ppeal ... the ... been ... haust

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tion and delay. Where the accused repeatedly requested that certain persons should be summ... witnesses and the Court twice issued

the travelling ...

did not excuse the Court from its duty to secure their attendance as the accused had never been requested to deposit the sum necessary for the expenses. MAHOMED ZAMIRUDDIN *v.* KING-EMPEROR . . . . 3 Pat. L. J. 632

—— s. 429—

See PRINTING PRESS. I. L. R. 38 Calc. 202

—— ss. 429, 439—

See SANCTION FOR PROSECUTION (19). I. L. R. 39 Mad. 750

—— s. 432—*Reference under—Indian Electricity Act (IX of 1910), s. 33, scope of—"Every person," meaning of.* The words "every person" in s. 33 of the Indian Electricity Act is not con- ... III ... to ... in ... ces

—— s. 432—*contd.*

;o have resulted in loss of life or personal
Re HAWKINS (1915)
I. L. R. 39 Mad. 686

—— s. 435—

See s. 107 . . 3 Pat. L. J. 302

See s. 133 . I. L. R. 48 Calc. 538

See s. 145 . I. L. R. 41 All. 302
I. L. R. 36 All. 233

See BENGAL REGULATION VI OF 1825, s. 2.
I. L. R. 33 All. 84

See HIGH COURT (JURISDICTION).
I L. R. 34 Bom. 378
I. L. R. 37 Calc. 287

See PRESS ACT (I OF 1910), s. 3 (*1*), PROVISO . . I. L. R. 39 Mad. 1164

———— *Order by Deputy rate amounting to a dismissal of complaint—complaint, disposed of by District Magis- Further enquiry ordered by Sessions Judge— ction to make such order.* Where the te party filed a complaint against the ner before the Deputy Magistrate of Sing- who called for a police-report and subse- 7 on a consideration of that report passed lowing order on the 28th November 1911 : r mistake of law, s. 406, I. P. C." and the te party thereupon filed another complaint the Deputy Commissioner who ordered ial enquiry by the Deputy Magistrate and considering his report directed that the hould be entered as false as the outcome ivil dispute and then the opposite party the Sessions Judge who ordered a further y under s. 437, Cr. P. C. *Held*, that having to the provisions of s. 435, sub-s. (*4*), Cr. P. e Sessions Judge should not have ordered r enquiry into the complaint. The order Deputy Magistrate, dated the 28th Novem- 11, must be regarded as an order dismissing mplaint. *Girish Chandra* v. *The Emperor, V. N. 638, Nagendra Nath Sen* v. *Mr. Korb, N. 456*, followed. That the case having disposed of by a competent authority it not thereafter have been withdrawn by eputy Commissioner to his own file under , Cr. P. C. That when the Deputy Commis- proceeded to revise the Deputy Magis- s order and have a further enquiry made, st be taken that he was acting under s. 435, C. SIDDIK *v.* CHAKAURI KHANSAMA (1913)
17 C. W. N. 451

———— *High Court—Revi- Jurisdiction—Magistrate's order as to com- tion—District Municipalities Act (Bombay II of 1901), s. 161 (2).* An order passed by a strate under s. 161 (2) of the Bombay Dis- Municipalities Act, 1901, can be revised by High Court. DINABAI JIJIBHAI. *In re* (1919)
I. L. R. 43 Bom. 864

—— ss. 435, 436—

See s. 239 . I. L. R. 42 Mad. 561

———— *Commitment to the rt of Sessions by the High Court in revision— ian Arms Act, ss. 19F, 20.* Where in a case eeded with under s. 19F, the evidence re-

—— ss. 435, 436—*contd.*

corded by the Magistrate disclosed an offence under s. 20 of the Arms Act, the High Court directed the commitment of the case to the Court of Sessions. NISHI KANTA LAHIRI *v.* THE CROWN (1916) . . . . 20 C. W. N. 732

———— *Refusal of District Magistrate to interfere and commit to Sessions before completion of inquiry before Sub-Magistrate —Power of Sessions Judge to commit* suo motu *after discharge by Sub-Magistrate.* An order of a District Magistrate refusing to call for the records and commit to the Sessions an accused person while the charge against him is still under inquiry before an inferior Magistrate is not an order refusing to revise an order of discharge and a Sessions Judge may order commital of the accused to the Sessions Court after his dis- charge by the inferior Magistrate. *Kalimuthu* v. *Emperor (1903) I. L. R. 26 Mad., 477*, dis- tinguished. GANDI APPA RAZU *v.* KING-EMPEROR (1920) . . . . I. L R. 43 Mad. 330

—— ss. 435, 437—

See s. 200 . . 3 Pat. L. J. 346

—— ss. 435 to 439—*Revision—Practice— Application to be made first to Sessions Judge or District Magistrate—Act No. XLV of 1860 (Indian Penal Code), ss. 499, 95—Defamation—Act causing slight harm.* So far as the practice of the High Court in the matter of applications for revision on the Criminal side is concerned, an application to the lower Court should be considered an essential step in the procedure, and that should be so whether the District Magistrate or the Sessions Judge has power to grant the relief or not. In future, therefore, failure on the part of the appli- cant to submit his application to the lower Court will operate as a bar to the application being entertained by the High Court. *Emperor* v. *Mansur Husain, I. L. R. 41 All. 687*, referred to. Observation on the application of s. 95 of the Indian Penal Code. SHARIF AHMAD *v.* QABUL SINGH . . . . I. L. R. 43 All 497

—— s. s. 435, 438—

See ACQUITTAL . I L. R. 44 Calc. 703

See REVISION . 3 Pat. L. J. 302

———— *District Magistrate— Reference to High Court—Power to refer a case heard by Sessions Judge.* A District Magistrate is not empowered to make a reference to the High Court questioning the propriety of judg- ment by a Sessions Judge. *Queen-Empress* v. *Karamdi, I. L. R. 23 Calc. 250*, followed. EMPEROR *v.* LOBO (1916) . I. L. R. 41 Bom. 47

—— ss. 435, 439—

See s. 133 . I. L. R. 48 Calc. 534

See s. 145 . I. L. R. 41 All. 302

See HIGH COURT . I. L. R. 41 All. 587

See SANCTION FOR PROSECUTION.
I. L. R. 44 Calc. 816

———— *Charter Act (24 & 25 Vict., cap. 104), s. 15—High Court, powers of, to revise—Complaint of offences under Indian Penal Code (Act XLV of 1860), ss. 189 and 504—Charges framed—Prosecution evidence unreliable—Offences not made out—Prosecution not* bonâ fide—*Interlocu*

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

———— **ss. 435, 439**—*contd.*

tory order—Process-server's right to enter any house to effect service. A complaint was preferred against the accused in respect of offences under ss. 189 and 504, Indian Penal Code, and charges were framed under the said sections by a second class Sub-Magistrate. A criminal revision petition was filed by the accused in the High Court to quash the proceedings on the ground that the evidence on record was insufficient to substantiate either of the charges and that the proceedings

to interfere in revision. *Held,* that though the power of revision has to be exercised with great care the High Court has jurisdiction to interfere at any stage of the proceedings, if it considers that in the interest of justice it should do so. *Held* (on the facts of the case), that the case was a fit one for interference in revision, as a careful consideration of evidence of the prosecution led to the conclusion (i) that the ingredients necessary to constitute an offence under ss. 189 and 504, Indian Penal Code, had not been made out and

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but that the complainant was a tool in the hands of others. For an offence under s. 504 of the Indian Penal Code, mere abuse will not do without
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right of entry into any house without the permission of the owner or person in charge. *Re* KUPPUSWAMI AYAR (1915) . I. L. R. 39 Mad. 561

———— *High Court—Criminal revisional jurisdiction—Power to interfere with order passed under para. 1 of s. 2 of the Workmen's Breach of Contract Act (XIII of 1859)—Contract*

or specific performance of the contract, under para. 1 of s. 2 of the Workmen's Breach of Contract Act, 1859. The accused entered into an agreement with the complainant engaging to remove 100 logs of timber from a forest to a forest depôt, a distance of 22 miles, and received an advance of Rs. 440. The accused having failed to carry out the contract, was tried under s. 2 of the Workmen's Breach of Contract Act, 1859, and was ordered to repay the advance. On application under criminal revisional jurisdiction: *Held,* that the contract in question was not a contract of an artificer, workman or labourer and did not fall within the purview of the Act. EMPEROR *v.* DEVAPOA RAMAPOA (1918) I. L. R. 43 Bom. 607

———— *Revision by High Court of order of acquittal—Irregularities in procedure and absence of proper charge to jury—Defence witnesses examined as Court witnesses and cross-examined by both sides—S. 342—Examination of accused by Court, necessity of—S. 451—Trial of*

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

———— **ss. 435, 439**—*concld.*

European British subject. The accused, a European British subject, was charged with the commission of an offence under s. 326, Indian Penal Code, and he was tried by the District Magistrate with the aid of a jury under s. 451, Criminal Procedure Code. It appeared that the evidence given by three police witnesses in the preliminary enquiry was read over to them and treated as their examination-in-chief. The Magistrate declined to admit in evidence a map prepared by the investigating

them. There was no examination of the accused under s. 342, Criminal Procedure Code. The

was explained to the jury. On the acquittal of the accused the High Court was moved by the complainant in revision: *Held,* that the trial

that the trial was conducted in an atmosphere of prejudice and the order of acquittal should be set aside. That the examination of the two witnesses who had been summoned as Court witnesses but were essentially defence witnesses in the manner aforesaid was highly improper. That this was pre-eminently a case in which an opportunity of making a statement should have been given to the accused. GANGADHAR GOALA *v.* REGINALD WILLIAM LEMON REED .
25 C. W. N. 609

———— **ss. 435, 439, 133**—*Revision petition to the High Court against an order under s. 133—Order of a single Judge of the High Court—Appeal against order, if maintainable—Letters Patent (24 & 25 Vict., cap. 104, cl. 15)* No appeal lies, under cl. 15 of the Letters Patent, against an order of a single Judge of the High Court in a Criminal Revision Petition preferred against an order of a Magistrate acting under s. 133 of the Code of Criminal Procedure. SUBBAYYA *v.* RAMAYYA (1915) . . I. L. R. 39 Mad. 537

———— *Revision—Practice—*
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whether the District Magistrate or the Sessions Judge has power to grant the relief or not. In future, therefore, failure on the part of the applicant to submit his application to the lower Court will operate as a bar to the application being entertained by the High Court. *Emp... Mansur Husain, I. L. R. 41 All. 657,* ... Observations on the application of s. ... Indian Penal Code. SHARIF AHMAD ... SINGH . . . I. L. ...

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—contd.

——— ss. 435, 439, 491—

See EXTRADITION WARRANT. **I. L. R. 42 Calc. 793**

——— s. 436—

See s. 435 . . **20 C. W. N. 732**
I. L. R. 43 Mad. 330

See s. 439 . **I. L. R. 42 Mad. 561**

——— *Scope of section—Discharge, meaning of—Commitment to Sessions Court under the section—Accused tried and acquitted by competent Magistrate on charge framed—Competency of Sessions Court to direct commitment on another charge which in his opinion should have been framed.* The petitioner was tried and acquitted by a competent Magistrate on a charge of simple forgery under s. 465, Indian Penal Code. The Sessions Judge by an order under s. 436, Criminal Procedure Code, directed the commitment of the petitioner on a charge of forgery of a valuable security under s. 467, Indian Penal Code, with which he held the petitioner should have been charged. *Held, per* RICHARDSON, *J.*, that s. 436, Criminal Procedure Code, contemplated a case of discharge and the petitioner not having been properly or improperly discharged in respect of an offence under s. 467, Indian Penal Code, the Sessions Judge had no power to direct his commitment or to order a further inquiry under proviso (*b*) in respect of that offence. The acquittal of an accused on a charge framed does not necessarily imply that the Magistrate discharged him in respect of any other charge which might have been framed. The Magistrate must consciously do something or make some order which shows that in his opinion on the materials before him the accused should not be charged for that offence. The meaning of "discharge," and the general rule of the Code that a discharge should precede the framing of a charge were considered. *Per* TEUNON, *J.*—The Magistrate's order acquitting the accused of an offence under s. 465, Indian Penal Code, was tantamount to an order discharging the accused of the graver offence under s. 467, Indian Penal Code. The fact that no charge was framed and the Magistrate was not asked to frame a charge under the graver section was immaterial. ABDUL HAKIM *v.* HASAN ALI (1917) . . **22 C. W. N. 117**

——— *Penal Code (Act XLV of 1860), ss. 323, 324, 376, 511—Subordinate Magistrate taking cognizance on police charge-sheet—No mention of offence under ss. 376, 511, Indian Penal Code—Prosecution not pressing for* [illegible] *before Magistrate—Order by District Magistrate directing commitment—Validity of order—Reference by Sessions Judge—Quashing of commitment by High Court—Jurisdiction of District Magistrate.* Where a Subordinate Magistrate took cognizance of a case on a police charge-sheet charging the accused with offences of assault and hurt under ss. 323 and 324, Indian Penal Code, but no charge was made [illegible] under ss. 376 and 511, [illegible]

offence under ss. 376 and 511, Indian Penal Code, and the accused was so committed: *Held* (on a reference by the Sessions Judge), that the proceedings of the Subordinate Magistrate did not amount to an order of discharge on the major offence and the District Magistrate had no jurisdiction to pass an order under s. 436 of the Criminal Procedure Code directing the Subordinate Magistrate to commit the accused to the Sessions for the offence under ss. 386 and 511, Indian Penal Code. Commitment quashed and the Subordinate Magistrate directed to proceed with the trial of the minor offences. *Krishna Reddi v. Subbamma, I. L. R. 24 Mad. 136,* distinguished. SESSIONS JUDGE OF COIMBATORE *v.* MUTHAPPA GOUNDAN (1918) . . . . **I. L. R. 41 Mad. 982**

——— *Discharge—Commitment to Court of Session by District Magistrate, grounds for.* Before a District Magistrate orders the committal to the Court of Session of an accused who has been discharged by an inferior Court, he should come to a finding, with reference to the evidence that the accused has been improperly discharged. It is not enough that, in his opinion, the charge is of such a character that it should be considered by a Court of Session. SRIKISHEN LAL *v.* THE KING-EMPEROR **1 Pat. L. J. 97**

——— s. 437—

See s. 119 . **I. L. R. 38 All. 147**
I. L. R. 35 Bom. 491

See s. 202 . . . **5 Pat. L. J. 47**

See s. 203 . . **I. L. R. 35 All. 73**
I. L. R. 40 All. 133

See CHARGE . **I. L. R. 41 Calc. 66**

See FURTHER INQUIRY.
I. L. R. 39 Calc. 228

——— *Discharge, order of, by High Court Sessions, if any bar to fresh proceedings—Nolle prosequi.* An order of discharge by the High Court in the exercise of its Original Criminal Jurisdiction is no bar to fresh proceedings being taken before a competent Magistrate upon complaint or upon a police report or under s. 190 (c) of the Code of Criminal Procedure. *Mir Ahmed Hossein v. Mahomed Askari, I. L. R. 29 Calc. 726, F. B.: 6 C. W. N. 641,* referred to. Where an accused person was put upon his trial before the High Court Sessions on charges punishable under ss. 363 and 366 of the Indian Penal Code and an order of discharge was passed upon the Advocate-General entering a nolle prosequi, and subsequently the accused being again sent up to take his trial upon the same charges, the Deputy Magistrate held that he could not do so [illegible]: *Held,* that the Magistrate was wrong in declining [illegible] and he was bound to adjudicate on the charges properly laid before him against the accused. *Held,* also, that the order of discharge by the High Court [illegible] 15 C. W. N. 932

——— [illegible]
[illegible]

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

———— s. 437—*contd.*

second complaint—Jurisdiction. Held, that it is

complaint. *Queen-Empress* v. *Umedan, All. Weekly Notes, (1895) 86,* followed. EMPEROR *v.* KEYMER (1913) . . . . I. L. R. 36 All. 53

———— *Accused discharged by Magistrate—Order for further inquiry—Notice—Judicial, discretion—Practice.* Nothing in s. 437 of the Code of Criminal Procedure requires previous notice to be given to any accused person who has been discharged, before further inquiry into his case is ordered by a competent authority, that is, by the High Court, or the Sessions Judge or the District Magistrate. Nevertheless as a matter of judicial discretion it is advisable that previous notice should issue when the matter for consideration is the setting aside of an order of discharge in favour of the accused person who has been actually before the Court to answer the facts alleged against him. *Queen-Empress* v. *Ajudhia, I. L. R. 20 All. 339,* referred to. EMPEROR *v.* ABDUL LATIF (1918) . I. L. R. 40 All. 416

———— *Further enquiry—Dismissal of complaint merely on report of President Panchayet.* Where the Magistrate dismissed a complaint of assault and theft merely on the report of the President Punchayet without giving the petitioner any opportunity to substantiate his case and the order of dismissal referred to one of the charges only of the complaints: *Held,* that there should be a further enquiry into the complaint. PURNA CHANDRA DEY *v.* AMBICA CHARAN ADHIKARY (1919) . 23 C. W. N. 575

———— *"Discharge"—Subordinate Magistrate omitting to frame a charge.* Two persons were placed on trial before a Magistrate of the second class for offences under ss. 307 and 323 of the Indian Penal Code. One of these persons was discharged; but, as regards the other, the Magistrate, whilst framing a charge against him under s. 323 omitted to say anything about the other section. *Held,* that the effect of this was equivalent to a discharge so far as the offence under s. 307 was concerned and it was open to the District Magistrate to direct a further inquiry under s. 437 of the Code of Criminal Procedure. *Krishna Reddi* v. *Subbamma, I. L. R. 24 Mad. 106,* referred to. SHEO NARAIN SINGH *v.* RADHA MOHAN SINGH . I. L. R. 42 All. 128

———— *Order for further inquiry after discharge without notice to the accused—when further inquiry should not be ordered. Held,* that an order for further inquiry after discharge should not be passed without notice to the accused, the order being one which is prejudicial to him. *Dulla* v. *Empress (2 P. R. (Cr.) 1901,* referred to. *Held,* also that further inquiry should not be ordered unless the order of discharge was manifestly perverse or foolish or was based upon a record of evidence which was obviously incomplete. *Emperor* v. *Kiru (10 P. R. (Cr.) 1911 F. B.),* page 34, *per* KENSINGTON, J., cited. NABI BAKHSH *v.* THE CROWN

I. L. R. 1 Lah. 216

———— ss. 437, 119—*Power to order further inquiry under s. 437 does not extend to order of*

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

———— ss. 437, 119—*contd.*

discharge under s. 119. The power conferred by s 437 of the Criminal Procedure Code to order further inquiry cannot be exercised in the case of orders of discharge under s 119 of the Code, where the Magistrate before making the order of discharge, has called upon the person, into whose conduct the inquiry is made, to establish his defence. The word 'discharged' in s. 437 must be read as equivalent to 'discharged' within the meaning of ss. 209, 253 and 259 of the Code. VELU TAYI AMMA *v.* CHIDAMBARAVELU PILLAI (1909) . . . . I L. R. 33 Mad. 85

———— ss. 437, 202, 203 and 204 (3)—*Dismissal of complaint—Further inquiry ordered by Sessions Judge—Whether notice should be issued*

dismissed under s. 203 is not bad on the ground that notice was not given to the accused. SHEO NARAIN SINGH *v.* RAM PERTAP RAI

4 Pat. L. J. 456

———— s. 438—

See s. 107 . . I. L. R. 40 All. 143

See ACQUITTAL . I. L. R. 44 Calc. 703

See PENAL CODE (ACT XLV OF 1860), s. 266 . . I. L. R. 40 All. 84

———— *Enhancement of sentence—Reference made by District Magistrate after Sessions Judge has declined to interfere—High Court—Practice. Quære:* Whether a District Magistrate is as a matter of law entitled to make a reference to the High Court under s. 438 of the Code of Criminal Procedure in a matter in which the Sessions Judge has been asked to send a case up to the High Court for enhancement of sentence and has refused to do so. But if he is so entitled, it is extremely inconvenient that a District Magistrate should do so, and the High Court would not take action upon such reference without special reason. *Queen-Empress* v. *Zor Singh, I. L. R. 10 All. 146, Emperor* v. *Jamna Bai, I. L. R. 28 All. 91,* and *Emperor* v. *Krisnaji Shamrao, 6 Bom. L. R. 1090,* referred to. EMPEROR *v.* GANGA (1914) . . . . I. L. R. 36 All. 378

———— *High Court will not interfere with an acquittal in revision where an appeal might have been preferred by Government.* In a case in which the complainant being absent, the Magistrate acquitted the accused under s. 247, Criminal Procedure Code, it subsequently transpired that the absence of the complainant had been procured by the fraud of the accused who had had him arrested and kept in custody on a false charge. No appeal against the acquittal was preferred by Government but the District

[illegible]

an order of acquittal where an appeal [illegible] Government against such an order. *Re* [illegible] GOUNDAN (1914) . . I. L. R. 38 [illegible]

———— *Interference* [illegible] *Court on reference by Sessions Judge* [illegible] *of fact.* Where, under s. 438, C[illegible] Judge made a reference to [illegible]

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

—— s. 438—*contd.*

mending that a conviction under s. 323, I. P. C., should be set aside on the merits, the High Court accepted the reference and set aside the conviction. EMPEROR *v.* NASIRAM MISTRI **24 C. W. N. 549**

—— *Enhancement of sentence—Criminal Procedure Code (Act V of 1898), s. 438.* Where the accused pleaded guilty to the charge framed against him and was convicted and the District Magistrate made a reference to the High Court recommending the enhancement of the sentence: *Held,* that having regard to the circumstances of the case and the fact that the prosecution did not ask for further examination of witnesses after the framing of the charge to which the accused pleaded guilty, the sentence should not be enhanced. KING-EMPEROR *v.* SATYA KINKAR GHOSE. . **25 C. W. N. 212**

—— ss. 438, 439—

See s. 345 . **I. L. R. 42 All. 474**

—— s. 439—

See s. 6 . . **I. L. R. 37 Calc. 287**

See s. 146 . **I. L. R. 32 All. 132**

See s. 195 . **I. L. R. 36 All. 403**
19 C. W. N. 447

See s. 239 . **I. L. R. 42 Mad. 561**

See s. 408 . . **4 Pat. L. J. 435**

See s. 423 . **I. L. R. 37 Mad. 119**

See s. 435 . . **25 C. W. N. 609**

See ACQUITTAL . **I. L. R. 42 Calc. 612**
19 C. W. N. 184

See ASSESSORS . **I. L. R. 40 Calc. 163**

See CRIMINAL TRESPASS
I. L. R. 43 Calc. 1143

See HIGH COURT . **I. L. R. 41 All. 587**

See JURISDICTION OF HIGH COURT.
I. L. R. 38 Calc. 786

See PERJURY . **I. L. R. 43 Calc. 542**

See REVISION . **I. L. R. 47 Calc. 438**

See SANCTION FOR PROSECUTION.
I. L. R. 39 Mad. 750

1. —— *Revision—Powers of High Court—District Registrar.* A District Registrar is not a Court subordinate to the High Court either on the civil, criminal or revenue side, and the High Court has no power to interfere with the order of the Registrar impounding a document and calling upon the applicants to show cause why they should not be prosecuted for forgery. EMPEROR *v.* UDIT NARAIN DUBE (1912) . . . . **I. L. R. 35 All. 109**

2. —— *Revision on facts—Practice of the High Court and its powers under the law—When High Court should consider evidence in revision—Civil Procedure Code (Act V of 1908), s. 100—Indian Penal Code (Act XLV of 1860), s. 211—Nature of proof necessary.* *Per* MOOKERJEE J.—Applications for revision in criminal case stand on a fundamentally different footing from appeals against appellate decrees in civil suits. In cases of the latter description the Court is bound by the rigid provisions of s. 100, C. P. C., to act on findings of fact embodied in the judgment of the lower Appellate Court. In criminal cases there is no such statutory restriction to the exercise of the jurisdiction of the High Court. As a matter of practice the High Court in revision does not ordinarily interfere with the conclusions of the lower Appellate Court on questions of fact but there can be no question as to the competency of the High Court to interfere with a finding of fact when the occasion requires it and the Court will not hesitate to do so when satisfied that the finding is manifestly erroneous and a miscarriage of justice would result from it if left uncorrected. *Belilios* v. *Queen, 12 B. L. R. 249; Buran Saheb* v. *King-Emperor, 6 Bom. L. R. 1069,* referred to. Observations of JENKINS, *C. J.,* in *Bankatram* v. *King-Emperor, I. L. R 28. Bom. 533, 566,* quoted with approval. The application of the observations of the Judicial Committee in *Mirza Sajjad Hussain* v. *Nawab Wazir Ali Khan, 16 C. W. N. 889,* that Judges in India must not have "impliedly the duty laid upon them of making their narrative of the circumstances minutely and completely exhaustive under the penalty that if they failed to do so the absence from their minds of elementary considerations might be presumed," is not to be extended to criminal cases. A critical examination of the judgments of the subordinate Courts is not of much assistance when the High Court proceeds to revise the findings of fact of the lower Courts. A much safer course is to obtain a broad and comprehensive view of the facts of the case and then to ascertain whether there has been a failure of justice. *Rama Nath Katapahar* v. *King-Emperor, 2 C. L. J. 524,* referred to. In a case under s. 211, Penal Code, failure on the part of the complainant to establish the truth of his allegation does not by any means justify the inference that the complaint was false; and to secure a conviction in this class of cases it must further be established beyond reasonable doubt that the circumstances are not merely consistent with the guilt of the accused but entirely inconsistent with his innocence. *Per* CARNDUFF, *J.*—The observations of the Judicial Committee in *Mirza Sajjad Husain* v. *Nawab Wazir Ali Khan, 16 C. W. N. 889,* may well be given a wider application and are especially relevant in respect of judgments of affirmance even in criminal cases. *Per* IMAM, *J.*—It is not usual for the High Court in revision to discuss a case on its facts though it is open to it to do so. RAM PROSAD *v.* THE KING-EMPEROR (1912)
17 C. W. N. 370

3. —— *Revision of sentence on consideration of fresh facts—Penal Code (Act XLV of 1860), s. 147—Rioting over disputed possession of chur—Finding of Settlement Officer pronounced after issue of Rule considered by High Court in revising sentence.* In a case of rioting arising out of a dispute relating to the possession of a *chur* between the zamindar and the talukdar in which both the lower Courts found in favour of the complainant on the question of possesion, but the Assistant Settlement Officer, after the judgment of the Sessions Judge in appeal was pronounced and after a Rule was issued by the High Court, found in connection with the preparation of record-of-rights that the culturable area in the *chur* was in the possession of the

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— **s. 439**—*contd.*

zamindar whose men the petitioners were, the High Court for the purpose of revising the sentence considered the judgment of the Assistant Settlement Officer and reduced the sentence. ARAJ SARKAR *v.* EMPEROR (1913) . **18 C. W. N. 646**

4. ——— *Criminal Revision under—Compounding of offences—Incompetency of High Court to sanction composition, in Revision—Criminal Procedure Code (Act V of* [illegible] ; sitting [illegible] sanction [illegible] *s. 345,* Criminal Procedure Code, which is exhaustive of the Courts which can sanction the composition of offences and the stages at which the composition can be effected. *Emperor* v. *Ram Piyari, I. L. R. 32 All. 153,* dissented from. *Re* RANGAYYA (1915). . **I. L. R. 39 Mad. 604**

5. ——— *Presidency Magistrate, order of discharge by—Revision by High Court* The High Court has power under s. 439 read with s. 423 of the Criminal Procedure Code to revise an order of discharge passed by a Presidency Magistrate and to direct a further enquiry if there are good reasons for doing so although no question of jurisdiction arises in the case. Where *N*, one of several accused persons, was discharged by the Magistrate under s. 253, Criminal Procedure Code, and the High Court at the hearing of the appeal of the other accused persons who were convicted by the Magistrate directed that the evidence of *N* should be recorded and in disposing of the appeal took into consideration the evidence so recorded and being of opinion that that evidence could not in some respects be accepted, issued a rule to show cause why the order of dis- [illegible] the High Court of its revisional jurisdiction. [illegible] the High [illegible] discharge [illegible] is recorded under orders of the High Court and which was used by that Court for the purpose of coming to the conclusion as to the guilt of the other accused might afford material to the prosecution to support or frame the charge against *N* and to allow this would be contrary to the tradition of justice in criminal cases. KING-EMPEROR *v.* NANDA GOPAL ROY (1916) . **20 C. W. N. 1128**

6. ——— *Appealable and non-appealable sentences given on a joint trial—Appeal by some of the accused—Reference made by Appellate Courts as to the others.* Of several persons tried jointly by a Magistrate, some received appealable sentences others non-appealable. The former appealed to the Sessions Judge, who acquitted them, but on grounds that were applicable to all. *Held*, that it was the duty of the Judge to bring the cases of the remaining accused to the notice of the High Court under s. 439 of the Code of Criminal Procedure. EMPEROR *v.* BHOLA (1917) . **I. L. R. 39 All. 549**

7. ——— *High Court—Revisional jurisdiction—Order of acquittal.* The High Court of Bombay has power, under s. 439 of the Criminal Procedure Code, 1898, to interfere in revision with an order of acquittal; but by a long established practice of the Court, revisional applications against orders of acquittal are not entertained from private petitioners except it be on some very broad ground of the exceptional requirements of public justice. FARDOON CAWASJI, *In re* (1917)

I. L. R. 41 Bom. 560

8. ——— *Acquittal—Reference to High Court by Sessions Judge—Interference by High Court, principle governing—Jurisdiction of High Court.* The High Court has jurisdiction to interfere with acquittals, in revision under s. 439 of the Criminal Procedure Code, but it will not exercise that jurisdiction on a Reference by a Sessions Judge except where serious injustice has been caused by error of law. MOGAL BEG, *In re* (1918) **I. L. R. 42 Mad. 109**

9. ——— *Enhancement of punishment by High Court in case tried by a Magistrate, second class—after expiry of the sentence.* The three accused had committed a very serious assault upon the complainants. They were tried for offences under s. 325 of the Penal Code by a Magistrate of the second class, who convicted them and sentenced them to three months' rigorous imprisonment and a fine of Rs. 25 each. The case was reported by the District Magistrate to the High Court for enhancement of punishment. The sentences of imprisonment had expired when the case came up for hearing by the High Court. *Held*, that the practice of the Court is not to enhance the sentence when the accused has completed his sentence of imprisonment except in exceptional circumstances as in the present case. *Held*, also that under s. 439 (3) of the Criminal Procedure Code the High Court has power to inflict any punishment which might have been inflicted for the offence by a Magistrate of the first class and is not limited to the powers of the trying Magistrate. *Emperor* v. *Kamal (16 Cr. L. J. R. 712)*, followed. CROWN *v.* JAGAT SINGH . . **I. L. R. 1 Lah. 453**

——— **ss. 439, 476**—

See HIGH COURT, JURISDICTION OF.

I. L. R. 40 Calc. 477

——— When action is taken by a Revenue Court under s. 476 the order is not open to revision under s. 439 but might be under s. 115 of the Civil Procedure Code. RUKTA SINGH *v.* THE KING-EMPEROR (1921)

6 Pat. L. J. 178

——— **ss. 439, 476, 200**—*Power of High Court to interfere under s. 439 with proceedings* [illegible] want of jurisdiction, when a Criminal Court has taken action under s. 476 of the Criminal Procedure Code. The words "as if upon complaint made and recorded under s. 200" introduced in the Code of 1898 were not intended to effect any change in the revisional power of the High Court. *Eranholi Athan* v. *King-Emperor, I. L. R. 25 Mad. 98*, overruled. O[illegible] NARAYANAN SOMAYAJIPAD *v.* EMPEROR [illegible]

I. L. R. [illegible]

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

———— **ss. 439, 258**—*Order of acquittal set aside by High Court in revision on merits, on the application of the complainant.* Where the trying Magistrate in his judgment by which he acquitted the accused while laying great stress on all considerations that might affect the credibility of the witnesses for the prosecution, omitted to consider what might be advanced in their favour and also failed to appreciate the corroborative value of an important witness for the prosecution, the High Court, on the application of the complainant, set aside the order of acquittal on the merits and directed a re-trial by a new Magistrate. SHAIKH BAGU *v.* RAIKA SINGH (1914)

18 C. W. N. 1244

———— **ss. 439, 422, 423**—*Order of acquittal. Revision petition to the High Court by private parties—Power of High Court to interfere—Interference, in what cases—Service of notice of appeal on District Magistrate—Omission of service, effect of—Irregularity.* The High Court has power to interfere in revision against an order of acquittal on the application of private parties, but will do so only when it considers that interference is urgently demanded in the interest of public justice. The High Court will not interfere with an order of acquittal where the question is one as to the appreciation of evidence or where there is no patent error or defect in the order which has resulted in grave injustice. Mere omission to serve notice of appeal on the District Magistrate, under ss. 422 and 423 of the Code of Criminal Procedure, is only an irregularity and will not render the proceedings *ab initio* void. VELLAYANAMBALAM *v.* SOLAI SERVAI (1915)

I. L. R. 39 Mad. 505

———— **ss. 439, 476**—*Revision—Jurisdiction of High Court—Order for prosecution passed by a District Magistrate instead by a Collector acting as a Court of Revenue.* The Collector of a district in deciding a Revenue appeal came to the conclusion that a receipt filed in the case was not genuine. He took no action at the time as a Court of Revenue, but subsequently acting as District Magistrate he held an inquiry into the matter of the receipt and sent the person whom he thought to be concerned with the making of the receipt to a subordinate Magistrate for trial. *Held,* that the High Court had jurisdiction to interfere in revision and that the order passed by District Magistrate was *ultra vires.* EMPEROR *v.* RAM SAHAI (1917) . **I. L. R. 40 All. 144**

———— **ss. 439, 517, 520**—*Restoration of movable property—Charge of theft—Malkhana register order passed in, making over property to complainant—Acquittal by High Court—Subsequent order of Magistrate refusing to revise order in Malkhana register—Revision by High Court.* Certain properties alleged to be stolen properties, were found in the house of the petitioner who was tried and convicted of theft. These properties were in the custody of the Court and after the judgment of the Sessions Judge affirming the conviction of the petitioner, the trying Magistrate passed an order in the Malkhana register to the effect that the properties should be made over to the complainant. No order was passed on the record of the case. The petitioner moved the High Court against the conviction and sen-

CRIMINAL PROCEDURE CODE (ACT V OF 1898).

———— **ss. 439, 517, 520**—*contd.*

tence and was acquitted. After his acquittal by the High Court, the petitioner applied to the trying Magistrate for the restoration of the properties to him, but the Magistrate held that he could not revise his previous order in the Malkhana register. The petitioner then moved the High Court and obtained a Rule: *Held,* that the Malkhana register forms no part of any criminal case, unless it is brought on the record in a legal way and the order in complainant's favour recorded in it was not one under s. 517, Criminal Procedure Code, but the order refusing to revise that order was an order under s. 517, Criminal Procedure Code, and the High Court had jurisdiction to revise it under s. 520, as also under s. 439, Criminal Procedure Code. The intention of the Legislature in cl. (*3*) of s. 517 is that an order under s. 517 should not be carried into effect until it really becomes final either by there being no appeal within the prescribed period or by any final order by a Court of final jurisdiction. That after the accused is acquitted of theft or burglary, the proper order to make is to direct that the property found in the possession of the accused should be restored to him. The complainant in that case could go to the Civil Court, file a suit and secure an injunction. That, in the circumstances of the case, the absence of a prayer by the petitioner as to the restoration of the properties in his previous application to the High Court was no bar to his getting relief in this Rule. KEDAR BISWAS *v.* MATHURA NATH MITRA (1913) . . . . **18 C. W. N. 959**

———— **ss. 439, 562**—*Revision—Powers of High Court.* Inasmuch as action taken under s. 562 of the Code of Criminal Procedure takes the place of a sentence on an accused person, the High Court cannot in revision substitute for an order under that section a definite sentence of whipping or imprisonment. EMPEROR *v.* GHASITE (1914) . . **I. L. R. 37 All. 31**

———— **ss. 447, 454, 532**—

See JURY, TRIAL BY

I. L. R. 37 Calc. 467

———— **s. 451**—

See s. 435 . . **25 C. W. N. 609**

———— **ss. 462 (3), 537**—*European British subject—Jury—Jury not chosen by lot—Illegality. Held,* that the provisions of s. 462 (3) of the Code of Criminal Procedure are imperative and if there is no choosing of the jury by lot, as provided for by the section, the result is that the whole trial is vitiated. *Brojendro Lal* v. *King-Emperor, 7 C. W. N. 188,* referred to. EMPEROR *v.* BRADSHAW (1911) . . . . **I. L. R. 33 All. 385**

———— **ss. 464, 465**—*Insanity—Inquiry into present unsoundness of mind of accused person to precede his trial on the substantive charge.* Where there is any reason for supposing that an accused person may be of unsound mind and consequently incapable of making his defence, it is imperatively necessary that this question should be inquired into or tried under the provisions of s. 464 or s. 465 of the Code of Criminal Procedure *before* the Court proceeds to inquire into or try the substantive charge against the accused. *Muhammad Husain* v. *King-Emperor, 15 Oudh Cases, 321,* referred to. EMPEROR *v.* JHABBU

I. L. R. 42 All. 137

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— s. 465—

See s. 14 . . . 3 Pat. L. J. 291

——— s. 471—*Acquittal of criminal lunatic—Court can order his detention in jail—Further orders to be passed by Government.* When a criminal lunatic is acquitted under the provisions of s. 470 of the Criminal Procedure Code, the Court can order under s. 471 of the Code that the accused be detained in custody in the jail where he then is until the further orders of Government and that the case be reported to Government for further orders. EMPEROR *v.* SOMYA HIRYA (1918) **I. L. R. 43 Bom. 134**

——— s. 476—

See s. 4 . **I. L. R. 38 All. 32**

See s. 12 . **I. L. R. 39 Calc. 1041**

See s. 157 . **I. L. R. 32 All. 30**

See s. 195 . **I. L. R. 40 Calc. 360**

See s 202 . **18 C. W. N. 95**

See s. 439 . **I. L. R. 40 All. 144**

See APPRAISEMENTS. **I. L. R. 48 Calc. 1086**

See "CERTIORARI." **I. L. R. 36 Mad. 72**

See COLLECTOR **I. L. R. 40 Calc. 465**

See COMPLAINT **I. L. R. 40 Calc. 444**

See COURT . **I. L. R. 37 Calc. 642**

See CRIMINAL PROCEDURE CODE s 195 **5 Pat. L. J. 58**

See FALSE INFORMATION. **I. L. R. 43 Calc. 173**

See JUDICIAL PROCEEDING. **14 C. W. N. 799**

See LEGAL PRACTITIONERS ACT, s. 14. **15 C. W. N. 269**

See MADRAS ESTATES LAND ACT I OF 1908), ss. 164—167.

See PERJURY . **I. L. R. 43 Calc. 542**
I. L. R. 42 Calc. 240
I. L. R. 39 Mad. 414

See MAGISTRATE, POWER OF. . **I. L. R. 37 Calc. 72**

See MAGISTRATE, JURISDICTION OF. **I. L. R. 39 Calc. 1041**

See SANCTION FOR PROSECUTION. **I. L. R. 41 Calc. 446**
I. L. R. 43 Calc. 1152

——— "Court" meaning of—*Offence brought under the notice of the Court in the course of a judicial proceeding—Proceeding instituted by one Munsif for resistance to attachment of moveables in execution—Preliminary inquiry and final order by successor—Legality of order—"Judicial proceeding"—Execution proceedings.* The word "Court" in s. 476 of the Criminal Procedure Code includes the successor of the Judge before whom the alleged offence was committed, or to whose notice the commission of it was brought in the course of a judicial proceeding. Where, therefore, the judgment-creditor brought to the notice of the Munsif on the 23rd December 1908, the fact of resistance to the attachment of moveables in execution of his decree, and the Munsif called upon the opposite party to show cause, but his successor, after holding a preliminary inquiry under s. 476 of the Code, ordered their prosecution on 6th October 1909, for offences under *ss. 183, 186 and 353 of the Penal Code*: *Held*, that the order was not without jurisdiction. Action under s. 476 should, as far as possible, be prompt and expeditious and not unduly protracted. The definition of a "judicial proceeding" in s 4 (*m*) of the Criminal Procedure Code is not exhaustive. It includes an execution proceeding; and the resistance to the attachment of movables is, when reported or complained of to the Court, an offence brought under its notice in the course of a judicial proceeding within the meaning of s 476 of the Code. BAHADUR *v.* ERADATULLAH MALLIK (1910)
I. L. R. 37 Calc. 642
14 C. W. N. 799

in s. 476 of the Code of Criminal Procedure includes the *successor of the Judge before whom the alleged* offence was committed. *Bahadur* v. *Eradatullah Mallick, I. L. R. 37 Calc. 642*, followed. Whether a particular order is expedient or not is not a ground on which the High Court can interfere in revision under s 115 of the Civil Procedure Code. *In the matter of the petition of* NAWAL SINGH (1912) . . **I. R. R. 34 All. 393**

—"*Brought on an award* ... ds "brought ... Criminal Pro- ... er an offence which may have been committed in another *forum* and on some previous occasion. *Held*, also, that a proceeding in which a Court is asked *to pass a decree in accordance with an award* made with reference to a pending suit cannot be said to be other than a "judicial proceeding" within the meaning of the same section *Giruar Prasad* v. *King-Emperor, 6 A. L. J 392*, *Umrao Singh* v. *Hardeo, I. L. R. 29 All. 418*, and *Banke Bihari Lal* v. *Pokhe Ram, I. L. R. 23 All. 48*, referred to EMPEROR *v.* KAMTA PRASAD, (1911) **I. L. R. 33 All. 396**

——— Witness producing forged receipt—*Prosecution ordered by successor of trying Judge without preliminary enquiry—Legality.* The power to direct prosecution under s. 476, Criminal Procedure Code, is conferred *on the Court and not* on the individual judicial officer who fills the judicial office at the time of the original trial. A successor of the officer before whom the original trial took place is not bound to hold an independent investigation before making an order under s. 476, Criminal Procedure Code. The holding of a preliminary inquiry in a proceeding under s. 476, Criminal Procedure Code, is discretionary and a person against whom an order for prosecution has been passed *without such an enquiry* cannot complain unless he has been prejudiced by the omission. *Shaikh Bahadur* v. *Eradutulla, 14 C. W. N 799*, explained and followed. DEEPA NARAYAN BERA *v.* BEPIN BEHARY MITTER (1911) **15 C. W. N. 691**

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

———— **s. 476**—*contd.*

———— **Preliminary inquiry**—*Revision.* When a Magistrate takes action under s. 476 of the Code of Criminal Procedure, it is not necessary to the validity of his order that he should hold a preliminary inquiry, nor, if he does hold preliminary inquiry, is it necessary that he should give the person against whom such inquiry is being held an opportunity of cross-examining the witnesses. *Queen-Empress* v. *Matabadal, I. L. R. 15 All. 392,* followed. ABDUL GHAFUR *v.* RAZA HUSAIN (1912) **I. L. R. 34 All. 267**

———— **Order under, by Civil or Revenue Court if may be revised by High Court under s. 439**—*Civil Procedure Code (Act V of 1908), s. 115—High Courts Act 24 & 25 Vict., C. 104, s. 14.* In the case of an order passed under s. 476, Cr. P. C., by a Civil or a Revenue Court, s. 439, Cr. P. C., has no application, but such an order can be revised by the High Court under s. 115 of the Civil Procedure Code or under s. 15 of the High Courts Act 24 & 25 Vict., C. 104. An order made by a Criminal Court under s. 476, Cr. P. C., is liable to revision by the High Court under s. 439, Cr. P. C., S. 439, Cr. P. C., is to be read along with and subject to the provision of s. 435, Cr. P. C. Where an order under s. 476 made by a Civil or a Revenue Court is sought to be revised by the High Court, the Bench exercising Criminal Jurisdiction cannot as such deal with the matter but the Judges composing that Bench may do so if authorised by the Chief Justice under s. 14 of the High Courts Act. HAR PRASAD DAS *v.* THE EMPEROR (1913) . **17 C. W. N. 647**

———— **Belated order**—*Acquittal of the accused by one Magistrate, order for prosecution of the complainant by another, without jurisdiction.* Where the persons complained against by the petitioner were tried and acquitted by a Deputy Magistrate on the 1st August and a week later another Deputy Magistrate called on the petitioner to show cause why he should not be prosecuted under s. 211, Penal Code, and finally on the 23rd August directed his prosecution under s. 476, Cr. P. C., but subsequently on the District Magistrate observing that the order for prosecution ought to be made by the Magistrate who tried the accused persons, the trying Magistrate on the 16th September passed the following order —" Petition purporting to show cause against prosecution under s. 211 filed. The cause shown is not good; draw up proceedings under s. 211, I. P. C."—This order purporting to be made under s. 476, Cr. P. C., although the accused persons had applied for the prosecution of the petitioner: *Held,* that there was no judicial proceeding of any sort or kind before the Magistrate who made the order of the 23rd August, and his order for the prosecution of the petitioner was altogether beyond his jurisdiction. That the belated order of the 10th September did not represent the independent judicial opinion of the Magistrate, who made it. If he had thought that action ought to be taken under s. 476, Cr. P. C., he ought to have passed the order one and a half months before and the fact that he did not do so indicated very clearly that he did not at the time think it necessary. There may be cases, in which a Court may not think it necessary in the public interest to take action under s. 476, Cr. P. C., but may be willing to allow the person injured to seek redress. In such a case, it is not necessary that the order should be passed at or near the time of the disposal of the original case, *Held,* however, in the present case, that even treating the order of the 16th September, as one made under s. 195, Cr. P. C., the further prosecution of the petitioner should not be sanctioned, considering how illegally and unnecessarily he has been harassed in these proceedings. BHIM LAL SHAH *v.* EMPEROR (1912) **17 C. W. N. 290**

———— **Information before Police reported false**—*Informant called upon by Magistrate to prove his case—Order for prosecution under s. 211, Penal Code—Jurisdiction to make such order.* The petitioner lodged an information with the Police, who reported it to be false. The petitioner made no complaint in Court, but the Sub-Divisional Magistrate on receipt of the police-report passed the order " complainant to prove his case " and made over the case for disposal to another Magistrate who ultimately made an order under s. 476, Cr. P. C., against the petitioner: *Held,* that the order of the Sub-Divisional Magistrate and the proceedings held thereunder do not come within any of the provisions of the Code of Criminal Procedure and the order for prosecution was without jurisdiction. SARBA MAHTON *v.* THE EMPEROR (1913) . . **17 C. W. N. 824**

———— **Sanction for Prosecution but no order sending to Magistrate**—*S. 537 (b)—Illegality or Irregularity.* Where a sanction to prosecute given under s. 476, Criminal Procedure Code (Act V of 1898), did not order the accused to be sent before the nearest First Class Magistrate but merely ordered his prosecution: *Held,* that though the sanction was irregular it was not illegal and that the irregularity was cured by s. 537 (*b*), Criminal Procedure Code. *In re Bhup Kunwar, I. L. R. 26 All. 249, 256,* dissented from. *Re* SUPPAYYA THARAGAN (1914) **I. L. R. 37 Mad. 317**

———— **Limitation**—There is nothing in s. 476 of the Code of Criminal Procedure which requires a Court to take action, if at all, immediately after the conclusion of the case in which the offences are said to have been committed or within any fixed time thereafter. *In the matter of the petition of Nawal Singh, I. L. R. 34 All. 393, Girwar Prasad* v. *King-Emperor, 6 All. L. J. 392,* followed. *Aiya Kannu* v. *Emperor, I. L. R. 32 Mad. 49, Rainadulla* v. *Emperor, I. L. R. 31 Mad. 140,* not followed. *In re Lakshmi Das, I. L. R. 32 Bom. 184, Emperor* v. *Rustamji Hurmusji Tarwala, 4 Bom. L. R. 778,* referred to. EMPEROR *v.* TILAK PANDAY (1915) **I. L. R. 37 All. 344**

———— **Insufficient inquiry**—*Penal Code (Act XLV of 1860), s. 182—Calling for a report from interested party as to truth of complaint, propriety of—Order for prosecution, without sufficient enquiry into truth of complaint.* The petitioners filed an application before the Sub-Divisional Magistrate praying for proceedings under ss. 144 and 107, Criminal Procedure Code, against several servants of a certain factory, whereupon the Magistrate called for a report from the Manager of the factory, and on receipt thereof required

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— **s. 476**—*contd.*

the petitioners to show cause against prosecution under s. 182, Indian Penal Code, and then after examining some witness on each side, but without examining the petitioners themselves, made an order under s. 476, Criminal Procedure Code, directing their prosecution for an offence under s. 182, Indian Penal Code. *Held*, that the order of the Magistrate in calling for a report from the Manager of the factory was open to great objection. That the accused being the servants of the factory, the Manager was an interested party and he ought not to have been asked to make a report in these judicial proceedings. *Held* (in setting aside the order for prosecution), that further enquiry should be made into the *truth of the petitioners' complaint, and they* themselves should be examined if they chose to give evidence. EMPEROR *v.* RAFFI RAUT (1914)

19 C. W. N. 127

——— *Held*, that a gazetted subordinate to whom the Collector had delegated his powers, and who had before him proceedings for sale of immovable property (ancestral) was a Revenue Court acting in pursuance of s 70 of the Civil Procedure Code and that the High Court had no jurisdiction to revise an order, passed by such officer under s. 476 of the Criminal Procedure Code. EMPEROR *v.* ASHARFI LAL

I. L. R. 39 All. 91

——— **Perjury**—*Court bound to set out assignments of perjury alleged—Civil Procedure Code, 1908, s 115—Revision—Material irregularity. Held*, that when a Civil Court makes an order under s. 476 directing that a person should be prosecuted for perjury such Court is bound to set forth in its order the specific assignments of perjury alleged against the accused. Failure to do so is a material irregularity within the meaning of s. 115 of the Code of Civil Procedure. EMPEROR *v.* KASHI SHUKUL (1916) . . . . **I. L. R. 38 All. 695**

——— **Stay of previous proceeding, pending appeal in matter out of which they arise.** DEBI MAHTO *v.* KING-EMPEROR (1916)

20 C. W. N. 1116

——— **"Brought under the notice of the Court in the course of a judicial proceeding"**—*Circumstance fulfilling this requirement of the section.* In a case under s. 147, Indian Penal Code, a certain document was exhibited and used in evidence on behalf of the petitioner who was the accused. The trying Magistrate after having heard the evidence proceeded on leave and while on leave wrote a judgment which he forwarded to the District Magistrate who treated it as nullity and transferred the case to his own file under s. 350, Criminal Procedure Code. Before him the Public Prosecutor applied under s. 494, Criminal Procedure Code, to withdraw from the prosecution. After examining the evidence the District Magistrate allowed *this application.* Subsequently, after making a preliminary enquiry, he made an *order directing* the prosecution of the petitioner under ss. 467, 471, 474, Indian Penal Code, in respect of the aforesaid document. *Held*, that the offences as to which the prosecution of the petitioner was directed were brought to the notice of the District Magistrate in the course of a judicial proceeding within the meaning of s. 476, Criminal Procedure Code, and the order made was not without jurisdiction. CHANDRA KISHORE ROY *v.* KING-EMPEROR (1916)

21 C. W. N. 755

——— **Person not named in order**—*Magistrate taking cognizance of case on order under section, if can proceed against persons not named in the order.* The District Judge made an order under s 476 against one *R* who had applied before him for the probate of a will which in his opinion was *primâ facie* a forgery and in respect of which *R* was guilty of forgery or using or attempting to use a document knowing it to be forged. Before the Magistrate on the application of the public prosecutor the petitioner who was not a party to the probate proceedings before the District Judge was also summoned under ss 120B and 467, Indian Penal Code, in the same proceeding which was pending against *R Held*, that the petitioner was not a party to the proceedings in the Civil Court and as the offence which appeared to have been committed was one of those described in cl. (*1*) (*c*) of s 195, Criminal Procedure Code, neither sanction under that section nor a complaint of the Court under s. 476 was a necessary precedent to proceedings against him. That the Criminal Procedure Code provides for the taking cognizance of offences and not of offenders and a Magistrate who has legally taken cognizance of an offence on an order under s. 476 has jurisdiction to proceed against any one who may be proved by the evidence to be concerned in that offence, whether he was mentioned in the order under s. 476 or not. GIRIDHARI LAL SEROWGEE *v.* KING-EMPEROR (1916)

21 C. W. N. 950

——— **Offence not mentioned in s. 195**—*Preliminary enquiry, necessity of—Indian Penal Code (Act XLV of 1860), s. 225B* Where it was *reported to a Munsi that* the accused persons had endeavoured to rescue the judgment-debtor in a certain case tried by the Munsi from the custody *of the executing* peon and the Munsi purporting to act under s 476, Criminal Procedure Code, made an order sending up the accused *to the Magistrate for trial* under s. 225B, Indian Penal Code: *Held*, that the order made was bad for two reasons, *viz.*, that the offence under *s. 225B is not* one of the offences mentioned in s. 195, Criminal Procedure Code, and that the order was made without making any preliminary *enquiry.* That there may be cases where no preliminary enquiry is necessary, for example, in a case where the Judge is trying the case and *all the facts* which are material to the charge have

[illegible]

all the [illegible]

[illegible] form the judgment. But in a case like

[illegible]

preliminary [illegible]

him to determine whether or not there is any case fit to be *sent to* the Magistrate, it has no jurisdiction to send the accused under s. 476 Crimina

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— s. 476—*contd.*

Procedure Code. TARAK DAS MOITRA *v.* KING-EMPEROR (1916) . . . 21 C. W. N. 125

——— **Perjury**—*Court not bound to set out assignments of perjury alleged—Civil Procedure Code, 1908, s. 115—Revision—Material irregularity.* In every case, whether under s. 195 or s. 476 of the Code of Criminal Procedure, the particular statement, when the offence refers to a statement, should be set out, so that the accused person should not be taken by surprise, but should clearly know what is the statement which he is required to meet. It does not, however, follow that non-specification of the statement is a material irregularity justifying interference in revision by the High Court. EMPEROR *v.* CHHOTEY LAL (1917)

I. L. R. 39 All. 367

———**Offence not committed by a party to the proceeding.** S. 476 of the Code of Criminal Procedure (Act V of 1898) does not apply to cases where the offence was not committed by a party to a proceeding in respect of a document produced or given in evidence in such proceeding. *Abdul Khadar* v. *Meera Saheb, I. L. R. 15 Mad. 224,* followed. RAMALINGAM, *Re*

I. L. R. 40 Mad. 100

——— **Jurisdiction**—*Order for prosecution of persons not parties to a proceeding before the Court.* A Court in taking action under s. 476 of the Code of Criminal Procedure is not restricted, as regards the person against whom an order may be made, to the parties to a proceeding pending before it. *Jadunandan Singh* v. *Emperor. I. L. R. 37 Calc. 250,* dissented from. EMPEROR *v.* GANGA RAM (1917) . . **I. L. R. 40 All. 24**

——— **Knowledge of commission of offence after close of proceedings**—*Order under s. 476 of Criminal Procedure Code, validity of. Held,* by the FULL BENCH—Even where the facts of judicial proceeding are fresh in the mind of a Judge, he cannot take action under s. 476 of Criminal Procedure Code if the commission of an offence during the course of that proceeding is discovered by him only after the close of the proceeding. *Per* KUMARASWAMI SASTRI, *J.*—In such cases it is open to the Court to act under s. 195, Criminal Procedure Code, and direct an officer to file a complaint. *Aiyakannu Pillai* v. *Emperor, I. L. R. 32 Mad. 49,* applied. *In re* PADMANABHA HEBBARA (1918)

I. L. R. 42 Mad. 422

——— **Revenue appeal**—*heard by Assistant Collector—Direction to prosecute a party to the appeal as well as a third person implicated in the offence though not a party to the appeal—Preliminary inquiry conducted in part by the Assistant Collector and completed by the Criminal Investigation Department—Direction to prosecute need not be a part of the revenue appeal or its continuation.* Accused No. 1, a Mamlatdar, having decided a revenue case brought by accused No. 2, an Inamdar, against his tenants to recover rents appeals were preferred from the decision to the Assistant Collector. The appeals were decided on the 18th July 1916 by the Assistant Collector, who having suspected the genuineness of a Kabulayat produced in the case proceeded, on the 28th July 1916, to call for an explanation of the Inamdar and on the 10th October 1916 obtained a report from the Mamlatdar. The Assistant Collector perused the explanation and the report but as he considered the matter serious and demanding further inquiry, he applied on the 7th March 1917, for assistance of the Criminal Investigation Department from the District Magistrate. The assistance was given and inquiry made by the Police. On receipt of the report from the Police, the Assistant Collector passed, on the 2nd July 1917, an order referring the matter for inquiry to the nearest First Class Magistrate under s. 476 of the Criminal Procedure Code. The Magistrate committed the accused to the Sessions Court, where on trial held they were convicted and sentenced. On appeal to the High Court, it was contended, (i) that even if the offence was brought under the notice in the judicial proceedings of the Assistant Collector as regards the Inamdar, it was not brought to his notice as regards the Mamlatdar; *(ii)* that the whole of the preliminary inquiry ought to have been made by the Assistant Collector and that he was *functus officio* as soon as he made his reference to the District Magistrate; and (iii) that the delay in proceeding under s. 476 of the Criminal Procedure Code was fatal to the jurisdiction of the Assistant Collector to act under the section: *Held,* (i) that what was provided for in s. 476 of the Criminal Procedure Code was that after making preliminary inquiry into any offence brought to notice the case might be sent for inquiry to the nearest Magistrate of the First Class, that is to say, it was the case which was to be sent and not necessarily all the offenders who might be concerned in the commission of the offence; (ii) that some inquiry at least having been made by the Assistant Collector, he was not deprived of jurisdiction to act under the section by the mere fact that he took the precaution of making a more careful and deliberate inquiry with the assistance of the Criminal Investigation Department, or by the fact that he applied to the District Magistrate for assistance; (iii) that there was nothing in the wording of the section to require that officers acting under it were bound to make their inquiry either in the actual course of the judicial proceedings or so shortly thereafter as to make it really a continuation of those proceedings. *In re Lakshmidas Lalji, I. L. R. 32 Bom. 184,* followed. *Rahimadulla Sahib* v. *Emperor, I. L. R. 31 Mad. 140, Aiyakannu Pillai* v. *Emperor, I. L. R. 32 Mad. 49, Begu Singh* v. *Emperor, I. L. R. 34 Calc. 551,* and *Bahadur* v. *Eradatullah Mallick, I. L. R. 37 Calc. 642, 649,* dissented from. EMPEROR *v.* WAMAN DINKAR (1918) . . . **I. L. R. 43 Bom 300**

——— **"Offence referred to in s. 195,"** *meaning of—Jurisdiction of Court to take action under s. 476 whether restricted to limitations imposed by s. 195, Criminal Procedure Code. Held* by the FULL BENCH.—The words in s. 476, Criminal Procedure Code, "any offence referred to in s. 195" incorporate the conditions laid down by s. 195, and a Court can take action under s. 476 only under such conditions. Hence proceedings under s. 476 of the Criminal Procedure Code cannot be taken against a person who is neither a party to nor a witness in a suit in respect of

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

———— s. 476—*contd.*

abetment of forgery of a document exhibited in the suit. GOVINDA IYER *v.* REX (1919) I. L. R. 42 Mad. 540

———— **Bengal Tenancy Act.**—It is competent for a Collector in cases of disobedience to orders under ss. 69 and 70 of Bengal Tenancy Act to act under s. 195 or 476 of the Code and direct a prosecution under s. 188 of I. P. C. in respect thereof. LAKSHAN BOR AND OTHERS *v.* NARANARAIN HAZRA . . . 25 C. W. N. 617

———— **False complaint**—*Order passed by successor to Magistrate who dismissed complaint, legality of.* A Sub-Divisional Magistrate, on a complaint being preferred to him, recorded a finding that the complaint was false and called upon the complainant to show cause why he should not be prosecuted under s. 182 of the Penal Code. The Magistrate was then transferred and his successor, on the matter coming up before him, referred it to a Subordinate Magistrate "for hearing complainant and witnesses and report." On receipt of the report the Sub-Divisional Magistrate dismissed the complaint, and two months later, passed an order under s 476 of the Code of Criminal Procedure, directing the prosecution of the complainant under s. 211 of the Penal Code *Held,* that the Sub-Divisional Magistrate had jurisdiction to direct the prosecution of the complainant. *Held,* also, that the procedure adopted by the Sub-Divisional Magistrate in referring the enquiry to a Subordinate Magistrate for the purpose of hearing the complainant's witnesses and for report was irregular and that this irregularity was cured by s. 537 of the Code of Criminal Procedure. *Per* ATKINSON, *J.*—If an irregularity takes place and is allowed to pass unheeded and unnoticed, and a fresh prosecution follows founded upon the irregularity, and conviction follows, then after conviction the accused party cannot [illegible] in an anteceden[illegible] [illegible]enging the valid[illegible] BAIJNATH SINGH *v.* KING-EMPEROR. 1 Pat. L. J. 553

———— **Power of Appellate Court**—*after setting aside grant of sanction.* The District Judge has power to convert proceedings to obtain or to revoke sanction refused or granted in a lower Court under s. 195 of the Criminal Code into proceedings under s. 476. AMBICA PROSAD *v.* KING-EMPEROR 1 Pat. L. J. 607

———— An applicant obtained an *ex-parte* decree in a Small Cause Court in the Darbhanga District. The decree was transferred to the Chapra District for execution. The defendant in that suit then sued in the Munsiff's Court at Chapra to have the decree set aside on the ground that it had been obtained by fraud, and, having obtained a decree, he applied to the Munsiff for sanction to prosecute the applicant and others who had assisted him in the false suit. The Munsiff refused to grant sanction, but on appeal against that order, the District Judge directed the applicant to be prosecuted for various offences specified in his order. *Held,* that under s. 476 of the Code of Criminal Procedure, 1898, the District Judge was authorised to send the case for enquiry and trial to the nearest Magistrate of the first class at Chapra. LAKHMI SINGH *v.* BIRJMOHAN LAL 1 Pat. L. J. 586

———— **Offence committed in another Province**—"*In the course of a judicial proceeding.*" The first petitioner instituted a suit in the Small Cause Court at Bilaspur in the Central Provinces against a resident of Arrah, and obtained an *ex-parte* decree. At the petitioner's instance the decree was transferred to the Court of the Subordinate Judge at Arrah for execution The judgment-debtor then brought a suit in the Court of the Munsiff at Arrah to have the decree of the Bilaspur Court set aside on the ground of fraud, and obtained a decree. The petitioner appealed to the District Judge of Arrah, who confirmed the Munsiff's decision and directed the prosecution of the three petitioners under ss. 209 and 210 of the Indian Penal Code, 1860, as he found that they had combined to bring a false suit in the Bilaspur Court and had obtained a decree in that suit, by concealing from the defendant the institution of the proceedings and by tampering with the service of summonses. *Held,* that the District Judge had jurisdiction under s 476 of the Criminal Procedure Code, 1898, to order the prosecution of the petitioners. The hearing of the appeal by him was a judicial proceeding and the offences alleged to have been committed by the petitioners were brought to his notice in the course of that proceeding *Per* SHARFUDDIN, *J.*—S. 476 is a self-contained section and the reference in it to s 195 is only for the purpose of avoiding enumeration of the sections mentioned in s. 195. RAJKUMAR SINGH *v.* KING-EMPEROR 1 Pat. L. J. 298

———— **"In the course of a judicial proceeding"**—*Application to Small Cause Court for sanction to prosecute, refusal of—Appeal to District Judge—Appeal dismissed but prosecution ordered.* *A* sued *B* in a Court exercising the powers of a Small Cause Court and obtained an *ex-parte* decree. *B* then sued to have the *ex-parte* decree set aside on the ground of fraud, and succeeded. He then applied to the Court which tried the first suit for sanction to prosecute *A*. The Court rejected the application. *B* appealed, under s. 195 (6) of the Criminal Procedure Code, 1898, to the District Judge who refused to revoke the sanction but passed an order under s. 476 for the prosecution of *A* *Held,* that as the District Judge had no jurisdiction to entertain the appeal or application under s. 195 (6), the matter did not come to his notice in the "course of a judicial proceeding" within the meaning of s. 476. *Per* CHAMIER, *C J.*—With reference to Small Cause Court suits the District Judge is not "the Principal Court of original jurisdiction" within the meaning of s. 195 (7) (c). AMBICA TEWARY *v.* KING-EMPEROR . . 1 Pat. L. J. 293

———— **Revenue Court**—*whether Certificate Officer under the Public Demands Recovery Act (B. and O. IV of 1914) is——"in the course of a judicial proceeding."* A Certificate Officer, while proceeding under the powers conferred upon him by the *B.* and *O.* Public Demands Recovery Act, 1914, for the recovery of a public demand or adjudicating upon a petition filed in respect thereof by a person upon whom a demand

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— s. 476—*contd.*

is made is a Revenue Court and has power to direct a prosecution under s. 476 of the Code of Criminal Procedure, 1898. A Certificate Officer issued a demand for road-cess on two co-sharers, and one of them, *K*, filed a petition, which purported to be on behalf of both of them but was signed by *K* only, pleading payment, and he produced a *challan* in support of his plea. The Certificate Officer directed an inquiry to be made in his office as to the fact of payment, and, having come to the conclusion that the *challan* was forged, he called upon *K* to show cause why he should not be prosecuted. Eventually he directed the prosecution of both the co-sharers although only *K* had been called upon and had alone appeared to show cause. *Held*, (*i*) that the offence committed had been brought to the notice of the Certificate Officer in the course of a judicial proceeding, and (*ii*) that, although neither of the accused was entitled to notice, yet in the circumstances of this case *K's* co-sharer should also be called upon to show cause why he should not be prosecuted. MATHURA PRASAD *v.* THE KING-EMPEROR . . . . **4 Pat. L. J. 475**

——— Procedure—*Application for stay of proceedings thereunder initiated by a Civil Court —Question at issue in the criminal proceedings also sub judice in a civil case—Procedure—Jurisdiction.* Proceedings initiated by a Civil Court subordinate to the High Court under s. 476 of the Code of Criminal Procedure may be stayed by the High Court in the exercise of its general powers of superintendence, though not under the provisions of either the Code of Civil Procedure or the Code of Criminal Procedure. As regards the general question of the stay of criminal proceedings when these, on the face of them, raise a question of fact which is still under adjudication by a Civil Court of competent jurisdiction, the better procedure is to move the Civil Court for the expediting of the hearing of the case before it and then to move that the Criminal proceedings be stayed until the determination by the Civil Court of the question at issue before it. *Muthura Kunwar* v. *Durga Kunwar, Weekly Notes, 1905, p. 254,* referred to. RAJ KUNWAR SINGH *v.* EMPEROR . **I. L. R. 43 All. 180**

——— **Civil Court must come to a finding as to which of the parties committed offence.** *Held,* that a Civil Court ought not to take action under s. 476 of the Criminal Procedure Code without coming to a finding as to which of the parties sent for trial had committed the offence. *Crown* v. *Pirbhu Diyal* (*163 P. L. R. 1905*), followed. AMAR NATH *v.* MAM RAJ

I. L. R. 2 Lah. 68

——— *Criminal Procedure Code—" In the course of" judicial proceeding, meaning of—Petition for return of documents filed before Clerk of Court, if can be made the subject-matter of enquiry and order under the section.* After the disposal of two rent suits in the Court of the Munsif, the petitioner, it was alleged, filed two petitions before the clerk in charge of rent suits in the Munsif's Court asking for the return of the documents filed by one B, whose interest had since been acquired by the petitioner in the said rent suits. These petitions purported to bear

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*concld.*

——— s. 476—*concld.*

the signature of the pleader of B who acted for him in the said rent suits, but it was alleged that this signature was forged. The Munsif after holding a preliminary enquiry made an order under s. 476, Criminal Procedure Code, directing the prosecution of the petitioner for offences under ss. 463, 471, Indian Penal Code: *Held,* that the petitions in question were not filed in the course of a judicial proceeding and the Munsif had no jurisdiction to make the order. The words " committed before it " in s. 476, Criminal Procedure Code are qualified by the words " in the course of a judicial proceeding." GIRIJANDA KALI MITRA *v.* THE EMPEROR

26 C. W. N. 660

——— **ss. 476 and 478**—*Commitment made by a Munsif in the United Provinces to the Court of a Sessions Judge in the United Provinces, in respect of offences alleged to have been committed in Bengal.* Where, in the course of a judicial proceeding before the Munsif of Fatehabad in the district of Agra, certain offences under ss. 193, 209, 216, 467 and 471 of the Indian Penal Code, which appeared to have been committed in Bengal were brought under the notice of the Court, and the Munsif committed the persons suspected of such offences for trial to the Court of Session at Agra: *Held,* that the Court had jurisdiction under s. 478 read with s. 476 of the Code of Criminal Procedure to make the commitment. EMPEROR *v.* KHUSHALI RAM (1917). **I. L. R. 40 All. 116**

——— s. 477—*Scope of section—Accused not allowed an opportunity of defending himself—Irregular exercise of jurisdiction—Procedure.* S. 477 of the Code of Criminal Procedure gives to the Court of Session power to charge a person for any offence referred to in s. 195 and committed before it. It further gives the Court of Session the power to commit for trial and to try the person for the charge it has framed; but the section nowhere lays down that the trial is to be a summary trial, nor does the section anywhere demand a decision which is to be more prompt and speedy than that of any ordinary trial. The section was not intended so to be used as to give the accused no opportunity of defending himself against the charge framed. EMPEROR *v.* HADIYAR KHAN (1918)

I. L. R. 41 All. 197

——— s. 477A—

See COURT-FEE STAMP.

I. L. R. 47 Calc. 71

——— s. 478—

See s. 195 . **I. L. R. 34 Bom. 88**

L. R. 43 Mad. 361

See s. 476 . **I. L. R. 40 All. 116**

——— *Procedure—Commitment made by Munsif without following procedure laid down in the section—Commitment quashed,* A Munsif holding an inquiry under the latter portion of s. 478 of the Code of Criminal Procedure with a view to making a commitment to the Court of Session is bound to follow substantially the provisions of Ch. XVIII of the Code. Where in such circumstances the Munsif neither examined the witnesses in the presence of the accused nor

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— s. 478—*contd.*

explained the charge to them, the commitment was quashed as being bad in law. EMPEROR *v.* BABU PRASAD (1917) . I. L. R. 40 All. 32

——— s. 488 (1), (3), (6)—

See s. 369 . . 21 C. W. N. 344

See MAINTENANCE I. L. R. 41 Calc. 88

——— *Maintenance order if can be enforced against estate of deceased husband.* After the death of the person against whom an order for maintenance was made there is no claim enforceable under s. 488, Cr. P. C., against the estate of the deceased and the order for maintenance cannot be enforced in respect of arrears accrued due during the lifetime of the person who was ordered to pay maintenance. EAD ALI *v.* LAL BIBEE (1913) . . 17 C. W. N. 1130

——— *Maintenance—"Child," meaning of—Prostitution not a profession which the law will recognize.* The word "child" in s. 488 (*1*), Criminal Procedure Code (Act V of 1898), means a person who has not attained the age of majority. The attainment of puberty cannot be taken as the age when childhood ceases. The law will not treat prostitution as a profession by which a girl might earn her livelihood and maintain herself under s. 488, Criminal Procedure Code. It is against public policy to do so. KRISHNASWAMI AYYAR *v.* CHANDRAVADANA (1914) . I. L. R. 37 Mad. 565

——— *Maintenance—Criminal revision petition to the High Court—Order of a single Judge—Appeal against, if maintainable—Letters Patent, cl. 15—Criminal trial,* [illegible]

filed against an order of a Joint Magistrate passed under s. 488 of the Code of Criminal Procedure (Act V of 1898). APPADU *v.* APPAMA (1915) I. L. R. 39 Mad. 472

——— *"Unable to maintain itself," meaning of—Child entitled to maintenance from its mother's tavazi not entitled to order for maintenance from father.* A child that possesses a right to maintenance from its mother's tavazi is not entitled under s. 488, Criminal Procedure Code (Act V of 1898), to an order for maintenance against its father. *Kariyadan Pokkar* v. *Kayat Beeran Kutti, I. L. R. 19 Mad. 461,* followed. *In re Parathy Valappal Moideen (1913), Mad. W. N. 997,* not followed. The words "unable to maintain" in s. 488 are not confined to physical inability but include also pecuniary inability. CHANTAN *v.* MATHU (1915)

I. L. R. 39 Mad. 957

——— *Jurisdiction of Court within whose local limits the husband temporarily resided on the date of the institution of the case and some days previously.* Where in a case under s. 488, Criminal Procedure Code, instituted before the Chief Presidency Magistrate, it appeared that the husband ordinarily resided outside Calcutta but was temporarily there on the date the application was filed and for some days previously: *Held,* that this temporary residence was sufficient to give the Calcutta Court jurisdiction under sub-s. (*9*) of s. 488, Criminal Procedure Code. JOLLY *v.* JOLLY (1917). . 21 C. W. N. 872

——— *"Mutual Consent"—Wife's maintenance fixed by* panchayet*—Claim by wife for payment, whether Magistrate has power to entertain.* Where the differences between husband and wife are referred to the arbitrament of a *panchayet* and the *panches* award the wife a certain stipend as maintenance, a Magistrate has power under s. 488 of the Code of Criminal Procedure, 1898, to entertain a claim by the wife for the maintenance awarded to her, even though the reference to the *panchayet* was by consent of the parties. NATHUN SONAR *v.* MUSAMMAT MATURWA KUER . . 4 Pat. L. J. 109

——— *Fresh application under sect*[illegible] *cati*[illegible] tio[illegible] of [illegible] anc[illegible] tio[illegible] trate entertaining the fresh application inasmuch as there was no adjudication of the first application. MONMOHAN DE *v.* SURABALA DASI

24 C. W. N. 32

——— ss. 488, 489—*Magistrate—Order for maintenance to wife—Subsequent decree for restitution of conjugal rights—Decree puts an end to order for maintenance—Subsequent application by wife for increase in rate of maintenance not competent.* In 1910, a [illegible] under the [illegible] Procedure [illegible] obtained a [illegible] *of conjugal rights.* The decree was never executed: and the husband continued to pay without objection the allowance directed by the Magistrate's order of 1910. In 1918, the wife applied for and obtained from the Magistrate an order under s. 489 of the Code for an increase in the amount of maintenance. The husband having applied to the High Court: *Held,* that the decree of 1912 having as a matter of law determined or put an end to the Magistrate's order under s. 488, an application under s. 489 of the Code was not competent to the wife. CHANDULAL RANCHHOD, *In re* (1919)

I. L. R. 43 Bom. 885

——— s. 491—

See EXTRADITION WARRANT.

I. L. R. 42 Calc. 793

See HABEAS CORPUS.

I. L. R. 39 Calc. 164
I. L. R. 44 Calc. 76
I. L. R. 46 Calc. 52

See JURY, TRIAL BY.

I. L. R. 44 Calc. 723

——— *Grounds on which it may be issued—Habeas Corpus, right to, if may* [illegible]

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— s. 491—*contd.*

ment if bar to High Court's entertaining application, Evidence Act (I of 1872), ss. 2, 78, 86—Foreign records, authentication of—Hearsay evidence admitted by foreign Court if admissible—Copy of document proved in foreign Court if admissible. The jurisdiction of the High Court to give directions in the nature of Habeas Corpus under s. 491 of the Criminal Procedure Code, is not excluded by the issue by the Government of India of a warrant under s. 3, sub-s. 8 of the Extradition Act. The Government can only issue a warrant by virtue of the provisions of the Legislature authorising it, and if those provisions have not been carried out, the warrant and the custody thereunder may be found to be illegal under s. 491, Criminal Procedure Code, though with the extradition proceedings themselves the High Court cannot, except as allowed by the Act, directly interfere. *Quære:* Whether a supreme right like that to a Habeas Corpus can be taken away or limited by the Indian Legislature. *Held,* that if it can be so taken away it must be clearly shown that it has been expressly taken away. *Per* MOOKERJEE, *J.*—The burden lies heavily on those who assert it to show that it has been taken away by such implication as is absolutely necessary for the interpretation of the Statute. *Levinger v. The Queen, I. R. 3 P. C. 282, 289,* referred to. But the High Court in such a proceeding would not weigh the evidence before the Magistrate. Where the Magistrate has jurisdiction it is sufficient that there is some evidence on which the Magistrate may reasonably act. *In re Siletti, 87 L. T. 332, 334; 71 L. J. K. B. 935,* followed. *Per* CURIAM: The Evidence Act does not contain the whole law of evidence applicable to British India. Where therefore the records of a German Court were not authenticated in accordance with the Indian Evidence Act but in the manner prescribed by the English Extradition Act which is applicable in this country, the records were admissible under it. *Quære:* Whether hearsay evidence admitted in evidence in the proceedings in Germany is admissible in extradition proceedings in India. When the original Bill which the prisoner was alleged to have obtained by cheating was put in and proved by witnesses at the enquiry in the German Court: *Held,* that a copy of the document sent as part of the authenticated depositions and papers was admissible in evidence. There may be cases where the production of the original may be necessary for an enquiry in India. *In re* STALLMAN (1911) . . . **I. L. R. 39 Calc. 164**
15 C. W. N. 1053

——— *Directions of the nature of a habeas corpus—Application to be made to Judge on the Original Side of the High Court—S. 54, scope of —Circumstances justifying arrest—"Credible information" and "reasonable suspicion," meaning of.* An application under s. 491, Criminal Procedure Code, is to be made to the High Court in its Ordinary Original Criminal Jurisdiction. The petitioner who was the managing agent of a certain Provident Company of Calcutta was arrested by the Calcutta Police under s. 54, Criminal Procedure Code, on receipt of a letter written by an Inspector of Police in a certain district in the Bombay Presidency to the Commissioner of Police, Calcutta, in which it was stated that on enquiries into complaints against the Company and their local agent in Bombay it appeared, there being *primâ facie* evidence to that effect, that the managing agent and the local agent committed offences under ss. 409, 420, Indian Penal Code. The letter contained a request to cause the arrest of the petitioner and was forwarded by the District Magistrate with a note that the petitioner might be arrested under s. 54, Criminal Procedure Code, and sent to the Magistrate, 1st class, of the District, to be tried by him. It was admitted that the officer effecting the arrest in Calcutta relied solely on the aforesaid letter and had no personal knowledge of the facts of the case: *Held,* that the arrest of the petitioner under s. 54, Criminal Procedure Code, was not proper. That s. 54, Criminal Procedure Code, gives wide powers to a police-officer to make an arrest without an order from a Magistrate and without a warrant only *in certain circumstances limited by the provisions contained in the section, and it is necessary in exercising such large powers to be cautious* and circumspect. The section gives a police-officer personal authority and involves personal responsibility, and the "reasonable suspicion" and "credible information" must be based upon definite facts which the police-officer must consider for himself before he acts under the section. He cannot delegate his discretion or take shelter under the belief or judgment of another police-officer. In the circumstances of the case the High Court under s. 491, Criminal Procedure Code, directed the release of the petitioner. *In the matter of* CHARU CHANDRA MAJUMDAR (1916)
20 C. W. N. 1233

——— s. 492—

See PUBLIC PROSECUTOR. **I. L. R. 41 Calc. 425**

See SANCTION FOR PROSECUTION. **I. L. R. 41 Calc. 446**

——— s. 494—

See s. 247 . **I. L. R. 40 Mad. 976**

See WITNESS . **I. L. R. 46 Calc. 700**

See WITHDRAWAL OF PROSECUTION. **I. L. R. 48 Calc. 1105**

——— *Prosecution against one of two accused withdrawn—Such accused, if competent witness—Confession and prior statements of such accused if should be produced for cross-examination and contradiction.* The petitioner along with one *M* was placed on his trial under s. 411 of the Penal Code, but the prosecution against *M* was withdrawn, under s 494, Criminal Procedure Code, although no formal order of discharge was recorded. *M* was thereupon examined as a witness for the prosecution. It appeared that *M* had made a confession to a Magistrate and this confession was subsequently verified by the same or another Magistrate to whom *M* made further statements. The confession and these further statements were not placed on the record and copies of these were refused to the petitioner. *Held,* that notwithstanding the omission to record a formal order of discharge *M* ceased to be on trial with the petitioner as soon as the prosecution against him

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— **s. 494**—*contd.*

was withdrawn, and that being so he became a competent witness; but for the purpose of cross-examination and, if necessary, for contradiction the prior statements of the witness should have been made accessible to the accused. SHERATI SHEIKH *v.* THE KING-EMPEROR (1904)

18 C. W. N. 1213

——— *Withdrawal of prosecution by public prosecutor with leave of Court—Court must record reasons for granting leave—S. 170—Power of Superintendent of Police to control discretion of investigating police officer.* In according or withholding consent to an application by the public prosecutor for withdrawal under s. 494 (a), the Court acts in a judicial capacity and for its order, as for every order judicially made, the Court must give and record its reason so that the High Court may be in a position to say whether
[illegible] has been pro-
[illegible] the discre-
[illegible] ice officer by
[illegible] be controlled
[illegible] ESH CHANDRA
ROY *v.* SATISH CHANDRA ROY (1917)

22 C. W. N. 69

——— An order under this section allowing withdrawal of prosecution is a judicial order and reasons should be given. UMESH CHANDRA RAY *v.* SATIS CHANDRA ROY

25 C. W. N. 615

——— **s. 496**—

See s. 107 . **I. L. R. 36 Mad. 474**

See EXTRADITION ACT (XV OF 1903) ss. 7, 8 AND 8A.

I. L. R. 43 Bom. 310

——— **ss. 497, 498**—

See BAIL.

——— **s. 498**—

See HABEAS CORPUS

I. L. R. 44 Calc. 76

——— **s. 501**—

See s. 90 . **I. L. R. 38 Mad. 1088**

——— **s. 503**—

See COMPLAINT . **I. L. R. 42 Calc. 19**

——— **s. 512**—

——— *Evidence taken against an accused person who has absconded—Condition precedent to the use of such evidence against accused when arrested.* Evidence purporting to have been recorded under the provisions of s. 512 of the Code of Criminal Procedure cannot be used against the person concerning whom it was taken, unless it can be shown that before such evidence was recorded it was proved to the satisfaction of the Court that the accused had absconded and that there was no immediate prospect of arresting him. EMPEROR *v.* RUSTAM (1915)

I. L. R. 38 All. 29

——— *Evidence taken against accused persons who have absconded—Conditions precedent to the use of such evidence against accused when arrested.* A Magistrate recording evidence under the provisions of s. 512 of the Code of Criminal Procedure put on record a finding that the accused had absconded, but did not further state that there was no immediate prospect of their arrest. There was, however, evidence on the record from which he might have reasonably inferred that there was no immediate prospect of their arrest. *Held,* that the evidence so recorded was admissible against the accused when subsequently arrested. *Emperor* v. *Rustam, I. L. R. 38 All. 29,* distinguished. EMPEROR *v.* BHAGWATI (1918) . . . **I. L. R. 41 All. 60**

——— **s. 514**—

See s. 107 . **I. L. R. 1 Lah. 310**

——— *Surety-[illegible] nd to produce accused before Sessions Court—Proceeding for forfeiture of may be taken by a Magistrate.* Where a surety bond has been executed [illegible] r the appearance of an accused person before [illegible] particular Court, under s. 514 of the Criminal Procedure Code, proceedings to have the bond forfeited can be initiated only by that Court. HIRA LAL SHAHU *v.* EMPEROR (1909) . **14 C. W. N. 259**

——— *Forfeiture of bond—Bond for appearance taken under the City of Bombay Police Act (Bom. IV of 1902), ss. 106, 107—Jurisdiction of Chief Presidency Magistrate to order forfeiture.* The Presidency Magistrate of Bombay has no jurisdiction under s. 514 of the Criminal Procedure Code, to order forfeiture of bonds taken under ss. 106 and 107 of the City of Bombay Police Act, 1902. CRAWFORD, *In re* (1918) . . . . **I. L. R. 42 Bom. 400**

——— *Forfeiture of bond against surety where principal is not bound—Indian Contract Act, IX of 1872, s. 128.* One R. K. was arrested in Gwalior under a warrant issued at Montgomery. He was released on bail on [illegible]
app[illegible]
that [illegible]
of I.. [illegible]
to have been illegal and C. S. then applied for revision of the order of forfeiture. *Held,* that although R. K., the principal, was under the cir-
[illegible]
contract do not limit it, and has no reference to
[illegible]

I. L. R. 2 Lah. 204

——— *Bail bond—Bail, prisoner on, committing suicide—Discharge of sureties.* When a person who has been let out on bail commits suicide, the sureties are discharged from their obligation to produce him. VIJIARAGHAVALU NAIDU, *Re* (1914) . **I. L. R. 37 Mad. 156**

——— **s. 516**—

See s. 514 . . **14 C. W. N. 259**

——— **s. 517**—

See s. 439 . . . **18 C. W. N. 959**

See s. 524 . . . **5 Pat. L. J. 321**

——— *If applies to immovable property.* S. 517, Criminal Procedure Code

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— s. 517—*contd.*

has no application to immovable property. BISESUR SINGH *v.* KING-EMPEROR (1913)

18 C. W. N. 1146

——— *Setting aside of order by High Court—Re-delivery of possession.* The petitioners were convicted under s. 426 of the Penal Code. The Magistrate directed the Police under s. 517 to deliver possession of a garden over which the petitioners were alleged to have obtained possession by means of trespass. The order under s. 517 was set aside by the High Court in revision on the application of the petitioners but the Magistrate refused to re-deliver possession of the garden to them. *Held*, that the order of the High Court setting aside the order under s. 517, Criminal Procedure Code, carried with it the incident of restoration of the garden in question to the petitioners. The High Court directed the Magistrate to restore possession of the garden in question to the petitioners through the Police. SHEONANDAN SINGH *v.* BHOLANATH PATTAK (1913) . . . . . **18 C. W. N. 1147**

——— *Order as regards disposal of property—Discretion in making orders to be judicially exercised—Currency note—Property passes by delivery.* The accused stole a currency note, which he offered to a goldsmith as price for gold ornaments purchased by him. The goldsmith not having had sufficient cash, got the note cashed by a neighbouring shop-keeper (applicant), who cashed it in good faith. At the trial of the accused, the note was attached from the applicant. The accused was convicted of criminal breach of trust of the currency note which belonged to Government; and the note was ordered to be delivered to the Crown. The applicant having appealed: *Held*, that as property in a currency note passed by mere delivery, the applicant had obtained a good title to the note notwithstanding that the accused had no title. *The Collector of Salem, 7 Mad. H. C. R. 233*, and *Empress* v. *Joggessur Mochi, I. L. R. 3 Calc. 379*, followed. Orders under s. 517 of the Criminal Procedure Code (Act V of 1898) are discretionary, but the discretion is open to correction where it has been exercised in violation of accepted judicial principles. *In re* PANDHARINATH PUNDLIK 1915) . . . . . **I. L. R. 40 Bom 186**

——— *Delivery of property under—Order of delivery of property on joint receipt—Validity of such order.* On the discharge of an accused person on a charge of theft of articles admittedly found in possession of that person, on the ground that the accused had a *bonâ fide* belief in a claim of right to their possession, that person cannot claim return of the articles under s. 517, Criminal Procedure Code, as a matter of course. Under s. 517, Criminal Procedure Code, even where a party is charged with theft and that charge is dismissed or the party is discharged, an order can be made for the delivery of the subject-matter of the alleged theft to some party other than the party in whose possession the property was found at the date of the alleged theft. *Kuppammal* v. *Ramaswamy Udayan, Crl. Rn. C. No. 477 of 1905*, (unreported) followed. Property, part of which is joint family property, and part the self-acquisition of an undivided member of the family, may rightly be handed by the Court to the manager of the undivided family and the undivided member on their joint receipt. *Chalakonda Alasani* v. *Chalakonda Ratnachalam, 2 Mad. H. C. 56*, distinguished. KANAGA SABAI *v.* EMPEROR . . . **I. L. R. 34 Mad. 94**

——— ss. 517 and 520—

——— *Appeal—Jurisdiction—Power of Appellate Court to pass orders regarding property in respect of which an offence has been committed.* S. 520 of the Code of Criminal Procedure gives to an Appellate Court the same power as the Court which originally tried a case to pass orders under s. 517 of the Code. *Baloram Gogai* v. *Chintaram Kohta, 9 C. W. N. 549*, followed. *In re Devidin Durgaprasad, I. L. R. 22 Bom. 844*, distinguished. EMPEROR *v.* AZMAT SHAH KHAN (1913) . . . . **I. L. R. 35 All. 374**

——— *Power under, to confiscate property produced before Court—Conviction for gambling under ss. 6 and 7 of Madras Towns' Nuisances Act (III of 1889), ss. 6 and 7—Confiscation of money not actually used for gambling but found on gambler's person, validity of.* On a conviction for gambling under ss. 6 and 7 of the Madras Towns' Nuisances Act (III of 1889), an order to confiscate money found with the gamblers can only be passed under s. 517 of the Criminal Procedure Code; and only in respect of such money as has been actually employed in gambling and not in respect of other money found on the person of the gambler. *Per* AYLING, *J.*—Although s. 517 is in its terms wide, confiscation of property 'produced' before a Criminal Court is not justifiable unless it has been used for an offence, or an offence has been committed regarding it. *Per* PHILLIPS, *J.*—The powers under s. 517 are very large and the Magistrate's discretion is wide and the section empowers him to make such order as he thinks fit for the disposal of property 'produced' before him; but the discretion must be exercised judicially and not arbitrarily. *Re* APPAJI AYYAR (1918)

I. L. R. 41 Mad. 644

——— *Confiscation of property found with a vagrant ordered to give security under s. 109 (b) and 118—Validity of order of confiscation—"Enquiry" in s. 517, whether includes 'inquiry' under s. 117.* Under s. 517, Criminal Procedure Code (Act V of 1898), a Court can order confiscation not only of property which has been used for the commission of an offence or regarding which an offence has been committed but also of any other property which has been produced before it. A proceeding under s. 117, Criminal Procedure Code, is an 'inquiry' within s. 517. *In re Govindaraja Padayachi, 31 I. C. 827*, and *Jagannathan* v. *Varadaraja Mudaliar* (Criminal Revision Case No. 570 of 1915—unreported) dissented from. *Rassul Bibee* v. *Ahmed Moosajee, I. L. R. 34 Calc. 347*, followed. PYDI RAMANNA, *In re* (1918) . **I. L. R. 42 Mad. 9**

——— s. 520—

See s. 439 . . **18 C. W. N. 959**

——— *Magistrate—Order as to disposal of property—On appeal to the Sessions Court the order left untouched—Application to the District Magistrate to revise the order—Jurisdiction—Notice to the other side—Practice.* In

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— **s. 520**—*contd.*

trying a case of theft, a Magistrate of the First Class convicted the accused and passed an order disposing of the property produced before him. The Sessions Court, on appeal, confirmed the conviction, but left untouched the order as to the disposal of property. An application was then made to the District Magistrate to raise the order; and he varied it without issuing notice to the other side: *Held*, reversing the order, that the terms of s. 520 of the Criminal Procedure Code did not give any jurisdiction to the District Magistrate to interfere; and that he could only interfere as a Court of Revision where there had been no appeal to the Sessions Court. *Held*, also, that the District Magistrate ought not to have disposed of the matter without giving notice to the other side. *In re* LAXMAN RANGU RANGARI (1911) . . . **I. L. R. 35 Bom. 253**

——— *Order as to disposal of property—Order can be varied only by a Court of Appeal or Court of Revision entitled to act in the case.* In acquitting an accused person of the charge of theft of cattle, the trying Magistrate ordered the cattle to be returned to him. This order was modified by the Sessions Judge, who ordered the cattle to be given up to the complainant. The accused having applied to the High Court: *Held*, that the Sessions Judge had no jurisdiction, under s. 520 of the Criminal Procedure Code, to make the order he had made, since he was neither a Court of Appeal nor a Court of Revision in the case. *In re Laxman Rangu Rangari, I. L. R. 35 Bom. 253*, followed. *Queen-Empress* v. *Ahmed, I. L. R. 9 Mad. 448*, dissented from. *In re* KHEMA RUKHAD (1918) **I. L. R. 42 Bom. 664**

——— **s. 522**—

See s. 145 . **I. L. R. 37 All. 654**

——— *Restoration of im-*

which convicts of an offence attended with criminal force. An Appellate Court has no power to make such an order restoring possession of immovable property. *Narayan Govind* v. *Visaji, I. L. R. 23 Bom. 494*, referred to. BHAGBAT SHAHA *v.* SADIQUE OSTAGAR (1912) **I. L. R. 39 Calc. 1050**

——— *Propriety of order in the absence of finding as to dispossession of immovable property.* An order under s. 522, Criminal Procedure Code, is not sustainable where there is no finding that the complainant has been dispossessed of any immovable property. MOHAR KHAN *v.* GAYZUDDIN SHEIKH (1913) **18 C. W. N. 399**

——— *Penal Code (Act XLV of 1860), ss. 107, 349—Restoration of possession ... aning ... using ... s. 522.*

When the accused was convicted of rioting for causing violence in the prosecution of a common object, *viz.*, by destroying the complainant's fencing and raising a new fencing on the complainant's land: *Held*, that violence having been caused in this case to the fencing only and not to any person, there was no criminal "force" as defined in *s. 349* of the Penal Code, and no order directing delivery of possession could be made under s. 522, Criminal Procedure Code. SADASIB MANDAL *v.* EMPEROR (1913) . **18 C. W. N. 1150**

——— *Appellate Court, if can set aside order while maintaining conviction—S. 423, cl. (d)—Incidental order.* An Appellate Court has power under s. 423, cl. (*d*), which authorises the Appellate Court in appeal to make an incidental order to set aside an order under s. 522 while affirming the conviction. UJIR SHEIKH *v.* SYED ALI SHEIKH (1915) **19 C. W. N. 990**

on a conviction of rioting and hurt and the Sessions Judge in appeal set aside the conviction of rioting finding that the complainant who claimed to be the auction-purchaser of the property did not get possession and directed the order to be in abeyance pending a reference to the High Court but subsequently in the absence of the complainant declared it to be void: *Held*, that the Sessions Judge's order should not have been made behind the back of the party affected by it. MAJIDALI SARDAR *v.* ALI ASRAB (1919) **23 C. W. N. 862**

——— **ss. 522, 145**—*Infructuous order directing restoration of immovable property, if bar to proceeding under s. 145.* An infructuous order under s. 522, Criminal Procedure Code, which was never carried out, is no bar to the jurisdiction of the Magistrate taking proceedings under s. 145, Criminal Procedure Code, in respect of the same property. PROBHAT CHANDRA CHATTERJI *v.* PROSANNO KUMAR SEN (1914) **18 C. W. N. 1088**

——— **ss. 523, 524**—

See RIGHT OF SUIT. **I. L. R. 40 Bom. 200**

——— **ss. 524, 517, 88 and 89**—*Disposal of property produced in Court or seized by police—Suit to contest order of disposal—Limitation—Forfeiture, validity of—Construction of Statutes—Secretary of State, liability of, for costs.* The power of a Criminal Court with regard to property dealt with in s. 517 or 524 of the Code of Criminal Procedure, 1898, is limited to making arrangements for the custody and protection of the property while in the custody of Government and to making a transfer of possession to such person as it thinks proper. These sections do not empower the Government to confiscate the property or conclude the right of the person from whose possession the property has been taken, or of any other person, to contest the decision of the Criminal Court by civil suit. Such an order of confiscation being illegal and without jurisdiction the plaintiff's suit for recovery of possession is not barred by reason of their omission to institute a suit within one year of the order for the purpose of having it set aside. The words "at the disposal of Government" in s. 524 may reasonably be interpreted as meaning that Government shall be free to sell the property or to hold it as a trustee for

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

———— **ss. 524, 517, 88 and 89**—*contd.*

the true owner. When an Act of the Legislature gives power to any person for a public purpose from which an individual may receive an injury, if the mode of redressing the injury is pointed out by the Statute, the jurisdiction of the ordinary Court is sometimes ousted, and in case of injury the party cannot proceed by action. But it must be ascertained from the Statute itself whether it is intended to be conclusive and to bar all other remedies. *Obiter dictum*, ss. 88 and 89 debar an absconder from suing for the recovery of his property. In an unsuccessful litigation the Secretary of State is liable to pay costs like any other unsuccessful party. THE SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* LOWN KARAN MARWARI **5 Pat. L. J. 321**

———— **s. 526**—

See s. 21 . . **I. L. R. 35 Mad. 739**
See s. 107 . . **I. L. R. 32 All. 642**
See s. 110 . . **I. L. R. 37 All. 20**
See s. 145 . . **I. L. R. 34 All. 533**
See s. 177 . . **I. L. R. 42 Mad. 791**
See EXTRADITION . **I. L. R. 46 Calc. 31**
See TRANSFER . **I. L. R. 41 Calc. 719**

———— *Stay of proceedings pending Rule issued by the High Court—Refusal of Magistrate to act on reliable information thereof—Bias.* Where after a Rule was issued by the High Court and further proceedings were stayed a telegram from the petitioner's Vakil in the High Court intimating the orders of the High Court was filed before the trying Magistrate who refused to stay proceedings: *Held*, that the Magistrate acted injudiciously, and this would justify the Court in transferring the case. *Held*, further, that if the Magistrate had really any suspicion or doubt in the matter he might have asked the muktear who made the application to verify the telegram and to satisfy him as to whether the Vakil in the High Court was acting under instructions in the case. HEM CHANDRA KAR *v.* MATHUR SANTHAL (1909) . . . **16 C. W. N. 1031**

———— *Security for keeping the peace—Transfer.* S. 526 enables the High Court to transfer proceedings initiated under s. 107 to another Court of equal jurisdiction but which would otherwise have no jurisdiction and the High Court's Order will give jurisdiction for an enquiry under s. 117 and orders under s. 118. EMPEROR *v.* WAHIB ALI KHAN **I. L. R. 32 All. 642**

———— *Transfer—Nature of grounds warranting a transfer outside the district.* Where the Magistrate of a district refused to grant an interview to, and cancelled the arms license of a person who was under trial for various offences before the Joint Magistrate, it was *held* that these were sufficient reason for transferring the cases against him out of the district there being also grounds for granting a transfer from the Court of the Joint Magistrate. *Farzand Ali* v. *Hanuman Prasad, I. L. R. 19 All. 64*, followed. EMPEROR *v.* RAM KISHAN DAS (1913) **I. L. R. 35 All. 5**

———— *Transfer—Rule from High Court staying further proceedings—Telegram by the party, effect of—Issue of warrant pending rule.* Whereupon the High Court having issued a Rule staying further proceedings the petitioner sent a telegram which was laid before the trying Magistrate, but the petitioner having failed to appear on the date previously fixed, the Magistrate issued a warrant upon the petitioner: *Held*, that the sending of the telegram did not in any way absolve the obligation of the petitioner to appear before the Court on the date fixed and the issue of the warrant upon the petitioner was no ground for transfer of the case. The inconvenience of transferring a preventive proceeding for trial from one district to another adverted to. CHANDI PROSAD SINGH *v.* THE KING-EMPEROR (1912) . . . **17 C. W. N. 536**

———— *Application for transfer of criminal case on the ground of executive order hampering defence.* The Superintendent of Police in a letter to the Deputy Commissioner made certain charges of extortion against the petitioner who was a police officer under suspension and on this letter being placed before the Magistrate taking cognizance of cases a warrant was issued against the petitioner: *Held*, that if the letter of the Superintendent of Police was not a police report within the meaning of s. 190 (*1*) (*b*), it was a complaint. In the latter view the non-examination of the Superintendent on oath on the complaint was an irregularity which did not vitiate the proceedings taken. The High Court transferred the case, having regard to the fact that on account of the order of the Superintendent of Police (that the petitioner was to be allowed *facilities for instructing legal advisers* only on application to him) there might be a reasonable apprehension in the mind of the petitioner that his movements were unduly restricted. HARIHAR ROY *v.* KING-EMPEROR (1918) **23 C. W. N. 481**

———— *Held*, that the expression 'Criminal case' as used in s. 526 includes a proceeding initiated under s. 145 of the Code and that the High Court has power under s. 526 to transfer such proceeding from one Court to another subject to all conditions under which a transfer can be made. Also that an accused person is one over whom a Criminal Court exercises jurisdiction. JAGGWAHIR *v.* MURLI SHUKUL **I. L. R. 34 All. 533**

———— *Transfer—Riot—Cross cases before same Court—Opinion expressed by Court on evidence in one case no ground for considering it incompetent to try the other.* The fact that a Court before which there are pending two cross cases of riot has, on the trial of the first case, expressed opinions to some extent unfavourable to the accused in the second case, is no good ground for holding that the Court is incompetent to try the second case. *Asimmaddi* v. *Gobinda Baidya, 1 C. W. N. 426*, referred to. EMPEROR *v.* HARGOBIND (1911) . . **I. L. R. 33 All. 583**

———— *Transfer of a case, application by first informant, whether sustainable.* MULLICK, *J.*—A private person who sets the law in motion by giving information to the police is not entitled to apply for a transfer of the case under s. 526 of the Code of Criminal Procedure, 1898. Although s. 526 (*8*) provides an exception

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— s. 526—*contd.*

to the rule in that it contemplates that a complainant is a party interested in the trial for the purposes of cl. (3) this exception does not extend to a person who sets the law in motion by giving information to the police, or to a person who has suffered by the offence for which the accused is being tried. Cl. (3) of s. 526 is intended for the persons who have a right to be heard. Per JWALA PRASAD, *J.*—*A complainant is entitled to apply for a transfer under s. 526, but his rights are subordinate to those of the Crown.* Where there is a conflict between the private prosecutor and the Public Prosecutor in the matter of a transfer of a case the right of the latter must prevail. KAMUNA KANTHA JHA *v.* RUDRA KUMAR JHA **4 Pat. L. J. 656**

——— *Application for adjournment to apply for transfer, when to be made—Hearing, commencement of, in Sessions Court.* The first step in the hearing at a Sessions trial is the reading and explaining of the charge to the accused. An application for adjournment under s. 526, cl (8), Criminal Procedure Code, must therefore be made before the charge is read to the accused. *Quære*: Whether a contravention of s. 526, cl. (8), will render the trial illegal? *In re* KALI MUDALY (1912) . **I. L. R. 35 Mad. 701**

——— *Transfer— Grounds upon which an order for transfer should be made. Held*, on a construction of s. 526 of the Code of Criminal Procedure, that the law does not intend that a transfer of a case should be ordered simply because an accused person thinks that he would not get an impartial trial; but the real question to be considered is whether on the facts disclosed in the application for transfer there arises a reasonable inference that the Magistrate who is seized of the case may be prejudiced wittingly or unwittingly against the accused. *Sumeshwar* v. *King-Emperor, 12 All. L. J. 33, Empress* v. *Nobo Gopal Bose, I. L. R. 6 Calc 491, Furzand Ali* v. *Education and Registration, (1894) 1 Q. B. 750. The Queen* v. *Allan, 4 B. & S. 915*, and *Girish Chunder Ghose* v. *The Queen-Empress, I. L. R. 20 Calc. 357*, referred to EMPEROR *v.* JAGGAN (1914) . . . . **I. L. R. 36 All. 239**

Procedure Code and the trial was not vitiated by the Sessions Judge refusing time ABDUL SALAN *v.* KING-EMPEROR . **26 C. W. N. 660**

——— s. 527—

See JURISDICTION OF HIGH COURT. **I. L. R. 44 Calc. 595**

——— s. 528—

See s. 200 . . **3 Pat. L. J. 346**

See COMPLAINT **I. L. R. 46 Calc. 854**

See FALSE INFORMATION TO THE POLICE **I. L. R. 46 Calc. 807**

——— *Transfer—Effect of appointment of a Magistrate to be Chairman of a municipal board. Held*, that when a Magistrate is appointed to the post of Chairman of a municipal board and has taken over charge, he thereby becomes divested of his ordinary functions as a Magistrate, or if he retains any, he is no longer a "Magistrate subordinate to the District Magistrate," within the purview of s. 528 of the Code of Criminal Procedure. EMPEROR *v.* NATH MAL (1914) . . . . **I. L. R. 36 All. 513**

——— *Transfer of case—Power of District Magistrate, where Subdivisional Magistrate has previously refused to transfer on application by same party.* A District Magistrate is not precluded from exercising his power of transfer of a case under s 528 of the Criminal Procedure Code, on the application of a party, by reason of the fact that the Subdivisional Magistrate had previously refused to transfer the case at the request of the same party. *Thaman Chetty* v. *Alagiri Chetty, I. L. R. 14 Mad. 399*, followed. *Raghunatha Panduram* v. *King-Emperor, I. L. R. 26 Mad. 140*, dissented from. SANTHAPPA SETHURAN *v.* GOVINDASWAMY KANDIYAR (1916) **I. L. R. 40 Mad. 791**

——— s. 529—

See MAGISTRATE JURISDICTION OF. **I. L. R. 39 Calc. 1041**

——— s. 530—

See EUROPEAN BRITISH SUBJECT. **I. L. R. 39 Mad. 942**

See MAGISTRATES, BENCH OF. **I. L. R. 38 Mad. 304**

——— ss. 530, 531—

See MAGISTRATE. **I. L. R. 39 Calc. 119**

——— s. 531—

See s. 177 **I. L. R. 42 Mad. 791**

See s 182

See CHARGE . **I. L. R. 41 Calc. 66**

See COMPANY . **I. L. R. 32 All. 397**

I. L. R. 45 Calc. 490

See PENAL CODE, s. 463. **I. L. R. 36 Mad. 387**

——— s. 532—

See s. 196 . **I. L. R. 37 Calc. 467**

See s. 197 . **I. L. R. 43 Bom. 147**

See JURISDICTION OF CRIMINAL COURT. **I. L. R. 40 Calc 360**

——— s. 533—

See s. 14 . . **3 Pat. L. J. 291**

See s. 164 . **I. L. R. 2 Lah. 325**

See CRIMINAL PROCEDURE CODE s. 342 **5 Pat. L. J. 430**

See EVIDENCE ACT 1872, s. 91. **I. L. R. 35 All. 260**

——— s. 535—

See s. 233 . . **21 C. W. N. 756**

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— ss. 535, 537 (a)—

See CHARGE . I. L. R. 40 Calc. 168

——— s. 537—

See s. 4 . . 1 Pat. L. J. 392

See s. 90 . I. L. R. 38 Mad. 1084

See s. 195 . I. L. R. 37 All. 283

See s. 233 . . 19 C. W. N. 972
I. L. R. 41 Calc. 66

See s. 234 . . I. L. R. 32 All. 57

See s. 235 . I. L. R. 1 Lah. 562

See s. 236 . I. L. R. 45 Bom. 834

See s. 250 . I. L. R. 36 All. 132

See s. 268 . I. L. R. 43 All. 125

See s. 421 . I. L. R. 39 Mad. 527

See s. 462 . I. L. R. 33 All. 385

See s. 476 . . 1 Pat. L. J. 553

See COUNTERFEIT COIN.
I. L. R. 44 Calc. 477

See FALSE INFORMATION.
I. L. R. 43 Calc. 173

See JURISDICTION OF CRIMINAL CODE.
I. L. R. 40 Calc. 360

See SANCTION FOR PROSECUTION
I. L. R. 48 Calc. 867

See UNITED PROVINCES EXCISE ACT (IV OF 1910), s. 63. I. L. R. 35 All. 358

See WARRANT . . 3 Pat. L. J. 493

——— *Penal Code (XLV of 1860) ss. 182 and 211—Acquittal upon ground of absence of sanction—Practice—Revision—Application by private prosecutor against order of acquittal.* *Held*, that a Court of criminal appeal was not justified in setting aside a conviction under s. 182 of the Indian Penal Code on the sole ground that the offence, if any, which the appellants had committed was one under s. 211 of the Code and that no sanction for a prosecution under that section had been obtained. In this case under special circumstances the High Court entertained an application in revision presented by a private prosecutor against an order of acquittal. GUR BAKSH SINGH *v.* KASHI RAM (1914)
I. L. R. 37 All. 110

——— *Complaint referred to accused for report—complaint dismissed—validity of order.* It is not merely irregular but illegal for a Magistrate to whom a complaint is made to call upon the person accused for a report as to the truth or falsity of the charge preferred against him. Such an illegality *ipso facto* renders void an order made as a consequence of it. S. 537 of the Code of Criminal Procedure, 1898, deals merely with irregularities in procedure so far as such irregularities involve breaches of the rules of procedure provided by the Code itself. HARNARAIN HALWAI *v.* KARIMAN AHIR
5 Pat. L. J. 61

——— *Two false suits filed by same plaintiff—Order directing prosecution ambiguous as to whether it referred to both suits or only one, but construed by trying magistrate as referring to both—Convictions upheld.* Two suits were filed on the same day by the same plaintiff, (1) against one B. P. in the Court of the City Munsif of Bareilly, (2) against G. D. a relative of B. P., in the Court of the Subordinate Judge. It was alleged and found that both suits were instituted with the same object of harassing B. P. Both suits were dismissed as false. In relation to the suit in his Court the Subordinate Judge took proceedings against the plaintiff under s. 476 of the Code of Criminal Procedure, and in the course of these proceedings sent for and examined the record of the case in the city Munsif's Court. The Subordinate Judge then recorded an order under s. 476 of the Code directing the prosecution of the plaintiff under s. 209 of the Indian Penal Code. This order was ambiguously worded, and did not leave it beyond doubt whether the Subordinate Judge intended to direct the prosecution of the plaintiff in respect of both suits or only in respect of the suit in his own Court. The Magistrate, however, before whom the case came tried the plaintiff for offences in relation to both, and convicted him in respect of both. *Held* on application in revision—it not being made to appear that the accused had suffered any prejudice,—that the case was covered by s. 537 of the Code of Criminal Procedure, and the conviction of the plaintiff of offences in relation to both suits was not illegal. *Emperor* v. *Zahir Singh, I. L. R. 37 All. 283,* referred to. EMPEROR *v.* BABU RAM . . . I. L. R. 42 All. 12

——— s. 540—

See s. 244 . . I. L. R. 36 All. 13

——— s. 552—

See MAGISTRATE, JURISDICTION OF.
I. L. R. 39 Calc. 403

——— s. 555—

See WARRANT . . 3 Pat. L. J. 493

——— s. 556—

See COMPLAINT I. L. R. 46 Calc. 854

See LOCAL INSPECTION.
I. L. R. 37 All. 340

——— Personally interested—*Magistrate ordering prosecution as president of octroi subcommittee—Jurisdiction.* A Magistrate as the president of the octroi sub-committee of a Municipal Board, ordered the prosecution of the accused and with the consent of the accused tried the case himself. *Held*, that the Magistrate must be deemed to have been personally interested within the meaning of s. 556 of the Code of Criminal Procedure and was not qualified to try the case of the applicant whose consent could not confer jurisdiction upon him. *Emperor* v. *Mohan Lal, I. L. R. 27 All. 25,* distinguished. *In the matter of the petition of Inayat Husain, All. Weekly Notes (1899) 74,* referred to. EMPEROR *v.* BISHESHAR BHATTACHARYA (1910) . I. L. R. 32 All. 635

——— *Whether District Magistrate can try a case under the Indian Factories Act, XII of 1911, where he himself, as Inspector of Factories, ordered inquiries and sanctioned the prosecution.* *Held*, that a District Magistrate, who as Inspector of Factories ordered an enquiry to be made and in the same capacity sanctioned the prosecution, is disqualified by s. 556 of the Code of Criminal Procedure from trying the

CRIMINAL PROCEDURE CODE (ACT V OF 1898)—*contd.*

——— s. 556—*contd.*

case. *Mangal* v. *Emperor* (*5 P. W. R. 1912*), referred to. *Queen-Empress* v. *Chenchi Reddi* (*I. L. R. 24 Mad. 238*), distinguished. LORINDA RAM *v.* THE CROWN . . **I. L. R. 1 Lah. 35**

——— s. 562—

See s. 439 . . **I. L. R. 37 All. 31**

——— not applicable to aggravated forms of cheating.

See PENAL CODE, s. 420

I. L. R. 1 Lah. 612

——— *Penal Code* (*Act XLV of 1860*) *s. 420—S. 562, whether applicable to a conviction under s. 420.* The word "cheating" in s. 562 of the Code of Criminal Procedure does not cover the form of cheating punishable under s. 420 of the Indian Penal Code. *Emperor* v. *Ramjan Dadubhai, 16 C. L. J. 781,* approved and followed. *Harnarain* v. *Ramji Das, 12 All. L. J. 465,* dissented from. SUNDARAM AYYAR v. THE KING-EMPEROR (1917)

I. L. R. 41 Mad. 533

——— s. 562 of the Code of Criminal Procedure, 1898, describes the offences to which it applies by the short marginal descriptions given in the Penal Code in the sections dealing with those offences and the section does not warrant the construction that dishonest misappropriation and cheating include every offence under the headings of "Criminal Misappropriation" and "Cheating" in the Penal Code. EMPEROR *v.* DEVA KANTA JHA . . **5 Pat. L. J. 267**

——— The accused, a young man of 20, was convicted of theft for having picked the pocket of complainant of Rs. 10 and sentenced to 2 months rigorous imprisonment. The High Court in revision directed the accused to be released on furnishing a bond with sureties under the section. ABDUL KADER *v.* MONOMOHAN GOPE

25 C. W. N. 720

——— s. 565—

——— *Indian Penal Code* (*Act XLV of 1860*), *s. 75—Whipping* (*Act IV of 1909*), *s. 3—Sentence of whipping only passed on accused—Order to accused to notify his residence—Validity of the order.* S. 565 of the Criminal Procedure Code (Act V of 1898) must be strictly construed. The order contemplated by the section can only be made at the time of passing sentence of transportation or imprisonment upon a convict. It cannot be made where the Court, instead of passing that sentence, passes a sentence of whipping. EMPEROR *v.* FULJI DITYA (1910)

I. L. R. 35 Bom. 137

——— *Notification as to residence or change of residence—Temporary absence for a night not notified—Whether an offence under Indian Penal Code* (*Act XLV of 1860*), *s. 176.* Where all that was proved was that the accused who had been ordered to notify his residence and change of residence under s. 565, Criminal Procedure Code (Act VI of 1898), was absent from his house for a single night without notifying his absence: *Held,* that such temporary absence did not amount to a change of residence and that the accused was not guilty of an offence under s. 176, Indian Penal Code (Act XLV of 1860). *Re* CHENGADU (1917)

I. L. R. 40 Mad. 789

——— Sch. III, (8)—

See TRESPASS . **I. L. R. 39 Calc. 953**

——— Sch V, form M. VII—

See WARRANT . **I. L. R. 38 Calc. 789**

CRIMINAL PROCEEDINGS.

See LEAVE TO APPEAL TO PRIVY COUNCIL.

See PRACTICE.

See PRIVY COUNCIL—PRACTICE OF.

I. L. R. 42 Calc. 739

Information given by police officer to himself—Criminal Procedure Code (*Act V of 1889*), *ss. 154, 173, 190, (1) (b).* A prosecution is not legally instituted under s. 190 (*1*) (*b*) of the Criminal Procedure Code when the police report under s. 173 does not set forth the nature of the information, and the first information report under s. 154 is equally defective in this respect. LEE *v.* ADHIKARY (1909) . . . **I. L. R. 37 Calc. 49**

——— Pendency of civil suit—*Letter alleged to be forged set up as a defence—Genuineness of letter a principal issue in the case—Subsequent institution of criminal proceedings for forgery in respect of the same.* Where after the institution of a civil

alleged to bear a forged signature and in respect of which criminal proceedings under ss. 465 and 467 of the Penal Code were taken by one of the plaintiffs · *Held,* that inasmuch as the letter was a necessary part of the defendant's case and the question of its genuineness a principal issue in the suit, the criminal proceedings ought to be stayed pending the decision in the civil suit. SHASHI BHUSHAN SEAL *v.* EMPEROR (1910)

I. L. R. 38 Calc. 106

CRIMINAL PROSECUTION.

——— agreement to stifle—

See CONTRACT ACT. (IX OF 1872), s. 2.

I. L. R. 42 Bom. 33

——— limitation of time for—

See CALCUTTA MUNICIPAL ACT (BENG. III OF 1899), ss. 341 (1), ETC.

I. L. R. 37 Calc. 384

CRIMINAL REVISIONAL JURISDICTION.

See CRIMINAL PROCEDURE CODE, s. 439

See HIGH COURT.

See HIGH COURT, JURISDICTION OF

——— *Practice—Jurisdiction of High Court—Rule issued on one or more of several grounds in a petition, and ultimately discharged—Fresh Rule on the grounds of the same petition.* When a Rule has been granted on one or more of several grounds contained in a petition and is ultimately discharged, the High Court has no juris-

CRIMINAL REVISIONAL JURISDICTION—*contd.*

diction to issue a fresh Rule, in the same case, on the other or some of the other grounds of the petition, which were considered on the first occasion unless permission was given to the party, at the time of the discharge of the first Rule, to renew the application on the other grounds or some of them. *Rai Radha Gobind* v. *Gossain Mohendra Gir, 6 C. W. N. 340,* and *Bibhuty Mohan Roy* v. *Dasimoni Dassi, 10 C. L. J. 80,* referred to. JOYMANGAL PERSHAD NARAIN SINGH *v.* JHAGROO SAHU (1911)

I. L. R. 38 Calc. 933

——————— *Dismissal of complaint, reasons for—Criminal Procedure Code (Act V of 1898), s. 203—Grounds not taken in the first Court of Revision might be taken in the High Court—Government Circular, its effect—Statute law—Practice.* Grounds, which were not urged in the first Court of Revision, might be taken in the High Court. Under s. 203 of the Criminal Procedure Code (Act V of 1898) reason for dismissing the complaint must be recorded. No circular of the Government can authorize Magistrates to infringe, or in any way alter, the Statute law. MANIRUDDIN SIRCAR *v.* ABDUL RAUF (1912)

I. L. R. 40 Calc. 41

——————— *Practice—Time-limit of applications to High Court in criminal revision—Application made after the expiry of 60 days from the date of the order.* As a matter of practice the High Court will not, save in exceptional circumstances, entertain an application in criminal revision unless it is made within sixty days, excluding the time necessary to obtain copies, from the date of the order complained of. *In the matter of* KHETRA MOHAN GIRI (1916) **I. L. R. 43 Calc. 1029**

CRIMINAL SESSIONS, HIGH COURT.

——— **power to direct enquiry—**

See PERJURY . **I. L. R. 43 Calc. 542**

CRIMINAL TRESPASS.

See CRIMINAL PROCEDURE CODE, 1898, S. 106 . . **I. L. R. 42 All. 345**

See PENAL CODE (ACT XLV OF 1860), SS. 441, 442 AND 447.

See THEFT . **I. L. R. 44 Calc. 66**

See TRESPASS.

——————— *Mischief—Entry by a servant upon land in the possession of the Court of Wards and cutting bamboos thereon under the order of the owner—Penal Code (Act XLV of 1860), ss. 426, 747.* A servant of a proprietor who has voluntarily surrendered his estate to the Court of Wards does not commit criminal trespass of mischief by cutting or removing bamboos, etc., growing thereon, for the benefit of his master, under the circumstances of this case. PARMESWAR SINGH *v.* EMPEROR (1910) . . **I. L. R. 38 Calc. 180**

——————— *Unanimous verdict of Jury—Criminal Procedure Code (Act V of 1898), s. 307—Reference to High Court whether permissible in such a case—Penal Code (Act XLV of 1860), ss. 148, 304, 326, 149—Absence of charge—Acquittal.* Criminal trespass depends on the intention of the offender and not upon the nature of the act, and when the man's intention is to save his family and property from imminent destruction it cannot be said that because he commits civil trespass on his neighbour's land and cuts a portion of the *bund* belonging to his neighbour which he ordinarily would not be justified in doing, he is guilty of any criminal offence. Where the verdict of the Jury is unanimous and the Judge has agreed with it, he can make no reference under s. 307 of the Criminal Procedure Code. Where the accused were charged under ss. 148, $\frac{304}{149}$ and $\frac{326}{149}$ and the Jury found them guilty under s. 326 only : *Held,* that the verdict of the Jury under s. 326 was a judgment of acquittal inasmuch as there being no charge under that section independently, there could be no verdict given upon it. *Riazzudi* v. *King-Emperor 16 C. W. N. 1077, Panchu Das* v. *Emperor, I. L. R. 34 Calc. 698,* referred to. EMPEROR *v.* MADAN MANDAL AND OTHERS (1913)

I. L. R. 41 Calc. 662

——————— *High Court, power of, to allow composition of an offence on revision—Criminal Procedure Code (Act V of 1898), ss. 345 (5), 23 (1) (d), 439—Necessity of Criminal intent—Entry on land under* bonâ fide *claim of right—Penal Code (Act XLV of 1860), ss. 441, 447.* The High Court has no power, as a Court of Revision, under s. 439 read with s. 423 (*1*) (*d*), to sanction the composition of an offence when entered into after the conviction of the accused. *Adhar Chandra Dey* v. *Subodh Chandra Ghosh, 18 C. W. N. 1212, Sankar Rangayya* v. *Sankar Ramayya, 16 Cr. L. J. 750 ; 29 Mad. L. J. 521,* and *Emperor* v. *Ram Chandra, I. L. R. 37 All. 127,* followed. *Emperor* v. *Ram Piyari, I. L. R., 32 All. 153, Nagi Ahmad* v. *King-Emperor, 11 All. L. J. 13, Nidhan Singh* v. *King-Emperor, 1 Cr. L. J. 509 ; 5 Punj. L. R. 252, Ram Sarup* v. *Emperor, 11 Cr. L. J. 496 ; 13 O. C. 161,* and *Lall* v. *Emperor, 15 Cr. L. J. 567 ; 17 O. C. 92,* dissented from. *Abadi Begum* v. *Ali Husen, (1897) All. W. N. 26,* distinguished. To sustain a conviction under s. 447 of the Penal Code it is necessary to prove not only entry on land in the possession of the complainant but also one of the intents specified in s. 441. Where a person was charged under ss. 447 and 504 of the Penal Code and convicted only under the former : *Held,* that the intent to commit an offence or to intimidate, insult or annoy not having been established, the conviction was bad. If a person enters upon land in the possession of another, in the exercise of a *bonâ fide* claim of right without any such intent, he cannot be convicted under s. 447, though he may have no right to the land. *Empress* v. *Budh Singh, I. L. R. 2 All. 101, Re Shistidhur Parui, 9 B. L. R. App. 19,* and *Jurakhan Singh* v. *King-Emperor, 7 C. L. J. 238,* followed. AKSHOY SINGH *v.* RAMESHWAR BAGDI (1916) . . **I. L. R. 43 Calc. 1143**

CRIMINAL TRIAL.

See EVIDENCE . **I. L. R. 42 Calc. 784**

See JURISDICTION **I. L. R. 41 Calc. 305**

——— **prosecution of accomplice—**

See CRIMINAL PROCEDURE CODE, S. 339.

I. L. R. 37 All. 331

——— **rectification of defective charge—**

See CHARGE . . **I. L. R. 42 Calc. 957**

CRIMINAL TRIBES ACT (III OF 1911).

———— s. 5—The District Magistrate in granting or refusing an application to take the name of a person out of the register kept under s. 5 of the Criminal Tribes Act does not perform any judicial functions ; his functions are administrative and the High Court is not entitled to interfere with any order made by the Magistrate in this respect. HASAN ALI BEPARI *v.* KING-EMPEROR

I. L. R. 47 Calc. 843
24 C. W. N. 624

———— ss. 8 and 28—

See CRIMINAL TRIBES. ACT

I. L. R. 47 Calc. 843

———— s. 23—

1. ———— *First conviction for scheduled offence after the Act—Conviction for such offences, prior to the Act—Punishment.* An accused person who belongs to a tribe notified to come under the Criminal Tribes Act (III of 1911) and who is for the first time after the enactment of that Act convicted of an offence specified in the schedule to that Act, is liable to be punished under cl. (*a*) and not cl. (*b*) of s. 23 (1) of the Act, though he may have been convicted once or several times of such offence before the passing of the Act. SELLAMANI, *Re* (1916) . I. L. R. 40 Mad. 923

2. ———— *Member of criminal tribe—Second conviction for scheduled offence—Enhanced punishment.* The " second conviction " contemplated by cl. (*a*) of s. 23 of the Criminal Tribes Act, 1911, need not be the second conviction after the Act, nor is it necessary that it should be second in fact. Taking the conviction or convictions prior to the Act as one group constituting one conviction, the first one after the Act would be the second conviction for the purpose of the section though in point of fact it may be one more in a series of convictions prior to the Act. A third conviction within the meaning of cl. (*b*) of the section must be at least the second after the Act. *In re, Sellamani (1916) 40 Mad. 923*, followed. EMPEROR *v.* TUKA NANA (1920)

I. L. R. 45 Bom. 1082

CRITICISM OF GOVERNMENT.

See SEDITION . I. L. R. 38 Calc. 253

CROSS-APPEAL.

See CONTRACT . I. L. R. 39 Mad. 509

See PRIVY COUNCIL, PRACTICE OF.

I. L. R. 37 Calc. 623

CROSS-CLAIMS.

———— under same decree—

See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXI, R. 19.

I. L. R. 40 Bom. 60

CROSS-DECREES.

See CIVIL PROCEDURE CODE, 1908—

O. XXI, R. 18 I. L. R. 38 All. 669

O. XXI, RR. 18, 19, 20.

I. L. R. 33 All. 240

CROSS-EXAMINATION.

———— exhibiting documents during—

See RIGHT OF REPLY.

I. L. R. 43 Calc. 426

CROSS-EXAMINATION—*contd.*

———— of prosecution witnesses—

See JURISDICTION OF MAGISTRATE

I. L. R. 39 Calc. 885

———— paper put to witness—Right of opposite Counsel to see—

See PROBATE . I. L. R. 39 Calc. 245

———— question put in—

See DEFAMATION I. L. R. 41 Calc. 514

———— *Prosecution-witnesses, cross-examination of, after charge—Failure to name, on date of the charge, the witnesses required for cross-examination—Subsequent application before close of the case—Right of cross-examination, continuance of—Waiver—Criminal Procedure Code (Act V of 1898), s. 256.* S. 256 of the Criminal Procedure Code merely lays down that after the plea of the accused is taken he shall be required to state whether he wishes to cross-examine any, and if so which, of the prosecution witnesses whose evidence has been taken, but it does not state at what particular time he is to be asked this question, nor up to what time he has this right. Where, therefore, the accused were asked, on the day the charges were framed, whether they would call any of the prosecution witnesses for cross-examination and did not name any, but made an application to recall some of them for that purpose on the next court day and before the case had closed. *Held,* that they were entitled to have the prosecution witnesses recalled for the purpose of cross-examination, and that there was no waiver of their right under the section. INDER RAI *v.* C. R. BROWN (1909) . . . . I. L. R. 37 Calc. 236

———— If a cross examining counsel after putting a paper in the hands of witness merely asks him some questions as to its

(1911) . . . . . 16 C. W. N. 265

———— *Postponement Sessions trial—Application by defence counsel to postpone cross-examination till next day—Trial for murder—Refusal by Judge, effect of—Prejudice to accused—Re-trial—Practice.* Where, at a Sessions trial, the defence counsel applied, after the examination-in-chief of the first prosecution witness, for postponement of the cross-examination of the witnesses till the next day, on the ground of his unpreparedness, but did not ask for an adjournment

was that the witnesses examined on its date, four of whom were important, were not cross-examined by counsel or pleader, and the witnesses subsequently examined were inefficiently cross-examined and the cross-examination of the former witnesses might have elicited matters as to which the subsequent witnesses might have been cross-examined. *Held,* that the accused were prejudiced, and that

CROSS-EXAMINATION—*contd.*

there should be a re-trial by another Judge. SADASIV SINGH *v.* EMPEROR (1913)
I. L. R. 41 Calc 299

——————— *Practice—Accused right of—Leading questions—Evidence Act (I of 1872), ss. 143, 151.* In India, as in England, the accused are entitled in cross-examination to elicit facts in support of their defence from the prosecution witnesses wholly unconnected with the examination-in-chief. In the course of cross-examination of this character the defence are entitled, in view of the generality of s. 143 of the Indian Evidence Act, to ask leading questions. Under s. 154, the Court has the discretion to permit the prosecution to test by way of cross-examination, the veracity of their own witnesses with regard to the (unconnected) matters elicited by the defence in cross-examination. AMRITA LAL HAZRA *v.* EMPEROR (1915).
I. L. R. 42 Calc. 957

——————— The usual practice where some dependants support plaintiff's case is to order that they shall be at liberty to cross-examine the plaintiff's witnesses first, if they desire to do so, and to call their evidence and address the court before the defendants who oppose the plaintiff's case do so. In the special circumstances of this case the High Court, in the exercise of its powers of superintendence, interfered with the order of the lower court refusing to allow the defendants who opposed the plaintiff's claim, to cross-examine the latter's witnesses after the other defendants had cross-examined them. MOTIRAM MARWARI *v.* LALIT MOHAN GHOSH . . 5 Pat. L. J. 545

CROSS-OBJECTION.

See CIVIL PROCEDURE CODE, 1908, s. 92. . I. L. R. 40 Bom. 541
O. XLI, r. 22.

See COURT-FEES . . 3 Pat. L. J. 443

See COURT FEES ACT (VII OF 1870), SCH. I. ART. 1 . I. L. R. 40 All. 93

See OBJECTION.

See SALE . I. L. R. 43 Calc. 790

——— memorandum of—

See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XLI, R. 22.
I. L. R. 38 Mad. 705

——————— *Dismissal of substantive appeal for failure to give security—whether such dismissal is a dismissal for default—Code of Civil Procedure (Act V of 1901), O. XLI, r. 22 (4).* Where the respondent has filed a cross-objection, and where the parties have entered into contest before the Court on several occasions, and the appeal is dismissed upon the appellant's failure to furnish security, such a dismissal is a dismissal for default, and the respondent is, therefore, entitled to have his cross-objection heard and determined. MOWAR SHEOBAKSH SINGH *v.* MOWAR THAKUR DEYAL SINGH . . . . . 4 Pat. L. J. 164

——————— *Appeal by one defendant as against plaintiff—Co-defendants impleaded as formal respondents cross-appeal by defendant-respondent when appeal by him is barred—Code of Civil Procedure (Act V of 1908), O. XLI, rr. 4, 32 and 33—Covenant of title—Transfer of Property Act (IV of 1882), ss. 45 and 55 (2).* Where one of several defendants against whom a decree is passed

CROSS-OBJECTION—*contd.*

has allowed the period for appealing to elapse O. XLI, r. 22, of the Code of Civil Procedure, 1908, was not intended to revive his right merely because a co-defendant has instituted an appeal against the plaintiff on entirely different grounds. An appeal was filed by one of several defendants in which the plaintiff was the real respondent and the other defendants were merely formal respondents. The appeal was directed against the decree in so far as it affected the appellant's liability towards the plaintiff only. Of the defendant-respondents the only one who appeared in the appeal was defendant No. 1. He was affected by the decree in so far as it declared that a mortgage of the plaintiff-respondent's property which had been made to him had been satisfied and that the plaintiff was entitled to possession of the mortgaged property. The time to appeal from the decree having elapsed defendant No. 1 preferred a cross-appeal as against the plaintiff-respondent. *Held*, that the defendant No. 1 was not entitled to prefer the cross-appeal. O. XLI, r. 22 (1), in so far as it relates to a cross-objection, was provided to meet the case where a respondent, although the decree is not entirely in his favour, is content to let matters rest provided his opponent does not appeal, but who may not be willing to run the risk of having the findings in his favour varied or reversed without an opportunity of appealing against the findings which are adverse to him. The rule should ordinarily be confined to cases of cross-objections urged against the appellant, but O. XLI, r. 33, gives the court a wide discretion, where justice requires it, that cross-objections against a co-respondent should be heard. The rule should not be invoked to enable a litigant to avoid the provisions of other statutes such as the Limitation Act or the Court-Fees Act. In 1895 *C* transferred half of his mining rights in a certain *mauza* to *S*. In 1904, *C* having died in the meanwhile, *S* released to *C*'s estate for consideration the right, title and interest which he had acquired by the transfer of 1895. *Held*, that it was not competent to the administrators of *C*'s estate to complain that there was a defect in the title which *C* himself represented to *S* as subsisting. THE OFFICIAL TRUSTEE OF BENGAL *v.* CHARLES JOSEPH SMITH . 5 Pat. L. J. 328

——————— *Held*, that r. 22 of O. XLI of the Civil Procedure Code is not applicable to an appeal under cl. 15 of the Letters Patent and a memorandum of cross-objection cannot be entertained in these appeals. BROJENDRO CHANDRA SARMA *v.* PROSANNA KUMAR DHAR.
24 C. W. N. 1010

CROSS-SUITS.

See ACCOUNT . . 15 C. W. N. 930

CROWN.

See SECRETARY OF STATE.

——— applicability of Transfer of Property Act (IV of 1882) to—

See LEASE . I. L. R. 40 Mad. 910

——— delegation of authority to Secretary of State.

See EXECUTION OF DECREE.
I. L. R. 38 Calc. 754

——— escheat to—

See MULGENI LEASE
I. L. R. 42 Mad. 327

CROWN—*contd.*

———— right of, to prosecute—

See CONSPIRACY I. L. R. 42 Calc. 957

———— right of in Rivers—

See MADRAS IRRIGATION ACT, 1865 s. 4 I. L. R. 37 Mad. 322

CROWN DEBT.

———— priority of—

See ADMINISTRATION. I. L. R. 45 Calc. 653

See CIVIL PROCEDURE CODE, 1882, s. 411. I. L. R. 34 All. 223

See TRANSFER OF PROPERTY ACT (IV OF 1882), s. 69 . I. L. R. 40 Mad. 767

CROWN-GRANTS.

———— rule of construction of—

See INAM . I. L. R. 40 Mad. 268

CROWN GRANTS ACT (XV OF 1895).

———— s. 2—

See HINDU LAW—INHERITANCE. I. L. R. 40 All. 470

———— ss. 2, 3—

See REGISTRATION ACT (XVI OF 1908),

Ss. 17, 90 . I. L. R. 36 All. 176

S. 90 . . I. L. R. 43 Mad. 65

———— s. 3—*Government's power to prescribe by sanad rule of descent for grants by it contrary to the law—Subject's power to do same—Other property treated by grantee as part of sanad property, if governed by sanad—Property given by Government in exchange for property granted, if devolves according to sanad—Property given for the use of grantee as such, if governed as to descent by sanad—Moveable property, if so governed.* The Crown has in British

lands or other property any limitation of descent which is at variance with the ordinary law of descent of property applicable to the case. *B* died possessed of properties descendible under a Government sanad according to the rule of primogeniture and others not governed by the sanad: *Held*, that Government had power to give to *B* in exchange for any land covered by the sanad other lands and the lands so acquired by *B* in exchange would be subject to the rule of descent prescribed in the sanad. *Held*, also, that the rule of descent

shown to have existed. That the moveable property left by *B* not being covered by the sanad was not governed by the rule of descent prescribed therein. RAJENDRA BAHADUR SINGH *v.* RANI RAGHUBANS KUMAR (1918) . 23 C. W. N. 101

CRUELTY.

See DIVORCE . I. L. R. 38 Calc. 907
I. L. R. 39 Calc. 395

CRUELTY—*contd.*

See MAHOMEDAN LAW—RESTITUTION OF CONJUGAL RIGHTS. I. L. R. 40 All. 332

CRUELTY TO ANIMALS.

See DISTRICT POLICE ACT (BOMBAY). I. L. R. 45 Bom. 203

See PREVENTION OF CRUELTY TO ANIMALS ACT (XI OF 1890), s. 3, CL. (*b*).

CULPABLE HOMICIDE.

See PENAL CODE (ACT XLV OF 1860), Ss. 37, 302, 304. I. L. R. 35 All. 506, 560

S. 304 . . I. L. R. 42 All. 272

Ss. 304 AND 325 . I. L. R. 40 All. 103
I. L. R 42 All. 302

Ss. 325, 300 EXCEPTION 4. I. L. R. 40 All. 686

———— sentence of transportation for 14 years—If Legal—

See PENAL CODE, s. 59 25 C. W. N. 514

CUMULATIVE SENTENCES.

———— *Rioting—Separate sentences for rioting and causing hurt—Penal Code (Act XLV of 1860), ss. 147, 323.* Separate sentences for the offences of rioting and hurt are legal where it is found that each person took an individual part in the assault. *Nilmony Poddar* v. *Queen-Empress, I. L. R. 16 Calc. 442, Mohur Mir* v. *Queen-Empress, I. L. R. 16 Calc. 725, Ferasat* v. *Queen-Empress, I. L. R. 19 Calc. 105*, referred to. RAM ANGUTHA SINGH *v.* EMPEROR (1913). I. L. R. 40 Calc. 511

CURATORS' ACT (XIX OF 1841).

See SUCCESSION (PROPERTY PROTECTION) ACT (XIX OF 1841).

———— ss. 3, 4 and 14—*Oath's Act (V of 1840)—Death of representative Vatandar—Deceased's widow, representative Vatandar—Death of the widow—Application by the nearest heir of the deceased male Vatandar for possession—Six months, calculation of—Property claimed by right "in succession"*

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of the Curators' Act (XIX of 1841) the provisions of the Act could not be put in force because Kotrappa died more than six months before the

the Curators' Act (XIX of 1841), that is, there was no inquiry upon solemn declaration of the complainant (applicant). *Held*, confirming the order,

CURATORS' ACT (XIX OF 1841)—*contd.*

——— ss. 3, 3 and 14—*contd.*

that (i) the decease of the proprietor whose property was claimed by right "in succession" referred to in s. 14 of the Curators' Act (XIX of 1841) included the decease of Basawa because she was, between the death of her husband and her own decease, the proprietor of the property claimed. All that was to be decided was who should be put into possession of the property in succession to the last deceased holder. (ii) The Judge having acted upon the application of the claimant in addition to his affidavit on solemn affirmation the statements in the affidavit furnished sufficient grounds for action under s. 4 of the Curators' Act (XIX of 1841) having regard to the provisions of the Oaths Act (V of 1840). BHIMAPPA *v.* KHANAPPA (1909).
I. L. R. 34 Bom. 115

CURRENCY NOTE.

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), s. 517. **I. L. R. 40 Bom. 186**

——— Delivery of halves of—*Such delivery does not pass the property in the notes—Creditor receiving halves of notes from debtor not entitled to insist on delivery of the other halves.* The delivery by a debtor of halves of currency notes to his creditor with the intention of paying off the debt by remitting the other halves, does not pass the property in the notes to the creditor so as to enable him to claim delivery of the other halves. *Smith* v. *Mundy, 29 L. J. Q. B. 172,* followed. The debtor does not by simply sending the first halves, without anything more, become a trustee or bailee in respect of the other halves of the notes. *Per* ABDUR RAHIM, *J.*—S. 92 of the Indian Contract Act does not apply to money or currency notes, although the definition of goods in s. 76 of the Contract Act is wide enough to cover coins and currency notes. *Per* BAKEWELL, *J.*—The delivery of the half notes to the creditor was only one step towards or preparatory to the actual delivery of the notes, and indicates only an intention to transfer and does not constitute a delivery of the notes. KOTI VENKATA RAMIAH *v.* OFFICIAL ASSIGNEE OF MADRAS (1909) . . **I. L. R. 33 Mad. 196**

CURRENT ACCOUNT.

See LIMITATION ACT, 1908, SCH. I ART. 85.
I. L. R. 1 Lah. 12

CUSTODY.

See COUNTERFEIT COIN.
I. L. R. 44 Calc. 477

See EVIDENCE ACT (I OF 1872), s. 26.
I. L. R. 42 Bom. 1

See JURY . . **I. L. R. 44 Calc. 98**

CUSTODY OF CHILDREN

See GUARDIAN . **I. L. R. 38 Mad. 807**

See GUARDIANS AND WARDS ACT (VIII 1890), s. 25. **I. L. R. 39 Bom. 438**

See [illegible] **I. L. R. 41 Calc. 714**

See MINOR . . **L. R. 41 I. A. 314**

CUSTOM.

See ADOPTION . **I. L. R. 40 Calc. 879**

See [illegible], ESTATE OF ZIRA.
I. L. R. 49 Calc. 879

See [illegible] GRANT.
I. L. R. 42 Calc. 352

CUSTOM—*contd.*

See CIVIL PROCEDURE CODE (1908), s. 100.
I. L. R. 36 All. 256

See COMMON LAND **I. L. R. 1 Lah. 249**

See CUSTOM OF CASTE.

See CUSTOM OF THE TRADE.

See CUSTOM OF USAGE.
I. L. R. 45 Calc. 2853

See HINDU LAW—ADOPTION.
I. L. R. 32 All. 247

See HINDU LAW ALIENATION.
I. L. R. 43 Calc. 417

See HINDU LAW—CUSTOM.
I. L. R. 32 All. 363
42 Calc. 582

See HINDU LAW IMPARTIBLE ESTATE.
2 P. L. J. 339

See HINDU LAW PARTITION.
I. L. R. 45 Bom. 740

See HINDU LAW—SUCCESSION.
14 C. W. N. 770
I. L. R. 48 Calc. 997

See INSURANCE **I. L. R. 36 Bom. 484**

See JAIGIR . **I. L. R. 42 Calc. 305**

See JEWISH LAW.
I. L. R. 38 Calc. 708

See JURISDICTION **I. L. R. 35 Bom. 264**

See KHOD-KAST JOTES.
I. L. R. 48 Calc. 359

See KUNJPURA, STATE OF, SUCCESSION TO.
I. L. R. 39 Calc. 711

See LANDLORD AND TENANT.
I. L. R. 32 All. 125
I. L. R. 34 All. 545

See MAHOMEDAN LAW—PRE-EMPTION.
I. L. R. 38 Bom. 183

See MAHOMEDAN LAW—SUCCESSION.
14 C. W. N. 59

See MAPPILLAS OF NORTH MALABAR.
I. L. R. 38 Mad. 1052

See MEMONS. . **I. L. R. 43 Bom. 647**

See OCCUPANCY HOLDING.
15 C. W. N. 752

See OCCUPANCY RIGHT.
I. L. R. 46 Calc. 43

See PALAS OR TURNS OF WORSHIP.
I. L. R. 42 Calc. 455

See PRE-EMPTION.

See PRIMOGENITURE. . **18 C. W. N. 55**

See PROVINCIAL SMALL CAUSE COURT ACT, 1887, SCH II, cl. 13.
I. L. R. 43 All. 631

See RAILWAY RECEIPT.
I. L. R. 38 Mad. 664

See REMARRIAGE

See SCHOOLMASTER.
I. L. R. 44 Calc. 917

See SOHAG GRANT.
I. L. R. 42 Calc. 352

——— Adoption by Jains in Idar State—

See HINDU LAW—ADOPTION
I. L. R. 45 Bom. 754

CUSTOM—*contd.*

——— adoption of daughter's son—
See PUNJAB COURT ACT, 1918
I. L. R. 2 Lah. 167

——— adoption by widow without authority by Mahesris of Delhi—
See DECLARATORY SUIT.
I. L. R. 1 Lah. 92

——— adoption of daughter's son by Brahmins of Amritsar—
See PUNJAB COURT ACT, 1918, s. 41.
I. L. R. 2 Lah. 167

——— adoption of an orphan boy among Jains in the Idar State—
See HINDU LAW—ADOPTION (74)
I. L. R. 45 Bom. 754

——— Bombay Silver Market—
See CONTRACT (22) I. L. R. 42 Bom. 224

——— enabling tenant to build—
See MADRAS ESTATES LAND ACT (I OF 1908), ss. 9, 11, 151, 157, 187 (*g*).
I. L. R. 37 Mad. 432

——— evidence, etc., in relation to written contract—
See DOWL KABALIYAT 25 C. W. N. 13

——— expert evidence in proof of—
See CUTCHI MEMONS.
I. L. R. 41 Bom. 181

——— finding as to existence of—
See CIVIL PROCEDURE CODE, 1908 s. 100.
I. L. R. 41 Mad. 374

——— khanadamadi—
See PUNJAB COURTS ACT, 1914.
I. L. R. 1 Lah. 245

——— modifying ordinary Law—
See ILLEGITIMATE SON 25 C. W. N. 433
See CUSTOM . I. L. R. 45 Calc. 450

——— of caste—
See HINDU LAW—MARRIAGE.
I. L. R. 39 Bom. 538

——— of Impartibility—
See HINDU LAW—JOINT FAMILY.
I. L. R. 41 Mad. 778

——— of Succession (Mohomedan)—
See OUDH ESTATE ACT II, 1869 . . I. L. R. 38 All. 552

——— of inalienability—
See IMPARTIBLE ESTATE.
I. L. R. 36 Mad. 325

——— of Mohesirs of Delhi—
See DECLARATORY SUIT.
I. L. R. 1 Lah. 92

——— of Marwari merchants—
See HUNDI SHAH JOG.
I. L. R. 39 Bom. 513

——— of Nattukottai Chetties in Madura
See HINDU LAW—PARTITION
I. L. R. 44 Mad. 740

——— privacy in Gujarat—
See EASEMENT . I. L. R. 44 Bom. 496

——— plea of—
See THEFT . I. L. R. 41 Calc. 433

CUSTOM—*contd.*

——— primogeniture—
See CUSTOM . . 1 Pat. L. J. 109
See HINDU LAW. . 24 C. W. N. 60

——— recorded in Wajib-ul-arz—
See PROVINCIAL SMALL CAUSES ACT 1887, SCH. II CL. 13.
I. L. R. 43 All. 681

——— transferability of agricultural tenancies—
See TRANSFER OF PROPERTY ACT, 1882, s. 43 . . . 25 C. W. N. 420

——— up-country cotton merchants—
See CONTRACT ACT (IX OF 1872), ss. 178, 179 . . I. L. R. 42 Bom. 205

——— temple—disqualification of females to perform duties in—
See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXIII, R. 3.
I. L. R. 38 Mad. 850

——— Adoption—

——— *Of brother's daughter's son—Jats—Jullundur Tahsil*—onus probandi—Riwaj-i-Am. *Held*, that the plaintiff, the adopted son, on whom the *onus* lay, had failed to prove that by custom among Jats of *Mauza* Manko, *tahsil* and district Jullundur, the adoption of a brother's daughter's son is valid. *Ralla* v. *Budha (50 P. R. 1893 F. B.), Surain Singh* v *Jawahir Singh (20 Indian Cases 839), Ralia* v. *Waryam Singh (94 P. R. 1913)* and *Natha Singh* v. *Mangal (90 P. R. 1914)*, referred to; also *Sant Singh* v. *Megha, Civil Appeal No. 1232 of 1907 (unpublished)*, and the *Riwaj-i-Am. Uttam Singh* v. *Kesra Singh (159 P. R., 1890)*, dissented from. JAMIAT SINGH *v.* UJAGAR SINGH.
I. L. R. 1 Lah. 15

——— *Of a stranger—Jats of tahsil Fatehabad, district Hissar*—onus probandi—*estoppel—where adoption was the result of a compromise to which the challenger's grandfather was a party.*

been discharged in the present case. *Rattigan's Digest of Customary Law, page 54 and paragraph 37 (b)*, referred to. *Malagir* v. *Jagir (93 P. R. 1893)*, distinguished. *Held, however*, that as the

a material benefit and who was present and consenting when the ceremonies were performed, the defendant was stopped from disputing the adoption and was bound by his grandfather's action. *Labhu* v. Mussamma *Nihali (7 P. R. 1905), Devi Dial* v. *Utam Devi (37 P. R. 1907), Habib Khan* v. *Muhammad (68 P. R. 1912), Bhagat Ram* v. *Gokal Chand (150 P. R. 1908, p. 692)* and *Chuhar* v. Mussammat *Jas Kuar (69 P. R. 1917)*, referred to MOHAN *v. Mussammat* DHANNI.
I. L. R. 1 Lah. 31

——— *By an adopted son of his brother—Hindu Jats—Ludhiana District—Riwaj-i-Am. Held*, that it had not been shown that among Hindu Jats of the Ludhiana District a sonless proprietor who happens himself to have been an adopted son, is debarred from exercising the

CUSTOM—*contd.*

——— **Adoption**—*contd.*

general power possessed by a proprietor in the central and eastern parts of the Punjab of appointing one of his kinsmen to succeed him as his heir. Rattigan's Digest of Customary Law, paragraph 35 and the judgment of the District Court of Ludhiana, dated 9th October 1914 (Civil Appeal No. 124 of 1914, Hira *v.* Dewa Singh), referred to *Mehra* v. *Mangal Singh* (*90 P. R. 1914*) and *Ralla* v. *Budha* (*50 P. R. 1893* (*F. B*)., distinguished. *Held also*, that the plaintiffs collaterals, on whom the *onus* lay, had failed to prove that the adoption of a brother is invalid among these Jats. *Sant Singh* v. *Mula* (*44 P. R. 1913*) and *Waryam Singh* v. *Jiwan Singh* (*205 P. L. R. 1913*), referred to—also Rattigan's Digest, paragraph 36, and introduction to Chapter III and the Ludhiana Customary Law of 1911, page 98. *Semble*, that the suggested rule that no adoption can be valid in which the mother of the person adopted is debarred from marrying the adoptive father, does not apply amongst agriculturists of Ludhiana. *Gordon Walker's Customary Law, page 93*, referred to. JIWA SINGH *v. Mussammat* CHANDI. **I. L. R. 1 Lah. 39**

——— *Adoption of daughter's son—Manj Rajputs, tahsil Nakodar, district Jullundur—Riwaj-i-am. Held*, that by custom a *Manj Rajput* of *tahsil* Nakodar, district Jullundur, is authorised to adopt his daughter's son who is also an agnatic relation. SAMAND KHAN *v.* KHAWAJE KHAN . . . **I. L. R. 2 Lah. 193**

——— *Of daughter's son*—Dhanoi Jats—Tahsil *Kharar, District Ambala*—Wajib-ul-arz—*value of*. *Held*, that by custom among *Dhanoi Jats of Tahsil* Kharar the adoption of a daughter's son is valid. *Sunder Singh* v. *Mst. Mano* (*68 P. R. 1888*), followed. *Ralla* v. *Budha* (*50 P. R. 1893, F. B.*), referred to and distinguished. *Held also*, that a *Wajib-ul-arz* being part of a Revenue Record is of greater authority than a *Riwaj-i-am* which is of general application and is not drawn up in respect of individual villages. GURBAKHSH SINGH *v. Mst.* PARTAPO **I. L. R. 2 Lah. 346**

——— *Hindu Law—Will by adoptive father of entire estate in favour of natural son, born after the adoption—whether valid.* The plaintiff-appellant was adopted by his adoptive father in 1905; about five years later the adoptive father got a natural son, the defendant-respondent. The plaintiff sued the defendant for a share in the estate of his adoptive father. The defendant resisted the suit on the grounds (1) that the plaintiff, being the daughter's son of his adoptive father could not be validly adopted, (2) that the adoptive father (deceased) left a will by which he devised his entire estate to the defendant. *Held*, that under Hindu Law the adoption of a daughter's son is invalid, but that the plaintiff had succeeded in establishing a custom recognizing the validity of the adoption of a daughter's son among the *Khatris* of the town of Amritsar, and that he must therefore be treated as the validly adopted son of his deceased adoptive father. Sardar *Diwan Singh* v. Mussammat *Subhan* (*72 P. R. 1878*), *Atma Singh* v. *Jatta Singh* (*64 P. R. 1883*), *Taba* v. *Shib Charn* (*162 P. R. 1883*) *Ganda Mal* v. Mussammat *Radhi* (*67 P. R. 1886*), and *Harnaman* v. *Atma Ram* (*24 P. R. 1900*), referred to. *Held also*, that as soon as the plaintiff was adopted he became a co-parcener with his adoptive father, and that the latter could not dispose of any property which belonged to the joint family. His will therefore could operate only upon his separate property, and was invalid *qua* the joint property. All the property in the hands of the members of a joint family should be treated as joint property unless the contrary is proved. *Held further*, that the adopted son takes one-fourth of the entire estate in those provinces which follow the *Mitakshara* School of law. *Mayne's Hindu Law, paragraph 163*, referred to. PARMA NAND *v.* SHIV CHARN DAS **I. L. R. 2 Lah. 69**

——— **Alienation**—

——— *Ancestral property—"just antecedent debt"—nature of enquiry to be made by the alienee—rule laid down in Devi Ditta* v. *Saudagar Singh* (*65 P. R. 1900*), explained. The main question for determination in this case was whether an alienee of ancestral immoveable property from a person governed by custom is bound to prove *necessity* or enquiry as to *necessity* with respect to a debt which was due by the alienor to an antecedent creditor and which had been discharged by the alienee. In other words, is it the duty of the alienee to enquire, not only into the existence of the antecedent debt, but also into the nature and necessity thereof? *Held, per* SHADI LAL, *J.*, that an alienee discharging an antecedent debt is not required to make an enquiry into the nature thereof, and that this is in accord with the rule laid down in *Devi Ditta* v. *Saudagar Singh* (*65 P. R. 1900 F. B.*) *Muhammad Hayat Khan* v. *Sandhe Khan* (*55 P. R. 1908*) and *Muhammad Islam* v. *Hari Lal* (*7 P. W. R. 1914*), approved. *Maharaj Singh* v. *Balwant Singh*, (*I. L. R. 28 All. 508, 541*) and *Trevelyan's Hindu Law, page 310*, referred to. But the law enunciated above only helps an honest alienee who acts in perfect good faith. An alienee paying off an antecedent creditor gets no advantage, if he has knowledge of the true nature of the debt or acts in bad faith, or where he and the antecedent creditor are in effect one and the same person. *Held, per* LEROSSIGNOL, *J.*, that the principle laid down in *Devi Ditta* v. *Saudagar Singh* is that the initial *onus* lies on the outsider alienee to show that the debts were due, and when he has discharged that *onus*, the turn of the opposite party then comes to show that the alienee made no proper enquiry or that if he made one, he must have learnt of the real nature of the debts. The words "made no enquiry whatever" in *Devi Ditta* v. *Saudagar Singh* refer to an enquiry as to the *existence* of the debts but include also an enquiry as to their *nature* if the party challenging the alienation can show that the result of the first enquiry should have raised doubts in the minds of an ordianary prudent man as to the morality or reasonableness if the debts. *Held, per* CURIAM, that in this case all the circumstances including the fact that the alienor was a neighbour of the alienee, showed that the alienee must have known that the debts were contracted as an act of reckless extravagance and could not be regarded as just debts. JHANDU *v.* NIAMAT KHAN . . **I. L. R. 1 Lah. 472**

——— *Ancestral property—will in favour of daughter in presence of a half-brother —Kahuts*—Mauza *Adharwal*, tahsil *Chakwal, district Jhelum—Riwaj-i-Am. Held*, that it has been proved that by custom among Kahuts of *tahsil* Chakwal, district Jhelum, a sonless proprietor has the power to make a free disposition of

CUSTOM—*contd.*

——————— **Alienation**—*contd.*

his ancestral land to a daughter in the presence of brothers or other collaterals *Khuda Bakhsh* v. *Wa*
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referred to. *Mussammat Nur Bhari* v. *Dulla* (*56 P. R. 1899*), not followed. MUHAMMAD KHAN *v.* *Mussammat* KESRAN . **I. L. R. 2 Lah. 170**

——————— *Necessity—Sale price enhanced by a fictitious item—whether the actual transaction can be upheld* The plaintiffs, the nephews, sued in 1914 to challenge a sale of 18

tention of scaring away pre-emptors and decreed plaintiffs' claim on payment of their share in the balance of the purchase money. The defendants appealed to this Court. *Held*, that in cases like the present the real issue is what was the contract

Singh (*27 P. R. 1909*), not followed. *Held, also,* that as in this case the actual sale price of Rs. 1,212 for 18 *kanals* of land, paying a revenue of Rs. 5 only, was apparently the full market value and the vendors were in a necessitous condition, and considering the delay in taking action, the sale should be upheld and the plaintiffs' suit dismissed. PUNJAB SINGH *v.* ARJAN . **I. L. R. 2 Lah. 22**

——————— **Family Primogeniture in Chota Nagpur**—*One branch of a family is evidence of its applicability to another branch.* There is a custom in Chota Nagpur that an estate granted by the Maharaja of Chota Nagpur is impartible and is governed by the rule of primogeniture. This is not merely a family custom prevailing in the Maharaja's family but it is also the *lex loci* of Chota Nagpur. Where a custom prevails in one branch of a family, it is strong evidence to be relied on that it applies with equal force to another branch of the same family. *Per* CHAPMAN, J. The Privy Council decision to the effect that the words *putra putradi*, occurring in a modern Hindu Will would convey an estate unconditional and unlimited are based upon the

ATKINSON, J. A grant of land containing the words *putra putradi* conveys an absolute perpetual estate in the lands descendible from generation to generation coupled with full powers of alienation. *Query:* Whether in Chota Nagpur this rule is subject to a proviso, *viz.*, "so long as there are lineal male descendants entitled to inherit." LAL GAJENDRA NATH SAHI DEO *v.* LAL MATHURLAL NATH SAHI DEO . . . **1 Pat. L. J. 109**

———————, **Evidence of presumption**—*Inference of existence of a custom from continued use of land*

CUSTOM—*contd.*

for a particular purpose. *It is open to a Court to* inf
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to the conclusion that an alleged custom is unreasonable or that the privilege is enjoyed as a result of permission given or that it is exercised by stealth or force, the Court is entitled to find against the custom. *Kuar Sen* v. *Mamman, I. L. R. 17 All. 87*, referred to. SHADI LAL *v.* MUHAMMAD ISHAQ KHAN (1910) . . . **I. L. R. 33 All. 257**

——————— **Maintenance claim**—The Plaintiffs were two Mahomedan concubines and their illegitimate sons by a deceased Hindu claiming against the Legitimate son for maintenance on the ground of family custom. *Held*, custom not proved. CHARANJIT SINGH *v.* AMIR ALI KHAN.
I. L. R. 2 Lah. 243

——————— **Inheritance**—*Customary Law of Punjab—Sheikh Ansaris, Tribe of—Gift by father to daughter—Estate taken by donee—Evidence and proof of custom—Acquiescence and consequent estoppel—Partition by agreement of parties as acquiescence in title of allottees—Limitation Act (XV of 1877), Sch. II, Art. 118—Ineffective adoption—Mahomedan Law.* The appellants claimed possession of the property in suit on the allegation that it was ancestral property to which they were entitled as reversioners. The defence was that the respondent was in possession under a gift from the last owner, a Mahomedan lady who had adopted him as her heir, and who had herself received the property in dispute as a gift from her father in lieu of her mother's dower; and that the suit was barred by limitation. The parties were Sheikh Ansaris of a Pathan tribe of Punjab Mahomedans; and the appellant's case was that according to a

ation, and that the gift to the respondent was therefore void. In dismissing the appeal from the Chief Court of the Punjab. *Held*, by the Judicial Committee, on the documentary evidence as to the course of litigation concerning the property,
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dence relating to the devolution of the property was inconsistent with the existence of such a custom, and in fact disproved it: nor was it supported by evidence as to the limited rights by custom of a widow in her deceased husband's property, nor by evidence of a custom preventing a Mahomedan father from giving his property to one son to the exclusion of another. *Held,* also, that there was strong evidence of the appellant's acquiescence in the respondent's title, in the fact that in 1895-96 the principal lands which had been held in undivided shares by the parties were by agreement partitioned, each having allotted to him lands which represented his share; and that the respondent's share on the partition represented lands which had come to him from the gift which the appellants now disputed as being void. *Semble:* that the omission to bring within the period prescribed by Art. 118 of Sch. II of the Limitation Act (XV of 1877) a suit to obtain a declaration that an adoption was invalid or never in fact took place, was no bar to a suit like the present for possession of property *Tirbhuwan Bahadur* ...

CUSTOM—*contd.*

eshur Bakhsh Singh, I. L. R. 28 All. 727 ; L. R. 33 I. A. 156, followed. Under the general Mahomedan law an adoption cannot be made: and even if it be made, can carry with it no right of inheritance. MUHAMMAD UMAR KHAN *v.* MUHAMMAD NIAZ-UD-DIN KHAN (1911) **I. L. R. 39 Calc. 418**

———— **Timber**—*Tenants if may cut and appropriate timber trees—Reasonableness or unreasonableness of custom if question of law or fact—Custom not unreasonable.* The reasonableness or unreasonableness of a custom is a question of law. *Bradburn v. Foley, 3 C. P. 129, 135,* followed. Where a customary right claimed by tenants to cut and appropriate trees upon the holding was upheld in the First Court, but the Judge on appeal declared the custom to be unreasonable in so far as it permitted the appropriation of timber trees. *Held,* that there was nothing unfair or dishonest or contrary to the public good in the custom and it was not unreasonable GURAI KAR *v.* RANI KUARMONI SINGHA MANDHATA (1915)

19 C. W. N. 1188

———— **Succession—Among tribal communities in the Punjab**—*Agnates—General custom excluding daughters, exceptions to—Succession of daughter when married to near collateral who is in her father's house as khana-damad (resident son-in-law)—Riwaj-i-am or official record of customs, value of, as evidence.* A Mahomedan Jat belonging to the sub-community of Dabs settled in the Jhang District of the Punjab, died without male issue, and leaving a widow and a daughter who was married to a near collateral of the deceased who was also his *khana-damad* or resident son-in-law. In a suit by the respondents who as collaterals based their claim to a share of the property of the deceased on a general custom of agnatic succession in the community or tribe to the exclusion of the daughter and her descendents, the appellant, the son of the daughter of the deceased who was the devisee of his will, alleged that a daughter married to a near collateral who takes up his residence in the father-in-law's house as a *khana-damad,* succeeded to her father's inheritance in preference to the agnatics, and produced in support of this special custom the Riwaj-i-am or official records of custom in addition to a considerable amount of oral testimony. *Held* (reversing the decision of the Chief Court), that on the death of the widow who had inherited the entire estate, the daughter and her son were entitled to succeed in preference to the respondents. Assuming that such a general custom as that relied on by the respondents existed, as to which the decisions of the Punjab Chief Court were by no means uniform, specially in the case of Mahomedan tribes who were endogamous, it was clear that the rule was admittedly subject to many exceptions: see Rattigan's "Digest of Customary Law for the Punjab," Chap. II, para. 23, where they are enumerated ; and Roe's "Tribal Law in the Punjab" where particular stress is laid on the value of the Riwaj-i-am as a record of tribal customs and it is said that "son-in-law of the house is a regular institution." *Held,* also, that the Riwaj-i-am was a public record prepared by a public officer in discharge of his duties and under Government rules, and was clearly admissible in evidence to prove the facts therein entered subject to rebuttal. And their Lordships were of opinion that the statements in the Riwaj-i-am for the Jhang District formed a strong piece of evidence in support of the custom set up by the appellant, which it lay upon the respondents to rebut, and they had failed to do so. BEG *v.* ALLAH DITTA (1916) . . . **I. L. R. 44 Calc. 749**

———— **Inheritance**—*Evidence admissible to prove custom at variance with the Mahomedan law—Exclusion of daughters from inheritance—"Riwaj-i-am"—Value of the riwaj-i-am as evidence.* One Saiyid Asghar Ali, a native of Qasba Palwal in the Gurgaon district of the Punjab and the owner of a small amount of land in Palwal, though not a "Biswadar" nor a member of an agricultural family, entered the service of the Government of the North-Western Provinces and became a tahsildar. He rendered distinguished service during the mutiny, and was rewarded by Government with the grant of a village called Wair Badshahpur in the Bulandshahr district. After his retirement Asghar Ali retired to his native town. He died in 1876, leaving him surviving two widows, two daughters and a minor son. On the petition of the widows the Bulandshahr estate was taken over by the Court of Wards. When the son came of age, the Court of Wards released half the estate in his favour; but retained half for the benefit of the widows and the daughters and their heirs. After the death of the widows and one of the daughters the son, Ali Asghar sued to recover possession of the remaining half of the Bulandshahr property on the ground that, according to the custom of the Punjab, and the local custom of the biswadars of Palwal in particular, daughters were not entitled to any share in the paternal inheritance in the presence of a son. *Held,* that evidence was admissible to prove the custom alleged by the plaintiff, notwithstanding that such custom was contrary to the Mahomedan law; but that the plaintiff had failed to prove that any such custom as that set up by him applied to his family. The value as evidence of the document known as "*Riwzaj-i-am*" discussed. ALI ASGHAR *v.* THE COLLECTOR OF BULANDSHAHR (1917)

I. L. R. 39 All. 574

———— There is a custom in Chota Nagpur that on estate granted by the Maharaja is impartible and governed by the rule of primogeniture. LAL GAJENDRA NATH SAHI DEO *v.* LAL MUTHURALAL NATH SAHI DEO.

1 Pat. L. J. 109

———— *Proof of custom modifying Mahomedan Law—Custom excluding women from share of inheritance of paternal relation—Bombay Regulation IV of 1827, s. 26—Punjab Laws Act, 1872, s. 5—Essentials in proving custom—Family custom—Position and relationship of members of family—Denial by prominent member of family of existence of custom—Failure to produce Revenue Records as evidence.* On the death of a wealthy Shia Mahomedan in Sind, intestate and leaving no widow or child, the nearest surviving relations were a nephew (the plaintiff-appellant) and a sister and her son, the first and second defendants-respondents. The appellant's case was that the question as to the rights of inheritance was governed, not by Mahomedan Law, but by a custom which excluded women from any share in the inheritance of a paternal relation. *Held,* that under s. 26 of Bombay Regulation IV of 1827, which had been extended to Sind, no presumption can be made in favour of the existence of a usage or custom where it is known that such usage or custom is prevalent, but it was incumbent on the appellant to allege and prove the custom on which

CUSTOM—*contd.*

be relied. *Daya Ram* v. *Sohel Singh, 41, Punj.*

12 Moo. I. A. 81; and the principles applicable to the proof of customs in England were not to be applied in considering such a custom as that claimed in the present suit. Nor was it necessary to reject

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down ought certainly to be established by some witness, but it was not necessary that all should be proved in every case, as that might greatly weaken the evidence by tradition to which in a custom of the character under consideration great

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of intestacy daughters of the deceased were excluded in favour of their brothers, and sisters in favour of male paternal relations, that such a custom had not on the evidence been sufficiently proved. The position and relationship of the different members of the family must always be considered in determining whether claims were not met because the rights to which they related did not exist, or whether they were put on one side because in the circumstances there was no need for asserting them. *Mirabivi* v. *Villayanna, I. L. R. 8 Mad. 464*, referred to. The fact that prominent members of the families concerned denied that such a custom as alleged existed; and the non-production of the Revenue Records, one of which showed a division according to Mahomedan Law,

of property according to Mahomedan Law, to a devolution determined by a family custom. ABDUL HUSSEIN KHAN *v.* SONA DERO (1917)

I. L. R. 45 Calc. 450

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claimed to recover a sum of Rs. 400 from the

his uncle. The allegation in the plaint was that A

The first Court decreed the claim holding that there was a universal custom amongst these *Pathans* that if a woman, whether virgin, married or widow,

CUSTOM—*contd.*

is abducted without the consent of her nearest relative or guardian the abductor is liable to pay a sum of money to that relative or guardian. In appeal the District Judge upheld the decision relying on *Shah Rahman* v. *Ismail Khan (82 P. R. 1904)*. The defendants preferred a second appeal to the High Court. *Held,* that the existence of the custom of *rogha* is established, but it is not enforceable as it is immoral and opposed to public policy, *Mussammat* B. J., being 19 years of age and competent to enter into a contract of marriage with any man of her own religion, the claim for compensation in the present case is in the nature of a claim for loss of a chattel or for the plaintiff's abstaining from committing an illegal act, that is to say, abstaining from any attempt to murder or otherwise injure the defendant. *Venkata Kristnayya* v. *Lakhmi Narayana (I. L. R. 32 Mad. 185 F. B.)*, referred to. *Shah Rahman* v. *Ismail Khan (82 P. R. 1904)*, distinguished. Gazetteer of the Attock District, page 56, and Settlement Report of the Kohat District, pages 76 to 79, and paragraph 159, referred to. *Per* DUNDAS, *J.* The Courts in this country are not bound to enforce a payment by a person who has performed an act which he was legally entitled to perform and which

principle of s. 26 of the Contract Act. ABBA KHAN *v.* NUR KHAN . . I. L. R. 1 Lah. 4

——— *Tribal Custom—Marriage-custom, requiring husband to live in wife's parent's household, the children being additions to wife's clan—C*

public policy—

by husband ag

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immoral or opposed to public policy in a tribal custom which requires a son-in-law to reside in the family of his father-in-law in order to have access to his wife. *Quære:* Whether Lalungs are governed by Hindu Law. Assuming that they are Hindus. *Held,* that their marriage relations must be governed by customs which prevail amongst the tribe provided that the customs are neither immoral nor opposed to public policy. Their marriage custom, according to which the parents of the

by removal of the wife from her father's house. It was *not injurious to the public interests,* that is, to the interests of the tribe to which the parties belonged, nor was it in conflict with any express law of the ruling power. *Tekait Monmohini* v. *Basanta Kumar Singh, I. L. R. 28 Calc. 751 : s.c. 5 C. W. N. 673,* referred to. LENGAHALUNG *v.* PENGURI LALUNGUI (1915) . 20 C. W. N. 406

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he appropriated out of his property a portion, called

CUSTOM—*contd.*

moopu, for the first wife's maintenance, that portion descending to her son if she had one, and the rest of the property was nationally divided, one moiety going to the son or sons by the first wife, and the other moiety to the son or sons by the second wife. In a suit for partition brought by the only son of a first wife against his father and the sons by the second wife the Judicial Committee applied the custom, without, however, determining what the father's share would be in the circumstances, as the question did not arise before their Lordships. The authorities as to the custom of patnibhaga, or the division according to wives, considered. [*Judgment of the High Court reversed.*] PALANIAPOA CHETTIAR *v.* ALAGAN CHETTI (1921).

I. L. R. 44 Mad. (P. C.) 740

———— **Pre-emption**—*Urban immoveable property—Delhi—Pahar Ganj—proof of custom—value of previous judgment based upon a compromise. Held*, that the plaintiff on whom the law had failed to prove that the custom of pre-emption prevails in Pahar Ganj, a suburb of Delhi. The custom of pre-emption has been held *onus* to prevail generally throughout the city of Delhi, but that applies only to the city proper as circumscribed by the city walls constructed during the *Moghal* period and has no application to a suburb which has grown up since the British Rule. *Held also*, that a judgment based upon a compromise or confession, although of some probative force, cannot be placed on the same footing as one in which after contest a custom was held to be proved or negatived. IMPERIAL OIL SOAP AND GENERAL MILLS CO. *v.* M. MUSBAH-UD-DIN . . . **I. L. R. 2 Lah. 83**

———— **Religious institutions**—Darbar Sahib (*Golden Temple*), *Amritsar—Succession to office of* granthi—*Son or* chela—*whether an infant can become a* chela. The plaintiff sued for a declaration that he, as son of Harnam Singh, deceased, the late *granthi* of the *Darbar Sahib*, Amritsar, was entitled to succeed his father in the office of *granthi* in preference to the defendant, a brother of Harnam Singh, who claimed to have been duly appointed as *chela* and nominated by deceased as his successor and duly elected and installed. *Held*, that the office of *granthi* to the *Darbar Sahib*, Amritsar, is of a religious character and not secular. *Held also*, that the question of succession to the office must be decided by the custom and practice of the institution as proved by the evidence, and a son, merely as such, had no right to succeed. *Held further*, that it had been established that one of the qualifications for the office of the *granthi* is that the candidate must be a good Sikh and a properly initiated *Singh*, and next he must become a *chela* and be nominated by his predecessor and this must be followed by an election and installation. *Nowrung Singh* v. *Bhugut Singh* (*No. 4 P. R. 1878*) and Bhai *Bhagat Singh* v. *Harnam Singh* (*No. 49 P. R. 1892*), followed. Macauliffe's History of the Sikh Religion, Chapter VII, pages 55, 59, 60 and 65, and Encyclopædia Britannica, Cambridge Edition, 1911, Volume XXV, pages 84-87, referred to. *Held also*, that there is no clear rule laid down as to the initiation of a *chela* or as to the nomination of a successor or election of a *granthi*, but a person is created a *Singh* by the ceremony called *Khandaka Pahul* or Baptism by the sword, and the candidate must have reached an age of discrimination and capacity to remember obligations, so that plaintiff, as an infant less than a year old, could not have been created a *Singh*. Encyclopædia Britinnica, Volume XXV, page 86, referred to. INDER SINGH *v.* FATEH SINGH.

I. L. R. 1 Lah. 511

———— **Darbar Sahib**—(*Golden Temple*), *Amritsar—Succession to properties in the hand of a* granthi—*Son or successor to the office—Relevancy of previous decision on points at issue—Indian Evidence Act, I of 1872, ss. 11, 13 and 43.* The plaintiff, as duly appointed successor to Harnam Singh, the late *granthi* of the Sikh religious institution known as *Darbar Sahib* or Golden Temple at Amritsar, sued the son of Harnam Singh for possession of certain properties, and the question was which of the properties in possession of Harnam Singh were dedicated to the office of *granthi* and which were his self-acquired property and not dedicated to the religious uses. A previous judgment, which was given in a suit contesting the right of the then *granthi* Jawahar Singh (the predecessor of Harnam Singh) to alienate certain shops, was referred to by plaintiff as proving that these shops were *waqf* and attached to the *gaddi* as found by the Court. Defendant objected to the relevancy of this judgment. *Held*, that in regard to properties dedicated to the office of *granthi* of the *Darbar Sahib*, Amritsar, succession goes to the person succeeding to the office, while properties acquired by the *granthi* himself out of his income, and not proved to have been dedicated to the office, descend to his natural heirs. There is a pre-emption that property which has descended from one *granthi* to another to the exclusion of natural heirs has been dedicated to religious uses, even if there is no positive evidence of actual dedication. *Ram Singh* v. *Nehal Singh* (*No. 136 P. R. 1889, page 470*) and *Har Parshad* v. *Shadu* (*No. 31 P. W. R. 1916, page 96,*) approved. *Held, also*, that a previous judgment in a suit contesting the right of the then *granthi* to alienate certain shops, wherein it was held that these properties were *waqf* and attached to the *gaddi* and could not be alienated by the *granthi*, could only be treated as admissible in evidence for the purpose of showing that at that time also the right of the *granthi* to alienate certain property was called in question. The finding of the Court that the property was *waqf* and was attached to the *gaddi* is not relevant in the present case. *Gujja Lal* v. *Fatteh Lall* (*I. L. R. 6 Calc. 171, F. B.*), *Rawasami* v. *Appavu* (*I. L. R. 12 Mad. 9*) and *Muhammad Amin* v. *Hassan* (*I. L. R. 31 Bom. 143, 157*), followed. Ameer Ali and Woodroffe's Law of Evidence, 5th Edition, page 170 *et seq.*, referred to. INDAR SINGH *v.* FATTEH SINGH . **I. L. R. 1 Lah. 540**

———— **Dohli tenure**—*Explained—sale for mortgage by* Dohlidar—*is absolutely void and can be impeached by the* Dohlidar's *successor. Held*, that the *Dohli* tenure is a rent-free grant of a small plot of land by the village community for the benefit of a temple, mosque or shrine, or to a person for a religious purpose. So long as the purpose for which the grant is made is carried out it cannot be resumed, but should the holder fail to carry out the duties of the office the proprietors can eject him. A tenure of this kind cannot be alienated by sale or mortgage, and any such alienation by the *Dholidar* is absolutely void and can be impeached by the *Dholidar's* successor. SEWA RAM *v.* UDEGIR.

I. L. R. 2 Lah. 313

———— **Succession**—*Existence from time immemorial—Grant purporting to create family-*

CUSTOM—*contd.*

custom—Proof of long line of succession. Whereby a confirmatory grant, dated the 4th February 1797,

down in the sanad of grant that she and the future Ranis were not entitled to sell or make a gift of the *Britti* but to enjoy the profits only for life, and prescribed a rule of succession to the effect that only Ranis of the family were to succeed to the properties for life, and no Rajas could claim or alter the course of succession as aforesaid. *Held,* that the grant in so far as it laid down a rule of succession was absolutely void, as it prescribed a right of succession unknown to Hindu Law. It was also void as it purported to create successive life estates in favour of unborn persons, the estate itself being undisposed of. Even if the rule of succession laid down in the sanad of 1797, had actually been followed, it could not be treated as binding upon the family unless it had ripened into a family custom. *Held,* also, that in order to establish a custom it must be shown that the custom had existed from time immemorial and where the custom set up was peculiar only to a single family the rule was more strictly enforced than ever. A family custom of proved antiquity was entitled to be recognised by the Courts, irrespective of the position and rank of the family but where the

Deb Raikut, 2 S. D. A. Sel. Rep. 249. Ramalakshmi Ammal v. *Sivanantha Perumal, Sethurayar, 12 B. L. R. 396 ; 14 Moo. I. A. 570, Garuradhwaja Prasad Singh,* v. *Superundhuaja Prasad Singh, I. L. R. 23 All. 37 ; L. R. 27 I. A. 238, Prince Mahomed Buktyar Shah* v. *Rani Dhojamani, 2 C. L. J. 20,* referred to. AMBALIKA DASI *v.* APARNA DASI (1918) . **I. L. R. 45 Calc. 835**

———— **Primogeniture**—*Hindu Law.* A Cus-

does not apply to it save so far as it was not inconsistent with the Custom. RAO KISHORE SINGH *v.* MUSAMMAT GAHENABAI. **24 C. W. N. 601**

———— **Succession**—*Acquired property—Sisters or collaterals in 9th degree*—Jats—*Jhelum District*—Riwaj-i-am—*Where custom is not established, whether Courts can fall back on the personal law of the parties—Punjab Laws Act, IV of*

male-holder, while the defendants were collaterals in the ninth degree. Plaintiffs relied upon custom but neither they nor defendants succeeded in proving a custom. The entry in the *Riwaj-i-am* was against succession of sisters. The property was non-ancestral. The Lower Courts dismissed the suit holding that plaintiffs had failed to prove their right to succession by custom. *Held,* that

for the decision of the case and that the suit must consequently be decreed in favour of the sisters. Mussammat *Sardar Bibi* v. *Sayad Ali Shah, (4 P. R. 1888) ; Khanan* v. Mussammat *Jatti (116*

CUSTOM—*contd.*

P. R. 1892), and *Khuda Bakhsh* v. Mussammat *Fateh Khatun, (13 P. R. 1919),* followed. Mussammat *Harnamon* v. *Santa Singh, (198 P. W. R.) 1912 ;* Mussammat *Uttar Kour* v. *Atma Singh, (47 P. R. 1870),* and *Ali Muhammad* v. *Suraj-ud-Din, (13 P. R. 1912),* distinguished, also Rattigan's Digest of Customary Law, paragraph 24. *Held also,* that, unless there is a provision to the contrary, the rules laid down in a *Riwaj-i-am* refer to ancestral and not acquired property. Mussammat *Raj Kour* v. *Talok Singh, (38 P. R. 1916),* and *Budhi Parkash* v. *Chander Bhan, (123 P. R. 1918),* followed. *Mussammat* FATIMA BIBI *v.* SHAH NAWAZ . . . . **I. L. R. 2 Lah. 98**

———— *Self-acquired property—sisters or collaterals in 8th degree*—onus probandi—*Muhammadan Rajputs*—tahsil *Nakodar, district Jullundur*—Riwaj-i-am. *Held,* that in questions of succession to self-acquired property between collaterals of the 8th degree and sisters referential

Hamira

Mussammat *Harnaman* v. *Santa Singh (98 P. W. R. 1912),* referred to; also Rattigan's Customary Law, Art. 34. *Bholi* v. *Kahna (35 P. R. 1909),* distinguished. *Held also,* that in regard to Muhammadan Rajputs of the Jullundur District the *onus* was also clearly on the sisters in view of the entries in the *Riwaj-i-am* of the district and that they had failed to discharge that *onus. Beg* v. *Allah Ditta (45 P. R. 1917, P. C.),* referred to. *Mussammat* HUSSAIN BIBI *v.* NIGHIA. **I. L. R. 1 Lah. 1**

———— *Daughter or near collaterals—Sipras of Miana Hazara,* Tahsil *Bhera District Shahpur—entries in* Wajib-ul-arz *and* Riwaj-i-am—*value of—whether applicable to both self-acquired and ancestral property* Mussammat G. B., the widow of plaintiffs' uncle G. R., on 19th April 1919, made a gift of her husband's landed property in 3 villages in *tahsil* Bhera, in favour of her daughter, and her deceased daughter's son. The plaintiffs sue for a declaration that the gift shall not affect their reversionary right after the death or re-marriage of the widow. It was found by the High Court on appeal that some of the property was ancestral, and some was not. The

perty. *Held,* that the portions of a *Wajib-ul-arz* which refer to custom are not provisions intended to enure for the duration of the Settlement only but are statements that a certain custom exists. *Rahiman* v. *Bala (8 P. R. 1892)* and *Masta* v. *Pohlo (52 P. R. 1896),* followed. *Also* that there is a certain presumption as to the correctness of such entries. *Dilsukh Ram* v. *Nathu Singh (98*

. Ghulam Kasim

. Digambar Singh

All. 129 P. C.),

Aulia v. *Alu (49 P. R. 1898), Ahmad Shah* v. *Khuda Baksh (33 P. R. 1903), Maha Ram* v. *Ram Mohar (65 P. R. 1903)* and *Muhammad Faiyaz Ali* v. *Bihari (I. L. R. 40 All. 56),* followed. *But* that though such entries are evidence the presumption as to their correctness is a rebuttable one. *Held also,* that entries in the *Riwaj-i-am* also carry with them certain presumptions of correctness. *Sham Ram* v. Mussammat *Hemi Bai (73 P. R. 1896), Ali Muhammad* v. *Dulla (26 P. R. 1901), Sheran* v. Mussammat *Sharman (117 P. R. 1901), Mehr Khan.*

CUSTOM—*contd*

v. *Karam Ilahi* (*13 P. R. 1902*), *Sher* v. *Alam Sher* (*94 P. R. 1905*), *Beg.* v. *Allah Ditta* (*45 P. R. 1917 P. C.*) and *Saide Khan* v. Mussammat *Amir-un Nisa* (*94 P. R. 1918*), followed. These presumptions are also rebuttable and when positive instances are given the *Riwaj-i-am* cannot be regarded as over-riding them. *Nidhu* v. *Ram Singh* (*2 P. R. 1909*), Mussammat *Ziainab Bibi* v. *Badar-ud-Din* (*43 P. R. 1913*), *Lelu* v. *Ram Chand* (*23 P. R 1916*), Mussammat *Raj Kour* v. *Talok Singh* (*38 P. R. 1916*) and *Budhi Parkash* v. *Chander Bhan* (*123 P. R. 1918*), followed. *Held further*, that in the case of self-acquired property the general custom is that daughters are preferred to collaterals. Rattigan's Customary Law, Article 23 (2) referred to. And as the entries in the *Wajib-ul-arz* of the villages concerned do not distinctly state that they relate to self-acquired property as well as ancestral property they should be read as referring merely to the latter. *Samand* v. Mussammat *Jindwand*, (*C. A. No. 665 of 1905*, unpublished), followed. *Held consequently*, that in this case in the absence of proof to the contrary the daughter is heir to the self-acquired property of her father and her mother's gift stands good to that extent, but will not bind the rights of the plaintiffs in respect of the ancestral property. GHULAM MUHAMMAD *v. Mussammat* GAUHAR BIBI.

I. L. R. 1 Lah. 284

——————— *Self-acquired property—daughters or collaterals—Arains of Ludhiana—meaning of "acquired property."* *Held*, that by custom a daughter is generally preferred to collaterals in the succession to "acquired" property of her father, and by "acquired" property is meant property not necessarily acquired by the father himself but property acquired by him of any of his ascendants short of the common ancestor. *Lokha* v. *Hari* (*64 P. R. 1893*), Mussammat *Ichhri* v. *Jowahira* (*18 P. R. 1896*), *Sham Ram* v. Mussammat *Hemi Bai* (*73 P. R. 1896*), *Khuda Yar* v. *Sultan* (*103 P. R. 1900*), *Nidhu* v. *Ram Singh* (*2 P. R. 1909*) and *Partab Singh* v. Mussammat *Panjabu* (*25 P. R. 1912*), followed—also Rattigan's Digest of Customary Law, s. 23 (2). *Mussammat* JAINAN *v.* NUR MUHAMMAD **I. L. R. 1 Lah. 365**
I. L. R. 2 Lah. 336

——————— *Self-acquired property—sister or collaterals in 6th degree—Mussalman Rajputs—Jullundur District—Riwaj-i-am.* *Held*, that among Mussalman Rajput agriculturists of the Jullundur District the *onus probandi* was on the plaintiff, the sister of the deceased, to prove that she is entitled to succeed to her brother's land in preference to the defendants, collaterals in the 6th degree, the entry in the *Riwaj-i-am* being against her, although the land was non-ancestral *qua* the defendants. *Ranjha* v. Mussammat *Jindwaddi* (*104 P. R. 1914*) and *Bholi* v. *Kahna* (*35 P. R. 1909*), distinguished. *Mussammat* JEWI *v.* SANDHI

I. L. R. 1 Lah. 433

——————— *Ancestral property—daughter or collateral in 7th degree—Birk Jats of Mauza Birkahsil Phillaur—district Jullundur—estoppel.* The plaintiffs, collaterals in the 7th degree of Suchet Singh, a *Birk Jat* of *Mauza.* Birk and the heirs of the latter's *pichhlag* sons and others after his death for possession of his land and house property. They had previously sued for declarations in respect of one exchange of land in favour of the *pichhlags* and other in respect of a will in their favour and obtained decrees. In those

CUSTOM—*contd.*

cases the daughter of Suchet Singh had not been mentioned. In the present case it was however urged that plaintiffs had no *locus standi* in the presence of the daughter who was a preferential heir. *Held*, that the plaintiffs, on whom the *onus* lay, had failed to prove that by custom thus collaterals in the 7th degree, exclude the daughter. Also that the old law to the effect that in the Jullundur District generally and particularly in the Phillour *Tahsil* agnates of any degree exclude daughters (*vide* Roe's Tribes Customs, 1895, p. 135) is no longer correct. The customary Law of the Jullundur District, 1918, by *Rai Bahadur Bhai* Hotu Singh, referred to, also *Beg.* v. *Allah Ditta* (*45 P. R. 1917 P. C.*), *Bholi* v. *M. Singh* (*86 P. R. 1908*), *Khaire Khan* v. *Ghulam Ghaus* (*32 P. R. 1911*), Mussammat *Partapo* v. *Asa Ram* (*96 P. R. 1913*), *Jiwan Singh* v. Mussammat *H. Kaur* (*41 P. R. 1914*), *Saide Khan* v. Mussammat *Amir-un-Nissa* (*94 P. R. 1918*), and Mussammat *Ishri* v. *Bhola Singh* (*52 Indian Cases 152*). *Held, also*, that the plaintiffs could not be allowed to rely on Suchet Singh's will to exclude the daughter from succession seeing that they had already obtained a declaration that it is invalid in a suit against the same defendants. BHOLA SINGH *v.* BABU . . . . **I. L. R. 1 Lah. 464**

——————— *Held*, that a Custom of Rogha (Bundi price) exists amongst Pathans but is not enforceable as being immoral and against public policy. ABBAS KHAN *v.* MIR KHAN

I. L. R. 1 Lah. 574

——————— Sayads of Kharkhauda, Rohtak District—*Family custom allowing special concessions to females—Daughter of predeceased brother or son of predeceased sister—Whether females possess the right of representation*—mesne *profits.* B. A., a *Sayad* of Kharkhauda in the Rohtak District, died in 1872. The whole of his property ultimately passed into the hands of his last widow, *Mussammat* B. B., and her donees. After her death three suits for possession were instituted, *viz.*,(1) by *Mussammat* N. N., the daughter of S. A., a predeceased brother of B. A. (2) by A. A., the son of a sister who survived B. A., but died before his widow, *Mussammat* B. B., and (3) by *Mussammat* A. N., a collateral in the fourth degree. *Held*, that the *Sayads* of Kharkhauda have for a very long period followed custom. *Kadar Ali* v. *Sikandar Ali* (*60 P. R. 1878*), *Civil Appeal No. 2295 of 1916* (*unpublished*) *Mir Mumtaz Ali* v. *Jawad Ali* (*82 P. R. 1887*), *Bunyad Ali* v. *Faiz Muhammad* (*173 P. R. 1889*), *Aman Ali* v. *Mussammat Amina Begam* (*46 P. R. 1890*), *Mussammat Umat-ul-Ala* v. *Mussammat Said-ul-Nissa* (*143 P. R. 1893*), *Mussammat Nasib-ul-Nissa* v. *Mansur Ali* (*120 P. W. R. 1909*) and *Faiz-ud-Din* v. *Aman Ali* (*143 P. W. R. 1910*), followed. *Held, however*, that in matters of succession they have been somewhat influenced by their personal law and have widely recognised the right of succession of females. *Mir Mumtaz Ali* v. *Jawad Ali* (*82 P. R. 1887*), *Faiz-ud-Din* v. *Aman Ali* (*143 P. W. R. 1910*), *Mussammat Nasib-ul-Nissa* v. *Mansur Ali* (*120 P. W. R. 1909*) and Civil Appeal No. 2295 of 1916 (unpublished), followed. *Held, also*, that on the death of a male holder the whole of his estate vests in the widow, and as the husband's life is assumed to continue in her person succession does not open out until the date of the death of the widow. Both *Mussammat* N. N. and A. A. were therefore respectively the daughter and son

CUSTOM—*contd.*

of a predeceased brother and sister. The brother having admittedly a priority over a sister, the rights of *Mussammat* N. N. a brother's daughter, were superior to those of A. A., a sister's son. It was also proved that the same would have been the result if A. A. had been the son of a surviving sister. *Moni Ram* v. *Keri Kolitani* (*I. L. R. 5 Calc. 776, P.C.*), *Janki Ammal* v. *Narayanasami* (*I. L. R. 39 Mad. 634, P. C.*), and *Mussammat Bhagi* v. *Muhammad* (*15 Indian Cases 734*), *followed. Held further*, that the right of representation exists in favour of females among the *Sayads of* Kharkhauda *at least in the absence* of near male heirs. *Mir Mumtaz Ali* v. *Jawad Ali* (*82 P. R. 1887*), *Faiz-ud-Din* v. *Aman Ali* (*143 P. W. R 1910*), *Mussammat Nasib-ul-Nissa* ... and Civil

...

P. R. 1908) per Robertson *J.*, *Mir Mumtaz Ali* v. *Jawad Ali* (*82 P. R 1887*) and *Faiz-ud-Din* v. *Aman Ali* (*143 P. W. R 1910*), followed. *Held further*, that under O. XX, r. 12, Civil Procedure Code, a decree should have been passed in favour of *Mussammat* N. N. directing an enquiry as to the rent or *mesne* profits from the institution of the suit until the delivery of possession to the decree-holder. *Must.* NASIB-UN-NISA v. *Mst.* AHAMDI-UN-NISA . **I. L. R. 2 Lah. 383**

——————— *Self-acquired property—collaterals in 9th degree or daughters—Gaur Brahmans of Thanesar* Tahsil *district Karnal—Village deserted and after 25 years re-acquired by some of the descendants of the common ancestor—whether land remains ancestral*—Riwaj-i-am—*costs.* The plaintiffs, collaterals in the 9th decree of one *M.*, brought the present suit for a declaration that two gifts made by the widow of *M.* of land inherited partly from husband and partly from one *Mst.* S., in favour of her two daughters and the son of a brother-in-law of *Mst.* S., should not affect their reversionery rights. It appeared that the village in which the land was situate was deserted about the year *A. D.* 1800 and the village had then passed out of cultivation, and that 25 years later some of the original proprietors or th... founded the v... t... were to the effect that daughters ... their father's property. *Held*, that the land became the self-acquired property of the persons who returned to the village 25 years after its desertion and re-acquired it and could no longer be considered to be ancestral property of the descendants (such as plaintiffs) of the common ancestor who may have originally possessed the whole village. *Held also*, that the burden of proof that by custom among Gaur Brahmans of *Mauza* Chhapri in the Thanesar *Tahsil* of the Kernal District, collaterals in the 9th degree exclude daughters in succession to non-ancestral property rested on the plaintiffs and was not shifted on to the defendants by entries in the *Riwaj-i-am* which were quite opposed to all principles of customary law and unsupported by instances. *Abdul Karim* v. *Sahib Jan* (*5 P. R. 1908*), *Bholi* v. *Man Singh* (*86 P. R. 1908*), *Wazira* v. Mst. *Maryan* (*84 P. R. 1917*) and *Khuda. Bakhsh* v. *Fateh Khatun* (*13 P. R. 1919*), followed; also Rattigan's Digest of Customary Law, article 23 *Beg* v. *Allah Ditta* (*45 P. R. 1917 P. C.*) distinguished. *Held further*, that the mere entries in the *Riwaj-i-am* in favour of the plaintiffs' case were not a sufficient reason for holding that the defendants should not be allowed their costs MANOHAR *v. Mst.* NAUHI **I. L. R 2 Lah. 366**

——————— *Whether land gifted to a stranger reverts to the line of the donor on death of donee without lineal heirs.* The plaintiff, a *Jat*, sued for redemption of land which was mortgaged ...

... that the rule of reversion to the donor's line on death of the donee without lineal heirs under Customary ... is a stranger ... (*133 P. R.* ... *Hussain* v. ... followed. ... *F. B.*) and ... distinguished. MULA SINGH *v.* AMIN CHAND. **I. L. R. 2 Lah. 283**

——————— Ancestral property—Ferozpore District—*Lessee not carrying out conditions of lease—Government afterwards granting proprietary rights to the sons of the lessee.* One *C.* was one of the lessees under Government whose position is described in paragraph 258 *et seq.* of Wilson's Settlement Report of the Ferozepore District, 1879-83. He had to fulfil certain conditions in order to preserve even his lease. He died in 1875 without fulfilling these conditions and the Government was legally entitled to evict him. Later in 1883 Government decided to grant proprietary rights to such lessees and these rights were actually granted to *C.'s* sons. *Held*, that the land was not ancestral property in the hands of the sons of *C. Bhuman* v. *Aziz* (*85 P W. R. 1909*), followed. *Raj Kishore Das* v. *Jaint Singh* (*I. L. R. 36 All. 387*), referred to. HARJI *v* CHANAN MAL . . . . . **I. L. R. 2 Lah. 195**

——————— Unreasonable or Uncertain—*Inundated lands—Remission of rent.* Where in a suit for rent, the tenants set up a custom of total remission of rent on the ground that a certain portion of the land was subject to innundation resulting in the destruction of crops, the extent of such destruction not being specific, and that crops were so destroyed during one of the years ...

... **I. L. R. 45 Calc. 475**

CUSTOM OF TRADE.

See CONTRACT ACT (IX OF 1872), ss. 1, 118. . . **I. L. R. 41 Bom. 518**

——————— proof of—

See SCHOOL MASTER. **I. L. R. 44 Calc. 917**

CUSTOM OR USAGE.

——————— *Facts proving existence of custom or usage whether questions of law—Actual proof thereof, question of fact—Second Appeal.* The question whether the facts found in any given instance prove the existence of the essential attributes of a custom or usage is a question of law which may be discussed in second appeal; the question whether such a state of facts has been proved by the evidence is merely a question of fact. *Kakarla Abbayya* v. *Raja Venkata Papayya Rao, I. L. R. 29 Mad. 24,* dissented from. KAILASH CHANDRA DATTA *v.* PADMAKISORE ROY (1917)
I. L. R. 45 Calc. 285

CUSTOMARY LAW.

——————— After customary law has been stereotyped in the form of a statute in which there is no provision saving the custom it is not open to the Court to give effect to custom. TANI ORAON *v.* LEDA ORAON. **1 Pat. L. J. 225**

——————— *In Kuzhikanam lease —Compensation for improvements—Right of tenant to possession until payment—Possession by tenant after period of lease, nature of—Possession, if adverse Notice to quit, if necessary—Customary law of Malabar—Malabar Compensation for Tenants Improvements Act (Madras Act I of 1900), principles of, if applicable.* Under the customary law of South Kanara, a *kuzhikanam* lessee is, as in Malabar, entitled to remain in possession of the holding after the expiry of the period fixed in the lease until he is paid the value of the improvements; consequently he does not acquire title by adverse possession by remaining in possession of the lands for more than twelve years after the expiry of the lease, *Srinivasa Pillai* v. *Venkatammal, 24 Mad. L. J. 296,* and *Kummatha Vittil Kunhi Kuthalai Haji* v. *Reverend Antoni Goveas, (1913), Mad. W. N. 339,* referred to. *Subbraveti Ramiah* v. *Gundala Ramanna, I. L. R. 33 Mad. 260,* distinguished. A *kuzhikanam* lessee who remains on the land after the period fixed in the lease, awaiting the payment of compensation for improvements, is not holding over as a tenant, and in the absence of evidence of assent by the landlord to the continuance of the tenancy, is not entitled to a notice to quit. S. 5 of the Malabar Tenants Improvements Act (I of 1900) only embodies the customary law of Malabar and South Kanara. THEMA *v.* KUNHI PATHNOMMA (1917) . . **I. L. R. 41 Mad. 118**

CUSTOMARY LAW OF THE PUNJAB.

See CUSTOM . **I. L. R. 39 Calc. 413**

CUSTOMARY RIGHT.

See GROVE LAW. **I. L. R. 42 All. 634**

See MAHOMEDAN LAW—PRE-EMPTION.
I. L. R. 39 Calc. 915

——————— to cut and appropriate trees—

See INCUMBRANCE **I. L. R. 37 Calc. 322**

CUTCHI MEMONS.

See MAHOMEDAN LAW—MAINTENANCE.
I. L. R. 37 Bom. 71

See WILL . **I. L. R. 43 Bom. 641**

——————— *Custom—Onus of proof —Expert evidence in proof of custom—Opinions of practising lawyers, not relevant—Opinion and belief of leading members of community influence by judicial and professional prepossessions, not relevant—Custom must be established by deliberate acts of volition—The Indian Evidence Act (I of 1872), ss. 32, cl. (3), and 48—Extent to which Cutchi Memons are governed by Hindu law—Cutchi Memons governed by the Hindu law of succession and inheritance as applying to an intestate separated Hindu possessed of self-acquired property—The Hindu law of joint family not applicable to Cutchi Memons—No distinction between ancestral property, joint family property and self-acquired property—Cutchi Memons may will away entire property—Cutchi Memons' wills to be interpreted according to Mahomedan and not Hindu law—Bequests in connection with 'Khairat,'* i.e., *charity work not void for vagueness—Alternative bequests in favour of charity not void as gifts conditioned in futuro—The Indian Limitation Act (IX of 1908), Art. 127—Costs.* A Cutchi Memon disposed of the whole of his property by will, part in favour of the next-of-kin and part in favour of charity. The provisions in favour of charity were as under. "I direct my executors and trustees as follows. They shall out of my '*punji*' set apart Rs. 3,00,000 (namely, three lacs) and shall therewith purchase Government Promissory Loan Notes or Port Trust Bonds, or they shall invest the said moneys for a short time in any of the other securities written (mentioned) in the twentieth section of the Indian Trusts Act.........My executors and trustees shall spend according to law the said sum or certain portions thereof in connection with some good works or charity in such manner as they may think just and proper, such as Hospital, Sanitarium, Suvavadkhana (lying-in hospital), Musafarkhana (resting house for travellers), Madrassas (schools), Scholarships, Dharamshalas, Medical Dispensaries, &c., (*i.e.*) in connection with any such 'Khairati' that is, 'charity' work, that is, in connection with such different works of charity. But the said sum shall not be expended in any other way or my heirs or the residuary legatee whom I have appointed in this my will shall not have any right to the same. I give full authority to my executors and trustees in that behalf." .... "Should no son be born to me agreeably to what is written above, or should (one) be born and should he die without leaving a son or heirs (daughters are not included amongst heirs), then as regards my whatever '*punji*' that there may be left, I give the whole thereof to my executors and trustees and direct them as follows. They shall utilize the whole of the said '*punji*' or portions thereof in such manner as they in their discretion think proper in connection with the above mentioned or any other good works of Khairat (charity) and I give full authority to my executors and trustees in that behalf." It was contended, *inter alia*, that the testator could not validly dispose of more than one-third of his property by will and that the above dispositions in favour of charity were void on two grounds (*a*) that they were bad for uncertainty, (*b*) that they were bad because they were conditional. *Held,* (i) that Cutchi Memons had acquired by custom the power of disposing of the whole of their property by will; (ii) that it was not proved in this case and never had been proved affirmatively that the Cutchi Memons had ever adopted as part of their customary law the Hindu law of the joint family, as a whole, or the distinction existing in that law between ancestral family, and joint family and

CUTCHI MEMONS—*contd.*

self-acquired property, (iii) that Cutchi Memons were subject by custom to the Hindu law of succession and inheritance as it would apply to the case of an intestate separated Hindu possessed of ... re, (iv) that the ... a good and val ... , bequests to ...

... 10 Bom. 1 dissented from. *Jan Mahomed* v. *Datu Jaffer, I. L. R. 38 Bom. 449*, followed and the judgment therein incorporated. *Abraham* v. *Abraham, 9 Moo. I. A. 195 ; Ahmedbhoy Hubibhoy* v. *Cassumbhoy Ahmedbhoy, I. L. R. 13 Bom. 534, Shivji Hasam* v. *Datu Mavj Khoja, 12 Bom. H. C. R. 281, Herba* v. *Gorbai, 12 Bom. H. C. R. 294,* and *Gangabai* v. *Thavar Mulla, 1 Bom. H. C. R. 71,* ... *a, I. L. R. 34* ... *ankar* v. *Bai* ... ferred to and ... OF BOMBAY ... 41 Bom. 181

CYPRES DOCTRINE.

See CHARITABLE TRUST
I. L. R. 48 Calc. 124

See LIMITATION ACT, 1877, SCH. II, ART. 123 . . **I. L. R. 36 Bom. 111**

See TRUSTEES AND MORTGAGEES' POWERS ACT, (XXVIII OF 1866), s. 43.
I. L. R. 35 Bom. 380

D

DACOITY.

See PENAL CODE SS. 390 AND 396.
I. L. R. 2 Lah. 275

See SEARCH WITHOUT WARRANT.
I. L. R. 38 Calc. 304

———— organization to commit—

See SECURITY FOR GOOD BEHAVIOUR.
I. L. R. 46 Calc. 215

———— preparation to commit—

See MAGISTRATE **I. L. R. 39 Calc. 119**

———— *Conviction for, if proper when less than five of the accused charged actually convicted—Charge of dacoity if sufficient notice of complicity with others not specified—Verdict of jury—Weight of evidence, High Court, if should discuss—Misdirection.* Where 8 persons were each of them separately charged with dacoity, but the jury acquitted four of them but found the other one guilty, the evidence before them being that there were more than five persons concerned in the offence even if the four who were acquitted were not there: *Held*, that the charge as against each of dacoity was sufficient notice to each of the accused that they were

DACOITY—*contd.*

———— preparation to commit—*contd.*

with each dacoit. The mere fact that the evidence was not sufficient to convict four of the accused actually charged would not in any way affect the question of the number of persons engaged. It is not necessary that the charge should in such cases specify that other persons besides those ...

... such as would commend itself to minds professionally trained to weigh testimony, for the High Court to express any opinion on its weight would be to usurp the functions of the jury. It had only to see that there had been no error of law in the proceedings and no misdirection to the jury. RASHIDAZZAMAN *v.* EMPEROR (1911)
15 C. W. N. 434

———— *Assessors — Questioning Assessors before delivery of their opinion—Charge alleging preparation to commit dacoity by assembling with masks, arms and implements—Acquittal of preparation, and conviction of assembling—Repugnancy in the findings, effect of—Appellate Court, power to alter finding of acquittal into one of conviction—Search—Irregularities in search, effect of—Right of accused to urge technical points—Necessity of cross-examination by accused on point when allegations of fraud and dishonesty are made—Presumption of knowledge from possession of incriminating articles—Criminal Procedure Code (Act V of 1898), ss. 103, 309, 423—Distinction between offences of preparation and assembling—Penal Code (Act XLV of 1860), ss.*

...

and then record their answers to them. He should allow them in the first instance to give their opinions in their own language and way, and he may then put to them such questions as are necessary to elucidate or supplement their opinions. Where the accused were charged, under s. 399 of the Penal Code, with making preparations to commit dacoity by assembling together with masks, arms and implements which might be used for that purpose, and the Judge found that there had been such assembly with such articles, but that there was not sufficient evidence of preparation and acquitted them under s. 399 but convicted them under s. 402 of the Penal Code: *Held*, that there was no repugnancy in his findings as, though he was of opinion that the accused did not commit an offence under s. 399 by assembling with masks, arms and implements, he had found that they did assemble, within the meaning of s. 402, and that the discovery of these articles with the other circumstances of the case, showed that the purpose of the assembly was to commit dacoity. In a popular sense assembling to commit dacoity may be an act of preparation for it, but a mere assembling ... ot "prepara- ... Section 402 ... proof of other ... be guilty of dacoity, yet guilty of preparation, and not guilty of preparation yet guilty of assembling. Evidence of the findings of masks, arms and implements at the place of the assembling is not necessary to constitute the offence under s. 402, but only to indicate the purpose of the assembling.

DAMAGES—*contd.*

(*a*) BREACH OF CONTRACT—*contd.*

use of the names of the defendant's estates and should express his intention of purchasing the whole or any part of the crops, and that "if the defendant should fail or neglect or refuse to sell the whole or any part of the crops of the defendant's estates as above provided, defendant should pay to the plaintiff the sum of £500 as liquidated damages and not as a penalty." The defendant having in the first half of the year 1906 sold to other persons five parcels of tea amounting in the aggregate to 53,315 lbs. without offering the plaintiff the option of buying the same, the plaintiff sued the defendant for £500 as liquidated damages in respect of this breach. The defendant having contended that the stipulation was by way of penalty: *Held*, that whatever the expression used in the contract in describing such a payment, the question must always be whether the construction contended for renders the agreement unconscionable and extravagant when made and one which no Court ought to allow to be enforced. That, in this case, it was impossible for the parties when making the contract to foresee the extent of the injury which might be sustained by the plaintiff on breach, that it was obvious that sales in breach of the contract would seriously affect his business, and that having regard to the very uncertainty of the loss likely to arise and to the fact that damages of this kind, though very real, might be difficult of proof and that the proof might entail considerable expense, it was most reasonable for the parties to agree beforehand as to what the damages should be. *The Clydebank Engineering Company, Limited* v. *Don Jose Castaneda*, [*1905*] *A. C. 6*, followed. That the payment stipulated was by way of liquidated damages fixing once for all the sum to be paid and not merely a penalty covering the damages though not assessing the same; and the plaintiff, under the circumstances, could not be called upon to adduce evidence of damage actually sustained by him. That the parties to the agreement were merchants using language in the sense in which it is used in their trade, and the expression "part of the crop" did not mean parcels which might be sold over a grocer's counter but parcels such as were in fact sold in the present case. Nor was it intended that if successive parcels forming parts of the same crop were sold a right to claim £500 in respect of each sale would accrue. ROWLAND VALENTINE WEBSTER v. WILLIAM DAVID BOSANQUET (1912)

16 C. W. N. 697

2. ———— **Wrongful termination of agreement**—*Agreement allowing Company's broker to appoint and dismiss under-brokers—Agreement terminated by new agreement—Measure of damages.* By an agreement, dated 31st May 1911, a Company of sugar dealers appointed the respondent and his partner their brokers for the sale and purchase of sugar for the period of 5 years, unless the agreement became sooner ended under its terms which allowed it to be terminated on 3 months' notice by either party. The respondent's firm were under the agreement to employ such under-brokers as might be required for the purpose of the sugar business; the under-brokers to be under the control of the Company, but liable to be dismissed by the respondent firm. On 8th June 1911 the respondent firm entered into an agreement with the appellants to employ

DAMAGES—*contd.*

(*a*) BREACH OF CONTRACT—*contd.*

them as under-brokers "for the sale and purchase of sugar in respect of all contracts to be entered into by the respondent firm on behalf of the Company under the agreement of 31st May 1911 and during its subsistence." The respondent's partner died on 27th April 1912, and on 12th August 1912 the contract with the appellants was wrongfully ended by the respondent. On 2nd December a new agreement was entered into between the Company and the respondent, which differed in many material respects from that of 31st May 1911, and appointed the respondent as their broker for a new period of 5 years on different terms. In a suit by the appellants on 28th July 1913 claiming from the respondent damages for the wrongful termination of their agency: *Held*, that damages were only recoverable up to 2nd December 1912. That agreement necessarily ended the original appointment of the respondent firm as brokers to the Company under the agreement of 31st May 1911, and with its termination the appellant's contract with the respondent firm also came to an end. LACHMANDAS KHANDELWAL v. RAGHUMULL (1919)

I. L. R. 47 Calc. 290
L. R. 46 I. A. 314

3. ———— **Measure of Breach by Buyer of contract for sale of shares**—*Sale by vendor at various dates after breach at higher prices than those prevailing at date of breach—Sale not in mitigation of damages—Buyer not entitled to benefit of higher rates of sale—Contract Act* (*IX of 1872*), *ss. 73* and *107*. Under contracts made at various dates between April and August 1911, the appellant agreed to sell to the respondents certain shares to be delivered on 30th December 1911. On that date the shares had fallen largely in value, and on the appellant tendering the shares the respondents declined to take them. Negotiations up to 26th February between the parties not resulting in a settlement, the appellant, after demanding a sum representing the difference between the agreed price of the shares and their value at 4·3 per share, the market price at the date of the breach of the contract, sold the shares at various dates from 28th February to October, in every case except one at a higher price than 4·3. In a suit brought on 22nd March 1912 by the appellant for the amount demanded, the Chief Court allowed the respondents the benefit of the increased prices received by sale of the shares by giving them, in mitigation of damages, credit for the prices realised over and above the market price on 30th December, on the date of the breach. *Held*, by the Judicial Committee (reversing that decision), that on the breach by the respondents their contractual right to the shares fell to the ground; and the appellant thereafter sold shares belonging to himself in order to ascertain the loss arising by reason of the respondents not completing at the contract price. If after the breach the seller holds on to the shares, the speculation as to the way the market will subsequently go is the speculation of the seller, not of the buyer; the seller cannot recover from the buyer the loss below the market price at the date of the breach, if the market falls, nor is he liable to the buyer if the market rises. A plaintiff who sues for damages is bound to take all reasonable steps to mitigate the loss consequent on the breach, and cannot claim any sum due-

DAMAGES—*contd.*

(*a*) BREACH OF CONTRACT—*concld.*

to his own neglect. But the loss to be ascertained is the loss at the date of the breach. *Staniforth* v. *Lyall, 7 Bing. 169,* followed. The fact that by reason of the loss of the contract which the defendant has failed to perform, the plaintiff obtains the benefit of another contract which is of value to him, does not entitle the defendant to the benefit of the latter contract. *Yates* v. *Whyte, 4 Bing. N. C. 272, Bradburn* v. *Great Western Railway Co., L. R. 10 Exch. 1,* and *Jebson* v. *East and West India Dock, L. R. 10 C. P. 300,* followed. The market rate of the breach is the decisive element. *Rodocanachi* v. *Milburn, L. R. 18 Q. B. D. 67,* and *Williams* v. *Agius, [1914] A. C. 10,* followed. This principle applies to a breach by either seller or buyer Neither s 73 nor 107 of the Contract Act (IX of 1872) could be referred to as in favour of the respondents: the former was only declaratory of the right to damages, and the latter was inapplicable to the present case. JAMAL *v.* MOOLLA DAWOOD SONS & Co. (1915) . . **I. L. R. 43 Calc. 493**

4. ———— Breach of contract of marriage —*Procuring a breach of the contract—Liability for the breach—Conspiracy to break the contract.* Defendant No. 1 agreed to give his daughter in marriage to the plaintiff; but subsequently he broke the contract and married her to the son of defendant No. 2. The plaintiff having sued to recover damages for the breach of contract from defendants, the lower Courts decreed the claim

was no sufficient

de'endant No. 2,

to show that defendant No. 2 directly and personally attempted to influence defendant No. 1 to break his contract with the plaintiff, nor was there anything like conspiracy between defendant No. 2 and his son to bring about the result. JEKISON. AS HARKISONDAS *v.* RANCHODDAS BHAGVANDAS (1916) . **I. L. R. 41 Bom. 137**

(*b*) IN TORT.

1. ———— Conspiracy—*Conspiracy, suit for damages for—Conspiracy provision relating to, in the Indian Penal Code, if excludes civil action for other conspiracies—Common unlawful object—Arrest of father by Magistrate and Police officers to induce son to confess to a crime—Motive, difference in, amongst persons so conspiring not material—Special damage, to what extent to be proved, in suit for damages from con- joint tort-feasors of action for— of 1877), Sch. II, Arts. 23, 36, 120—Standard of proof for actionable conspiracy, if same as for criminal offence—Assessment of damages—Civil Procedure Code (Act V of 1908), s 80—Notice of suit to Government officer acting in bad faith if necessary—Professional ethics—Counsel, retained by party, if may be examined as witness—Criminal Procedure Code (Act V of 1898), ss 154, 172—First information, proper recording of, by Police—"Case diaries," proper recording of, by investigating officer—Evidence Act (I of 1872), ss. 157, 158—First information report, use of, to corroborate or impeach informant—Explosive Substances Act (VI of 1908), s. 5—Bomb found in joint family residence, who may be held responsible for, possession whose—*

DAMAGES—*contd.*

(*b*) IN TORT—*contd.*

Jail Code, rules in operation of. The law does not permit of a man being arrested in order to put pressure on his son to confess even if the person causing the arrest believed that by so doing he will get evidence that will lead to the conviction of persons engaged in a huge conspiracy. Where three persons were found to have acted in concert in having a man arrested with that object, the fact that two of them did not believe the story upon which the charge against the son was based to be true whilst the third believed in its truth was no ground for the exemption of the latter from liability for damages resulting to the father from the conspiracy, for the motive of one conspirator may be different from that of the others. The standard of proof of a conspiracy in a suit for damages resulting therefrom is not in India the same as if the defendants were being tried on a criminal charge. *In the goods of Gopessur Dutt* (Unreported), relied on. A suit for damages resulting from a conspiracy which would be indictable at Common Law lies in British India according to the principles of justice, equity and good conscience, and the Indian Penal Code, by providing for only one form of criminal conspiracy, *viz.*, to wage war against the King, cannot be considered to have taken away this civil remedy either expressly or by necessary implication. *Quinn* v. *Leathem, [1901] A. C. 495,* followed. A suit brought on a conspiracy must be kept strictly to the cause of action that has been set out in the plaint. If a conspiracy is, as in this case, indictable at Common Law, it gives rise to civil liability if damage has been occasioned by it to the plaintiff. The present suit being based on two causes of action, *viz.*, (i) to recover the damage occasioned to the plaintiff as the result of an actionable conspiracy; and (ii) to recover damages for malicious prosecution against the defendants as joint tort-feasors: *Held*, that the suit though instituted beyond the period of limitation provided for suits for compensation for malicious prosecution was, in regard to the first mentioned cause of action, not barred by limitation, as it was brought within the period provided by Art. 36 or Art. 120 of the Limitation Act, the former article being applicable to the matter, and if it did not apply the latter being applicable Damage to a substantial amount should be proved by the plaintiff in order to establish a cause of action for conspiracy, though if substantial damage is proved the damages awarded need not be limited to the precise amount proved. *Held*, that the plaintiff should recover the amount he had to spend owing to his arrest, such damage not being too remote. A public officer sued in respect of an act done in bad faith is not entitled to notice under s 80, Civil Procedure Code. *Shahunshah Begum* v. *Fergusson, I. L. R 7 Calc. 499, Raghubans* v *Phool Kumari, I. L. R. 32 Calc. 1130, Muhammad* v *Panna, I. L. R. 26 All. 220,* relied on It is not the law that every person in a joint Hindu family should, merely on the ground that a bomb is found in the joint family residence, be liable to be imprisoned and tried for an offence under the Explosive Substances Act, s. 5. If the article is found in a portion of the house of which one member of the family has the exclusive use, such member must *primâ facie* be held responsible for anything that is found there. But if the article is found in a portion of the house of which all the members of t[illegible]

DAMAGES—*contd.*

(*b*) IN TORT—*contd.*

have use then *primâ facie* the *karta* of the family is responsible. But in either case it is only a presumption which may be rebutted and if the Police act on the information, which they believe, showing that the article found in a house is in the exclusive possession of one member of the family and the article is found in a portion of the joint family residence of which all the members of the family have the use, then the head of the family is not liable to arrest merely on the ground that the article is found in a portion of the house to which all the family can resort. *Queen-Empress* v. *Sangam Lal, I. L. R. 15 All. 129*, relied on. The rules contained in what is known as the Jail Code are rules framed by the Local Government under the powers contained in the Prisons Act and subsequently sanctioned by the Governor-General in Council. Rules when so framed and approved have the same force as the Statute, and it is not open to any person to set aside the provisions of such rules. A careful and accurate record of the first information has always been considered as a matter of the highest importance by the Courts in India, the object of the first information being to show what was the manner in which the occurrence was related when the case was first started. *Emperor* v. *Kampu K ki, 11 C. W. N. 554*, referred to. As the first information can be used in evidence under ss. 157 and 158 of the Evidence Act to corroborate or impeach the testimony of the person lodging the first information such a document becomes valueless if drawn up by some person other than the proper informant. As the first information in this case which related to a charge of criminal conspiracy at Midnapore was drawn up by a police officer employed in the Criminal Investigation Department in Calcutta and settled by an attorney: *Held*, that it was of no value. The object of recording "case diaries" under s. 172, Criminal Procedure Code, is to enable Courts to check the method of investigation by the Police, and this object was defeated in this case as the provisions of the law for recording "case diaries" from day to day had been deliberately disobeyed by the Police during the most important period of the investigation. *Queen-Empress* v. *Mannu, I. L. R. 19 All. 390*, referred to. PEARY MOHAN DAS *v.* D. WESTON (1911) . **I. L. R. 40 Calc. 898**
16 C. W N. 145

2. ——————— Malicious abuse of civil process—*If and when actionable—Decree, invalid execution under erroneous belief in its validity—Trespass, actionable without proof of malice and want of reasonable cause—Want of reasonable and probable cause, if question of law—Second appeal—Damages for trespass—Principle of assessment—Exemplary and nominal damages—Limitation Act (IX of 1908), if creates rights to sue.* Where there has been arrest of person or seizure of property in consequence of a civil action which is unfounded, vexatious and malicious, an action for damages may lie against the plaintiff. Whether there was reasonable or probable cause is a mixed question of fact and law and the High Court in second appeal though bound to accept the facts found is entitled to examine whether the inference drawn from those facts is legitimate. If a litigant executes any form of legal process which is invalid

DAMAGES—*contd.*

(*b*) IN TORT—*contd.*

for want of jurisdiction, irregularity or any other reason, and in so doing he commits any act in the nature of trespass to person or property, he is liable therefor in an action of trespass; it is not necessary to prove any malice or want of reasonable or probable cause. Where therefore the defendant had obtained an attachment of the property of the plaintiff under an erroneous impression that he had a decree capable of execution, the defendant was liable to be sued by the plaintiff for damages for trespass. *Clissold* v. *Cratchley, [1910] 2 K. B. 244*, followed. Where land with standing crop on it was attached by the defendant in execution of a decree which he erroneously believed he held against the defendant, but the plaintiff did not ask the direction of the Court or make any the slightest effort for the protection of the crop, which in consequence deteriorated and ultimately became valueless. *Held*, that the attachment was not the proximate cause of the loss of the crop, and the defendant could not be made liable for the value of the crop. The plaintiff was also not entitled to recover the amount she had to pay to the pleader whom she employed to search the records and ascertain whether there was a valid decree against her in favour of the defendant. For an act of trespass for which no blame attached to the defendant he could not be held liable to pay exemplary damages. Only nominal damages (which is not necessarily small damages) should be allowed in recognition of the fact that there has been an infraction of a legal right which is actionable without proof of actual damage or harm. BISHUN SINGH *v.* A. W. N. WYATT (1911)
16 C. W. N. 540

3. ——————— Wrongful attachment—*Suit for damages for—Want of reasonable and probable cause and malice must be proved—Malice, what amounts to—Special damage, proof of, amount of.* In a suit for damages for attachment before judgment, the plaintiff is bound to prove want of reasonable and probable cause for applying for attachment and malice in fact. The provisions of s. 95 of the new Code of Civil Procedure and s. 491 of the old Code which empowered Courts to award compensation when the attachment was applied for on insufficient grounds, were not intended to affect the applicability of the aforesaid rule of law, in regular suits brought for compensation. Malice means any improper or indirect motive, *i.e.*, some motive other than the one which should actuate the party. No hatred or enmity is required. Where the motive for the attachment is not to defeat any intended fraud on the part of the debtor, but to enforce speedy payment, it will amount to malice. The plaintiff in such a suit must prove special damage. It is not necessary however to show pecuniary loss, or that the plaintiff was affected in a specific manner. It will be sufficient if it is shown that the allegations made against him must damage his reputation and credit. It will be sufficient if the plaintiff must have sustained some damage such as the law takes notice of. *Quartz Hill Gold Mining Company* v. *Eyre, 11 Q. B. D. 674*, referred to. *Kumarasami Pillai* v. *Udayar Nadan, I. L. R. 32 Mad. 170*, followed. The fact that the defendant is a man of slender means ought not to be taken into consideration as a ground for reducing the amount

DAMAGES—*contd.*

(*b*) IN TORT—*contd.*

awardable as damages to the plaintiff. NANJAPPA CHETTIAR *v.* GANAPATHI GOUNDEN (1912)
I. L. R. 35 Mad. 598

——— **for attachment before judgment**—

See ATTACHMENT BEFORE JUDGEMENT.
I. L. R. 39 Mad. 952

4. ——— Malicious prosecution—*Onus of proof—State of mind of prosecutor at institution material—Review, setting up new case in—Counsel of prosecutor if competent witness of his good faith* P laid a charge of criminal trespass against *C* who was discharged. *C* thereupon sued *P* for malicious prosecution. *P*'s defence was that he instituted the charge on information of his servants whom he believed and in good faith. *Held*, that an *animus injuriæ*, *i.e.*, malice, cannot be inferred from the mere fact that prosecution has failed and the accused has been acquitted In an action for malicious prosecution the burden of proving malice and the absence of reasonable cause for the prosecution lies on the plaintiff The crucial point in almost all such actions is the state of mind of the prosecutor at the time he institutes the charge. After the decision of the case in defendant's favour by the Appeal Court, it was urged on behalf of the plaintiff, upon review, that the defendant should be held liable for the acts of his servants. *Held*, that the Court had properly refused to permit a new case to be set up at that stage. A counsel who had advised the prosecutor to institute the charge was a competent witness. C. E. VICTOR S COREA *v.* HENRY JOSEPH PEIRI (1909)
14 C. W. N. 86

5. ——— Principle of assessing—*Damages, too remote, cannot be recovered—Principle of assessing damages in actions on, contract compared—Duty of plaintiff to take means to reduce the damages—Easements Act (V of 1882), s. 33.* In a suit for damages sustained by the plaintiff in consequence of the defendant's obstruction of the plaintiff's right to way of his field, owing to which the plaintiff did not cultivate his lands, their Lordships *held*, (i) that non-cultivation of the lands was too remote a consequence of the defendant's wrongful act of obstruction as the plaintiff had not shown that there were no other means of cultivating and that it was in consequence of the wrong it was not reasonably possible for him to cultivate; (ii) that damages for the loss of crops could not be given, but that all that he was really entitled to was the extra cost which he would be put to for the cultivation of his land in consequence of the right of way being obstructed; and (iii) that the plaintiff was entitled to substantial damages for interference with the evidence of his right. Sedgwick on Damages, paragraphs 202 and 215, referred to. S. 33 of the Easements Act (V of 1882) and *Brijnath Singh* v. *Tetai Chowdry, 6 C. W. N. 197*, applied. *Per* CURIAM: Though the rule is the same in actions on contract and in tort, *viz.*, that the damages which the plaintiff is entitled to must result directly from the wrongful act of the defendant and that no claim can be made to damages which are only too remotely connected with it, there may be differences in the application to actions on tort of this basic principle which is common to both kinds of actions; in a contract it is the duty of the plaintiff as a

DAMAGES—*contd.*

(*b*) IN TORT—*contd.*

prudent man to take measures to reduce the damages as far as possible, for a breach of contract consists in the defendant's failure to do a certain act that he is bound to do and it would be quite open to the plaintiff to take other measures to obtain the result he expected from the defendant's performance; a tort, on the other hand, may consist in the defendant's failing to do an act which he is bound to do or in doing one which he ought not to do or in preventing the plaintiff from doing an act which he is entitled to do. KARIBASVANA GOWD *v* VEERABHADRAPPA (1913)
I. L. R. 36 Mad. 580

6. ——— Grounds of interference by the Court of Appeal—*Costs order for, if can be interfered with by the Court of Appeal—Cases where a successful litigant can be deprived of his costs—Civil Procedure Code (Act V of 1908), s. 98, if applicable to Letters Patent Appeals* *Per* SANDERSON, C. J.—The Court of Appeal should not interfere unless the decision of the trial Judge on a question of damages appears to be clearly erroneous. *The Englishman* v *Lala Lajpat Rai, I. L. R 37 Calc. 760, s c. 14 C. W. N. 713 (1910)*, approved The costs were in the discretion of the Judge. Such discretion must of course be a judicial discretion to be exercised on legal principles, not by chance medley, nor by caprice nor in temper. Dictum of Lord Coleridge, C J, in *Huxley* v. *West London Ex. Ry. Company, 17 Q. B. D. 373 at p. 376 (1886)*, approved The trial Judge should not have taken into consideration matters which must involve speculation on his part, as to the attitude of the respective parties. Principles on which a successful litigant should be deprived of his costs discussed *Jones* v. *Curling, 13 Q. B. D. 262 at p 268 (1884)*, approved "Everything which increases the litigation and the costs and which places on the defendant a burden which he ought not to bear in the litigation is a perfectly good cause for depriving the plaintiff of costs." *Huxley* v. *West London Extension Railway Company, 14 A. C. 26 at p 32 (1889)*, approved. *Per* WOODROFFE, J.—The English cases which deal with the question of revision of damages by the Court of Appeal have no application in this country where the jury system does not prevail Here the question of damages is to be dealt with by the Court of Appeal as any other portion of the case. *Englishman Limited* v. *Lajpat Rai, I. L. R. 37 Calc. 760. s. c. 14 C. W. N. 713 (1910)*, followed. The conduct of the plaintiff's next friend can, in no way, affect the damages to be paid to his infant son for actual injury and suffering. There is nothing wrong in itself in claiming exemplary damages for the Courts themselves award such damages. The ordinary rule is that costs do follow the events. The Court may however direct otherwise, but under the Code (s. 35) if it does so it must state its reasons in writing. This provision was enacted both to secure a proper exercise of discretion and in order that the Court of Appeal may be in a position to control the order and see whether there is good cause for departing from the general rule. It is not sufficient answer to say in such case, in an appeal from the judgment, that the costs are in the discretion of the Court. The Appellate Court must itself decide whether the order should be sustained, that is, whether the reasons required to be stated are good reasons founded on the facts of the

DAMAGES—*concld.*

(*b*) IN TORT—*concld.*

case. There are certain well-known principles on which a successful party may be deprived of his general costs. But where the Court purports to act on these principles it is open to the Appellate Court to enquire whether on the facts these principles have been rightly applied. The Court can get no nearer to a perfect test than the enquiry whether it would be more fair as between the parties that some exception should be made in the special instance to the rule that costs should follow upon success. Dictum of Bowen, C. J., in *Forster* v. *Farquhar*, [1893] *1 Q. B. 564.* The mere fact that the plaintiff claims more than he gets is no ground of depriving him of costs unless it is shown that the cost of the action has been increased by his claim. As regards the judgment about the costs of the appeal, the Judges having differed, it was held that s. 98, C. P. C., was not applicable but s. 36 of the Letters Patent applied and the opinion of the Chief Justice prevailed. JUSTAIN HULL *v.* ARTHUR FRANCIS PAULI . . . . . **24 C. W. N. 352**

———— **for trespass on land**—*Question of title raised in such a suit, if may be tried.* Although a decision on a question of title to land in a suit for damages for trespass thereto may not be conclusive, the Court is not for that reason precluded from trying and deciding that question in such a suit. SAHARALLI MOLLAH *v.* BHOLA MOLLA (1919) . **23 C. W. N. 647**

DAMDUPAT (RULE OF).

See LIMITATION **I. L. R. 37 Bom. 326**

———— *Decree in mortgage-suit between Hindus—Interest accruing after date fixed for redemption, whether rule applicable to.* The rule of *damdupat* applies to Hindus only so long as the relation between the parties is contractual, and ceases to apply when the matter has passed from the realm of contract into that of judgment. Where a decree has been passed on a mortgage, the rule does not apply to the interest accruing after the date fixed for redemption. *In the matter of Hari Lall Mullick, I. L. R. 33 Calc. 1269,* followed. *Ram Kanye Audhicary* v. *Cally Churn Dey, I. L. R. 21 Calc. 840,* not followed. *Sundar Koer* v. *Sham Krishen, I. L. R. 34 Calc. 150 L. R. 34 I. A. 9,* referred to. NANDA LAL ROY *v.* DHIRENDRA NATH CHAKRAVARTI (1913) . . . . **I. L. R. 40 Calc. 710**

———— *Damdupat, application of the rule of—Mortgage—Assignment of mortgage—Transfer of Property Act (IV of 1882), s. 2 (d).* The fact that the person entitled to sue on a mortgage happens by assignment to be a Parsee cannot affect the (Hindu) mortgagor's right to claim the advantage of the rule of *damdupat,* if it existed when the mortgage was entered into. It is not proper to infer that, because it has been expressly enacted that nothing in Chapter II of the Transfer of Property Act (IV of 1882) shall be deemed to affect any rule of Hindu Law, the Legislature has deprived a Hindu mortgagor of the protection afforded him by the rule of *damdupat.* The right of a mortgagee to sue for his principal and interest arising from a contract must be taken to be made subject to the usages and customs of the contracting parties. JEEWANBAI *v.* MANORDAS (1910)

I. L. R. 35 Bom. 199

DAMDUPAT (RULE OF)—*contd.*

———— *Mortgage between Hindus, whether the rule of Damdupat applies to—Transfer of Property Act (IV of 1882), s. 4—Contract Act (IX of 1872), s. 37.* There is nothing in the Transfer of Property Act (read with the Contract Act) to preclude the rule of *damdupat* from applying to mortgages between Hindus. *Madhwa Sidhanta Onahini Nidhi* v. *Venkataramanjulu Naidu, I. R. L. 26 Mad. 662,* not followed. *In the matter of Hari Lall Mullick, I. L. R. 33 Calc. 1269, Nanda Lal Roy* v. *Dhirendra Nath Chakravarti, I. L. R. 40 Calc. 710, Jeewanba* v. *Manordas Lachmondas, I. L. R. 35 Bom. 199,* and *Sundarabai* v. *Jayavant, I. L. R. 24 Bom. 114,* referred to. KUNJA LAL BANERJI *v.* NARSAMBA DEBI (1915)

I. L. R. 42 Calc. 826

DANABANDI AND BATAI SYSTEMS OF TENANCY.

———— *Presumption as to contract of tenancy from contract of tenancy in respect of adjoining lands—Record-of-rights published after institution of suit, if can be relied on—Non-attendance of landlord at apportionment—Liability of tenant if he appropriates whole of crops—Bengal Tenancy Act (VIII of 1885), s. 69.* The plaintiff claimed that certain lands were held by the tenants under the *danabandi* system, but the Courts below found that they were held under the *batai* system. In two other suits against the tenants of the same village the Court found that the tenants held under the *danabandi* system. There was no proof that there was an invariable custom prevalent in the village. The lower Appellate Court in deciding the case relied upon the record-of-rights which was finally published long after the institution of the suit. *Held,* that the mere circumstance that the contract of tenancy in respect of some land was of one description does not necessarily indicate that the contract was of the same description in respect of different lands in the same village held by other tenants, and the Court was free to conclude upon the evidence that the lands were held under the *batai* system. That the lower Appellate Court did not act improperly in relying on the record-of-rights. KAMALESHWARI PERSHAD SINGH *v.* KANHARI SINGH (1913)

17 C. W. N. 1159

DANCING WOMAN.

———— **illegitimate son of Sudra by—**

See HINDU LAW **I. L. R. 39 Mad. 136**

DANDA.

See HINDU LAW—DEBT.

14 C. W. N. 659

DANDIDARI RIGHT.

———— *Dandidari right, if a monopoly or a legal right to be recognised by Courts of Justice—Such right if personal or if can be transferred—Transfer, if must be by registered instrument—Estoppel, application of rule of, to employés and contracting parties—Assignee of right having enjoyed profits, if can deny assignor's title.* At a public auction held at the instance of Government the plaintiff as the highest bidder purchased the road-side lands on the bank of a river together with the *dandidari* right for one year. It appeared from the lease granted to him by Government that he became entitled to occupy the lands for one year and to exercise the calling of a broker in

DANDIDARI RIGHT—*contd.*

the market held thereon during that period. The defendants took an assignment from the plaintiff of the *dandidari* right and they commenced at once to exercise the calling of a broker in the market-place by virtue of the Government license which was made over to them, but they withheld payment of the money they had agreed to pay. The plaintiff sued for recovery of the consideration with damages for unlawful detention of his money. *Held,* that the term *dandidar* literally means a measurer and is applied to signify a broker who negotiates the sale of paddy and other produce in a market-place and receives as remuneration for his service a commission from the seller and the buyer who may choose to employ

a restriction upon a man's right to exercise his trade or calling tends to create a monopoly and is void as against public policy has no application to the present case. There is nothing illegal or contrary to public policy in Government allowing a market to be held on its land and taking measures to restrict the admission of brokers. That the *dandidari* right was not a right personal to the grantor from Government and could be transferred. The very fact that the right was granted by Government to the highest bidder affords some indication that the personal element does not enter into consideration when the grant is made That the *dandidari* right was transferable only by a registered instrument. That the defendants were at least licensees under the plaintiff, and as they had exercised their calling without interruption or interference they at any rate were not entitled to contend that the plaintiff had no title or that they themselves had acquired none from him. LAKHAN JENA *v.* ARJUN NAIK (1914) . **18 C. W. N. 1194**

DANGEROUS ARTICLE.

See GAS COMPANY . **14 C. W. N. 158**

DARBAR SAHIB—

See GOLDEN TEMPLE, AMRITSAR.
I. L. R. 1 Lah. 511, 540

DARBHANGA RAJ.

See BABUANA GRANT.

See HINDU LAW—CUSTOM.
I. L. R. 42 Calc. 582

DARPATNI (TENURE).

See LEASE . . **I. L. R. 45 Calc. 940**

DASTURAT.

See MALIKANA . **15 C. W. N. 1029**

———— *Nature of the right of—Immoveable property, interest in—Circumstances justifying inference as to the existence and lawful origin of—Limitation—Limitation Act (XV of 1877), Sch. II, Art. 131—"Refusal," meaning of.* The plaintiffs sued for a declaration of their right to recover certain sums of money as *dasturat* specified annual rates and for recovery of the sums as a charge on properties in the possession of the defendants. It appeared that the plaintiffs'

DASTURAT—*contd.*

claim for *dasturat* was asserted and allowed in Courts of law since 1795, sometimes in spite of opposition, on other occasions without opposition. *Held,* that the inference drawn by the lower Courts that the right alleged by the plaintiffs did exist and had a lawful origin was legitimate and the plaintiffs had an enforceable right to realise the sums claimed as *dasturat* from the defendants. That Art. 131 of the Second Schedule of the Limitation Act of 1877 was applicable to the case. That "refusal" in Art. 131 plainly implies a previous demand and as the plaintiffs asserted that there had been no demand and refusal within twelve years of the commencement of the present suit, the burden was cast upon the defendants to establish that the plaintiffs did make a demand and that the defendants did refuse, and as there was no evidence of this demand and refusal the suit was *primâ facie* not barred under Art. 131 That the right claimed was clearly in the nature of an interest in immoveable property being a right vested in the proprietors of a specified estate to receive certain sums of money periodically from proprietors of other estates in their character as such. Under the Limitation Act of 1859, a suit to recover such an interest would have to be brought within twelve years from the date when the cause of action arose upon the denial or refusal of the right and as it was not shown that there was any refusal while the Act of 1859 was in force, it must be held that the right was not extinguished before the Limitation Act of 1871 came into force HEM CHANDRA CHAUDHURI *v.* ATUL CHANDRA CHAKRABARTTY (1913) . . . . **19 C. W. N. 389**

DASTUR DEHI.

See PRE-EMPTION **I. L. R. 35 All. 478**

DATE OF BIRTH.

See EVIDENCE . **L. R. 43 I. A. 256**

DATE OF SALE.

See SALE . **I. L. R. 45 Calc. 151**

DATTAKA CHANDRIKA

See ADOPTION . . **26 C. W. N. 1**

———— **s. 5, paras. 24 & 25—**

See HINDU LAW—PARTITION.
I. L. R. 40 Bom. 270

DAUGHTER.

See HINDU LAW—DAUGHTERS' ESTATE.
I. L. R. 35 All. 481
38 All. 111

See HINDU LAW—INHERITANCE.
I. L. R. 38 Mad. 1144
I. L. R. 43 Calc. 30

———— **bequest to—**

See HINDU LAW—WILL.
I. L. R. 41 Calc. 1007

See WILL . **I. L. R. 44 Calc. 181**

———— **marriage of—**

See WILL . **L. R. 38 [illegible] 327**

DAUGHTER—*contd.*

——— succession of—

See Custom . I. L. R. 44 Calc. 749
I. L. R. 1 Lah. 284, 365, 464
I. L. R. 2 Lah. 366

——— suit by, for possession of father's estate—

See Civil Procedure Code (Act V of 1908), s. 2, cl. (11), O. XXII, r. 1.
I. L. R. 39 Mad. 382

——— *Hindu Law—Mitakshara—Daughters inheriting property from their father—Shares separate and absolute—Tenants-in-common.* In the Bombay Presidency a daughter taking property from her father inherits it as *stridhan* and daughters take their shares separately and absolutely. When the property so inherited is not physically divided, it is held by the daughters as tenants-in-common and not as joint tenants and there is no survivorship between them. In cases affecting inheritance the rule is to adhere to the decisions of the Court to which the district from which the case arose is subject. Vithappa *v.* Savitri (1910)
I. L. R. 34 Bom. 510

DAUGHTER-IN-LAW.

——— adoption by—

See Hindu Law . I. L. R. 44 Bom. 508

——— right to maintenance—

See Hindu Law—Maintenance.
I. L. R. 37 Mad. 396

DAUGHTER'S SONS.

See Custom (Adoption).
I. L. R. 2 Lah. 193

See Will . I. L. R. 38 Bom. 697

——— Adoption of, Khatris of Amritsar—

See Custom (Adoption).
I. L. R. 2 Lah. 69

——— of the great-grandson of the great-great-grandfather—

See Hindu Law—Stridhan.
I. L. R. 40 Calc. 82

DAYABHAGA.

See Hindu Law—Ayantuka Stridhan.
I. L. R. 37 Calc. 86

See Hindu Law—Inheritance.
I. L. R. 38 Calc. 603
I. L. R. 48 Calc. 643

See Hindu Law—Succession.
I. L. R. 43 Calc. 1

See Hindu Law—Minor.
26 C. W. N. 954

——— It governs Koches of Assam—

See Hindu Law . 24 C. W. N. 173

DEAD-LOCK.

See Company . I. L. R. 47 Calc. 654

DEAF AND DUMB ACCUSED.

See Criminal Procedure Code (Act V of 1898), s. 341.
I. L. R. 40 Bom. 598

DEATH.

——— of pleader in personal action—

See Personal Action.
I. L. R. 2 Lah. 189

——— presumption of—

See Limitation Act (IX of 1908), Arts. 140, 141 . I. L. R. 40 Bom. 239

——— sentence of—

See Privy Council, Practice of.
I. L. R. 42 Calc. 739

——— Presumption of—*Evidence Act (I of 1872), s. 108—Person not heard of for seven years—Time as to when presumption arises—Onus of proof.* When a person is not heard of for seven years, the presumption that arises under s. 108 of the Evidence Act is that he is dead at the time when the question is raised and not at some antecedent date. *Fani Bhushan Banerjee* v. *Surjya Kanta Ray Chowdhry, I. L. R. 35 Calc. 25*, followed. *Moolla Kassim* v. *Moolla Abdul Rahim, I. L. R. 33 Calc. 173*, referred to. Narki *v.* Lal Sahu (1909)
I. L. R. 37 Calc. 103

See also Evidence Act, ss. 107 and 108.
37 Mad. 440

DEBIT.

See Mortgage I. L. R. 39 Mad. 419

DEBT.

See Civil Procedure Code (1908), O. XXI, rr. 46, 546.
I. L. R. 37 Mad. 51

See Hindu Law—Debt.
I. L. R. 39 Bom. 113
I. L. R. 36 Bom. 68

See Hindu Law—Joint Family.
I. L. R. 34 Bom. 72
I. L. R. 43 Bom. 17

See Payment towards Debt.

See Succession Certificate.
I. L. R. 38 Calc. 182

See Time-barred Debt.
I. L. R. 42 Bom. 444

——— attachment of—

See Limitation Act (IX of 1908), Sch. I, Arts. 29, 62 and 120.
I. L. R. 38 Mad. 972

——— contracted in Singapore—

See Bankruptcy.
I. L. R. 40 Mad. 581

——— extinguishment of—

See Mortgage I. L. R. 38 Calc. 342

——— part of—

See Succession Certificate.
I. L. R. 42 Calc. 10

——— payable in kind—

See Interest Act (XXXII of 1839).
I. L. R. 38 Mad. 464

DEBT—*contd.*

———— son's obligation to pay—

See HINDU LAW—DEBT.

I. L. R. 41 Mad. 136

I. L. R. 44 Bom. 341

———— *Charge — Assignment —Transfer of Property Act (IV of 1882), s. 55, sub-s. (4).* There is no authority for the contention that a charge such as the one mentioned in s. 55, sub-s (4) of the Transfer of Property Act, is merely a personal right which cannot be transferred to an assignee. The debt could undoubtedly be transferred and there is no reason why the security for the debt should not also be transferred with it. *Hari Ram* v. *Devapat Singh, I. L. R. 9 Calc 167,* and *Moti La'* v. *Bhagwan Das, I. L. R. 31 All. 443,* distinguished. SHEONANDAN LAL v. ZAINAL ABDIN (1914)

I. L. R. 42 Calc. 849

———— *Hypothecatee of debt has the right to sue for the debt hypothecated—Transfer of Property Act (IV of 1882), s 134.* The holder of a charge on a debt due to his debtor is a transferee of an actionable claim and entitled to recover the debt from the transferor's debtor S. 134 of the Transfer of Property Act shows that the mortgagee is a transferee and entitled to sue in his own name for the recovery of the original debt. Where the original creditor is added as a party, the chargeholder, though not entitled to the whole amount, may recover the amount RAMASAMI PILLAI v MUTHU CHETTI (1910)

I. L. R. 34 Mad. 53

———— *carrying interest—Payment without specific appropriation—Creditor's right to apply payment in discharge of interest first.* Where a debt is due which carries interest,

ppro-

, rule

that

the money is first applied in payment of interest and then when that is satisfied in payment of the capital. MEKA VENKATADRI APPU ROW v. RAJA P. A. ROW . . . **26 C. W. N. 33**

———— *Due with interest—*

to appropriate any indefinite payment which he gets from

A debtor

that it w

he did so,

on these terms, but then he must give back the money or cheque by which the money was proffered. R. B. SETT NEMICHAND v. SETT RADHA KISHEN

26 C. W. N. 153

DEBTOR.

See EMBARRASSMENT.

I. L. R. 42 Calc. 652

See MORTGAGE . **23 C. W. N. 817**

See PROVINCIAL INSOLVENCY ACT (III OF 1907), s. 31 . **I. L. R. 37 All. 383**

DEBTOR—*contd.*

———— part payment by literate—

See PRESIDENCY SMALL CAUSE COURTS ACT (XV OF 1882), s. 69.

I. L. R. 38 Mad. 438

———— rights of surety against—

See NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881), ss. 30, 47, 59, 74 AND 94 . **I. L. R. 39 Mad. 965**

See INSOLVENCY **I. L. R. 44 Calc. 535**

DEBTOR AND CREDITOR.

See INSOLVENCY **I. L. R. 44 Calc. 899**

See TRANSFER OF PROPERTY ACT (IV OF 1882), s. 53 . **I. L. R. 43 Calc. 521**

———— *Acknowledgment of debtor's liability by another and acceptance of same by creditor—Rights of creditor—Novation—"Consideration"—Administration of justice in Courts in India on general principles of equity and justice —Contract Act (IX of 1872), ss. 2 (d) and 62.* Where the transferee of a debtor's liability has acknowledged his obligation to the creditor for the debt to be paid by him, under the provisions of the registered instrument conveying to him all the moveable and immoveable properties of the original debtor, and the acknowledgment was communicated to the creditor and accepted by him: *Held, first,* that the arrangement between the creditor and the transferee did not amount to a *novation* within the meaning of s. 62 of the Contract Act; *secondly,* that the obligation undertaken by the transferee was for, and intended to be for, the benefit of the creditor; and, *lastly,* that the creditor is entitled to sue the transferee on the registered instrument. *Tweddle* v *Atkinson, 1 B & S. 393, 121 E. R. 762,* is inapplicable in British Courts in India. *Khwaja Muhammad Khan* v. *Husaini Begam, I. L. R 32 All. 410; L R. 37 I. A. 152, Gregory and Parker* v *Williams, 3 Mer. 582; 36 E. R 224, Touche* v *Metropolitan Railway Warehousing Company, L. R 6 Ch App. 671,* and *Gandy* v *Gandy, 30 Ch. D 57,* referred to. The definition of "consideration" in the Indian Contract Act is wider than the requirement of the English law The aim of the mofussil Courts of justice in British India is to do complete justice in one suit according to the general principles of justice, equity and good conscience. *Rambux* v. *Chittangeo Modoosoodh in Paul Chowdhry, B. L. R. Sup. Vol. 675; 7 W. R. 377,* referred to. DEBNARAYAN DUTT v. CHUNILAL GHOSE (1913) . . . . **I. L. R. 41 Calc. 137**

———— *Creditor, an alien enemy firm—Interest on debt—Debtor not entitled to claim suspension of interest from the date of outbreak of war to the date when the enemy firm obtains a license to trade.* Where a person indebted to an alien enemy had paid interest in respect of a transaction entered into before the outbreak of hostilities and sought a refund of the amount paid for the period between the outbreak of hostilities and the date of a license to trade obtained by the enemy firm: *Held,* following the opinion expressed in *High Stevenson and Sons* v. *Aktienge-sellschaft Fur Cartonnagen-Industrie, [1918] A. C. 239,* that he was not entitled to such refund, as there was no suspension of interest in respect of such transactions during that period. VALLI MAHOMED v. BERTHOLD REIF (1919) . . **I. L. R 44 Bom. 1**

DEBUTTAR.

See Court-fee **I. L. R. 39 Calc. 906**

See Hindu Law—Endowment.

15 C. W. N. 126
I. L. R. 39 Calc. 33
L. R. 47 I. A. 140

See Land Acquisition.

I. L. R. 39 Calc. 33

See Religious Endowment.

I. L. R. 48 Calc. 1019

—————— **suit against—**

See Parties . **I. L. R. 37 Calc. 229**

—————— *Order of successions of shebait as laid down in deed of endowment, if may be altered by donor.* It is clear law that the donor of a debutter property can make no change in the order of succession of *shebaits* as laid down in the deed of endowment in the absence of a reservation to that effect in the deed. Gouri Kumari Dasi *v.* Indra Kumar Mukhopadhya

26 C. W. N. 920

—————— *Suit against Debuttar estate—Expenses necessary for Debuttar estate—Indemnity to estate of former sebait by successor—Liability of Debuttar estate.* The parties to this litigation were the descendants of a testator, who by his will dedicated immoveable property to the performance of the worship of certain idols and other pious acts, and provided for the order of succession to the office of sebait among his descendants. The suit was instituted on 25th January 1897 by the respondents as executors of a deceased sebait against the appellant, who had been appointed receiver of the debuttar estate, for money which, owing to interference and obstruction by the appellant in the collection of the rents, had not been received by the deceased sebait during his sebaitship, and for expenses he had consequently been obliged to pay out of his private funds to protect the estate, and enable him to perform his obligations as sebait. All the other surviving descendants of the testator were made parties, and the appellant was sued both in his capacity as receiver and in his personal capacity. After the expiration of the period of limitation prescribed for the suit, an amendment of the plaint was made by the Court, adding to it a prayer that it might be determined who was the sebait, and that the debuttar estate should be represented by the person declared to be entitled to the sebaitship. The appellant was found to be so entitled and was impleaded as sebait. *Held*, affirming the decision of the High Court, that the object of the amendment was merely to determine judicially which of the living descendants of the original testator, all of whom were already parties to the suit, was to be considered sebait. It did not alter the character of the suit, nor amount to the addition of a new defendant within the meaning of s. 22 of the Limitation Act (XV of 1877), and the suit was therefore not barred. *Held*, also, that the estate of the deceased sebait was entitled to be reimbursed all sums properly expended by him in the preservation of the debuttar estate (as payment of Government revenue and the like), and in defending his position as sebait which was challenged unsuccessfully by the appellant. *Walters* v. *Woodbridge, L. R. 7 Ch. D. 504,* followed. The respondents were also entitled to recover all moneys properly expended by the deceased sebait in performing the obligations imposed upon him by the original testator's will. The right of indemnity was incident to the position of a trustee, and the liability in respect of that indemnity was the first charge on the trust estate. Peary Mohun Mukerjee *v.* Narendra Nath Mukerjee (1909)

I. L. R. 37 Calc. 229

—————— *Presumption, conditions of—If may be made in favour of an illegal transaction—Debutter lands, intention to create permanent tenancy of, if may be presumed.* A presumption in favour of a transaction assumes of its regularity: it cannot be made in favour of that which offends legal principle. Where lands are *debutter*, to create a permanent tenancy at a fixed rent under it would be a breach of duty in the shebait and an intention in the shebait to create such tenancy is not therefore presumable. Satya Sri Ghoshal *v.* Kartik Chandra Das (1912)

16 C. W. N. 418

——————Grounds for removal of trustee—Sale of debutter property and purchase by shebait discussed. Monohar Mookerjee *v.* Raja Peary Mohan Mookerjee

24 C. W. N. 478

DECEPTION.

See Fabricating False Document.

I. L. R. 48 Calc. 911

DECISION BASED ON OATH.

See Res Judicata.

I. L. R. 36 Mad. 287

DECLARATIONS AND INJUNCTIONS.

See Bombay Revenue Jurisdiction Act (1876), s. 4 (*a*) **I. L. R. 34 Bom. 232**
I. L. R. 43 Bom. 277
I. L. R. 44 Bom. 261

See Civil Procedure Code (Act VIII of 1859), s. 15 **I. L. R. 34 Bom. 676**

See Civil Procedure Code, 1908—
s. 9 . . **I. L. R. 32 All. 527**
s. 110 . **I. L. R. 40 Bom. 477**

See Court Fees Act, s. 17.

I. L. R. 36 Bom. 628

See Declaratory Decree and Suit.

See Hindu Law—Coparcener.

I. L. R. 40 Bom. 329

See Injunction.

See Jurisdiction.

I. L. R. 34 Bom. 267

See Madras Land Encroachment Act (III of 1905), ss. 5, 6, 7 and 14.

I. L. R. 39 Mad. 727

See Municipal Council.

I. L. R. 38 Mad. 6

See Municipal Law.

L. R. 43 I. A. 243

See Specific Relief Act (I of 1877), s. 42 . . **I. L. R. 32 All. 316**
14 C. W. N. 576
I. L. R. 42 Bom. 438

DECLARATIONS AND INJUNCTIONS—*contd.*

See STAMP ACT (II OF 1899), s. 57.
I. L. R. 38 Mad. 349

See VALUATION OF SUIT.
I. L. R. 43 Bom. 507

———— **form of—**

See LAND ACQUISITION.
I. L. R. 44 Bom. 797

———— **suit for—**

See BOMBAY HEREDITARY OFFICES ACT, SS. 25 AND 26 **I. L. R. 40 Bom. 55**

———— *Public road—Right of marching in procession with a car—Suit for declaration of right—Injunction restraining interference with the right.* Plaintiffs sued on behalf of themselves and of other members of a religious community to have a declaration of their right of marching in procession with a car along a particular public road to certain temples and for an injunction restraining the defendants from interfering with the plaintiffs. The defendants contended that the plaintiffs had no right to march along the road. The lower Courts dismissed the suit on the ground that the road being public the plaintiffs could not sue unless special damage were shown and proved. On second appeal by the plaintiffs. *Held*, reversing the decree and allowing the claim, that the suit was not for removal of a public nuisance but for a declaration of the right of an individual community to use the public road Every member of the public and every sect has a right to use the public streets in a lawful manner and it lies on those who would restrain him or it to show some law or custom having the force of law abrogating the privilege *Sadgopachariar* v. *A. Rama Rao, I. L. R. 26 Mad. 376*, followed. BASLINGAPPA PARAPPA *v.* DHARMAPPA BASAPPA (1910) . **I. L. R. 34 Bom. 571**

———— A suit for a declaration that a mortgage-decree is not binding on the plaintiff and for an injunction restraining the defendant from executing the same is a suit for a declaratory decree with consequential relief within the meaning of s. 7, cl. (4) (c) of the Court Fees Act and an *ad valorem* fee is payable on the valuation fixed in the plaint.—ARUNACHALAM CHETTY *v.* RANGASAWMY PILLAI (1914)
I. L. R. 38 Mad. 922

———— *Valuation of claim.* In a suit for a declaration and for an injunction by way of consequential relief, the plaintiff has the right to value his claim for the purpose of Court-fees; and the value for the purpose of jurisdiction is the same. BALKRISHNA NARAYAN *v.* JANKIBAI . . **I. L. R. 44 Bom. 331**

DECLARATION OF LONDON.

See CONFISCATION.
I. L. R. 42 Calc. 334

See PRIZE COURT **I. L. R. 44 Bom. 61**

DECLARATION OF OWNERSHIP.

See LESSOR AND LESSEE.
I. L. R. 39 Mad. 1042

DECLARATION OF PARIS.

See CONFISCATION.
I. L. R. 42 Calc. 334

DECLARATION OF VALUE.

See RAILWAYS ACT (IX OF 1890), s. 75.
I. L. R. 39 Calc. 1029

DECLARATORY DECREE.

See AGRA TENANCY ACT (II OF 1901), ss. 79, 95 . . **I. L. R. 35 All. 299**

See CIVIL PROCEDURE CODE (ACT V OF 1908), s. 11 **I. L. R. 37 Bom. 307**

See COURT-FEE **I. L. R. 40 Calc. 615**

See HINDU LAW—GIFT
I. L. R. 40 Mad. 818

———— **effect of—**

See DIGWARI TENURE.
I. L. R. 43 Calc. 743

———— *Specific Relief Act (I of 1877), s. 42—Suit by alleged reversioner for declaration of title—Legal interest or character* ... *revoke probate* ... *robate Court*— ... *Hindu widow, not analogous—Rule of res judicata, origin and application of—Rule existing in Hindu as well as English law* . On an application to the District Court, by the first respondent, for probate of the will of *B*, a Hindu who died leaving two widows but no male issue, the appellants entered a caveat denying the genuineness of the will, and asserting that they were the reversioners of *B* and had therefore a *locus standi* to oppose the grant of probate. The District Court held that the caveators had failed to prove their interest, and granted probate of the will to the first respondent as executor by implication The High Court on appeal affirmed that decision, and the appellants without any further appeal instituted a suit in the Subordinate Judge's Court against the first respondent and the two widows for a declaration that they were the next reversioners to the estate of *B* according to Hindu Law in the case of an intestacy, and as such were entitled to obtain revocation of probate. The first Court gave them a decree, but on appeal the High Court held that the suit was barred by s 13 of the Civil Procedure Code, 1882, as being *res judicata* by the decision of the District Court in the probate proceedings. *Held*, by the Judicial Committee (without deciding the question of *res judicata*, that the suit was not maintainable with reference to s 42 of the Specific Relief Act (I of 1877): the will had been affirmed by a Court of appropriate jurisdiction, and its decision could not be impugned by a Court exercising a different jurisdiction: for the purposes of the suit the will must stand, and there was no intestacy. The appellants had therefore shown no legal character or title which would justify them in asking for the declaration sought, and the suit must be dismissed as misconceived and incompetent. The right of a reversioner to sue where a widow in possession for her life estate was committing acts of waste to the prejudice of those who might succeed to the property on her death, was not analogous: such a position necessarily assumed the absence of an immediate and absolute testamentary disposition Suits of that kind formed a very special class and the question in them was one solely between the reversioner and the widow, the former being unable by such a suit to get as between himself and a third party an adjudication of title which he could not obtain without

DECLARATORY DECREE—*contd.*

it. *Kathama Natchair* v. *Dorasinga Tever, I. R. 2 I. A. 169,* referred to. *Semble:* The rule of *res judicata* while founded on ancient precedent is dictated by a wisdom which is for all time: see 6 Coke's Institutes 9A. Though the rule may be traced to an English source, it embodies a doctrine in no way opposed to the spirit of the law as expounded by the Hindu Commentators. Vijnanesvara and Nilakantha include the plea of a former judgment among those allowed by law, citing for this purpose a text of Kalyayana: see Mitakshara (Vyavahara) Book II, Ch. I (edited by J. R. Gharpure), p. 14; and Mayukha, Ch I., s. 1, p. 11, of Mandlik's edition. The application of the rule by the Courts in India should therefore be influenced by no technical considerations of form but by matter of substance within the limits allowed by law. SHEOPARSAN SINGH *v.* RAMANANDAN PRASAD SINGH (1916)
I. L. R. 43 Calc. 694

———— *Execution by Hindu widow, in possession of her husband's estate, of deed purporting to confer absolute interest in property to one reversioner to the exclusion of others—Right of excluded reversioners to declaration that the deed is not binding on them—Specific Relief Act (I of 1877), s. 42, ill. (e).* Where a Hindu widow (defendant 1) in possession of her husband's estate had executed a deed purporting to confer the absolute interest in the property on one of the reversioners (defendant 3) to the exclusion of others who claimed to be also reversionary heirs (plaintiffs): *Held,* that under s. 42, illustration (e) of the Specific Relief Act (I of 1877) the plaintiffs who as heirs ranked equally with defendant 3 were entitled to a declaration that the deed was not binding on them, notwithstanding that they may never get any title because events may preclude them from doing so, and though such a declaration involves a finding that the plaintiffs are reversionary heirs. *Janaki Ammal* v. *Narayanasami Aiyer, I. L. R. 39 Mad. 634; L. R. 43 I. A. 207* distinguished. SAUDAGAR SINGH *v.* PARDIP NARAYAN SINGH (1917)
I. L. R. 45 Calc. 510

———— *Power of Courts in Santal Parganas to grant.* A Court in Santal Parganas had power to decree a suit for a declaration coupled with a claim for consequential relief. LALA SHAHA *v.* KADO MAHTO . **6 Pat. L. J. 87**

DECLARATORY SUIT.

See ARREARS OF REVENUE.
I. L. R. 47 Calc. 331

See BENGAL TENANCY ACT.
1 Pat. L. J. 67
s. 106 . . **15 C. W. N. 110**

See CIVIL PROCEDURE CODE (1908), s. 9.
I. L. R. 37 All. 313

See COURT-FEE **I. L. R. 39 Calc. 704**
I. L. R. 40 Calc. 245

See DECLARATION AND INJUNCTION AND DECLARATORY DECREE.

See HEREDITARY OFFICES ACT (BOM. III OF 1874), ss. 25, 36.
I. L. R. 34 Bom. 101
s. 67 . . **I. L. R. 33 Bom. 420**

DECLARATORY SUIT—*contd.*

See INJUNCTION **I. L. R. 47 Calc. 733**

See JURISDICTION **I. L. R. 35 Bom. 264**
I. L. R. 34 All. 358

See MADRAS LAND ENCROACHMENT ACT (MAD. III OF 1905).
I. L. R. 38 Mad. 674

See PENSIONS ACT (XXIII OF 1871), ss. 4, 5, 6 . **I. L. R. 37 All. 338**

See SPECIFIC RELIEF ACT (I OF 1877), s. 42 . . . **14 C. W. N. 576**
I. L. R. 36 All. 312

See VALUATION OF SUITS.
5 Pat. L. J. 397

See WAKF . **I. L. R. 33 All. 660**

———— **By a worshipper of a Khankah—**

See LIMITATION ACT, 1903, ARTS. 120, 134, 144 . . **I. L. R. 1 Lah. 66**

———— **By a reversioner to a Hindu widow—**

See LIMITATION ACT, 1908, ARTS. 120, 125 . . . **I. L. R. 1 Lah. 69**

———— *In respect of property partly in possession of the Court and partly of tenants—Custom—Adoption—Mahesris of Delhi—Power of widow to adopt without husband's authority or collateral's consent—Hindu Law.* One *Mussammat* D., the widow of J. K., a *Mahesri* of Delhi, adopted her minor brother M. D. After her death the present plaintiff-respondent, cousin of J. K., brought the present suit for a declaration against the minor and his father that he is the owner of a certain house and for an injunction. It appeared that 3 rooms in the house were in the possession of the Court and the remaining portions were occupied by tenants who had not attorned to either party. *Held,* that under the circumstances the suit for a declaration without consequential relief was maintainable. *Chinnamal* v. *Varadaraju (I. L. R. 15 Mad. 307)* and Mussammat *Lachhmi Bai* v. Mussammat *Hondi Bai (100 P. R. 1913),* referred to. *Held,* also, that in the matter of adoption *Mahesris* follow custom and not strict *Mitakshara* Law and that defendants-appellants on whom the *onus* rested had proved that among them a widow can adopt to her deceased husband in cases, as in the present one, where her husband had separate property and was not a member of a joint family and that neither the authority of her husband nor the consent of collaterals was necessary to validate the adoption. *Mathura Das Karnani* v. *Sri Kissen Karnani (44 Indian Cases 5),* referred to. Cases No. 1524 of 1913 (unpublished), distinguished. KALU RAM *v.* PIARAI LAL . . . . . **I. L. R. 1 Lah. 92**

DECREE.

See AMENDMENT OF DECREE.

See CIVIL COURTS ACT (XIV OF 1869), s. 32 . . **I. L. R. 38 Bom. 662**

See CIVIL PROCEDURE CODE, 1882—

ss. 235, 320 . **I. L. R. 34 Bom. 142**

ss. 268, 278, 283.
I. L. R. 33 Bom. 631

DECREE—*contd.*

See TRANSFER OF PROPERTY ACT—
s. 85 . . **I. L. R. 34 Bom. 354**
ss. 88, 89 . **I. L. R. 40 Bom. 321**

——— **after adverse possession**—
See LIMITATION **I. L. R. 44 Bom. 934**

——— **against a deceased person**—
See CIVIL PROCEDURE CODE (1908), O. XXI, R. 7 **I. L. R. 40 All. 423**

——— **against a company, before liquidation**—
See COMPANIES ACT (VII OF 1913), s. 207 . **I. L. R. 38 All. 407**

——— **against a father**—
See HINDU LAW—JOINT FAMILY.
I. L. R. 43 Bom. 17

——— **against recorded tenant, effect of**—
See LANDLORD AND TENANT.
I. L. R. 37 Calc. 75

——— **against Talukdar**—
See GUJARAT TALUKDARS' ACT (BOM. ACT VI OF 1888), s. 29E.
I. L. R. 43 Bom. 44

——— **against widow for husband's debt**—
See HINDU LAW—WIDOW.
I. L. R. 39 Mad. 565

——— **against wife**—
See RESTITUTION OF CONJUGAL RIGHTS.
I. L. R. 44 Bom. 454

——— **alteration of**—
See PRIVY COUNCIL PRACTICE.
I. L. R. 37 Calc. 623, 649

——— **assignment of**—
See SPECIFIC PERFORMANCE.
I. L. R. 43 Calc. 990

——— **based on perjured evidence**—
See FRAUD . **I. L. R. 37 All. 535**

——— **by Instalments**—
See CIVIL PROCEDURE CODE, 1908, O. XXXIV, R. 14 **I. L. R. 44 Bom. 981**

——— **by mutual consent**—
See HUSBAND AND WIFE.
I. L. R. 38 Calc. 629

——— **conditional, on money being paid into Court**—
See EXECUTION OF DECREE.
I. L. R. 39 All. 193

——— **construction of**—
See CIVIL PROCEDURE CODE (1908), O. XXXIV, RR. 4, 5 AND 10.
I. L. R. 40 All. 109
See EXECUTION OF DECREE.
I. L. R. 37 All. 97

——— **execution—Claim to property**—
See ATTACHMENT.
I. L. R. 45 Bom. 1020

——— **ex-parte**—
See CIVIL PROCEDURE CODE, 1908, SS. 47 AND 144 **I. L. R. 44 Bom. 702**

DECREE—*contd.*

——— **ex-parte**—*contd.*
s. 148, O. IX, R. 3.
I. L. R. 36 All. 77
See EX-PARTE DECREE.
See PROVINCIAL SMALL CAUSES ACT, 1887, s. 17 . . **I. L. R. 43 All. 438**

——— **extension of time for payment limited by**—
See CIVIL PROCEDURE CODE, 1908, 148, 151, O. XXXIV, R. 8.
I. L. R. 42 All. 639
I. L. R. 43 All. 2

——— **for balance**—
See MORTGAGE **I. L. R. 47 Calc. 370**

——— **for costs**—
See CONTRIBUTION.
I. L. R. 32 All. 585

——— **for joint possession**—
See HINDU LAW—HUSBAND AND WIFE.
I. L. R. 38 Mad. 1036

——— **for less than amount claimed**—
See CIVIL PROCEDURE CODE (1908), O. XXXIII, RR. 10 AND 11.
I. L. R. 38 All. 469

——— **for money**—
See EXECUTION OF DECREE.
I. L. R. 39 Calc. 298
See EASEMENT . **I. L. R. 39 Calc. 59**
See LANDLORD AND TENANT.
I. L. R. 37 Calc. 75

——— **for order of abatement of suit**—
See CIVIL PROCEDURE CODE, 1908, O. XXII, RR. 3, 5, 9 **I. L. R. 1 Lah. 493**

——— **for redemption**—
See CIVIL PROCEDURE CODE (ACT V OF 1908), SS. 11, 47.
I. L. R. 42 Bom. 246

——— **for restitution of conjugal rights**—
See CIVIL PROCEDURE CODE, 1908, O. XXI, R. 33 **I. L. R. 44 Bom. 972**

——— **for sale**—
See ESTOPPEL . **I. L. R. 48 Calc. 591**
See MORTGAGE . **I. L. R. 37 All. 309**
47 Calc. 370, 662

——— **in preemption case**—
See PRE-EMPTION DECREE.
I. L. R. 2 Lah. 281

——— **form of**—
See CIVIL PROCEDURE CODE (1908)—
O. XIII, R. 7 . **I. L. R. 43 All. 318**
O. XXI, R. 35 **I. L. R. 34 All. 150**
See HINDU LAW—ALIENATION.
I. L. R. 40 Calc. 966
See HINDU LAW—JOINT FAMILY.
I. L. R. 37 Mad. 435
See MORTGAGE **I. L. R. 36 All. 36 & 123**
I. L. R. 40 Calc. 378
I. L. R. 38 Bom. 24

DECREE—*contd.*

——— in terms of award—

See CIVIL PROCEDURE CODE, 1882, s. 443. I. L. R. 44 Bom. 202

——— knowledge of—

See SUBSTITUTED SERVICE. I. L. R. 38 Calc. 394

——— mistake whether a ground for altering—

See RES JUDICATA . 1 Pat. L. J. 313

——— modifying decree of Lower Court—

See CIVIL PROCEDURE CODE, 1908, s. 110. I. L. R. 43 All. 220

——— modification of, after appeal—

See PRACTICE . I. L. R. 37 Calc. 548

——— mortgage suit—

See CIVIL PROCEDURE CODE (ACT V OF 1908), s. 47, O. XXII, R 10. I. L. R. 39 Mad. 488

——— mortgage of—

See MORTGAGE I. L. R. 33 Mad. 429

——— nature of—

See LIMITATION ACT (IX OF 1908), SS. 132 AND 75 . I. L. R. 39 Mad. 981

——— of Appellate Court—

See MORTGAGE . I. L. R. 39 Calc. 925

——— of Revenue Court—

See PUNJAB LAND REVENUE ACT, 1887, s. 117 . . I. L. R. 1 Lah. 223

——— of Small Cause Court—

See AMENDMENT OF DECREE. . I. L. R. 1 Lah. 342

——— on compromise—

See COMPROMISE DECREE. I. L. R. 1 Lah. 344

——— part assignment of—

See CIVIL PROCEDURE CODE, 1908, O. XXI, R. 16 . I. L. R. 35 All. 204

——— passed in ignorance of the death of one of the respondents—

See APPEAL, PARTIES TO AN. I. L. R. 39 Mad. 386

——— payable by instalments—

See LIMITATION ACT (IX OF 1908), SCH. I, ART. 182 (7) I. L. R. 39 All. 230

——— payment or adjustment of—

See CIVIL PROCEDURE CODE, 1908, O. XXI, R. 2 . I. L. R. 46 Bom. 91

——— power to alter—

See LIMITATION I. L. R. 44 Calc. 759

——— reversed in appeal—

See ASSIGNEE OF A MONEY-DECREE. I. L. R. 38 Mad. 36

——— revivor of—

See CIVIL PROCEDURE CODE, 1882, s. 244. 14 C. W. N. 357

See LIMITATION ACT (IX OF 1908), SCH. I, ART. 183 . I. L. R. 40 Mad. 1127

DECREE—*contd.*

——— satisfaction of—

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), s. 257A. I. L. R. 38 Bom. 219

——— security for performance of—

See CIVIL PROCEDURE CODE (1908), s. 145 . . I. L. R. 39 All. 225

——— setting aside of—

See JURISDICTION L. R. 46 I. A. 140

See MISTAKE . I. L. R. 43 Calc. 217

——— suit on—

See EXECUTOR DE SON TORT, LIABILITY AS . . I. L. R. 33 Mad. 423

——— transfer of—

See CIVIL PROCEDURE CODE (ACT V OF 1908), SS 47 AND 50. I. L. R. 38 Mad. 1076

s. 48, O. XXI, I. L. R. 35 Bom. 103

s. 144 . . I. L. R. 40 Mad. 299

See POLITICAL AGENT AT SIKKIM. I. L. R. 38 Calc. 859

——— upon compromise—

See CIVIL PROCEDURE CODE (ACT V OF 1908), s. 48 I. L. R. 39 Bom. 256

——— whether creates a mortgage—

See MORTGAGE . I. L. R. 2 Lah. 53

——— without evidence—

See EX-PARTE DECREE I. L. R. 43 Calc. 1001

1. ALTERATION, AMENDMENT AND SETTING ASIDE OF DECREE.

See LIMITATION . 2 Pat. L. J. 206

See PRACTICE . I. L. R. 37 Calc. 649

See PRIVY COUNCIL PRACTICE. I. L. R. 27 Calc. 623

———by Court which granted it—

See AMENDMENT OF DECREE. I. L. R. 1 Lah. 342

1. ——— By Subordinate Judge of his decree after it had been affirmed by the High Court on appeal—*Future interest struck out of decree not being in accordance with judgment—Amendment limited to one decree-holder of joint decree on appeal to High Court—Civil Procedure Code, 1882, ss. 206—209.* A joint and several mortgage decree passed by the court of a Subordinate Judge under s. 88 of the Transfer of Property Act (IV of 1882), which gave future interest on the amount decreed, was affirmed on appeal by the High Court. Subsequently, on the application of the judgment-debtor (the *respondent*, who had deposited in the court the whole amount due under the decree, including future interest) the Subordinate Judge, notwithstanding objections by the decree-holders, amended his decree by striking out the future interest on the ground that such interest was not [illegible]

DECREE—*contd.*

1. ALTERATION, AMENDMENT AND SETTING ASIDE OF DECREE—*contd.*

judgment on which the decree was based. The decree-holders (the appellant and another who was a transferee of the original decree-holders) made separate applications to the High Court for revision of the Subordinate Judge's order. On the application of the transferee decree-holder, a Bench of the High Court held that the Subordinate Judge had no jurisdiction to amend a decree which had been affirmed by the High Court, and set aside his order, but only so far as it affected the transferee decree-holder. On the appellant's application the same Bench held that under the circumstances it was not a case in which they ought to exercise their discretionary power of revision. *Held*, by the Judicial Committee, that if the order of amendment was without jurisdiction as altering a decree after it had been amended on appeal, the alteration was equally ineffectual in the appellant's case as in the case of the other decree-holder, and should not have been allowed to stand; and the appeal was therefore decreed. BRIJ NARAIN *v.* TEJBAL BIKRAM BAHADUR (1910) . . **I. L. R. 32 All. 295**

2. ———— Decree of competent Court, if may be challenged in a fresh suit—*Fraud practised on the Court, to be proved—Ex-parte mortgage decree set aside against one defendant—Re-hearing, fresh decree against all—Application for order absolute in respect of later decree, opposed by defendants against whom previous decree not set aside—Objection overruled and decree made absolute—Suit to set aside decree on same grounds, if competent—Merger of first decree in second, whether there is—First decree, whether impliedly set aside.* Upon an application to set aside an *ex-parte* mortgage decree passed against *P*, *R* and *B*, it was found that there was no proper service of summons upon *B*, and upon a re-hearing, a new and comprehensive decree against all three defendants was passed. The decree-holder's application for an order absolute in respect of this decree was opposed by *R* on the ground that he was no party at the re-hearing and that the previous decree against him, never having been set aside, a second decree in respect of the same matter could not be legally made against him. The objections were overruled and a decree absolute was made against all the defendants. *R* then brought the present suit for a declaration upon the same grounds that the second decree was ineffectual and void as against him. *Held*, that the suit was equivalent to a suit for the rescission and destruction of a former decree of a competent Court—a relief which could not be obtained except on the ground of fraud practised upon the Court which made the decree. A challenge of the method of the exercise of the jurisdiction of a Court—a challenge which has reference to the merits of the case—can never in law justify a denial of the existence of such jurisdiction. RAJWANT PRASAD PANDE *v.* MAHANT RAM RATAN GIR (1915) . . . . **20 C. W. N. 35**

3. ———— Conditional decree—*Ordering a plaintiff to make a payment within a specified time—Court not competent to extend time limited—Civil Procedure Code (1908), s. 114—Review of judgment—Jurisdiction.* Except in the case of mortgage decrees, where a Court by its decree orders a party to make a payment, or take certain action within a specified time and provides that certain detrimental consequences shall follow in the event of non-compliance with its order, the Court itself has no jurisdiction to extend the time limited by the decree, save on an application for review under s. 114 read with O. XLVII, r. 1, of the Code of Civil Procedure. *Naik Ram* v. *Bhagwan Chand, 15 A. L. J. 511*, overruled. SAJJADI BEGAM *v.* DILAWAR HUSAIN (1918) **I. L. R. 40 All. 579**

4. ———— Clerical or arithmetical mistake—*Whether successive applications for amendment of decree maintainable—Civil Procedure Code (XIV of 1882), ss. 13, 206—Inherent power of Court.* A Court is competent to entertain successive applications for amendment of clerical or arithmetical mistake in a decree, or of error arising therein from any accidental slip or omission. Such applications for amendment of a decree are not barred by the rule of *res judicata*. But if an application for amendment has been heard and disposed of on the merits, a subsequent application may not be maintained in the same matter, and it may be barred upon general principles of law. The power to amend a decree so as to correct a clerical or arithmetical mistake therein, or an error arising from an accidental slip or omission, is inherent in every Court and may be exercised at any time the error is discovered, although the Court cannot exercise such power unless the error is of the description mentioned in s. 206 of the Code of 1882. LANGAT SINGH *v.* JANKI KOER (1911) **I. L. R. 39 Calc. 265**

5. ———— Rectification of—*Suit if lies to rectify a decree in a previous suit.* Where a decree was passed by a Court which had jurisdiction and authority to make it and the judgment-debtors failed to adopt the remedies for correcting the decree which were open to them by law, by reason of their omission to ascertain the terms of the decree in time, a suit to rectify the decree is not maintainable. *Chand Mea* v. *Asima Banu, 10 C. W. N. 1024, Jogeswar Atha* v. *Ganga Bishnu Ghattack, 8 C. W. N. 473, Sri Gopal* v. *Pirthi Singh, 6 C. W. N. 889*, referred to. BHANDI SINGH *v.* DOWLAT RAY (1912) **17 C. W. N. 82**

6. ———— Decree incapable of execution—*Amendment of decree—Limitation—Time if runs from date of amendment.* A decree which does not specify the reliefs granted, is incapable of execution and cannot be considered as time-barred and legally dead even though three years have elapsed from the date of the decree. An application for execution of a decree for rent which was originally incapable of execution, is not barred by limitation, although presented more than three years after the date of decree but within three years from the date of amendment of the decree making it capable of execution. MOHAMAYA PROSAD SINGH *v.* ABDUL HAMID (1913) **18 C. W. N. 266**

7. ———— Not in accordance with judgment—A decree must be self-contained and must be executed as it stands. If it is not in accordance with the judgment, application should be made for its amendment. BHIKARI SUKUL *v.* GADADHAR RAMANUJ DAS (1912) **17 C. W. N. 87**

DECREE—*contd.*

1. ALTERATION, AMENDMENT AND SETTING ASIDE OF DECREE—*contd.*

8. ———— **Mistake**—To justify rectification there must be very strong grounds, such as, that the decree was obtained by some grave mistake vitiating the whole character of the decree so that its execution would amount to an abuse. *Jogeswar Atta* v. *Ganga Bishnu Ghattack, 8 C. W. N. 473* and *Chand Mea* v. *Srimati Asima Banu, 10 C. W. N. 1024*, referred to, SREENATH DASS v. GHANESHYAM NAIK (1917) . **3 Pat. L. J. 465**

9. ———— **Mortgage decree**—*Application for decree absolute after expiry of limitation and without notice to mortgagor—Suit to set aside.* A suit will not lie to set aside a decree absolute merely on the ground that the application was barred by limitation and no notice given to the mortgagor. BHAIJA PARWA v. JANNA KHAN **3 Pat. L. J. 478**

10. ———— **Compromise**—If a decree expiry of a compromise is inaccurate the only cause is a separate suit to set it aside for grave mistake, etc. RAM LAYAN SAHU v RAM BIRICH KOER **5 Pat. L. J. 205**

11. ———— **Fraud**— *Decree-power of court set aside for fraud*—The mere fact that a decree is obtained by fraud is not *per se* sufficient for the Court to set it aside—If obtained in respect of a non-existant subject matter a court can set aside even its own decree. *Nanda Kumar Halder* v. *Ramjiban Halder I. L. R. 4 Calc. 990*, approved CHATTU SINGH v. RAI RADHA KISHEN **4 Pat. L. J. 187**

2. CONSTRUCTION OF DECREE.

1. ———— **Decree in suit**— *Suit by mortgagor for account—Application for redemption decree in appeal—Redemption decree passed by Court in appeal—Decree in the suit—Interpretation—Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 15D, cl. (3). Held*, dismissing the second appeal, that when the decree of the lower Court is reversed or varied in appeal, the decree of the Appellate Court becomes the decree in the suit which is to be executed in execution proceedings. NAVLAJI SARDARMAL v. RAMA DHONDI (1909) . . . . **I. L. R. 34 Bom. 158**

2. ———— **Decree for rent**— *Bengal Tenancy Act (VIII of 1885), ss. 65, 159, 160, 167—Suit for entire rent by person for the time being found to be sole landlord, subsequently held to be a co-sharer —Decree, if rent-decree or money-decree—Purchaser at rent sale, if may annul subordinate interest without annulling superior interest immediately under him—Remand—Transfer of analogous case for trial by one Court.* Where certain persons who were alleged to be only co-sharers, being found by the Court of first instance to be the 16 annas proprietors of certain zamindari properties, took possession of the whole of the properties in execution of their decree pending an appeal to the High Court and were maintained in possession even after the High Court had set aside the decree and until it was decided by the Privy Council agreeing with the High Court that they had only a two-thirds share in the properties: *Held*, that a decree for the entire rent obtained by them during this period in a suit instituted after they had got themselves registered as 16 annas

DECREE—*contd.*

2. CONSTRUCTION OF DECREE—*contd.*

proprietors under the Land Registration Act was a decree for rent within the meaning of s. 65 of the Bengal Tenancy Act. That they were then the only persons competent to maintain a rent suit, and for the purposes of that suit they completely represented the estate of the landlords. The purchaser of a tenure at a rent sale cannot annul a subordinate interest leaving untouched a superior interest immediately subordinate to the interest purchase by him. MAFIJUDDIN SARDAR v. ASHUTOSH CHAKERBUTTY (1910) **14 C. W. N. 352**

3. ———— **Order dismissing an appeal for default**—*Appeal from such an order—Civil Procedure Code (Act V of 1908), s. 2, sub-s. (2); O. XLI, r. 17.* An order dismissing, for default, an appeal under O. XLI, r. 17 of the Code of Civil Procedure, is not a "decree" within the meaning of s 2 of the Code, and as such is not appealable. *Radha Nath Singh* v. *Chandi Charan Singh, I. L. R. 30 Calc. 660, Ramchandra Pandurang Naik* v. *Madaw Purushottam Naik, I. L. R. 16 Bom. 23. Pohlar Singh* v. *Gopal Singh, I. L. R. 14 All. 361*, referred to. RUKMINIMAYI DASI v. PARAN CHANDRA BHERA (1910) **I. L. R. 39 Calc. 341**

[illegible]

orders in [illegible] *ocedure Code (Act* [illegible] which does not [illegible] t lands to be given to plaintiff who sued for possession of all the lands in suit but merely declared the right of the defendant to remain in possession of a portion of the lands of the whole of which she was in possession, is one that is not capable of execution by the plaintiff, by way of possession of the rest being given to him, especially when there was not even a declaration of plaintiff's right to the rest of the lands. A question whether a decree is executable or not is certainly one that comes within ss. 2 and 47 of the Civil Procedure Code (Act V of 1908), the former of which enacts that the determination of any questions within s. 47 is a decree; an appeal lies from such determination under s. 2. The determination of a mere issue by the executing Court, made prior to the passing of the final order, would not be regarded as an adjudication between the parties against which an appeal would lie. *Venkatagiri Iyer* v. *Sadagopachariar, 14 Mad. L. J. 359*, referred to. Orders in execution which declare (i) that execution shall issue and that a Commissioner be appointed for carrying out execution, (ii) that interest is payable, and (iii) that a party is entitled to mesne profits are appealable, though the final orders determining the extent of amount will have to be passed only thereafter. *Narayana Pattar* v. *Gopalakrishna Pattar, I. L. R. 28 Mad. 355, Ram Kirpal* v. *Rup Kuari, I. L. R. 6 All. 269, Bhup Indar Bahadur Singh* v. *Bijai Bahadur Singh, I. L. R. 23 All. 152, Maharaja of Burduan* v. *Tara Sundari Debi, I. L. R. 9 Calc. 619*, and *Deoki Nandan Singh* v. *Bansi Singh, 14 C. L. J 35*, referred to. *Held*, that an appeal against a preliminary order in execution can be filed even after the date of the final order, which merely carries out and is consequential on the preliminary order, though no appeal has been filed against

DECREE—*contd.*

2. CONSTRUCTION OF DECREE—*contd.*

the final order. *Uman Kunwari* v. *Jarbhandan, I. L. R. 30 All. 479,* followed. *Mackenzie* v. *Narsingh Sahai, I. L. R. 36 Calc. 762, Kuriya Mal* v. *Bishambhar Das, I. L. R. 32 All. 225, Madhu Sudan* v. *Kamini Kanta Sen, I. L. R. 32 Calc. 1023, Baikuntha Nath Dey* v. *Nawab Salimulla Bahadur, 12 C. W. N. 590,* and *Narain Das* v. *Balgobind, 8 All. L. J. 604,* not followed. Similarly an appeal against an order of remand can be filed even after the date of the final decree consequential on remand. *Subba Sastri* v. *Balachandra Sastri, I. L. R. 18 Mad. 421,* and *Mullikarjuna* v. *Pathaneni, I. L. R. 19 Mad. 479,* followed. Where a right and jurisdiction are conferred expressly by statute they cannot be taken away or cut down except by express words or by necessary implication. When the law gives a person two remedies, he is entitled to avail himself of either of them unless they are inconsistent. There is no question of election in such cases, *Gulab Koer* v. *Badshah Bahadur, 13 C. W. N. 1197,* followed. With the reversal of the earlier order the later order which depends for its validity upon the earlier one, *ipso facto* ceases to have any force. LAKSHMI *v.* MARU DEVI (1914) . . **I. L. R. 37 Mad. 29**

5. ———— **Garnishee order**—*Revenue payable on estate ordered to be paid into Court—Revenue in future can be ordered to be paid—Civil Procedure Code (Act V of 1908), O. XXI, r. 52—Darkhast kept alive as long as the decree remains unsatisfied—Practice and procedure.* Under a consent decree the sum found due was made payable in instalments; and the plaintiff was to be put in possession of the defendants' lands and also to receive the defendants' share of the revenues of three Inam villages. In the execution proceedings under the decree in 1894, a consent order was taken whereby defendant No. 1 was constituted the plaintiff's tenant of the lands and the revenues of the villages were to be paid to the plaintiff through the Court. The Court then passed an order to the effect that the Revenues of the villages should be paid by the village officers into Court. The payments so made were made over to the plaintiff till 1892, when the Court struck off the application for execution on the ground that the Court was *functus officio* for all purposes of execution as soon as it had put the plaintiff in possession of the lands in 1895 and issued one garnishee order of the same year. The plaintiff having appealed: *Held,* that the order passed upon the darkhast of 1894 continued alive and effective up to 1912, and would remain in force till the plaintiff's debt was satisfied. PER CURIAM: Property attached yielding a revenue or producing interest or dividends is within the meaning and contemplation of all garnishee orders issued under O. XXI, r. 52 of the Civil Procedure Code (Act V of 1908); and that such interest or dividend becoming due, and therefore in the future, is expressly provided for in that rule, and it would follow upon the same principle that if an estate yielding a revenue were properly attachable under the same rule, then revenue *in futuro* would be for all the purposes of such attachment on the same footing as interest or dividend. UMABAI *v.* AMRITRAO ANANT (1914) **I. L. R. 39 Bom. 80**

DECREE—*contd.*

2. CONSTRUCTION OF DECREE—*contd.*

6. ———— **Baroda Court Decree**— *Defendant's objection to jurisdiction and other pleas—Defendant's contentions overruled—Decree against defendant—Transfer of decree to a British Court for execution—Refusal to execute the decree on the ground of nullity—Voluntary submission to the jurisdiction of the Baroda Court—Execution by British Court.* In a suit brought in a Baroda Court, the defendant objected to the jurisdiction of the Court to try the suit and also raised other pleas. The Court overruled the defendant's contentions and passed a decree against him. The decree having been subsequently transferred to a British Court for execution that Court refused to execute it on the ground of its being a nullity as the defendant had not voluntarily submitted to the jurisdiction of the Baroda Court he having protested against the right of that Court to entertain the suit at the earliest opportunity. *Held,* that, having regard to circumstances, the case was one of voluntary submission to the jurisdiction of the Baroda Court as the defendant had raised other pleas along with his objection to the jurisdiction of the Court to entertain the suit and that the decree passed by that Court could be executed by a British Court. *Parry & Co.* v. *Appasami Pillai, I. L. R. 2 Mad. 407,* distinguished. HARCHAND PANAJI *v.* GULABCHAND KANJI (1914) . . **I. L. R. 39 Bom. 34**

7. ———— **Difference between consent decree and decree made on consent**—*Fraud. Per* JENKINS, *C. J.*—It is well settled that a contract of parties is none the less a contract because there is superadded to it the command of a Judge. It still is a contract of the parties and as the contract is capable of being rectified for an appropriate mistake, so, as a necessary consequence, is the decree which is merely a more formal expression given to that contract. There is no analogy between such a decree and a decree obtained upon contest and giving accurate expression to the Court's intention, and a fresh suit does not lie to set it aside on the ground that the Judge was mistaken. *Per* HOLMWOOD, *J.* (concurring). It does not matter whether the decree accurately expresses the intention of the judgment as that is a matter for amendment and not a separate suit. *Per* JENKINS, *C. J.* A decree can be set aside on the ground of fraud if of the required character. KUSODHAJ BHAKTA *v.* BROJO MOHAN BHAKTA (1915) . . . . **19 C. W. N. 1228**

8. ———— **Divisibility**—*Decision in the absence of defendant—Summons against one of two defendants residing outside British India returned unserved—Compromise of suit by the other defendant both for himself and the absent defendant acting on power of attorney empowering management of business and institution, conduct and defence of suit—Compromise decree if binding on absent defendant—Decree set aside even as against defendant present on the ground of decree being indivisible.* The plaintiff and the four defendants were partners. The first three defendants brought a suit against the plaintiff and the fourth defendant for dissolution of partnership and other incidental reliefs. The plaintiff was at the time admittedly residing outside British India in Rajputana and the summons which was issued against him was returned by the Political Agent at Rajputana with the remark that it was impossible

DECREE—*contd.*

2. CONSTRUCTION OF DECREE—*contd.*

to serve it upon the defendant in time as the date fixed for the hearing of the case was too close at hand. Before the summons so returned had reached the Court the suit was compromised by the fourth defendant both for himself and the plaintiff. The fourth defendant professed to represent the plaintiff on the basis of a power of attorney in his favour which authorised him to manage the partnership business, to continue, institute, prosecute, defend or oppose all suits that were or might be brought by or against the executant in respect of his business and property. The plaintiff sued to have the compromise decree set aside: *Held,* that the Code contemplates service of summons upon the party sought to be made liable and the position in the present case being in substance the same as if no summons had ever been issued for service on the defendant, the decree made against the plaintiff could not bind him. A judgment made under such circumstances as happened in the present case when the summons issued against the defendant was returned unserved may be set aside on the ground that the defendant must in essence be a party to the suit before the plaintiff can have judgment against him. That the decree was also liable to be set aside on the ground that the power of attorney did not authorise the fourth defendant to bind the plaintiff by the compromise That the decree was liable to be set aside not only in so far as the plaintiff was concerned but also with regard to the fourth defendant because the decree on the face of it was indivisible and could not be set aside in part. That the effect of the order of the High Court was to discharge the entire decree in the suit and to revive it for retrial CHATTERJEE BRAHMIN *v* DURGADUTT AGARWALLA (1915) . . **20 C. W. N. 943**

9. ——— For mesne profits is appealable and in suit praying for same *ad valorem* Court fee can be claimed, *Bhup Indar Bahadur Singh* v. *Bijai Bahadur Singh, I L. R. 33 All. 152,* followed. NAND KUMAR SINGH *v* BILAS RAM MARWARI (1917) . . . **3 Pat. L. J. 67**

10. ——— Merger of appeal—*Dismissal for default—Civil Procedure Code (Act V of 1908), s. 2 (2); O. XXI, r. 22—Omission to give notice under O. XXI, r. 22, effect of—Bengal Tenancy Act (VIII of 1885), s. 155 (3)—Extension of time under s. 155 (3).* The original decree is merged in the appellate decree whether the latter confirms,
decree, and it i
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Saiba, I. L. 1
Lakshman, 24 C. L. J. 517, referred to. But this doctrine cannot be applied where the appeal is dismissed for default. In such a case the appeal fails for non-prosecution, and it cannot be said that the Court of Appeal adopts the decree of the Primary Court. The judgment of the Lower Court therefore, is the judgment to be enforced. *Bipro Das* v. *Chundra Seekur, 7 W. R. 521,* referred to. S. 2 (2) of the Code of Civil Procedure, 1908, expressly provides that any order of dismissal for default is not a decree. The notice prescribed by s. 248 of the Code of Civil Procedure now replaced by O. XXI, r. 12, is necessary in order that the Court may obtain jurisdiction to proceed against the property of the judgment-debtor by way of execution. The omission to give notice, as required by the rule, is not a mere irregularity which makes the proceedings voidable but is a defect which goes to the very root of the proceedings and renders it void for want of jurisdiction *Gopal Chunder* v. *Gunamani Dasi, I. L. R. 20 Calc. 370, Sahdeo Pandey* v. *Ghasiram, I. L R. 21 Calc. 19, Parashram* v. *Balmukund, I. L. R 32 Bom 572,* referred to. S. 155 of the Bengal Tenancy Act enables the Court to give the tenant relief on the footing that there shall be no forfeiture at all when relief is granted; the forfeiture is stopped *in limnie,* so that there is no question of any destruction of an interest which has to be called into existence again. It is competent to the Court to entertain an application for extension of the period fixed by the decree for the performance thereof under s 155 (3) of the Bengal Tenancy Act Whether an order for extension of time should be made or not depends upon the circumstances of the litigation, *i.e.*, upon the circumstances disclosed at the original trial and the events subsequent. *Sinnaman* v. *Sham Charan, 16 C. W. N. 1090, 16 C. L. J. 520,* referred to. SHYAM MANDAL *v.* SATINATH BANERJEE (1916) . **I. L. R. 44 Calc. 954**

11. Validity questioned in execution proceedings—*Remedies of the aggrieved party—Practice.* The Court, executing the decree, must take the decree as it stands and has no power to go behind the decree or entertain an objection to the legality or correctness of the decree. The validity of a decree cannot be questioned in execution proceedings on the ground that as the lunatic plaintiff was not properly represented by a competent next friend in the suit, no decree for costs could have been made against him. A proceeding to enforce a judgment is collateral to the judgment, and, therefore, no enquiry into its regularity, or validity can be permitted in such a proceeding. On this principle it can properly be held that a judgment against a person who was *non compos mentis* at the time of the trial and yet was not represented by a legal guardian, is not to be impeached in execution, but should be reversed or annulled in some direct proceeding taken for that purpose. Such a judgment can be attacked, for instance, by way of an application for review to the Court which made it, by way of an appeal or application for revision to a superior tribunal or by way of a regular suit in a Court of competent jurisdiction, but the Court which made the decree cannot, when called upon to execute it, be invited to hold that the decree was erroneously or improperly made. Authorities reviewed KALIPADA SARKAR *v.* HARI MOHAN DALAL (1916) **I. L. R. 44 Calc. 627**

3. EXECUTION.

See CIVIL PROCEDURE CODE, 1908—

s. 47 **I. L. R. 44 Bom. 97 and 977**

ss. 47 AND 66, O. II, R. 2, O. 21, R. 69 **I. L. R. 44 Bom. 352**

s. 47, O. XXI, R. 92. **I. L. R. 44 Bom. 551**

s. 145 . . **I. L. R. 44 Bom. 34**

O. XXI, RR. 72 AND 73. **I. L. R. 44 Bom. 346**

DECREE—*contd.*

3. EXECUTION—*contd.*

——— **Order for stay of execution not appealable—**

See Civil Procedure Code (Act V of 1908), s. 47.

I. L. R. 45 Bom. 241

1. ——— **Decree for rent**— *Suit for redemption—Taking of accounts under the Dekkhan Agriculturists' Relief Act (XVII of 1879)—Result of account showing that mortgagee overpaid himself from rents and profits—Mortgagee's right to execute decree for rent.* In virtue of a decree for four years' rent, passed at a time when the provisions of the Dekkhan Agriculturists' Relief Act did not apply the plaintiff (mortgagee) became entitled to recover a certain sum from the defendant (mortgagor). After the introduction of the Dekkhan Agriculturists' Relief Act, the latter sued the former for redemption of the mortgage of the land in respect of which the rent-note sued on had been passed; on taking accounts in the way directed by the Act, it was found that the plaintiff as mortgagee had overpaid himself from the rents and profits of the land. The plaintiff thereafter applied to execute his decree for rent. Both the lower Courts dismissed the application on the ground that the plaintiff had already recovered more than was due to him as mortgagee from the rents and profits of the land. On appeal:—*Held,* that the rent decree must be executed as it stood, having regard to the fact that the provisions of the Dekkhan Agriculturists' Relief Act did not apply when it was passed, and that the accounts which were taken for the purposes of the subsequent decree were taken for a special purpose—that is, for enabling the defendant to redeem on favourable terms, and did not entitle him to recover anything from the plaintiff by way of set-off. Mugappa *v.* Mahamadsaheb (1909)

I. L. R. 34 Bom. 260

2. ——— **Legal representative** —*Who ought to be made representative—Person with the best primâ facie title sufficiently represents estate.* A decree-holder who has to apply for execution against the legal representative of the deceased judgment-debtor, may select, from among several rival claimants, as legal representative, the one whom he believes honestly to have best *primâ facie* title and the representation, in the absence of fraud or collusion, will be sufficient, even though it is subsequently found out some other person is the true legal representative. *Khiarajmal* v. *Daim, I. L. R. 32 Calc. 296* explained. Ramaswami Chettiar *v.* Oppila mani Chetti (1909) . . . . **I. L. R. 33 Mad. 6**

2(a). ——— **Until a decree nisi** is made absolute (which must be by proper application in Court) there is no decree capable of execution. Sir Jehanjir Cowasji *v.* The Hope Mills Ltd.

I. L. R. 33 Bom. 273

3. ——— **Preliminary, in suit for accounts,** *appeal against—Final decree made pending appeal—Preliminary decree set side on appeal—Application to execute final decree—Executing Court, if can treat the final decree as superseded, though not formally set aside.* On 21st March 1908, a preliminary decree was passed directing the defendant to render accounts to the plaintiff. On 21st May, the defendant preferred an appeal and did not thereafter appear in the proceedings for taking accounts which went on in the first Court and did not take any part in those proceedings which ended in a decree in favour of the plaintiff for a definite sum on the 28th May 1908. On 11th August 1908, the Appellate Court set aside the preliminary decree holding that the defendant was not bound to render any account and that decree was affirmed by the High Court in second appeal on 30th August 1910. On 22nd February 1911, the plaintiff having applied for execution of the final decree of 28th May 1908: *Held,* that the passing of the final decree did not take away the jurisdiction of the Appellate Court to hear the appeal against the preliminary decree. *Mackenzie* v. *Narsinga Sahai, 10 C. L. J. 113, Baikuntha Nath* v. *Salimulla, 6 C. L. J. 547,* and *Madhusudan* v. *Kumini Kanta, I. L. R. 32 Calc. 1123,* distinguished. That the final decree, which was dependent on and subordinate to the preliminary decree, was superseded by the decision of the Appellate Court setting aside the preliminary decree, and it was not necessary for the defendant to have the final decree formally set aside. That it was competent to the executing Court to refuse to execute the final decree on the ground that it had been superseded and ceased to be operative. Ram Nath Singh, *v.* Basanta Narain Singh (1913) . . **17 C. W. N. 868**

4. ——— **Mahomedan family**—*Decree for debts of a deceased Mahomedan against the heir in possession—Other heir not a party to the suit, whether bound by the decree —Representation.* A Mahomedan died leaving as his heirs a son *M,* two widows *S* and *B* and three daughters. He bequeathed all his property to *M.* On *M*'s death the property was inherited by his heirs, a daughter *A* and his widow *R,* who remained in possession of the property. A money decree was obtained against the estate of *M* in a suit by a creditor in which the defendants were *R, S* and an illegitimate son of *M. A* was not made a party to the suit. In execution of the decree, *M*'s right, title and interest in house No. 371 was sold, and purchased by defendant No. 4. Subsequently, *A* having died, her interest in the property was conveyed by her heir to the plaintiff who sued to recover by partition *A*'s share in house No. 371. *Held,* that the plaintiff was entitled to succeed as *A*'s share in the house was not bound by the creditors' decree as she was not made a defendant in the suit and her interest could not be represented by *R. Davalava* v. *Bhimaji Dhondo, I. L. R. 20 Bom. 338,* discussed. Bhagirthibai *v.* Roshanbi (1918)

I. L. R. 43 Bom. 412

5. ——— **Instalment decree**— *Decree directing interest to be paid annually and principal after twenty-five years and in default of payment of interest, interest and principal to be recovered at once—Defaults made in payment of interest—Proceedings taken from time to time for recovery of interest—Defaults mutually condoned—Subsequent application for execution for arrears of interest and principal amount —Execution not barred.* A decree was passed in favour of the plaintiff on the 12th February 1894. It provided for the payment of a certain sum by way of interest every year, and for the payment of the principal

DECREE—*contd.*

3. EXECUTION—*contd.*

on the expiration of twenty-five years; but if the interest was not paid in any year then the principal and interest in one sum was to be recovered at once. The judgment-debtor made default in payment of annual instalments of interest. Execution proceedings were, therefore, taken from time to time for a series of years till 1914 in order to get payment of the instalments of interest due under the decree. In 1916, the judgment-creditor issued a Darkhast praying for execution for the whole amount, principal and interest. The judgment-debtors contended that the execution was entirely barred, because, the judgment-creditor had not taken advantage of the default clause. The trial Court dismissed the Darkhast on the ground that the principal had not become due, that only three years' interest

ment-creditor after 1914 when continued default in payment of interest was made to take advantage of the decree and apply in execution further instalment which was in arrear and for the principal amount. *Raichand Motichand* v *Dhondo Laxaman, 1918, 42 Bom. 728,* referred to AMBIT KHANDERAO *v.* GOVIND RAMCHANDRA, 1920

I. L. R. 44 Bom. 840

6. ———— **Mistake**—*In partition effected by Collector—Partition not in accordance with the direction of the decree—Wrongful distribution of shares—Collector's power to re-open partition—Court's duty to rectify mistake of its agent.* One Atmaram Bhagwant, a member of a Mirasi family, brought a suit for partition of his 1-36th share in three villages. In November 1888 a decree was passed directing that the half share of the Desai family in each of the three villages should first be separated and the remaining share divided between the members of the Mirasi family in accordance with the decree. Atmaram applied for execution of the decree in Darkhast No. 127 of 1893, but before partition was made on this application, defendant No. 8 filed Darkhast No. 404 of 1894 for his share. These Darkhasts were disposed of in 1898 when defendant No. 8's share was separated and given into his possession. The appellants (defendants Nos. 10—12) then applied for separate possession of their share in 1900 but when the surveyor prepared a list of lands remaining over after the first partition as the share of the appellants, the latter found that the Khasgi land in one of the villages remaining for their share was less than what they were entitled to and that the plots below and adjoining their houses had been allotted to the share of defendant No. 8. They then applied to the Collector to re-open partition. The Collector declined to do this and referred the matter to the Court on the ground that the appellants refused to take possession of their shares. The appellants, therefore, applied to the Court for fresh partition and determination of their legitimate share. The lower Courts dismissed their application as being barred by *res judicata.* On appeal to the High Court: *Held,* granting the application, that the Court would not allow a mistake of one of its agents in carrying out its directions to work permanent injustice.

DECREE—*contd.*

3. EXECUTION—*contd.*

RAMCHANDRA DINKAR *v.* KRISHNAJI SAKHARAM. (1915) . . . **I. L. R. 40 Bom. 118**

7. ———— **Baroda Court**—*Application for execution presented to Baroda Court though within time according to Baroda law, still out of time according to British Indian law—Transfer of decree to British Indian Court—Execution barred by limitation.* A decree was passed by the Baroda Court in 1909. The first application to execute the decree was made in 1913, it being within the time prescribed by the law in Baroda. The decree was transferred to the Ahmedabad Court (British) for execution in 1915, where the judgment-debtor contended that no application to execute the decree having been made within three years of its date, the execution of the decree was barred. *Held, that the decree was incapable of execution* in the Ahmedabad Court having been barred according to the British Law of Limitation which governed the case NABIBHAI VAZIRBHAI *v.* DAYABHAI AMULAKH (1916)

I. L. R. 40 Bom. 504

8. ———— **Instalment decree**— *Entire decretal debt to become payable on failure to pay any one instalment—Application to execute the decree three years after default.* An instalment decree was made on June 28, 1909. It provided that the debt be paid in eight annual instalments and that on failure to pay any one of the instalments before the next had become due, the creditor could call in the whole amount of debt with interest at the agreed rate It was found that no instalment was ever paid In September 1915 the creditor presented the Darkhast but the lower Courts held it time-barred On appeal to the High Court it was contended that it was optional with

arrears then due. *Held,* that on the terms of the decree a complete legally enforceable right had accrued to the judgment-creditor on failure to pay *the first annual instalment in June 1910,* and the period of limitation allowed to him within which to enforce it was three years and no longer. The darkhast was, therefore, barred by limitation. RAICHAND MOTICHAND v. DHONDO LAXUMAN (1918) . . . **I. L. R. 42 Bom. 728**

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on 18th February 1899. The first Darkhast was presented on 20th March 1907; second on 31st March 1910 and a third on 12th September 1910, when the defendant appeared and contended that the Darkhast of 31st March 1910 was barred. The Court decided that the Darkhast of 12th September 1910 was in time and directed that the money due should be paid by instalments. On 26th March 1913, Rs. 220 were paid to plaintiff. The last Darkhast was filed on 19th November 1915 to recover the balance due. The lower appellate Court dismissed the Darkhast as time-barred on the ground that the decree was dead on 31st March 1910 and even though the further Darkhast was admitted thereafter that would not have the effect of reviving the On a to

DECREE—*contd.*

3. EXECUTION—*contd.*

the High Court, *Held*, that the Darkhast was within time as the order made on the Darkhast of 12th September 1910, not having been reversed on appeal, was valid. *Mungal Pershad Dichit* v. *Girja Kant Lahiri Chowdhry (1881) L. R. 8 I. A. 123*, relied on. DESAIPPA *v.* DUNDAPPA

I. L. R. 44 Bom. 227

10. ———— **Surety-bond** *for restitution—Suit.* Where a bond is passed as security for restitution in the event of the decree being reversed in appeal, a suit based upon such bond can be maintained. MOTILAL VIRCHAND *v.* THAKORE CHANDRASANGJI (1911)

I. L. R. 36 Bom. 42

4. FORM.

———— *Irregularity — Decree not drawn up—Contents of decree—Costs—Practice.* It is the duty of a Court to draw up a decree after a case has been decided, and the decree should show the costs incurred by the parties. SAGAR CHANDRA MANDAL *v.* DIGAMBAR MANDAL (1910)

I. L. R. 38 Calc. 125

5. TRANSFER AND ASSIGNMENT.

See SPECIFIC PERFORMANCE.

I. L. R. 43 Calc. 890

1. ———— **Transfer takes effect from date of transfer** *and not from date of its recognition by Court.* Where a decree is transferred by an instrument in writing, such transfer takes effect from the date of such instrument and not from the date of its recognition by the Court. *Puthiandi Mammed* v. *Avalil Moidin, I. L. R. 20 Mad. 157*, considered. The transfer of a decree may, in the absence of a contract to the contrary, be regarded as conditional upon the Court granting the transferee permission to execute. The transferee, before repudiating the transfer, is bound to do all that is reasonably necessary to obtain such permission. SADAGOPA CHARIAR *v.* RAGHUNATHA CHARIAR (1909)

I. L. R. 33 Mad. 62

2. ———— **Assignment to defeat creditors** *—Transfer made for valuable consideration, but not bond fide—Transfer of Property Act (IV of 1882), s. 53—Statute 13 Eliz., c. 5—Validity of transfer of moveable property—Practice of Privy Council—Point not before Courts below.* In this case the Judicial Committee upheld the decision of the High Court as to the invalidity of certain assignments which though for good consideration were made to defeat creditors; and *held* that the question whether any of the parties could establish right based not on the assignments but on other grounds such as the actual payment of debts, was a point not before the Courts below, and therefore their Lordships would not decide it. CHIDAMBARAM CHETTIAR *v.* SRINIVASA SASTRIAL (1914) . . . **I. L. R. 37 Mad. 227**

3. ———— **It may be questioned as benami in execution proceeding**—*Decree assigned to judgment-debtor's pleaders —Effect—Pleader trustee bound to reconvey on terms—Proper procedure, institution of suit.* The assignment of a decree to the pleader of the judgment-debtor does not extinguish the judgment-debt and release the judgment-debtor from liability. The pleader

DECREE—*contd.*

5. TRANSFER AND ASSIGNMENT—*contd.*

holds the decree on trust for his client and is bound, if called upon by the latter, to assign the decree to him, but no Court will decree such an assignment except, upon equitable terms. A question that the assignee of a decree is *benamidar* for some body else cannot be gone into in execution proceeding. When the judgment-debtors alleged that the assignee was a *benamidar* for their pleader. *Held*, that it was not practicable in execution proceedings to go behind the decree and alter the liability of the parties, after investigation of the sum which would be equitably payable by the judgment-debtor to the assignee of the decree to entitle him to obtain a reconveyance thereof. This should be the subject of investigation in a suit, the execution proceedings being stayed to enable the judgment-debtor to institute such a suit. NAGENDRABALA DASSI *v.* DEBENDRA NATH MAHISH (1917)

22 C. W. N. 491

DECREE AGAINST A MAJOR AS MINOR.

———— *Court-sale in execution of decree, validity of—Limitation Act (IX of 1908), Art. 12, applicability of.* A decree obtained against a person treating him as a minor while in reality he was a major on its date is not a nullity; consequently a sale in execution of such a decree cannot be set aside on the ground that the Court had no jurisdiction to pass the decree. The period of limitation to apply to set aside the court-sale is one year as provided by Article 12 of the Limitation Act. SESHAGIRI RAO *v.* HANUMANATHA RAO (1915)

I. L. R. 39 Mad. 1031

DECREE FOR DIVORCE.

See DIVORCE ACT (IV OF 1869), s. 37.

I. L. R. 39 Bom. 182

DECREE FOR INJUNCTION.

See CIVIL PROCEDURE CODE (ACT V OF 1908), ss. 2 (*11*) 53.

I. L. R. 42 Bom. 504

DECREE FOR MONEY.

———— **payment of—**

See CIVIL PROCEDURE CODE, 1908 O. XXI, R. 1 . **I. L. R. 35 Bom. 35**

DECREE FOR PARTITION.

See LIMITATION ACT (IX OF 1908), ART. 182. . . **I. L. R. 45 Bom. 952**

———— *Decree made absolute unnecessarily—Application to execute the decree if made within three years of the final decree is in order.*

DECREE FOR POSSESSION.

———— *Decree-holder obtaining possession of the property without executing the decree—Subsequent dispossession—Maintainability of a fresh suit—Doctrine of merger where applicable.* The doctrine of merger does not apply to a decree for ejectment. If a party obtains a decree for a debt or for damages for tort, the

DECREE FOR POSSESSION—*contd.*

original cause of action merges in the decree, but a decree in ejectment differs very much from other decrees. Plaintiff obtained a decree for possession of certain immoveable property which she did not put into execution for over three years, but had obtained actual physical possession over the property. She was subsequently dispossessed and brought a suit for possession. *Held*, that as she had been in actual possession of the property, a fresh cause of action had accrued and her suit was maintainable being within twelve years of such dispossession. *Quære:* Whether a suit is maintainable upon a decree when the execution of it has become time-barred. DHANRAJ SINGH *v.* LAKHRANI KUNWAR (1916)
I. L. R. 38 All. 509

DECREE FOR RENT.

See LANDLORD AND TENANT.
I. L. R. 41 Calc. 926

See MORTGAGE **I. L. R. 38 Calc. 923**

———— *Right of Landlord to choose manner of execution.* *Held*, that it was not competent for a Court to direct in what manner the landlord shall execute a decree for rent and he cannot be compelled to proceed first against the holding and then against the person of the tenant. MAHARAJAH KESHO PRASAD SINHA *v.* LALGI RAY
1 Pat. L. J. 138

DECREE-HOLDER.

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), s. 258 **I. L. R. 34 Bom. 575**
39 Mad. 1026

See INSOLVENCY **I. L. R. 41 All. 274**

See LIMITATION ACT (XV OF 1877), s. 8, SCH. II, ART. 179, EXPL. I.
I. L. R. 34 Bom. 672

See LIMITATION ACT (IX OF 1908)—
s. 22 . . **I. L. R. 38 Mad. 837**
SCH. I, ARTS. 29, 62 AND 120.
I. L. R. 38 Mad. 972

See PROVINCIAL INSOLVENCY ACT 1907, ss 16 AND 34 . **1 Pat. L. J. 235**

———— fraud of—

See CIVIL PROCEDURE CODE (ACT V OF 1908), ss. 47 AND 50.
I. L. R. 38 Mad. 1076

———— Rival—

See RATEABLE DISTRIBUTION.
I. L. R. 38 Mad. 221

———— status of—

See SALE . . **I. L. R. 45 Calc. 294**

———— *Petition for execution —Sale of properties not mentioned in the decree—Personal decree—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 6—Application, if necessary—Court's power to amend—Code of Civil Procedure (Act V of 1908), s. 153.* A decree-holder cannot ignore the terms of a decree directing him to bring the properties mentioned in it to sale before proceeding against other properties of the judgment-debtor. *Manti Kamoji* v. *Chodimalla Ramamurthy, 3 Mad. L. T. 325. Varadiah* v. *Raja Perumal Raja Bahadur, Appeal Against O. 257 of 1909,* followed. But when the judgment-debtor has no saleable interest in the

DECREE-HOLDER—*contd.*

properties directed to be sold, the decree-holder need not go through the farce of putting them up to sale. A decree directing the defendant to pay a certain sum, and in default directing the hypothecated property to be sold is a personal decree, *Raja of Kalahasti* v. *Varadachariar, 21 Mad. L. J. 1036,* followed. When there is a personal decree, no application for another personal decree under O. XXXIV, r. 6, can be granted. *Dinabandhu* v. *Mashuda, 16 C. L. J. 318,* referred to. S. 153 of the Code of Civil Procedure (Act V of 1908) enables the Court under the above circumstances to order, if necessary, an amendment of the execution petition. PERIYASAMI KONE *v.* MUTHIA CHETTIAR (1913)
I. L. R. 38 Mad. 677

DECREE IN FORECLOSURE.

See MORTGAGE . **I. L. R. 39 Calc. 925**

DECREE NISI.

See DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879), s 15B.
I. L. R. 43 Bom. 477

See MORTGAGE
I. L. R. 43 Bom. 334

———— *Decree for possession on payment of a certain sum within six months, in default, forfeiture of the right to recover possession—Appeal—Confirmation of decree—The term of six months to run from the date of the final decree.* The plaintiff brought a suit to recover possession of property as purchaser from defendants 1—6 and to redeem the mortgage of defendant 7. The first Court having dismissed the suit, the appellate Court, on plaintiff's appeal, passed a decree directing the plaintiff to recover possession on payment to defendants 1—6 of a certain sum within six months from the date of its decree and then to redeem defendant 7, and on plaintiff's failure to pay within six months from the date of the decree he should forfeit his right to recover possession. All parties being dissatisfied with the decree, the plaintiff preferred a second appeal to the High Court and the two sets of defendants filed separate sets of cross objections. The High Court confirmed the decree and the plaintiff's second appeal and the defendants' cross objections were dismissed. Within six months of the date of the High Court's decree the plaintiff deposited in Court the amount payable by him [illegible] ndant 7 con- [illegible] ving complied [illegible] first appellate Court, his right to recover possession in execution was forfeited. The lower Courts upheld the defendant's contention and dismissed the *darkhast*. On second appeal by the plaintiff, *Held*, reversing the decree, that the time for executing a decree *nisi* for possession ran from the date of the High Court's decree confirming the decree of the lower Court, for what was [illegible] looked at and interpreted was the [illegible]

[illegible]

DECREE ON MORTGAGE.

See LIMITATION ACT (XV OF 1877), SCH. II, ART. 179
I. L. R. 39 Bom. 20

DECREE OVER.

See CIVIL PROCEDURE CODE, 1908, O. XXXIV, R. 6
I. L. R. 42 All. 519

DEDICATION.

See HINDU LAW—ENDOWMENT.
I. L. R. 46 Calc. 951

———————— These can be dedicated by a joint family and no deed is necessary. TADI BULLI TAMMIREDDI *v.* TADI BULLI GANGIREDDI.
I. L. R. 45 Mad. 281

DEDICATED PROPERTY.

———— acquisition of—

See SHEBAIT . **I. L. R. 40 Calc. 895**

DEED.

See EVIDENCE, ADMISSIBILITY OF.
I. L. R. 38 Calc. 892

———— construction of—

See CONSTRUCTION OF DEED.

See PROMISSORY NOTE.
I. L. R. 36 Mad. 370

———— execution of—

See PARDANASHIN LADY.
I. L. R. 47 Calc. 175

———— form of proof of—

See EVIDENCE . **I. L. R. 44 Calc. 345**

———————— *Interpretation of deed —Reference to conduct where language unambiguous, if permissible.* Where the language of a written instrument is clear, no reference is permissible for its interpretation to the conduct of the parties. ROHIM BAKSH MANDAL *v.* SHAJAD AHMAD (1914)
19 C. W. N. 1311

———————— *Material alteration of —Destruction of right of suit—Negotiable Instruments Act (XXVI of 1881), s. 87.* An alteration in a document which has the effect of enabling the payee to sue on the document in a Court where he could not have sued on it in its original form is a material alteration and as such destroys the right of action on the document. Altering a negotiable instrument by causing the words "or order" to disappear and making it non-negotiable is a material alteration, under ordinary law and also under s. 87 of the Negotiable Instruments Act (XXVI of 1881). The facts that the payee eventually filed the suit in another Court different from the one intended at the time of the alteration and that it was not necessary for him to rely on the altered state of document to enable him to succeed therein do not make the alteration any the less material. *Gour Chandra Das* v. *Prasanna Kumar Chandra, I. L. R. 33 Calc. 812*, followed. *Decroix, Verley et Cie.* v. *Meyer & Co., 25 Q. B. D. 343*, distinguished. LAKSHMAMMAL *v.* NARASIMHARAGHAVA AIYANGAR (1913)
I. L. R. 38 Mad. 746

DEED—*contd.*

———————— *"Easements, advantages, appurtenances, held and enjoyed as part of the house," meaning of.* Words in a sale-deed of a house, such as the following:—"All my right, title and interest in and to the said house and ground with all the buildings, fixtures, rights, easements, advantages and appurtenances, whatsoever to the said house and ground appertaining or with the same held and enjoyed or reputed as part thereof or appurtenant thereto," are wide enough to convey not only actually existing easements but also (*a*) a way formerly enjoyed as an easement, but as to which the right had been suspended by unity of possession of the two tenements, and (*b*) a way, which during the unity of possession, had never existed as an easement but was in fact used for the convenience of one of the tenements afterwards served. *Chunder Coomer Mookerji* v. *Koylash Chunder Sett, I. L. R. 7 Calc. 665*, followed. If on a disposition of property belonging to the same owner, tenements are served and conveyed to different people either simultaneously or at different times but as part of one transaction, *quasi easements*, apparent and continuous and necessary for the enjoyment of the several tenements as they were enjoyed at the time of severance, will pass to the grantees thereof. In either case the conveyances are regarded in equity as one transaction, and each grantee who takes his tenement with the knowledge that the other tenements are being conveyed at the same time or will be conveyed as part of the same transaction, is deemed, in the absence of express stipulation, to take the land burdened or benefited, as the case may be, by the qualities which the previous owner had a right to attach to the different portions of his property before severance. VENKIAH *v.* KRISHNAMOORTHY (1913)
I. L. R. 38 Mad. 141

DEED OF CONVEYANCE.

See VENDOR AND PURCHASER.
I. L. R. 37 Calc. 362

DEED OF ENDOWMENT.

See RELIGIOUS TRUST.
I. L. R. 40 Calc. 251

DEED OF SALE.

See VENDOR AND PURCHASER.
I. L. R. 42 Calc. 56

DEED OF TRUST.

See TRUST . **I. L. R. 40 Calc. 232**
I. L. R. 41 Calc. 19

DEFAMATION.

See ACQUITTAL **I. L. R. 37 Calc. 604**

See EVIDENCE ACT (I OF 1872), s. 132.
I. L. R. 40 All. 271
I. L. R. 43 All. 92

See LIBEL

See MALICIOUS PROSECUTION.
I. L. R. 38 Calc. 880

See PENAL CODE (ACT XLV OF 1860) s. 498 . **I. L. R. 37 Mad. 110**

See PENAL CODE, s. 499.

DEFAMATION—*contd.*

See Privy Council, practice of.
I. L. R. 41 Calc 1023

See Tort . **I. L. R. 39 Mad. 433**

——— **made outside British India**—

See Tort . **I. L. R. 39 Mad. 433**

——— **suit for**—

See Civil Procedure Code, 1908, O. XXV, r. 1 . **I. L. R. 35 Bom. 421**

1.——— **Subsequent prosecution**—*Acquittal under s. 182 of the Penal Code—Subsequent complaint under s. 500 by the person defamed, in respect of the same statement—Subsequent prosecution not barred—Criminal Procedure Code (Act V of 1898), s. 403.* An acquittal under s. 182 of the Penal Code in respect of false information contained in a petition to the manager of an estate is no bar to a subsequent prosecution for defamation under s. 500 of the Penal Code, on the same statements. *Sharbekhan Gohain* v. *Emperor, 10 C. W. N. 85*, distinguished. Ram Sebak Lal *v.* Muneswar Singh (1910)
I. L. R. 37 Calc. 604

2.——— **By pleader**—*Questions put in cross-examination on instructions without ascertaining their truth or falsity—Absence personal malice—Presumption of good faith—Rebuttal of presumption—Duty of Advocate—Public good—Penal Code (Act XLV of 1860), s. 499 Exception (9).* A pleader is entitled to the presumption that the questions he

his client's interest. *Upendra Nath Bagchi* v. *Emperor, I. L. R. 36 Calc. 375 ; 13 C. W. N. 340*, followed. It is the duty of the pleader to present his client's case, but it is not his duty to enquire whether it is true or false, so far, at any rate, as the purpose of a prosecution for defamation is concerned. It is for the public good that a person charged with the responsibility of an advocate should, as far as may be, feel unfettered by any control, other than that of the Court, in the use of every weapon placed at his disposal by law for the defence of his client Nikunja Behari Sen *v.* Harendra Chandra Singh (1913)
I. L. R. 41 Calc. 514

3.——— **Expulsion from caste** — *Words imputing loss of caste, when actionable—Privilege —Caste usage.* It is open to one member of a caste to refuse to associate with another for what he considers to be an infringement of caste rules; and no Court can call upon him to assign a reason for not associating. It is not however open to one member to call another an outcaste. The caste or the majority of them may expel a member from the caste. The Courts will interfere if he is so expelled without being given a proper opportunity for explanation. Words which impute unworthiness to remain a member of the caste are defamatory and give rise to a cause of action; and where the words used are ambiguous, it must be decided on evidence whether they were intended to bear a libellous meaning. Where a libellous communication is made regarding a member of a caste, the mere fact that the person making such communication is a member of the caste, will not of itself suffice to make the communication privileged. Cooposami Chetty *v.* Duraisami Chetty (1909)
I. L. R. 33 Mad. 67

4.——— **Pleader's comment** *in Court that the Plaintiff forged documents by means of fraud if amounts to—Suit for defamation against pleader—Defence pleader's comment that "the Plaintiff forged documents by means of fraud," if amounts to defamation—Legitimate comments, privilege of—Question of malice and of personal charge.* In a suit for rent the defence pleader, while commenting on certain exhibits, used the expression that "the Plaintiff (a lady) forged documents by means of fraud." In a previous rent suit brought by the husband of the Plaintiff, the collection papers were held to have been manufactured. *Held*—

necessarily imply any personal charge against the lady, who might have had nothing personally to do with the suit beyond the fact that she was

was in

in good

is client

and his remarks were not irrelevant but were pertinent to the enquiry which was being made before the Judge and had a direct bearing on the case. Shiva Kumari Debi *v* Becharam Lahiri
25 C. W. N. 835

5.——— **Statement by accused**—*made in application to District Magistrate for transfer of case—Absolute or qualified privilege—English law, applicability of, in the mofussil—Construction of Statues—Penal Code (Act XLV of 1860), s. 499.* S. 499 of the Penal Code is exhaustive; and if a defamatory statement does not fall within the specified Exceptions, it is not privileged. The English common law doctrine of absolute privilege does not obtain in the mofussil in India. A defamatory statement made in bad faith by an accused, against whom a trial is pending in a Criminal Court, and contained in a petition to the District Magistrate for a transfer of the case, is not absolutely privileged, but is punishable under

[illegible] *Mugneeram Choudhary, 11 B. L. R. 321, Bhikumber Singh* v. *Becharam Sircar, I. L. R. 15 Calc. 264, Woolfun Bibi* v. *Jesarat Shaikh, I. L. R. 27 Calc. 262, Golap Jan* v. *Bholanath Khettry, I. L. R. 38 Calc. 880*, distinguished. *Haidar Ali* v. *Abru Mia, I. L R. 32 Calc. 756*, referred to. *Kari Singh* v. *Emperor, I. L. R. 40 Calc. 441* (note), explained. The proper course in construing an Act is to ascertain the natural meaning of its language, and not to assume that it was intended to leave the existing law unaltered, except when such intention is stated: *Bank of England* v. *Vagliano, [1891] A. C. 107*, and *Norendra Nath Sircar* v. *Kamalbasini Dasi, I. L. R. 23 Calc. 563*, followed. The essence of a Code is to be exhaustive in the matters in respect of which it

DEFAMATION—*contd.*

declares the law, and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction: *Gokul Mandar* v. *Pudmanund Singh, I. L. R. 29 Calc. 707,* followed. KARI SINGH *v.* EMPEROR (1912) . . . **I. L. R. 40 Calc. 433**

6. ——————— *Defamatory statements by a party to a judicial proceeding—Absolute or qualified privilege—Distinction between civil and criminal liability—Penal Code (Act XLV of 1860) Preamble and ss. 1, 2, 5 and 499—Charter Act (24 and 25 Vict. c. 104) s. 9—Letters Patent, 1865, cl. 30—Common Law of England as to defamation—Reference to previous history of legislation—Construction of Codes—Illustrations as aid to construction—Refusal of sanction not bar to prosecution for defamation—Criminal Procedure Code (Act V of 1898) s. 403—Powers of the Supreme and High Courts in contempts.* A defamatory statement, on oath or otherwise, by a party to a judicial proceeding falls within s. 499 of the Penal Code, and is not absolutely privileged. Under cl. 30 of the Letters Patent, 1865, the provisions of such Code must be followed, and the Court cannot engraft thereon exceptions derived from the Common Law of England or based on public policy. The civil liability for defamation in India does not stand on the same basis as the criminal. A suit for damages for a defamatory statement, made on oath or otherwise, by a party to a judicial proceeding, in the absence of statutory rules on the subject, is governed by the principles of justice, equity and good conscience, which according to a large preponderance of judicial opinion, are identical with the corresponding relevant rules of English Common Law. The preamble to the Penal Code and ss. 1 and 2, read with s. 5, prescribe that all acts or omissions contrary to the provisions of the Code, or of special and local laws, or other laws enumerated in s. 5 of the Code and none others are punishable as offences. *H. C. Pro. 22 Sept. 1866, 3 Mad. H. C. Ap. XI, XVII,* referred to. Reference to the previous history of legislation is legitimate only when there is a reasonable doubt as to the construction of a statute. *Ishuree Persad Narain Sing* v. *Lal Chutterput Sing, 3 Moo. I. A. 100, 130, Brown* v. *McLachlan, L. R. 4 P. C. 543, 550,* referred to. But in the construction of Codes the language of the statute and its natural meaning must be first examined, uninfluenced by any consideration of the previous law on the point, and an interpretation cannot be placed on the plain language of a statute inconsistent therewith on the supposed policy of the Legislature not to depart from the English Law on the subject. *Bank of England* v. *Vagliano Bros., [1891] A. C. 107, Robinson* v. *Canadian Pacific Ry. Co., [1892] A. C. 481, Narendra Nath Sircar* v. *Kamalbasini Dasi, I. L. R. 23 Calc. 563,* followed. The history, however, of the Penal Code shows an intention to deviate in many respects from the English Law of defamation. Drafts of the Penal Code, 1837, Note *R* of 1846 and 1847, Chap. XXXV, referred to. The Court must administer the law as prescribed by the Legislature and neither enlarge nor restrict its scope. *Egerton* v. *Brownlow, 4 H. L. C. 1, 123,* referred to. An illustration is a useful indication of the intention of the Legislature but is not binding when inconsistent with the language of the section. *Dubey Sahai* v. *Ganeshi Lal, I. L. R. 1 All. 34, 36, Queen-Empress* v. *Fakirapa, I. L. R. 15 Bom. 491, Koylash Chunder Ghose* v. *Sonatun Chung Barooie, I. L. R. 7 Calc. 132,* referred to The Court should accept the illustrations when it can do so in aid of construction and they should not be rejected for inconsistency with ideas derived from another system of jurisprudence, nor, except in a very special case, for an assumed repugnancy. *Mahomed Syedol Ariffin* v. *Yesh Ooi Gark [1916] 2 A. C. 575,* referred to. The refusal of an application for sanction to prosecute a party to a judicial proceeding, under ss. 182, 193, I. P. C., is not a bar, under s. 403, Cr. P. C., to his prosecution for defamation. *Ram Sebak Lal* v. *Munesuar, I. L. R. 37 Calc. 604,* referred to. The Supreme Court had power to punish summarily for contempts under the Common Law of England, such part thereof having been introduced into the Presidency Towns by their Charters; and the High Courts have the same power either by inheritance under s. 9 of the Charter Act 24 and 25 Vict. c. 104), replaced by the Government of India Act, 1915 (5 and 6 Geo. V. c. 61), s. 106, or as inherent in them as Courts of Record, unrestricted by cl. 30 of the Letters Patent, 1865. *Surendra Nath Banerjee* v. *C. J. and Judges of the High Court, I. L. R. 10 Calc. 109, 131, McDermot* v. *Judges of British Guiana, 5 Moo. P. C. (N. S.) 466, 497, Legal Remembrancer* v. *Matilal Ghose, I. L. R. 41 Calc. 173,* and *Re Motilal Ghose, I. L. R. 45 Calc. 169,* referred to. Similarly the power and authority exercised by the Supreme Court outside the Presidency Towns, as indicated in *Re Maharanee of Lahore,* (1848) Tay 428, has become vested in the High Court subject, however, to the provisions of the Letters Patent and the legislative power of Governor-General in Council. Authorities reviewed. SATISH CHANDRA CHAKRAVARTI *v.* RAM DOYAL DE (1920)

I. L. R. 48 Calc. 388

DEFAULT.

See CIVIL PROCEDURE CODE, 1908, O. IX

See CONSENT DECREE.
I. L. R. 44 Bom. 544

See DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879), s. 15B, CL. (2).
I. L. R. 35 Bom. 190

See EXECUTION OF DECREE.
I. L. R. 38 Calc. 482

See MORTGAGE **I. L. R. 39 Mad. 981**

See WAIVER . . **15 C. W. N. 10**

——————— **dismissal of suit for—**

See APPEAL . **I. L. R. 37 Calc. 426**

See TRANSFER OF PROPERTY ACT (IV OF 1882), s. 10 . **I. L. R. 38 Mad. 867**

——————— **in filing annual list of members—**

See COMPANY . **I. L. R. 45 Calc. 490**

——————— **in payment of instalments—**

See LIMITATION **I. L. R. 38 Mad. 374**

DEFAULTER.

See INCUMBRANCE.
I. L. R. 37 Calc. 322

See SALE FOR ARREARS OF REVENUE.
I. L. R. 41 Calc. 1092
I. L. R. 44 Calc. 412

DEFECT.

See CHARGE . **I. L. R. 41 Calc. 66**

DEFECTIVE DECLARATION.

See INSURANCE **I. L. R. 41 Calc. 581**

DEFECTIVE INSTALLATION.

See GAS COMPANY . **14 C. W. N. 158**

DEFENCE.

See HABEAS CORPUS.
I. L. R. 39 Calc. 164

———— opportunity for—

See MUTT . **I. L. R. 40 Mad. 177**

———— struck out—

See FOREIGN JUDGMENT.
I. L. R. 39 Mad. 95

DEFENCE OF INDIA ACT 1915.

See CONTRACT ACT 1892 s. 23.
I. L. R. 44 Bom. 6

———— s. 2—

1. ———————— *Defence of India (Consolidation) Rules, 1915, rr. 23, 29 and 30—Procedure—Criminal Procedure Code, s. 191.* Upon a statement made to a District Magistrate, not upon oath and not signed by the informant, the Magistrate issued warrants against four persons in respect of an offence under r. 23 of the Defence of India (Consolidation) Rules, 1915. These four persons were tried for and convicted of such offence, and were sentenced to twenty months' imprisonment: *Held*, that the trial was bad. Either the Magistrate was acting under s. 191 (c) of the Code of Criminal Procedure, in which case he was bound to ask the accused if they objected

statement upon oath. Furthermore, with reference to rule 30 of the rules in question, the Dis- ... corded a formal ... that the initia- ... e persons impli- ... nent was advisable: *Held*, also, that the rule under which the conviction had been recorded was inapplicable to the facts of the case, because it is not possible to "dissuade" a person from doing something which he has already done. EMPEROR *v.* MAHADEO SINGH (1918) . . . **I. L. R. 41 All. 164**

2. ———————— *Rules framed under, creating offences—Time from which acts specified in rules are offences—Special tribunals, no creation of—Trial by Magistrates as under Criminal Procedure Code, validity of—Sanction for prosecution by Acting District Magistrate, validity of—General Clauses Act (X of 1897), s. 17, cl. (1).* Rules framed under s. 2 of the Defence of India Act must be read as part of that section and are effective from the date of their publication and are not dependent on the remainder of the Act being brought into operation. *Held*, accordingly, that a person in the Presidency of Madras, who, in contravention of the rules, dissuades anyone from entering into His Majesty's Military Service, is guilty of an offence though the remainder of the Act had not been brought into operation in this province: *Held*, further, that in the absence of

DEFENCE OF INDIA ACT, 1915—*contd.*

———— s. 2—*contd.*

a notification creating special tribunals for the trial of such offences under the Defence of India Act, such offences are triable by the ordinary Magisterial Courts of the country in the manner provided by the Criminal Procedure Code as 'offences against other laws' within schedule II of the Code. By virtue of s. 17, cl. (*1*), of the General Clauses Act (X of 1897) an Acting District Magistrate is competent to sanction a prosecution in all cases where a District Magistrate can sanction the same. KANDASAMI PILLAI *v.* EMPEROR (1918) . **I. L. R. 42 Mad. 69**

———— s. 4— *Power to create Courts—* S. 22 of the Indian Councils Act read with s. 9 of

...

A High Court has power to declare an Act of the Indian Legislature *ultra vires.* PARAMESWARAHIR *v.* EMPEROR . . . **3 Pat. L. J. 537**

———— ss. 7, 8 and 11—*Jurisdiction of High Court—Held*, that the High Court had no jurisdiction to superintend the proceedings of Commissioners appointed under the Act. SHEONANDAN PRASAD SINGH *v.* KING-EMPEROR.
3 Pat. L. J. 581

———— rules 23, 29 and 30—

See DEFENCE OF INDIA ACT, 1915, s. 2
I. L. R. 41 All. 164

DEFENDANT.

See PROBATE . **I. L. R. 41 Calc. 519**

———— addition of—

See PARTIES . **I. L. R. 46 Calc. 48**

———— changing character of—

See PARTIES . **I. L. R. 37 Calc. 229**

———— duty of—

See PLEADINGS **I. L. R. 37 Calc. 856**

———— misdescription of—

See PLAINT . **I. L. R. 43 Calc. 441**

———— right to offer evidence—

See PRACTICE . **I. L. R. 40 Calc. 119**

———————— *Death of — Legal Representative not brought on record—Decree subsequent to such death, validity of—Objection to such decree in execution.* A decree passed after the death of the defendant and before his legal representative was brought on the record is a nullity. *Janardhan* v. *Ramachandra, I. L. R. 26 Bom. 317. Radha Prasad Singh* v. *Lal Sahab Rai, I. L. R. 13 All. 53,* and *Imdad Ali* v. *Jagan Lal, I. L. R. 17 All. 478,* followed. *Goda Coopooramier* v. *Soondrammall, I. L. R. 33 Mad. 167,* distinguished. Objection to that effect can be taken in the execution proceedings. SUBRAMANIA *v.* VAITHINATHA (1913) . . . . **I. L. R. 38 Mad. 682**

DEITY.

See PARTIES . **I. L. R. 46 Calc. 877**

DEKKHAN AGRICULTURISTS' RELIEF ACT (BOM. XVII OF 1879).

See CIVIL PROCEDURE CODE (ACT V OF 1908), ss. 2, 97, O. XXVI, rr. 11, 12 (2). **I. L. R. 38 Bom. 392**

s. 11 . . **I. L. R. 36 Bom. 548**

See DECREE . **I. L. R. 34 Bom. 260**

See MORTGAGE. **I. L. R. 43 Bom. 703**

——— **Wife of an agriculturist—Status—** *Suit by mortgagee to recover possession—Prayer for payment of principal and interest at certain rate—Decree—Payment of principal and interest—Payment of interest at certain rate till the principal is doubled—Contractual relation not superseded by the decree—Redemption suit—Accounts.* Under the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879) the wife of an agriculturist cannot claim to be an agriculturist. A decree obtained by a mortgagee in the year 1867 to recover possession of the mortgaged property set out that the plaintiff (mortgagee) was suing for possession of the mortgaged land with a prayer that until possession should be delivered over, or until the mortgage money was paid off, interest should be awarded at the rate of 2 per cent. per mensem. The decree then ordered that the mortgagor "should pay to the plaintiff (mortgagee) R390 and interest, R27, in respect of his claim. Until payment of the moneys, or until the principal is doubled, interest should be paid at the rate of 2 per cent. per mensem from 30th July 1867; and until payment of the moneys the land mortgaged, which was asked for in suit, should be handed over according to agreement. And the defendant should redeem the land by paying the plaintiff's money." Subsequently the mortgagor having brought a suit for redemption and accounts it was contended that the plaintiff's right to have accounts taken from the mortgagee in possession was lost by reason of the aforesaid decree: *Held*, that the terms of the decree did not deprive the mortgagor of a right to accounts. The decree did not supersede the contractual relation, but by putting the mortgagee into possession merely carried out the terms of the contract which for the rest it preserved and kept alive. There was no foreclosure either in fact or in intention, and it was in his capacity as mortgagee entitled by the contract to possession that he was put into possession by the said decree. RADHABAI *v.* RAMCHANDRA VISHNU AND RAMCHANDRA VISHNU *v.* RADHABAI (1910) . . . . **I. L. R. 35 Bom. 204**

——— **Redemption suit—Tagavi advance by Government,**—*Nature of—Auction sale for non-payment of the advance—Benami purchase by the mortgagee—Advantage gained in derogation of the rights of the mortgagor—Purchase ensures for the benefit of the mortgagor—Indian Trusts Act (II of 1882), s. 90—Transfer of Property Act (IV of 1882), s. 76, clause (c)—Land Revenue Code (Bom. Act V of 1879), ss. 56, 153—Land Improvement Loans Act (XIX of 1883), s. 7.* One B passed a San mortgage of the properties in suit in favour of *N* on the 20th September 1894. After *B*'s death his widow *K*, for herself and on behalf of her minor daughter, the plaintiff, executed a fresh possessory mortgage in favour of defendant No. 1, in 1903, and put him in possession. Before the date of this mortgage, *K* had obtained a *tagavi* advance from Government on survey

DEKKHAN AGRICULTURISTS' RELIEF ACT (BOM. XVII OF 1879)—*contd.*

No. 311 which was included in the mortgage In 1905 survey No. 311 was sold by public auction for the arrears of *tagavi* and was purchased by defendant No. 1 through his *gumasta*, defendant No. 2. On the 4th August 1909 defendant No. 1 assigned his mortgage rights to defendant No. 3 and on the same day defendant No. 2 sold survey No. 311 to defendant No. 3. In 1912 the plaintiff sued to redeem the survey number along with the other mortgaged property under the provisions of the Dekkhan Agriculturists' Relief Act 1879. The defendant No. 3 contended that since the sale the plaintiff had no right left in survey No. 311 and was not entitled to redeem it. On these pleadings the question arose for consideration whether the *tagavi* dues were a charge of a public nature which the mortgagee was bound to pay and whether the sale having taken place the provisions of s. 56 of the Land Revenue Code would apply so as to leave no room for the application of s. 90 of the Indian Trusts Act with reference to the conduct of the mortgagee: *Held*, that the *tagavi* advance was a charge of a public nature within the meaning of clause (c) of s. 76 of the Transfer of Property Act, 1882. It was a Government demand accruing due in respect of the land while it was in possession of the mortgagee: *Held*, also, that the sale having taken place owing to the default of the mortgagee, s. 90 of the Indian Trusts Act applied: *Held*, further, that s. 56 of the Land Revenue Code did not apply as it was held as a fact that there had been no forfeiture such as would be a necessary condition precedent under s. 153 of the Land Revenue Code to the application of the provisions of s. 56 for the purposes of recovering dues as arrears of land revenue. CHHITA BHULA *v.* BAI JAMNI (1916) . **I. L. R. 40 Bom. 483**

——— **Owner deprived of property by fraud**—*Suit to recover, brought in the form of a redemption suit, if lies.* A suit which, although in form a suit for redemption, was really a suit to recover property of which the rightful owner had been deprived by fraud, was not one in which special relief could be granted under the Dekkhan Agriculturists' Relief Act. BACHI *v.* BICKCHAND JOIMAL (1910) . **15 C. W. N. 297**

——— **s. 2**—

1. ——— **Agriculturist — Definition —** *Estate of agriculturist in charge of Court of Wards—The Court of Wards is an agriculturist—Court of Wards Act (Bom. Act I of 1905).* A Court of Wards constituted under the Court of Wards Act (Bom. Act I of 1905) and representing the estate of a minor agriculturist is entitled to bring a suit under the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879). The Dekkhan Agriculturists' Relief Act countenances no distinction based upon the comparative riches or poverty of the person whose status is being investigated. MANOHAR RAMCHANDRA *v.* COLLECTOR OF NASIK (1912) . **I. L. R. 37 Bom. 97**

2. ——— *Person engaging himself personally in agricultural labour is an agriculturist irrespective of his income from other sources—Bharwad or shepherd—Pastoral income.* A person who ordinarily engages personally in agricultural labour within certain specified limits is an agriculturist as defined by s. 2 of the Dekkhan

DEKKHAN AGRICULTURISTS' RELIEF ACT (BOM. XVII OF 1879)—*contd.*

——— s. 2—*contd.*

Agriculturists' Relief Act, 1879, irrespective of the proportion which his strictly agricultural income may bear to any other income accruing to him. A *bharuad* (shepherd) who engages personally in agricultural labour is an agriculturist although his income from non-agricultural (*i.e.*, pastoral) sources may be greater than his other income. BHIKHA FAKIRA *v.* RAICHAND MANJI (1912)

I. L. R. 37 Bom. 398

3. ——— *Assignee of Government revenue, not an agriculturist* The income derived from tenants by an Inamdar which is to a certain extent attributable to the fact that he is the assignee of Government revenue and, therefore, does not have to pay over a portion of that income to Government but may keep it for himself, cannot be taken into consideration in

(1911) . . . . **I. L. R. 35 Bom. 266**

4. ——— *Sources of income —Agriculture—Scholarship or stipend received by a student is not income from non-agricultural sources* The income from agricultural sources of two brothers was R250 a year. They had two houses which yielded as rent R30 a year. One of the brothers held a scholarship of R15 a month; and the other received a stipend of R7 a month at a

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Dekkha

1879):

for the money they received either as scholarship or stipend were more bounties. PARVATIBAI *v.* YESHVANT KRISHNA (1911)

I. L. R. 36 Bom. 199

5. ——— *Son of agriculturist is not an agriculturist* The minor son of an agriculturist who is depending for his support on his father is not an agriculturist within the meaning of s. 2. Dependence for livelihood upon another who is an agriculturist is not the same thing as earning livelihood for oneself by agriculture. To earn livelihood by agriculture is to obtain means of livelihood by it DAGDU *v.* MIRASHEB (1912) . . **I. L. R. 36 Bom. 496**

6. ——— *Gosavis—Earning livelihood by mendicancy and also from agriculture.* The plaintiffs who were Gosavis had no lands of their own at the date of the suit, but purchased some thereafter. They were following two occupations, one that of Gosavis, and the other that of agriculture. On a claim made by them to be *agriculturists within the meaning of the term* as defined in the Dekkhan Agriculturists' Relief Act, 1879: *Held,* that the plaintiffs were not agriculturists, for they adduced no proof to bring themselves under the first part of the definition, and they could not take advantage of the second branch inasmuch as they being Gosavis, the presumption would be that their ordinary occupation was that of mendicancy. SAVALPURI *v.* BALAVALAD YADAOSHET (1912)

I. L. R. 36 Bom. 543

DEKKHAN AGRICULTURISTS' RELIEF ACT (BOM. XVII OF 1879)—*contd.*

——— s. 2—*contd.*

7. ——— *Grant of a village as service vatan —Construction—Grant of revenue and not of soil—Holders not agriculturists* Where a Sanad evidencing grant of a village as service vatan did not go the length of granting anything more than a share of the revenue and provided that in certain cases the grant may be converted into private property, which had not been done, and a question having arisen as to whether the grant was one of soil and whether the holders were agriculturists within the meaning of the Dekkhan Agriculturists' Relief Act (XVII of 1879): *Held,* that the grant was a grant of a share of the revenue and not a grant of the soil and did not entitle the holders to be considered agriculturists in view of explanation (*b*) to s. 2 of the Dekkhan Agriculturists' Relief Act (XVII of 1879). CHUNILAL JAMNADAS *v.* BHANUMATI (1911) . . . **I. L. R. 36 *Bom.* 151**

8. ——— *Interpretation.* S. 2 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) gives two definitions of the term "agriculturist," one in cl. 1 and the other in cl. 2. The former applies where a party to a suit is an agriculturist at the time the suit is filed by or against him The second clause, which gives a special definition of the term "agriculturist" for the purposes of Chapters II, III, IV and VI and s. 69 of the Act, is not exhaustive but is merely inclusive and is intended for a special purpose The decision in *Mahadev Narayan Lokhande* v. *Vinyak Gangadhar Purandhare, I. L. R. 33 Bom. 504,* does not lay down the proposition of law that a party to a suit is not entitled to the privileges of an agriculturist under the Dekkhan Agriculturists' Relief Act, 1879, if he was not an agriculturist at the time the liability in question was incurred even though it may be that he was an agriculturist within the meaning of the first clause of s. 2 at the time of the suit. DAMODAR NANDRAM *v.* MANBAI (1909) . . . . **I. L. R. 34 Bom. 65**

9. ——— *Amending Act (XXIII of 1881)—Ratnagiri District—Mortgage of 1881—Suit or account—Agriculturist.* The plaintiff whose land and residence was in Ratnágiri District executed a mortgage in the year 1881. The Dekkhan Agriculturists' Relief Act (XVII of 1879) which extended to the districts of Poona, Sátára, Sholápur and Ahmednagar was not applicable to the Ratnágiri District in the year 1881. In the year 1896 the plaintiff brought a suit for an account of what was due on the mortgage under the provisions of s. 15D of the Act (XVII of 1879) and contended that he was an agriculturist in 1881, that is, when the liability under the mortgage was incurred: *Held* that the plaintiff could not sue under s. 15D of the Act (XVII of 1879) as he was not an agriculturist within the meaning of the Amending Act (XXIII of 1881). The expression "then defined by law" in s. 2, cl. 2 of the Act (XVII of 1879) relates to the time when any part of the liability was incurred. SHANKAR RAMKRISHNA *v.* KRISHNAJI GANESH (1909)

I. L. R. 34 *Bom.* 161

——— **ss. 2 (2), 10A**—*Evidence Act (I of 1872), s. 92—Agriculturist—Mortgage in form of sale—Redemption suit—Intention of the parties*

DEKKHAN AGRICULTURISTS' RELIEF ACT (BOM. XVII OF 1879)—*contd.*

——— ss. 2 (2), 10A—*contd.*

at the time of the transaction. The object of s. 10A of the Dekkhan Agriculturists' Relief Act (XVII of 1879) is not to enable a party to the suit to prove, notwithstanding the words of the document, what the real intention was at the time when the document was executed. Regard must be paid to the date of the transaction and an agriculturist can only be allowed, according to the provisions of s. 10A, to enjoy the special benefit of the favoured class in disregarding the provisions of s. 92 of the Evidence Act (I of 1872), if he belonged to the favoured class as defined by the statute at the date of the transaction. SAWANTRAVA *v.* GIRIAPPA FAKIRAPPA (1913) **I. L. R. 38 Bom. 18**

——— *Agriculturist at time of transaction—Sale or mortgage—Oral evidence prove which—Defendant conveyed his land to plaintiff by document in form of sale deed—sometime before ss. 2 and 20 of Dekkhan Agriculturists' Relief Act, 1879 was extended to District in which defendant lived.* The plaintiff having sued to recover possession of the land, the defendant sought to prove by oral evidence that the transaction was a mortgage under s. 10A of the Act: *Held,* that the defendant could not take the advantage of s. 10A of the Dekkhan Agriculturists' Relief Act, 1879, since he could not prove that he was an agriculturist at the date of the transaction, as at that time it could not be said that the Act was extended to the District merely because ss. 2 and 20 had been extended. CHANBASAYYA *v.* CHENNAPGAVADA . **I. L. R. 44 Bom. 217**

——— **ss. 3, cl. (y) and 10 A**—*Suit for possession under a sale-deed—Contemporaneous lease—Nature of suit—Intention of parties.* The plaintiff relying on his sale-deed of 1887 sued to recover possession of the land in suit alleging that the defendant held it as his tenant under a lease of even date with the sale-deed. The defendant pleaded that his father and not the plaintiff was the purchaser under the deed of 1887, that the plaintiff was the savkar (creditor) who advanced money and the payment of interest was secured by the contemporaneous lease. Both the lower Courts went into the question of intention of the parties under s. 10A of the Dekkhan Agriculturists' Relief Act and found the defendant's case established on facts. On appeal to the High Court: *Held,* that the case was rightly disposed of under s. 10A of the Dekkhan Agriculturists' Relief Act. The nature of the suit under cl. (*y*) of s. 3 of the Act should not be determined by the frame of the plaint, but by the allegations of the parties which raised the question of mortgage or no mortgage. GANTAM JAYACHAND *v.* MALHARI (1916) **I. L. R. 40 Bom. 397**

——— **ss. 3 (w), 12 and 13**—*Suit for redemption—Mortgage superseded by consent-decree—Allegation of fraud—Form and reality of the suit.* The plaintiff's father executed a mortgage in 1894. In 1899, the mortgagee sued the mortgagor for the recovery of the mortgage debt and for sale of the property. In 1900, there was a consent-decree by which a new sum was taken as capitalized principal and provision was made for payment of money by instalments. The security under this arrangement differed in some particulars from the security of the earlier mortgage. On the same day as this consent-decree was obtained, Survey No. 50, which was included in the older mortgage but was excluded from the purview of the consent-decree, was sold by the mortgagor to the mortgagee. In 1903, the mortgagee obtained possession of the property and since then remained in possession. In 1911, the plaintiffs brought a suit to redeem the mortgage of 1894 by setting aside the consent-decree and the sale deed alleging that they were obtained by fraud, coercion and misrepresentation: *Held,* that the suit though in form a redemption suit was in reality a suit to set aside a sale deed and a Court's decree and then to recover property of which the plaintiffs had been fraudulently deprived. Such a suit is outside the provisions of the Dekkhan Agriculturists' Relief Act, 1879. *Bachi* v. *Bikhchand, 13 Bom. L. R. 56,* applied. S. 3, cl. (*u*) of the Dekkhan Agriculturists' Relief Act, 1879, contemplates either *simpliciter* or primarily and substantially a mortgage suit. VINAYAKRAO BALASHEB *v.* SHAMRAO VITHAL (1916) . . **I. L. R. 40 Bom. 655**

——— **ss. 3 (w), 10 and 53**—*Suit falling under s. 3 (w)—Decision not appealable—Revision by District Judge.* The decision in a suit falling under s. 3 (*w*) of the Dekkhan Agriculturists' Relief Act (XVII of 1879) is not appealable according to the provisions of s. 10 of the Act. Under s. 53 of the Act, the District Judge alone and not the Subordinate Judge of the First Class is authorized in such a case, to pass an order in revision. SITARAM MORAPPA *v.* VISHVANATH SERI KHANDOBA (1914) . . **I. L. R. 39 Bom. 165**

——— **s. 10A**—

See S. 2 . **I. L. R. 38 Bom. 18**
I. L. R. 44 Bom. 217

See S. 3 . **I. L. R. 40 Bom. 397**

——— *Written instrument—Oral evidence to vary the terms—Enactment relating to procedure—Retrospective effect—pending proceedings—Suit—Appeal.* The law embodied in s. 10A of the Dekkhan Agriculturists' Relief Act (XVII of 1879) is one of procedure, and being retrospective in effect applies to pending proceedings whether in a suit or an appeal. GOPAL GHELA *v.* RAJARAM AMTHA (1911) **I. L. R. 36 Bom. 305**

——— *Redemption suit—Sale in reality a mortgage—Evidence of oral agreement varying the written document—Evidence Act (I of 1872), s. 92, pro. I.* The plaintiff brought a redemption suit under the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879) alleging that the deed which he had executed to the defendant, though on its face a deed of sale, was in reality only a deed of mortgage, the defendant having promised at the time of the execution of the deed that he would allow redemption on payment of the money advanced. The defendant replied that the transaction was sale. The First Class Subordinate Judge of the Dharwar District to which s. 10A of the Dekkhan Agriculturists' Relief Act (XVII of 1879) was not extended found on the evidence that the deed passed by the plaintiff was not proved to be really a mortgage and dismissed the suit. The plaintiff

DEKKHAN AGRICULTURISTS' RELIEF ACT (BOM. XVII OF 1879)—*contd.*

———— **s. 10A**—*contd.*

appealed urging that the proper issue in the case was as to whether the sale-deed was not obtained or induced by the defendant by means of fraud or misrepresentation within the meaning of proviso I of s. 92 of the Evidence Act (I of 1872) and prayed for a remand: *Held*, confirming the decree, that the plaintiff sought to make a new case in appeal in so far as he endeavoured to base his case, not upon a separate oral agreement, but upon some fraud which would invite the application of proviso I of s. 92 of the Evidence Act (I of 1872): *Held*, further, that in the districts to which s. 10A of the Dekkhan Agriculturists' Relief Act (XVII of 1879) was not extended, it was not open to the Court to enter upon a defence which consisted of an allegation of an oral agreement varying the written contract. *Dagdu* v. *Nana, I. L. R. 35 Bom. 93*, and *Sangira Malappa* v *Ramappa, I. L. R. 34 Bom. 59*, followed. *Balkishen Das* v. *W. F. Legge, I. L. R. 22 All. 149*, referred to. SOMANA BASAPPA *v.* GADIGEYA KORNAYA (1910) . **I. L. R. 35 Bom. 231**

————*Transfer of Property Act (IV of 1882), s. 41—Sale-deed in the nature of mortgage*—Bonâ fide *transferee for value without notice of mortgage—Transfer executed less than twelve years before the institution of suit—Whether transferee protected.* The second proviso to s. 10A of the Dekkhan Agriculturists' Relief Act does not protect a *bond fide* transferee for value without notice of the real nature of the transaction if he holds under a registered deed executed less than twelve years before the institution of the suit. *Per* MACLEOD, *C. J.*:—The object of the Legislature in enacting s. 10A of the Dekkhan Agriculturists' Relief Act was to protect the mortgagor and not the transferee, if the mortgagor was sufficiently diligent in seeking to redeem the property. *Per* HEATON, *J.*:—Where s. 10A of the Dekkhan Agriculturists' Relief Act applies, s. 41 of the Transfer of Property Act ceases to have any application and is replaced by the 2nd proviso to s. 10A (of the former Act). PRANJIVANDAS *v.* MIA CHAND . . **I. L. R. 45 Bom. 87**

———— **s. 12—Compromise by pleader**—*Court's duty to record the compromise and pass decree in its terms—Pleader's compromising without authority from his client—Client to apply to cancel the compromise.* There is nothing in the provisions of s. 12 or in any other section of the Dekkhan Agriculturists' Relief Act, 1879, which expressly deprives the parties to a suit of the power of entering into a compromise and having that compromise recorded under s 375 of the Civil Procedure Code of 1882 which is the same as order XXIII, rule 3 of the Code of 1908. A compromise means the settlement of a disputed claim. Where a party complains that a compromise effected in his name by his pleader was unauthorised, he must move the Court to cancel all that has been done and to revive the suit. *Basangowda* v. *Churchigirigowda, I. L. R. 34 Bom. 408*, followed. PIRAJI *v.* GANAPATI (1910) **I. L. R. 34 Bom. 502**

cf. **I. L. R. 35 Bom. 190**

———— **ss. 12, 13**—

See CIVIL PROCEDURE CODE (ACT V OF 1908), s. 11, EXPL. IV; O. II, R. 2. **I. L. R. 39 Bom. 138**

DEKKHAN AGRICULTURISTS' RELIEF ACT (BOM. XVII OF 1879)—*contd.*

———— **ss. 12, 13**—*contd.*

———— **Retrospective effect**—*Indebtedness existing at the date of the passing of the Act, as well as future indebtedness.* The plaintiff sued to recover from the defendant a certain sum due on a money bond, dated the 17th May 1904. The suit was cognizable by the Court in its Small Cause jurisdiction. The bond sued on was passed in adjustment of an existing debt which itself was the balance due on previous advances. Some of the provisions including ss. 12 and 13 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) were made applicable to the district on the 15th August 1905 and the present suit was filed on the 26th March 1909. As the several advances which led to the bond were prior in date to the application of the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879) to the district, the following question arose:—"Whether s. 13 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) is retrospective so as to apply to the case of transactions entered into before the date of its extension to the district but the suit in respect of which is instituted after that date?" *Held*, in the affirmative, that s. 13 of the Act is retrospective. Ss. 12 and 13 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) show that it was the intention of the Legislature to open up all transactions between the parties having a bearing upon the claim out of which the suit arises from the very commencement. This is one of the means adopted by the Legislature to carry out the intention expressed in the preamble of relieving the agricultural classes from indebtedness existing at the date of the passing of the Act as well as future indebtedness. SIVLAL JETHABHAI *v.* BHIKA RAMJAN (1909) **I. L. R. 34 Bom. 220**

———— *Several mortgages as part of the same transaction over the same property—Splitting up of security—Suit on one mortgage—Sale in execution of decree free from any incumbrance—Sale proceeds applied in paying off the mortgage in suit—Balance of sale proceeds—Second suit on remaining mortgages—Attachment of balance of sale proceeds—Second suit barred.*

See CIVIL PROCEDURE CODE, (ACT V OF 1908), O. II, R. 2. **I. L. R. 45 Bom. 55**

———— **s. 13**—

See CIVIL PROCEDURE CODE (ACT V OF 1908), ss. 2, 97 **I. L. R. 39 Bom. 422**

See STATUTE, CONSTRUCTION OF. **I. L. R. 35 Bom. 307**

See TRANSFER OF PROPERTY ACT (IV OF 1882), s. 66. **I. L. R. 45 Bom. 117**

1. [illegible]
dar– [illegible]
sessi[illegible]
Act [illegible]
date [illegible]
the [illegible] mortgaged with possession certain Vatan Inam lands to Babaji Anant, an ancestor of the defendants. Madhavrao died, 1873, and in 1909

DEKKHAN AGRICULTURISTS' RELIEF ACT (BOM. XVII OF 1879)—*contd.*

———— **s. 13**—*contd.*

plaintiff sued to redeem the mortgage under the provisions of the Dekkhan Agriculturists' Relief Act, 1879. The defendants contended that by reason of the provisions of s. 5 of the Vatan Act, the mortgage became void on the death of Madhavrao and that they had been in possession adversely since that date. The Court of first instance disallowed the contention on the ground that the mortgagee claimed to hold the property as such and not as owner, and after taking accounts passed a decree in favour of the plaintiff awarding mesne profits from the date of suit till possession at Rupees four hundred a year. This decree was confirmed by the lower appellate Court. On appeal to the High Court: *Held,* that the mortgagee remained a mortgagee for the purpose of the redemption suit, even assuming that he had been in possession for more than twelve years since the death of the original mortgagor. Unless there was some definite indication on the part of the person in possession that he would from a certain date claim as absolute owner, and not as mortgagee, he could only acquire by adverse possession the limited interest to which he was entitled at the mortgagor's death, namely, that of a mortgagee: *Held,* further, that mesne profits from the date of suit could not be awarded as the enforcement of the provisions of s. 13 of the Dekkhan Agriculturists' Relief Act, 1879, placed the mortgagor in a much more favourable position than he would be in, if he relied upon the terms of the contract, and no presumption could arise that the mortgagee was, apart from the provisions of the Act, not entitled to retain possession after the date of the institution of the suit. *Janoji* v. *Janoji, I. L. R. 7 Bom. 185,* applied. RAMCHANDRA VENKAJI NAIK *v.* KALLO DEVJI DESHPANDE (1915)

I. L. R. 39 Bom. 587

2.———— *Mortgage—Several mortgages connected together and involving the same security—One suit for account and redemption—Mode of taking account.* Where there are several mortgages in favour of the same mortgagee, all connected with and involving the same security, the provisions of s. 13 of the Dekkhan Agriculturists' Relief Act, 1879, should not be held to isolate the account of each mortgage when there is one suit filed by the mortgagor for the redemption of all the mortgages. DHONDI BIN RANOJI *v.* REVAPPA SATAPPA (1917)

I. L. R. 41 Bom. 453

3.———— *Suit for accounts—Original mortgage transaction merged in a decree—Subsequent mortgage in satisfaction of part of the decretal debt—Whether the amount of the mortgage be regarded as principal sum in taking accounts—Court's power to go behind the decree.* The defendant mortgagee had obtained a decree against the plaintiffs and other mortgagors for a certain amount. In satisfaction of their share of the decretal debt, the plaintiffs passed a mortgage bond in favour of the defendant for R1,480. The plaintiffs having sued for accounts on the mortgage under the Dekkhan Agriculturists' Relief Act, 1879, the lower Courts treated R866 out of the mortgage amount as representing the original principal under the earlier decree and allowed interest only on that sum. On appeal to the High Court: *Held,* that R1,480 should be regarded as the principal amount for the purpose of taking accounts. S. 13 of the Dekkhan Agriculturists' Relief Act, 1879, allowed the Court to go behind the private settlement or a private contract but it did not empower the Court to go behind a civil Court's decree in which any preceding contract between the parties was merged. MAREPPA *v.* GUNDO ANNAJI (1918)

I. L. R. 43 Bom. 1

4.———— *Accounts—No data showing exact amount of principal sum—Court can form reasonable estimate of the amount from the amount of consideration stated in the deed.* In taking accounts under s. 13 of the Dekkhan Agriculturists' Relief Act, in the absence of data showing exactly how much principal has been received, the Court can form a reasonable estimate from the amount of consideration stated in the bond as to the probable amount of actual principal, and there is no legal objection to that estimate being accepted and acted on. *Dhondi* v. *Lakshman (1894) 19 Bom. 553,* explained. KONDAN *v.* INDARCHAND . . **I. L. R. 45 Bom. 323**

5.———— *Accounts—Series of transactions—Second transaction entered into before the first transaction had come to an end—Accounts could be taken as if the transactions were one entire transaction.* In 1885 there was a mortgage between the parties under which the mortgagee was to remain in possession of the mortgaged property and to receive profits in lieu of interest on a part of the principal amount and the remaining amount was to carry interest. In 1891 and 1895 fresh advances were made on bonds secured on the same property. The lower Courts found that when the last advance of 1895 was made the original mortgage transaction had not come to an end but was still open between the parties. Accordingly an account of all the transactions under the Dekkhan Agriculturists' Relief Act was taken and it was found that nothing was due to the mortgagee. In second appeal it was contended that the accounts were taken according to a wrong method. *Held,* that the series of transactions between the parties were exactly the kind of series of transactions contemplated by s. 13 of the Dekkhan Agriculturists' Relief Act and accounts could be taken of the whole series as if they were one entire transaction. *Vishnu Keshav Joshi* v. *Satwaji valad Tulsaji Navale (1897) P. J. 87,* distinguished. GURUNATH KESHAV *v.* SADASHIV BALKRISHNA . . **I. L R. 45 Bom. 216**

———— **ss. 13, 15D and 16**—*Momentary dealings, mortgages and promissory notes—Suit for general account and redemption—One general account of mortgage and promissory note transactions—Mortgages found to be satisfied—Surplus profits under mortgage transactions applied in reduction of the claim on promissory notes—Provision of the Dekkhan Agriculturists' Relief Act (XVII of 1879) for two different classes of suits for account by agriculturists—s. 15 D and 16 of the Act—Mortgage account entirely separate from the promissory note account—Mortgagee not accountable for surplus profits under mortgage transactions.* In a suit for general account under the Dekkhan Agriculturists' Relief Act (XVII of 1879) and for redemption of mortgaged property, the plaintiff combined

DEKKHAN AGRICULTURISTS' RELIEF ACT (BOM. XVII OF 1879)—*contd.*

——— ss. 13, 15 D and 16—*contd.*

his claim for account of the mortgage transactions with his claim for an account of moneys lent upon promissory notes. In taking an account the Court made up one general account of the mortgage transactions and the promissory note transactions and having found that the mortgages were satisfied, applied the profits subsequent to the date of the satisfaction of the mortgage debts in the account in reduction of the amount due to the defendant on the promissory notes: *Held,* that the account could not be accepted. The Dekkhan Agriculturists' Relief Act (XVII of 1879) has made provision for two different classes of suits for account by agriculturists. S. 15D of the Act relates purely and exclusively to mortgage transactions. Under that section the plaintiff agriculturist may have either a declaration of the amount due or he may combine a declaration of the amount due with a decree for redemption. S. 16 of the Act entitles the plaintiff to sue for a general account of money dealings between him and the lender and for a bare declaration of the amount due without any relief being claimed. Thus the two sections where accounts are contemplated stand on a different footing. Under the Act the mortgage account must be treated as entirely separate from the promissory note account so that the lender mortgagee would not be accountable for surplus profits received by him after the date when the mortgage claims were satisfied. *Janoji* v. *Janoji, I. L. R. 7 Bom. 185* and *Ramchandra Baba Sathe* v. *Janardan Apaji, I. L. R. 14 Bom. 19,* referred to. LAXMANDAS HARAKCHAND *v.* BABAN (1914)

I. L. R. 39 Bom. 73

——— s. 15B—.

See LIMITATION ACT (IX OF 1908), SCH. I, ARTS. 181, 182.

I. L. R. 43 Bom. 689

1.——— *Mortgage decree—Decree nisi.* A decree in a redemption suit under the provisions of the Dekkhan Agriculturists' Relief Act provided that on mortgagor paying a certain amount within twelve months he would be entitled to redeem or in default the mortgagee should recover the amount by sale of the mortgaged property: *Held,* that on the terms of the decree, it was substantially a decree *nisi* and was not one of the variants permitted by s. 15B of the Dekkhan Agriculturists' Relief Act, 1879. RAMJI *v.* PANDHARINATH (1918)

I. L. R. 43 Bom. 477

2.——— *Mortgage account—Redemption—Mortagee allowed interest—Mortgagee's liability to account for mesne profits from the date of suit till restoration of possession—Practice.* Plaintiffs sued for accounts and for redemption of a mortgage under the Dekkhan Agriculturists' Relief Act and obtained an instalment decree for redemption in their favour. By the terms of the decree, the plaintiffs were directed to pay certain amount with interest at 6 per cent. per annum from the date of suit and were held entitled to recover possession of the property mortgaged at once, the mortgagee being liable to account for profits received from the date of suit till restoration of possession to the plaintiffs. The mortgagee having objected to that part of the decree which gave him interest and directed him to account for mesne profits: *Held,* overruling the objection, that under s. 15B (1) of the Dekkhan Agriculturists' Relief Act the Court had power to allow interest to the mortgagee and to direct him to account for mesne profits from the date of suit till restoration of possession. *Ramchandra Venkaji Naik* v *Kallo Deuj Deshpande (1915), 39 Bom. 587,* distinguished. MAHAMAD EBRAHIM *v.* SHAIKH MAHOMAD.

I. L. R. 44 Bom. 372

3.——— *Power to order payment by instalments—Decree—Award on arbitration out of Court.* A decree was passed in terms of an award, which was arrived at on arbitration out of Court. On proceedings being taken to execute the decree, the judgment-debtor applied to the Court for an order to make the decretal amount payable by instalments under s. 15B of the Dekkhan Agriculturists' Relief Act, 1879: *Held,* that the Court had no power to make any order as to instalments under s. 15B of the Dekkhan Agriculturists' Relief Act, 1879, which did not apply, inasmuch as the application to file the award was not a suit of the description mentioned in s. 3, cl. (*y*), of the Act. *Mohan* v. *Tukaram, I. L. R. 2 Bom. 63,* and *Ghulam Jilani* v. *Muhammad Hassan, L. R. 29 I. A. 58,* commented on GOVINDRAO NARHAR *v.* AMBALAL MOHANLAL (1911) . . . **I. L. R. 35 Bom. 310**

4.——— *Compromise—Decree in terms of the compromise—Application for decree—Terms of the compromise opposed to law—Public policy—Instalments—Default—Payment of whole sum.* A suit brought against an agriculturist-defendant to recover money by sale of mortgaged property was compromised on the terms that the defendant should pay the amount in equal annual instalments, and that on failure to pay any two instalments the plaintiff should be at liberty to realise the whole of the balance by sale of the entire mortgaged property through the Court The compromise was brought before the Court with a view to obtain a decree in its terms. The defendant when examined by the court agreed to be bound by its terms which were explained to him. The Subordinate Judge, however, felt doubt as to the validity of the compromise; and referred for opinion the following two questions to the High Court: (*i*) whether the compromise was lawful although it provided that in default of the payment of two instalments the plaintiff should realize the whole balance due by sale of the entire mortgaged property, such provision having been opposed to s. 15B, cl. (*2*) of the Dekkhan Agriculturists' Relief Act, 1879; and (*ii*) whether the Court was bound to pass a decree on a compromise of this character: *Held,* that the term "that in default of payment of two instalments the whole mortgaged property shall be liable to sale" was contrary to the public policy as declared in s. 15B, cl. (*2*) of the Dekkhan Agriculturists' Relief Act, 1879; and that, therefore, it was not competent to the Court to pass a decree which would be in conflict with the statutory provision: *Held,* further, that the mere fact that the defendant though apprised of the terms of the compromise agreed to it, did not invest the Court with jurisdiction to pass a decree

DEKKHAN AGRICULTURISTS' RELIEF ACT (BOM. XVII OF 1879)—*contd.*

——— s. 15B—*contd.*

to carry out the compromise. KISHANDAS SHIVRAM MARWARDI *v.* NAMA RAMA VIR (1910)
I. L. R. 35 Bom. 190

5. ——— *Civil Procedure Code (Act V of 1908), O. XXIII, r. 3—Agriculturist mortgagor—Suit for account of principal and interest—Decree in terms of compromise—Compromise made without compliance with the special provisions of the Dekkhan Agriculturists' Relief Act—Compromise valid :* *Held* by the Full Bench that a compromise in a suit which came under the Dekkhan Agriculturists' Relief Act (XVII of 1879) was not bad in law because it was made without compliance with the special provision (s. 15B) of that Act. SHIVAYAGAPPA *v.* GOVINDAPPA (1913) . . . **I. L. R. 37 Bom. 614**

6. ——— *Payment by instalments—Default in payment—Order for sale of necessary portion of property under s. 15B (2)—Application to make the decree final under Order XXXIV, rule 5 (2) of the Civil Procedure Code, not necessary.* A decree-holder for sale upon a mortgage, in default of payment of instalments order under s. 15B (1) of the Dekkhan Agriculturists' Relief Act (XVII of 1879), need not apply under Order XXXIV, rule 5 (2) of the Civil Procedure Code to make the decree final before he can apply for sale of the necessary portion of the property under s. 15B (2) of the Act. KASHINATH VINAYAK *v.* RAMA DAJI (1916) . **I. L. R. 40 Bom. 492**

7. ——— s. 15(d)—*Suit by mortgagor for account—Application for redemption decree in appeal—Redemption decree passed by Court in Appeal—Interpretation.* In a suit for an account brought by a mortgagor under the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879) the Court found that a sum of R100 was due by the plaintiff to the defendant. The defendant appealed. The Appellate Court, on the plaintiff's application that his suit should be treated as one for redemption, passed a decree for redemption on payment of R49-2-0 by the plaintiff to the defendant. The defendant preferred a second appeal contending that the words "the decree in the suit" in s.15D. cl. (3) of the Act meant decree in the original Court and not of the Court of Appeal: *Held* dismissing the second appeal, that when the decree of the lower Court is reversed or varied in appeal, the decree of the Appellate Court becomes the decree in the suit which is to be executed in execution proceedings. NAVLAJI SARDARMAL *v.* RAMA DHONDI (1909) **I. L. R. 34 Bom. 158**

——— s. 20—*Court—Instalments, power to grant—Status of agriculturist not at the date of decree, but in execution proceedings.* The Court has no power to grant instalments, under s. 20 of the Dekkhan Agriculturists' Relief Act (XVII of 1879), in the case of a judgment-debtor who was not an agriculturist when the decree was obtained, but who becomes one at the time of the execution by limiting himself exclusively to profits in land. BALCHAND CHATURCHAND *v.* CHUNILAL JAGJIVANDAS (1913).
I. L. R. 37 Bom. 486

——— s. 22—*Decree—Execution—Agriculturist—Exemption from liability to attachment of*

DEKKHAN AGRICULTURISTS' RELIEF ACT (BOM. XVII OF 1879)—*contd.*

——— s. 22—*contd.*

sale—Absence of proof of exemption—Jurisdiction of the Court to order sale—Civil Procedure Code (Act V of 1908), s. 60. S. 60 of the Civil Procedure Code (Act V of 1908) lays down the general rule that property liable to attachment and sale in execution of a decree is lands, houses, etc., belonging to the judgment debtor. An agriculturist, in order to resist the application of that general rule, must prove that he belongs to the privileged class so as to render s. 22 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) applicable to his case. In the absence of such proof the exemption from liability to attachment or sale does not exist for the purpose of execution proceedings and the executing Court has, therefore, complete jurisdiction to make the order for sale. NARAYAN ANAND RAM *v.* GOWBAI (1912)
. **I. L. R. 37 Bom. 415**

——— *House of agriculturist—Exemption from sale—Exemption not confined to cases of contractual debts but extends to restitution proceedings—Civil Procedure Code (Act V of 1908), s. 144.* The defendants paid into Court a sum which they had to pay under a decree, and at the same time preferred an appeal against the decree. The sum paid into Court was taken away by the plaintiff. The appeal filed by the defendants was successful: the decree was reversed and the suit ordered to be retried. The defendants thereupon applied under the provisions of s. 144 of the Civil Procedure Code, for restitution of money paid by them; and prayed for an order to sell the plaintiff's house in case he failed to make the restitution. The plaintiff contended that he being an agriculturist his house could not be sold, by virtue of the provisions of s. 22 of the Dekkhan Agriculturists' Relief Act, 1879. The lower Courts negatived the contention on the ground that the provisions of s. 22 applied only in cases of contractual debts and not to restitution proceedings. The plaintiff having appealed: *Held*, that if the plaintiff was an agriculturist, his house was immune from sale under s. 22 of the Dekkhan Agriculturists' Relief Act (XVII of 1879). The true construction of s. 22 of the Dekkhan Agriculturists' Relief Act (XVII of 1879) is, first, a general provision that immoveable property belonging to an agriculturist shall always be immune from sale, and, secondly, a *proviso* directing that this immunity is subject to exception where the two following conditions are both satisfied, that is to say, (*a*) where the decree or order in question relates to the repayment of a debt, and (*b*) where the agriculturist's property has been specially mortgaged for the payment of that debt. The limiting words referring to a debt occur only in the *proviso* and cannot be imported into the main rule so as to restrict its express generality. MAHADEO RANGNATH *v.* RAMA TUKARAM (1915).
I. L. R. 40 Bom. 194

——— ss. 39, 48—*Conciliation—Time taken up in conciliation proceedings—Exclusion of time—Limitation.* The plaintiff sued on a promissory note dated the 12th of June 1905. He first applied on the 23rd May 1908 for a conciliator's certificate under s. 39 of the Dekkhan Agriculturists' Relief Act, 1879, and obtained it on the 31st August 1908. Then, on the 10th September 1908, both

DEKKHAN AGRICULTURISTS' RELIEF ACT (BOM. XVII OF 1879)—*contd.*

———— ss. 39, 48—*contd.*

he and the defendant made a joint application for conciliation. The conciliator held that the first certificate that he had granted had become useless, and gave a fresh certificate on the 3rd December 1908. The suit was brought on the 11th December 1908. It was contended that the suit was barred by limitation: *Held,* that the suit was within time, inasmuch as the whole proceeding from the 23rd of May 1908 to the 3rd of December 1908, was one and continuous, and that period should be excluded under s. 48 of the Act. DEVIDAS *v.* VITHALDAS (1911) **I. L. R. 36 Bom. 183**

———— **ss. 47 and 48**—*Transfer of Property Act (IV of 1882), s 85—Limitation Act (IX of 1908), s. 11, Art. 11—Agriculturist mortgagor—Suit—Conciliator's certificate—Mortgagor necessary party along with other persons interested—Exclusion of time spent in obtaining Conciliator's certificate—Limitation.* Defendants 1 and 2 brought a suit on a mortgage against defendant 3 and while the suit was pending, defendant 3 mortgaged the same property, namely, a house along with other properties to the plaintiffs. Defendants 1 and 2 having obtained a decree, they applied for execution and sought to recover the decretal debt by sale of the house. Thereupon, the plaintiffs intervened and applied that the house should be sold subject to their mortgage lien. The
disallowed they
1, 2 and 3 to est
mortgage. The suit was brought within one year of the order rejecting their application after the exclusion of the time taken up in obtaining the Conciliator's certificate under ss. 47 and 48 of the Dekkhan Agriculturists' Relief Act (XVII of 1879), defendant 3 being described in their mortgage as an agriculturist Defendants 1 and 2 contended that defendant 3 being not a necessary party, the Conciliator's certificate was unnecessary and the suit was time-barred: *Held,* that under the provisions of the Transfer of Property Act (IV of 1882) defendant 3 was a necessary party to the suit which was brought on the strength of the mortgage and he being an agriculturist, the Conciliator's certificate was necessary and the suit was, therefore, not time-barred. EKNATH PANDOBA *v.* DAGADURAM (1912) **I. L. R. 36 Bom. 624**

———— *s.* 48—

See LIMITATION **I. L. R. 38 Bom. 656**

———————— *The "words period of limitation prescribed" in the section, construction of—Whether the words refer only to the period expressly provided in the Limitation Act—Decree—Execution—Conciliator's certificate—Civil Procedure Code (Act V of 1908), s. 48—Limitation.* A decree was obtained on October 28th, 1899, and was followed by three *darkhast* which had been made within the time allowed. The fourth *darkhast* was presented on August 23rd, 1913, that is, more than twelve years after the decree. In July 1911, the judgment-creditor applied for a conciliator's certificate, the suit being governed by the Dekkhan Agriculturists' Relief Act, 1879. The certificate was obtained on March 29th, 1913. A question being raised whether under s. 48 of the Dekkhan Agriculturists' Relief Act, 1879, the judgment-creditor was entitled to exclude the interval of time occupied in obtaining the certificate in computing the period of limitation prescribed by s. 48 of the Civil Procedure Code, 1908: *Held,* answering the question in the affirmative, that the words "the period of limitation prescribed for any suit or application" in s. 48 of the Dekkhan Agriculturists' Relief Act, 1879, were general and comprehensive and referred to the limitation prescribed in any law for the time being in force. They could, therefore, control or modify the period of time allowed not only in the statute of limitation but also that in s. 48 of the Civil Procedure Code, 1908. *Dayaram* v. *Laxman, 13 Bom L. R. 284,* distinguished. SHIDAYA VIRBHADRAYA *v.* SATAPPA BHARMAPPA (1918) . . . **I. L. R. 42 Bom. 367**

DEKKHAN AGRICULTURISTS' RELIEF ACT (BOM. XVII OF 1879)—*contd.*

———— **s. 71**—*Civil Procedure Code (Act V of 1908), O. XXI, r. 20, O. XXXII, r. 7—Decree in favour of minor—Compromise of the decree with minor's mother—Compromise neither certified to nor sanctioned by the Court—Payment made under compromise to be taken into account under the decree.* A decree passed on a mortgage provided for payment of Rs 662-15-0 in annual instalments of Rs. 60 each commencing from the 15th April

ment of which was endorsed on the decree though not certified to the Court. Nor did the Court sanction the compromise. Later the widow and the Nazir of the Court were appointed guardians of the property of the minor. Early in 1907 they applied to recover the amount of the first instalment whicl
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O. XXI, r.

paid. CHHOGANLAL KALIDAS *v* FARASRAM KURNASHANKAR. . **I. L. R. 45 Bom. 1128**

———— **s. 72**—*Agriculturist—Status at the time when the cause of action arises—Sons of original debtor, not in existence at the date of the cause of action, are yet within the statute—"Person," meaning of.* The defendants' father passed a registered bond to the plaintiff in 1900, the cause of action under which accrued in 1901. In 1912, the plaintiff filed a suit to recover moneys due unde
time
the
1879,
did not apply, for at the time the cause of action arose in 1901, they were not only not agriculturists but were not in existence at all. The lower Court negatived the contention and decreed the suit. The defendants having appealed: *Held,* that the suit fell within the scope of s. [illegible] of the Dekkhan Agriculturists' Relief Act, and that the plaintiff was entitled to the [illegible] limitation. The word "person" in s. [illegible] Dekkhan Agriculturists' Relief Act [illegible] 1879) is equivalent to the word "[illegible]" which occurs in s. 2, cl. (w) of the Act [illegible] *v.* A[illegible] (1915) I. L. R. [illegible]

DELAY.

See Bail . I. L. R. 37 Calc. 412

See Divorce . I. L. R. 47 Calc. 1068

See Limitation Act (XV of 1877) ss. 5 and 7 . I. L. R. 34 Bom. 589

See Limitation Act (IX of 1908) ss. 5 and 14 . I. L. R. 42 Bom. 295

See Petition . I. L. R. 41 Bom. 36

See Probate . I. L. R. 42 Calc. 480

See Sanction for Prosecution. I. L. R. 47 Calc. 741

See Stay of Execution. I. L. R. 48 Calc. 796

——— caused by closing of Court—

See General Clauses Act (X of 1897), s. 10 . . I. L. R. 35 Bom. 35

——— effect of—

See Specific Relief Act (I of 1877), ss. 15 and 17 I. L. R. 37 Mad. 403

——— excuse of—

See Limitation I. L. R. 38 Bom. 653

——— in filing appeal—

See Limitation Act (IX of 1908) s, 5. I. L. R. 41 Bom. 15

See Amended Letters Patent, cl. 15. I. L. R. 42 Bom. 260

——— in investigation of claim.

See Civil Procedure Code (Act VIII of 1859), s. 15 . I. L. R. 34 Bom. 676

DELEGATION OF AUTHORITIES, POWERS OR FUNCTIONS.

See Local Government, powers of. I. L. R. 37 Calc. 467

See Probate . 14 C. W. N. 1068

——— by Chairman—

See Demolition of Building. I. L. R. 37 Calc. 585

——— by Collector—

See Revenue Jurisdiction Act, Bombay (X of 1876), ss. 4 (c), 5 and 6 I. L. R. 37 Bom. 542

——— by Trustee—

See Trustee of a Temple. I. L. R. 44 Mad. 636

——— District Magistrates, powers of—

See Criminal Procedure Code, s. 17 I. L. R. 36 All. 468

——— nazir's power of—

See Attachment I. L. R. 40 Calc. 849

DELHI.

——— Pahar Ganj—Whether Custom of Pre-emption prevails—

See Custom (Pre-emption). I. L. R. 2 Lah. 83

DELHI LAW ACT (XIII OF 1912).

See Forfeiture. I. L. R. 42 Calc. 730

DELIVERY.

See Carriers . I. L. R. 39 Calc. 311

See Sale of Goods. I. L. R. 40 Calc. 523

——— taking of—

Dishonestly receiving stolen property . I. L. R. 40 Calc. 990

DELIVERY OF INSTRUMENT.

See Registration Act 1908, s. 17. 25 C. W. N. 985

DELIVERY OF POSSESSION.

See Rioting . I. L. R. 41 Calc. 43

——— resistance to—

See Possession I. L. R. 47 Calc. 907

DELIVERY ORDER.

See Carriers . I. L. R. 41 Calc. 703

See Vendor and Sub-vendee. I. L. R. 38 Calc. 127

DEMANDS.

See Mahomedan Law—Pre-emption. I. L. R. 37 All. 522

DEMISE.

——— absence of actual—

See Registration of Documents. L. R. 46 I. A. 240

DEMOLITION OF BUILDING.

See Acquiescence. I. L. R. 37 Calc. 833

——— *Calcutta Municipal Act (Beng. Act III of 1899), ss. 18, 102 (1) (c), 391, 449—Sanction by District Building Surveyor of additions to contemplated building —Delegation of power by Chairman—Legality of sanction—Sanction of General Committee—Proceeding under s. 449—Application thereunder to Magistrate, signed for the Chairman by the Secretary to the Corporation and the General Committee—Irregularity.* An addition to a contemplated building sanctioned by a District Building Surveyor, to whom the power of sanction has been delegated by the Chairman under s. 18 of the Calcutta Municipal Act, 1899, is a duly authorized erection, and the sanction of the General Committee under s. 391 is not necessary. S. 391 applies only to alterations of, and additions to, existing buildings. Where the General Committee approved of the suggestion of the Building Sub-Committee that certain additions to a building were unauthorized, and that an application should be made to the Magistrate under s. 449 of the Act, and directed the Chairman to make it, whereupon an application was made, purporting to come from the Chairman, but signed by the Secretary to the Corporation, who was also Secretary to the General Committee :—*Held*, that the irregularity, if any, was cured by s. 102 (*1*) (*c*) of the Act. Kissori Lal Jaini *v.* The Corporation of Calcutta (1910) . . . I. L. R. 37 Calc. 585

DEMONSTRATIVE LEGACY.

See Will . I. L. R. 43 Cal. 201

DEMURRAGE.

See RAILWAY COMPANY.
I. L. R. 42 All. 655

DENATURED SPIRIT.

See EXCISE . I. L. R. 41 Calc. 694

DENIAL OF JUSTICE.

See DISPUTE CONCERNING LAND.
I. L. R. 38 Calc. 24

DE NOVO TRIAL.

See REMAND . I. L. R. 44 Calc. 929

DEPENDENT RELATIVE REVOCATION.

——— **doctrine of**—

See HINDU LAW—WILL.
I. L. R. 39 Mad. 107

DEPORTATION.

See LIBEL . I. L. R. 37 Calc. 760

DEPOSIT.

See BENGAL TENANCY ACT, s. 153-A.
15 C. W. N. 760

See CONTRACT ACT (IX OF 1878), ss. 39, 55, 64, 65, 73, 74 AND 75.
I. L. R. 38 Mad. 178

See PATNI SALE . I. L. R. 47 Calc. 337

——— **by co-tenant, under s. 310A, Civil Procedure Code, 1882**—

See CONTRIBUTION . I. L. R. 38 Calc. 1

——— **by judgment-debtor**—

See RATEABLE DISTRIBUTION.
I. L. R. 40 Calc. 619

——— **forfeiture of**—

See CONTRACT. I. L. R. 33 All. 166
I. L. R. 38 Mad. 801
I. L. R. 41 All. 324
24 C. W. N. 40

See CONTRACT ACT, 1872, s. 55.
I. L. R. 33 Mad. 375

——— **in Court**—

See MORTGAGE . I. L. R. 37 Calc. 282

——— **of earnest money, forfeiture of**—

See CONTRACT, BREACH OF.
I. L. R. 38 Mad. 801

——— **of money**—

See LIMITATION ACT (IX OF 1908), s. 17.
I. L. R. 37 Mad. 175

——— **order to make**—

See PRESS ACT (I OF 1910), s. 3.
I. L. R. 37 Bom. 555

——— **right to on insolvency**—

See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXXVIII, R. 5.
I. L. R. 39 Mad. 903

——— *Contract Act (IX of 1872), ss. 43, 70—Deposit by co-tenant not made party in co-sharer landlord's suit for share of rent to set aside sale—Civil Procedure Code (Act XIV of 1882), s. 310A—Sale set aside—Liability of other co-tenants to contribute.* A co-sharer landlord brought a suit for his share of the rent against all except one of several co-tenants, and sold the holding in execution of the decree obtained therein. A purchaser of the interest of the remaining co-tenant applied under s. 310A, Civil Procedure Code, and the sale was set aside on his making the required deposit: *Held, Per* JENKINS, *C. J.*; that on the findings of fact of the lower Appellate Court, that the plaintiff did not intend to make the deposit gratuitously and that the defendants enjoyed the benefits thereof and the deposit having moreover been made lawfully in that it was done with the approval of the Court, s 70 of the Contract Act applied. That the plaintiff was entitled to sue the defendants in contribution but only in respect of their share of the decretal debt and not in respect of the penalty of 5 per cent on the purchase-money payable under s 310A, Civil Procedure Code. *Per* DOSS, *J.*—That the plaintiff was entitled to recover the defendant's share of the decretal debt, not under s. 70, as being a co-tenant, he was himself liable to the landlord for the whole debt, but under s 43, his obligation to pay remaining notwithstanding that the decree was passed against the other co-tenants only. That the sale not having been confirmed and the sale-proceeds withdrawn when the deposit was made, the decree remained undischarged and was only satisfied when the money deposited by plaintiff was withdrawn MOHENDRA GHOSHAL *v* BHUBAN MARDANA (1910) . . **14 C. W. N. 945**

1. ——— **Husband depositing money in wife's name in his shop**—*Interest allowed over the amount—Depositee allowed to withdraw—Husband acknowledging trust—Creation of trust—Trusts Act (II of 1882), ss. 5 and 6—Transfer of Property Act (IV of 1882), ss 5 and 54* *D* made a credit entry of R20,000 in his books in the name of his wife *H* carrying interest at 4½ per cent The entry was made on the 1st November 1891 as of the 30th November 1890. The amount of R20,000 was treated as belonging to *H* in the *sarvaya* (balance sheet) in the *samadaskat* book (account book of deposits, etc.) and in the *vyajavahi* (interest account book) In November 1895 *H*, on the occasion of her going on pilgrimage, withdrew some money from the account. *H* died on the 2nd March 1901. On the 29th July 1901 *D* wrote a letter to his four daughters by *H* saying that the money above referred to was given by him to *H* as a gift, that the four daughters had equal right to take the money but that it was to be divided after his death. In February 1903 *D* debited the whole amount to *H*'s account and credited the same to the sons of *M*, one of the daughters of *D* and *H*. This he confirmed by his will which he made shortly afterwards wherein he stated that the money was always his own and never belonged to his wife *H*. After *D*'s death, which took place in March of the same year, the three remaining daughters of *D* and *H* sued to recover their share of the money:—*Held*, that the plaintiffs were entitled to recover their share in the amount. *Held*, by CHANDAVARKAR, *J.*, that the circumstances proved showed that *D* intended a trust in favour of his wife *H*, and that that trust was carried into effect legally by him. *Held*, by HEATON, *J.*, that there was no trust, but that, in the circumstances of the case, *D* conferred on *H* a right to the money though he did not actually

DEPOSIT—*contd.*

give her money, and this right he by his own acts and words made perfect by those means which were appropriate to the purpose. BAI MAHAKORE *v.* BAI MANGLA (1911)

I. L. R. 35 Bom. 403

2. ———— **Stakeholder**—*Valid assignment by depositor to his creditor—Neglect of the creditor to recover—Creditor chargeable with the amount.* Where money deposited with a stakeholder was validly assigned by the depositor to his creditor in satisfaction of his debt and the creditor, being able to recover the amount so assigned, neglected to do so, he was chargeable with the amount. GANPATRAO BALKRISHNA BHIDE *v.* MAHARAJA MADHAVRAO SINDE (1910) **I. L. R. 35 Bom. 1**

3. ———— **Contract for purchase of land**—*Every payment by a purchaser to the vendor is not in the nature of a deposit liable to be forfeited if the purchaser violates his Contract.* It is incumbent on the Court in each case to ascertain the real intention of the parties from all the terms of the Contract. NAWAB KHAJA HABIBULLAH *v.* ARMEN DEWAN.

24 C. W. N. 40

DEPOSIT IN COURT.

See MORTGAGE . **I. L. R. 37 Calc. 282**

See SALE. **I. L. R. 48 Calc. 811**

———— **time for**—

See EXPARTE DECREE

I. L. R. 39 Mad. 583

———— *Putni rent—Bengal Tenancy Act (VIII of 1885), ss. 54, 61, 62 (2), 125 (e)—Putni Regulation (VIII of 1819).* S. 61 of the Bengal Tenancy Act is applicable to a *putnidar*, as it does not in any way affect the Regulation VIII of 1819 relating to *putni* tenures, and it is open to him to deposit the *putni* rent in Court. BATA KRISHNA RANO *v.* JANKI NATH PANDE (1914) . . **I. L. R. 41 Calc. 1000**

———— *Judgment debtor—Transferee of the judgment-debtor—Bengal Tenancy Act (VIII of 1885), s. 174—Sale, setting aside of.* An application under s. 174 of the Bengal Tenancy Act can be made by the judgment-debtor alone and by no other person. *Ranjit Kumar Ghosh* v. *Jogendra Nath Ray, 16 C. L. J. 546,* referred to. SURENDRA NARAYAN SINGH *v.* LACHMI KOER (1915) **I. L. R. 43 Calc. 100**

———— *Money paid under compulsion of Law—Want of bonâ fides—Action for recovery of money—Civil Procedure Code (Act V of 1908), O. XXI, r. 46, cl. (1)—Attachment of debt due to a stranger on the allegation that the granishee's creditor was benamidar of the judgment-debtor—Deposit by garnishee, conditional on enquiry—Withdrawal of the money from Court by the attaching creditor without notice to the garnishee —Court's power of enquiry.* Where debt due to a stranger was attached on the allegation that he was benamidar of the judgment-debtor and the attaching creditor withdrew the money by leave of the Court without notice to the garnishee in a suit by the latter for the recovery of the money deposited, it being found that there was no benami transaction as alleged: *Held,* that the rule that money paid under compulsion of a legal process was irrecoverable can only be pleaded where the party who has got the benefit of his

DEPOSIT IN COURT—*contd.*

opponent's payments, acts *bonâ fide. Marriot* v. *Hampton, 7 T. R. 269,* distinguished. *Ward and Co.* v. *Wallis, (1900) 1 Q. B. 675,* followed. Cl. (3) r. 46 of O. XXI of the Civil Procedure Code does not contemplate of cases where the deposit was purely conditional on enquiry being held as to judgment-debtor's rights and a withdrawal by the attaching creditor of the money so conditionally deposited, without notice to the garnishee, even though made with the leave of the Court, is a grave abuse of judicial process. It is true that O. XLVI does not expressly contemplate of an enquiry as is enjoined by O. V, rule 45 of the Rules of the Supreme Court in England, but the Court has inherent power to enquire. HARINATH CHOWDHURY *v.* HARADAS ACHARJYA CHOWDHURY (1915) . . . **I. L. R. 43 Calc. 269**

DEPOSIT OF TITLE-DEEDS.

See TITLE . **I. L. R. 37 Calc. 239**

DEPOSITION.

See INSOLVENT . **I. L. R. 46 Calc. 996**

See PERJURY—WITNESS.

I. L. R. 42 Calc. 240

———— **corroboration of**—

See EVIDENCE ACT (I OF 1872), ss. 21, 157

I. L. R. 34 Bom. 599

———— **reading over of**—

See CHARGE . **I. L. R. 42 Calc. 957**

———— **taken in absence of accused**—

See HABEAS CORPUS.

I. L. R. 39 Calc. 164

———— **under compulsion**—

See FALSE EVIDENCE.

I. L. R. 37 Calc. 878

———— *Criminal Procedure Code, s. 360—Deposition of witnesses to be read out to them in presence of accused.* The disregard at trials in the mofussil of the provision of s. 360 of the Criminal Procedure Code which requires that deposition of a witness should be read over to him in the presence of the accused or his pleader, condemned. JYOTISH CHANDRA MUKHERJEE *v.* EMPEROR (1909) **I. L. R. 36 Calc. 955**
14 C. W. N. 82

———— *Witness reading over his deposition in Court—Admissibility of same on subsequent trial for perjury—Misdirection—Material evidence recorded in anticipation of the examination of a witness not ultimately called—Direction to Jury to exclude such evidence—Power of High Court to substitute its own finding for verdict of Jury—Civil Procedure Code (Act V of 1908), O. XVIII, r. 5—Evidence Act (I of 1872), ss. 80, 167—Criminal Procedure Code (Act V of 1898), s. 423.* The persual of his deposition by a witness is a substantial compliance with r. 5, O. XVIII of the Civil Procedure Code, and such deposition, when duly signed by the Judge, is admissible under s. 80 of the Evidence Act, without proof, on a subsequent trial of the deponent for giving false evidence. *Elahi Baksh Kazi* v. *Emperor, I. L. R. 45 Calc. 825,* referred to. *Empress* v. *Mayadeb Gossami, I. L. R. 6 Calc. 762, Mohendra Nath Misser* v. *Emperor, 12 C. W. N.*

DEPOSITION—*contd.*

845, Rakhal Chandra Laha v. *Emperor, I. L. R. 36 Calc. 808, Jyotish Chandra Mukerjee* v. *Emperor, I. L. R. 36 Calc. 955*, and *Emperor* v. *Jogendra Nath Ghose, I. L. R 42 Calc. 240*, distinguished. *Kamatchinathan Chetty* v. *Emperor, I. L. R. 28 Mad. 308, Bogra* v. *Emperor, I. L. R. 34 Mad. 141*, and *Meango* v. *Bamah*, (*1918 Mad. W. N. 237*, referred to. The essential requirements of s. 80 are that the witness should be duly sworn and examined, and that his deposition should be signed by the Judge. A certificate at the end of the deposition that it was read over to or by the witness is not required by r. 5, O. XVIII, and its omission does not affect the admissibility of the deposition under s. 80 of the Evidence Act on the presumption arising thereunder. Where certain material evidence was admitted at the trial, in anticipation of the examination of a witness who was not, however, called, and the Judge directed the jury to put it out of their minds —*Held*, that such evidence might have had considerable influence on their minds, and that its admission was a misdirection notwithstanding the Judge's direction to exclude it from consideration. *Rex* v. *Norton*, [*1910*] *2 K. B. 500*, referred to. It is always dangerous to give in advance evidence the admissibility of which depends on what other witnesses may say when and if examined, and the Court should be very cautious in allowing such evidence to be given especially in jury trials. Under s. 167 of the Evidence Act if, in the opinion of the Appellate Court, there is sufficient legal evidence to justify the decision, the improper admission of other evidence is not in itself a ground for interference. But in jury trials the Appellate Court ought not to substitute its own verdict on the legal evidence for that of the jury. *Wafadar Khan* v. *Queen Empress I. L. R. 21 Calc. 955, Sadhu Shaikh* v. *Empress, 4 C. W. N. 576*, followed. In such cases the Court should not confirm the conviction on the legal evidence as sufficient unless satisfied that the verdict would have been the same if no evidence had been wrongly admitted, and this principle applies as well to cases of improper admission of evidence as to cases of misdirection. Conviction and sentence set aside, but no retrial ordered in the circumstances. RAMESH CHANDRA DAS *v.* EMPEROR (1919) . **I. L. R. 46 Calc. 895**

——————— *Admissibility of deposition when not taken in accordance with law on subsequent trial for abetment of forgery and of user—Deposition signed by Judge and witness—No cross-examination on the point at the trial—Presumption of compliance with the law—Civil Procedure Code (Act V of 1908)—O. XVIII, rr. 5, 6—Evidence Act (I. of 1872), ss. 80, 91.* The provisions of O. XVIII, rr. 5 and 6 of the Civil Procedure Code (Act V of 1908) are directory, and non-compliance therewith does not render the deposition inadmissible on a subsequent trial of the deponent either for giving false evidence or for abetment of forgery and of dishonest user of a bond proved by him in the course of a civil suit. *Empress* v. *Jayadeb Gossami, I. L. R. 6 Calc. 762, Kamatchinathan Chitty* v. *Emperor, I. L. R. 28 Mad. 308*, and *Emperor* v. *Jogendra Nath Ghose, I. L. R. 42 Calc. 240*, commented on *Bogra* v. *Emperor, I. L. R. 34 Mad. 141*, approved. If a deposition has not been read over to the witness, in the presence of the presiding Judge, it does not prove itself under s. 80 of the Evidence Act, but it may still be proved in some other way, *e g*, by the Judge who recorded it or by the admission of the *deponent*. S. 91 of the Evidence Act, even if it covers deposition, merely excludes oral evidence *of its contents*, but does not make the document inadmissible in evidence, nor does it deal with the *question* of its mode of proof otherwise. Where the deposition bore the signatures of the *presiding* Judge and of the deponent in his own vernacular, and the Judge and a pleader for the defendant, on whose behalf the appellant had deposed, *were examined* at the Sessions trial, but not cross-examined by the latter to show that the deposition had not been read over to *him* in the presence of the presiding officer, and there was nothing *to the contrary on* record of the Sessions trial. *Held*, that the infergnce was that the deposi- [illegible] *Per* [illegible] from [illegible] in it merely because the contents may not in fact be correct. Failure to ensure the accuracy of the record may create doubt as to the *correctness* of its contents, but does not affect its admissibility when it is otherwise proved. ELAHI BAKSH KAZI *v.* EMPEROR (1918) **I. L. R. 45 Calc. 825**

DEPUTY COLLECTOR.

See COLLECTOR.

——— procedure by, under the Rent Recovery Act—

See JURISDICTION OF HIGH COURT.
I. L. R. 38 Calc. 832

DEPUTY COMMISSIONER.

See PATNI LEASE.
I. L. R. 42 Calc. 1029

——— order of—

See HIGH COURT, JURISDICTION OF.
I. L. R. 40 Calc. 518

DEPUTY MAGISTRATE.

See PUNITIVE POLICE.
I. L. R. 40 Calc. 452

——— in charge of the district—

See MAGISTRATE, JURISDICTION OF.
I. L. R. 39 Calc. 1041

DERAILMENT OF TRAIN.

See NEGLIGENCE. **I. L. R. 48 Calc. 757**

DESAI IN BELGAUM DISTRICT.

See LIMITATION ACT (IX OF 1908), SCH. 1, ART. 152. **I. L. R. 43 Bom. 376**

DESAIGIRI ALLOWANCE.

——————— *Surat District*. In [illegible] is alien- [illegible] L. R. 26 [illegible] . DULLABHBHAI . . . **I. L. R. 45 Bom. 948**

DESCRIPTION OF PROPERTY.

See SALE IN EXECUTION OF DECREE.
I. L. R. 41 Calc. 590

DESERTION.

See DIVORCE . **I. L. R. 44 Calc. 1091**
I. L. R. 47 Calc. 1068

DESHGAT INAM.

See FORFEITURE **I. L. R. 36 Bom. 539**

DESHGAT VATAN.

See GRANT . **I. L. R. 39 Bom. 68**

See GRANT OF LAND.
I. L. R. 43 Bom. 37

DESHMUKHI VATAN.

See HEREDITARY OFFICES ACT (BOM. ACT III OF 1874), ss. 11, 11A.
I. L. R. 37 Bom. 37

DESHPANDE KULKARNI VATAN.

See PENSIONS ACT (XXIII OF 1871), s. 4.
I. L. R. 37 Bom. 91

DESHPANDEGIRI CASH ALLOWANCE.

See LIMITATION ACT (IX OF 1908), s. 7.
I. L. R. 42 Bom. 277

DESIGN.

——————— *Wrist-watch band—Registration—Application by outside party to expunge—Cancellation of registration by Controller—Jurisdiction of Controller—New and original design—Shape and configuration—Ornamentation and utility—Analogous designs—Different purposes and dissimilar use—Motion to the High Court by registered proprietor—Other specific and adequate legal remedy available—Specific Relief Act (I of 1877), s. 45—Patents and Designs Act (II of 1911), ss. 62, 64, 67.* G registered a design for a wrist-watch band, which he called the "Novelty" band. Subsequently Messrs. B. & Co. copied the design and on threat of legal proceedings by G, applied to the Controller of Patents and Designs under s. 62 of the Patents and Designs Act for an order to remove the design from the register. This the Controller did after having issued notice on G and having heard both parties. G then in an application, entitled "In the matter of s. 45 of the Specific Relief Act and in the matter of the Indian Patents and Designs Act, 1911," moved the High Court for an order that the Controller had no jurisdiction to remove the registration of the design and that he should be required to restore the design to the register on the ground that the design was new and original. The Court dealt with the matter under s. 64 of the Indian Patents and Designs Act and discharged the Rule, Messrs. B. & Co. contending that the design in question had been anticipated by a bracelet produced by Messrs. C. & K. On appeal by the petitioner. *Held*, that the Controller had no jurisdiction to cancel the registration, and under the Act the proper and ordinary way of expunging the registration of a design was to apply to this Court under s. 64 of the Patents and Designs Act. *Held*, also, that s. 62 of the Patents and Designs Act was limited to applications by the registered proprietor, or by some person in whom his interest was vested, and the action of the Controller was not justified by that section. *Held*, also, that the Court had no power to revise the Controller's decision under s. 64. *Held*, also, that this application, which was made under s. 45 of the Specific Relief Act, was not barred by s. 64 of the Patents and Designs Act. *Held*, also, that the application of the shape of the "Novelty" band to a watch to be worn on the wrist was for a purpose so different from and for a use so dissimilar to the purpose of the bracelet, that the design in question might be said to be original. *Per* SANDERSON, *C. J.* The shape and configuration of the metal band taken by itself cannot be said to be new or original. *Per* WOODROFFE, *J.* A wrist band used to carry an ornament such as that produced by Messrs. Cooke and Kelvey and a wrist band to carry a watch do not appear to me to be so analogous as to deprive the applicant of his claim to novelty. Further, the band is original and differs from the other band produced, by its circular shape, according to which it passes at the back of the watch, and as a consequence of that produces a flattening. GAMMETER *v.* THE CONTROLLER OF PATENTS AND DESIGNS (1917)
I. L. R. 45 Calc. 606

DESTINATION.

See TRADING WITH THE ENEMY.
I. L. R. 42 Calc. 1094

DESTRUCTION OF IMAGE.

See IMAGE . **I. L. R. 41 Calc. 57**

DETECTIVE.

See ACCOMPLICE . **I. L. R. 38 Calc. 96**

——————— privilege of—

See CHARGE . **I. L. R. 42 Calc. 957**

DETENTION IN CUSTODY.

See POLICE OFFICER.
I. L. R. 46 Calc. 581

DEVOLUTION OF INTEREST.

See LIMITATION **I. L. R. 43 I. A. 113**

DEUR, RAJAH OF.

See SANAD . **I. L. R. 36 Bom. 639**

DEVASTANAM COMMITTEE MEMBER.

See HINDU LAW—DEBT.
I. L. R. 37 Mad. 458

DEVOLUTION, SCHEME OF.

See HINDU LAW—INHERITANCE.
I. L. R. 38 Calc. 603

——————— difference of opinion—

See REVISION . **I. L. R. 47 Calc. 438**

DHOLI TENURE.

See CUSTOM (RELIGIOUS INSTITUTIONS.)
I. L. R. 2 Lah. 313

DIGWARS.

——————— appointment of—

See DIGWARI TENURE.
I. L. R. 43 Calc. 743

DIGWARS—*contd.*

———— position of—

See LANDLORD AND TENANT.
I. L. R. 39 Calc. 696

DIGWARI TENURE.

See LANDLORD AND TENANT.
I. L. R. 39 Calc. 696

———— *Digwars of Ghat Bharra in district Bankura—Appointments made by Government—Whether any relief thereto could be given by the Civil Courts—Declaratory decree,*

but the Commissioner cancelled it on a misreading of the law, as to his title, and on appeal to the Government the plaintiff was directed to go to the Civil Court for relief: *Held,* that the Digwars of Ghat Bharra in Bankura were the holders of an office remunerated by the enjoyment of land, and the history of the office established a general usage on the death of a Digwar holding office to appoint his heir in his place as the successor to his office. That here the usage of the heir taking his predecessor's place could be traced back to the seventeenth century and so long a usage could not be disregarded as an exponent of the Digwari right. On the contrary the force of law could safely be ascribed to it, subject to the qualification that the heir's claim and tenure of office was dependent on the approval of the Government. That the Civil Court could do no more than express its conclusion that the plaintiff was the heir of one of the last incumbents and his claim to succeed was subject to the approval of the Government, and that the ground on which the Commissioner cancelled the Magistrate's sanction was erroneous in law. *Jogendra Nath Singh* v. *Kalicharan Roy, 9 C. W. N. 663,* distinguished. That in view of all the circumstances of the case, a declaratory decree could be made defining the plaintiff's position, though it may be that it was not really necessary, for having regard to the Government's reply referring the plaintiff to the Civil Court, it would probably be prepared to give or withhold its approval in accordance with the view expressed by the Civil Court, seeing that it invited recourse thereto. That in doing this "it was necessary" for the High Court "out of a wreckage of procedure to construct the material for a just decision" as the plaint was not happily drafted. *Cockerell* v. *Dickens, 2 Moo, I. A. 353, Durga Prasad Sureka* v. *Bhagan Lal, I. L. R. 31 Calc. 614 ; I. L. R. 31 I. A. 122, Gopi Narain Khanna* v. *Bansidhar, I. L. R. 27 All. 325 , L. R. 32, I. A. 123,* referred to. HEMENDRA NATH ROY *v.* UPENDRA NARAIN ROY AND SECRETARY OF STATE FOR INDIA (1915)
I. L. R. 43 Calc. 743

DILUTION OF SPIRIT.

See EXCISE . **I. L. R. 41 Calc. 694**

DILUVION.

See LANDLORD AND TENANT.
I. L. R. 41 Calc. 683

See LIMITATION **I. L. R. 44 Calc. 858**

———— *Reformation in situ —Land settled with raiyat, submergence of, followed by non-payment of rent—Abandonment—Accretion.*

DILUVION—*contd.*

The Plaintiff sued to recover possession of newly formed *char* lands as accretion to his raiyatijote. The defence was that the land was reformation *in situ* of land held by the Defendant in a Government Khas Mahal and which had been submerged in the river. It appeared that the lands diluviated in the same year that the Defendant obtained a lease of the land and remained under water for thirty years during which period no rent for it was paid by the Plaintiff, and since re-appearance the land was in the possession of the Defendant without any objection on the part of Government: *Held,*—That the land being reformation *in situ* could not be claimed by the Plaintiff as accretion to his estate. The only person entitled to object to the Defendant's possession was the Government, the owner of the Khas Mahal The land could not be held to be accretion to the Plaintiff's estate merely because the Defendant's rights under the lease might have been extinguished. AMINADDI *alias* AMIRADDI *v.* TARINI CHARAN MONDAL.
24 C. W. N. 211

———— *Abatement of rent on ground of —Rent, suit for —Abatement on ground of diluvion—Shifting of onus of proof on landlord to prove amount recoverable, on proof by tenant of fact of diluvion—Finding as to length of unit of measurement if can be assailed in second appeal.* Where there is no express agreement to the contrary as soon as the fact of diluvion is established by the tenant in a suit for rent he is entitled to abatement and the burden is shifted to the landlord to prove the reduced amount of rent justly recoverable by him which can be done only by proof of the extent of the diluvion. The finding of the lower Court on evidence as to the length of the unit of measurement cannot be assailed in second appeal. KRISTA DAS LAW *v.* ABDUL KARIM **25 C. W. N. 325**

DIRECTION.

See THIRD PARTY.
I. L. R. 34 Bom. 423

———— **to administrator (High Court can give)—**

See SUCCESSION ACT X OF 1865, ss. 264 AND 239.
I. L. R. 44 Bom. 682

DIRECTOR.

See COMPANIES ACT (IV OF 1882), ss. 137 AND 141 . **I. L. R. 40 Mad. 706**

See COMPANIES ACT (VII OF 1913), s. 38.
I. L. R. 41 Bom. 76

———— **liability of—**

See COMPANY.
I. L. R. 45 Calc. 486, 490

———— **of a Bank—**

See PRESIDENCY BANKS ACT. ss. 36, 37. **I. L. R. 39 Mad. 101**

———— **of a Company—**

See COMPANY . **I. L. R. 42 Bom. 264**

———— **personal interest of—**

See COMPANY . **I. L. R. 38 Mad. 991**

———— **powers of—**

See COMPANY . **I. L. R. 36 All. 412**

DIRHAM.

See MAHOMEDAN LAW—DOWER.
I. L. R. 32 All. 167

DISABILITY.

—— **to guardianship**—

See GURDIANS AND WARDS ACT (VIII OF 1890), ss. 17, 19.
I. L. R. 39 Mad. 473

DISBARMENT.

See MUKTEAR . **I. L. R. 38 Calc. 309**

DISBELIEF.

See EVIDENCE . **I. L. R. 42 Calc. 784**

DISCHARGE.

See CONSPIRACY TO WAGE WAR.
15 C. W. N. 593

See CRIMINAL PROCEDURE CODE, ss. 119, 437 . . **I. L. R. 36 All. 147**

s. 437 . . **I. L. R. 40 All. 416**
I. L. R. 36 All. 53
I. L. R. 42 All. 128

See INSOLVENCY **I. L. R. 44 Calc. 374**

See PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909) ss. 38 AND 52.
I. L. R. 44 Bom. 555

See SANCTION FOR PROSECUTION. .
I. L. R. 44 Calc. 970

—— **application for**—

See INSOLVENCY **I. L. R. 44 Calc. 899**

—— **effect of**—

See CONSPIRACY TO WAGE WAR.
I. L. R. 38 Calc. 559

—— **order of**—

See ADMINISTRATOR PENDENTE LITE.
I. L. R. 39 Calc. 587

See JURISDICTION OF CRIMINAL COURT.
I. L. R. 40 Calc. 71

—— *Surety discharged if there be variation in terms of contract without his consent or knowledge, although he has agreed that he would not claim his legal rights as surety.*

See CONTRACT ACT, s. 133.
I. L. R. 45 Bom. 157

DISCHARGE BY ATTORNEY.

See ATTORNEY AND CLIENT.
I. L. R. 40 Calc. 386

DISCHARGE OF ACCUSED.

See CRIMINAL PROCEDURE CODE, s. 437.
I. L. R. 36 All. 53

DISCIPLINARY JURISDICTION.

See ATTORNEY . **I. L. R. 41 Calc. 113**

See BOMBAY REGULATION (II OF 1827), s. 56 . **I. L. R. 37 Bom. 354**

See INSTRUCTIONS TO COUNSEL.
I. L. R. 40 Calc. 898

See LEGAL PRACTITIONERS' ACT, 1879.

See PLEADER . **I. L. R. 47 Calc. 1115**

See PROFESSIONAL MISCONDUCT.
I. L. R. 41 Calc. 113

—— **proceedings under clause (10) Letters Patent**—

See APPEAL TO PRIVY COUNCIL.
I. L. R. 39 Mad. 128

DISCIPLINARY JURISDICTION—*contd.*

—— *Signing of a pledge to civilly disobey certain laws to be fixed thereafter*—Satyagraha *movement—Lawyers taking the pledge are amenable to the Disciplinary Jurisdiction—Amended Letters Patent, clause 10.* The respondents who were lawyers practising in the Courts of the Ahmedabad District, joined a movement called the Satyagraha Sabha which was started as a protest against the enactment of the Anarchical and Revolutionary Crimes Act (XI of 1919), and signed a pledge whereby they bound themselves "to refuse civilly to obey these laws, (*viz.* the Anarchical and Revolutionary Crimes Act) and such other laws as a Committee to be hereafter appointed may think fit." *Held*, that action of respondents brought them within the disciplinary jurisdiction of the High Court but that in circumstances a warning was sufficient. In re JIVANLAL VARAJRAJ DESAI . **I. L. R. 44 Bom. 448**

DISCLAIMER.

See LANDLORD AND TENANT.
I. L. R. 43 Calc. 878

DISCOVERY.

See ARBITRATION . **4 Pat. L. J. 394**

See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XI.

See EVIDENCE ACT, 1872, s. 27.
25 C. W. N. 788

See INTERROGATORIES.

See MISDIRECTION
I. L. R. 45 Calc. 557

See REVIEW . **I. L. R. 42 Calc. 830**
I. L. R. 45 Calc. 60

—— **right to**—

See LAND ACQUISITION.
I. L. R. 38 Calc. 230

—— **production of documents relied on**—

See CIVIL PROCEDURE CODE, O. VII R. 14
I. L. R. 44 Bom. 625

—— *Inspection—Affidavit of documents—Practice—Civil Procedure Code (Act V of 1908), O. XI. rr. 13, 18 (2).* The filing of an affidavit of documents under O. XI, r. 13 of the Civil Procedure Code, by one party, does not preclude the other party from subsequently applying under O. XI, r. 18, para. (2), for further discovery and inspection. BASANTA COOMAR GOSWAMI *v.* KUMUDINI DASEE (1911)
I. L. R. 38 Calc. 428

—— *Interrogatories—Code of Civil Procedure (Act V of 1908), O. XI—Practice.* A party is entitled to interrogate on facts directly in issue on the pleadings. In a suit for the recovery of the amount of a *hundi*, alleged to have been drawn and accepted by the defendant in consideration of a loan: *Held*, that the defendant was entitled to discovery of the form in which the loan was alleged to have been made, and of the time and place the *hundi* was drawn and accepted, and the time and place and the names and addresses of the persons by whom it was presented. *Ali Kader Synd Hossain Ali v. Gobind Dass, I. L. R. 17 Calc. 840*, distinguished. BAIJNATH KEDIA *v.* RAGHUNATH PRASAD (1913).
I. L. R. 41 Calc. 6

DISCRETION OF COURT.

See APPELLATE COURT . I. L. R. 39 Bom. 386

See ARBITRATION I. L. R. 47 Calc. 849

See COMPANY . I. L. R. 39 Bom. 16

See CONTRACT ACT s. 65. I. L. R. 40 All. 558

See CIVIL PROCEDURE CODE (1908), O. XXIII, R. 1; s. 115. I. L. R. 40 All. 612

O. XXV R. 1 I. L. R. 35 Bom. 421

See COSTS . . 21 C. W. N. 339
I. L. R. 42 Bom. 327
I. L. R. 39 Mad. 476

See DIVORCE ACT, 1869, s 14. I. L. R. 41 Bom. 36

See ELECTION . I. L. R. 41 Calc. 384

See FALSE INFORMATION I. L. R. 43 Calc. 173

See FRAUD . I. L. R. 38 Mad. 203

See LIMITATION . I. L. R. 37 Bom. 326

See LIMITATION ACT, 1908, s. 5. I. L. R. 37 All. 267

See MAHOMEDAN LAW ENDOWMENT. I. L. R. 43 Calc. 1085

See PARTNERSHIP I. L. R. 42 Bom. 380

See PLEADERSHIP EXAMINATION. I. L. R. 40 Calc. 588

See PRE-EMPTION (MISC.) I. L. R. 36 All. 573

See PRESIDENCY TOWNS INSOLVENCY ACT (III OF 1909), s. 25. I. L. R. 35 Bom. 47

ss. 15 (2) AND 21 (1). I. L. R. 38 Bom. 200

s. 18 (3) . I. L. R. 41 Bom. 312

See SANCTION FOR PROSECUTION. I. L. R. 41 Calc. 446

See SPECIFIC PERFORMANCE. I. L. R. 38 Calc. 805

See SURETY . I. L. R. 44 Calc. 737

———— of municipalities—

See BOMBAY DISTRICT MUNICIPALITIES' ACT III OF 1901, s. 151. I. L. R. 44 Bom. 738

———— of trustee—

See RELIGIOUS TRUST I. L. R. 40 Calc. 232

DISHONEST INTENTION.

See CRIMINAL BREACH OF TRUST. I. L. R. 41 Calc. 844

See THEFT . . 14 C. W. N. 936
I. L. R. 44 Calc. 66

DISHONESTLY RECEIVING STOLEN PROPERTY.

———— *Receipt of property—Production of the railway receipt, payment of freight and taking of formal delivery—Property not actually removed, or attempted to be removed, from railway premises—Penal Code (Act XLV of 1860), s. 411.* Where the consignee presented a railway receipt for certain stolen goods to the station-master, paid the freight and received formal delivery of the package from the latter: *Held,* that the goods had come to be not merely in the potential possession of the consignee, but actually within his power and unrestricted control, though he had not removed them from the station where they were then lying, nor made any attempt to do so, and that he had received them within s. 411 of the Penal Code. *Reg.* v. *Hill, 3 Cox C. C. 533, 1 Den C. C 453,* distinguished. SHEWDHAR SUKUL *v.* EMPEROR (1913) I. L. R. 40 Calc. 990

DISLOYAL DOCTRINES.

See SECURITY FOR GOOD BEHAVIOUR. I. L. R. 46 Calc. 215

DISMISSAL.

See MUNICIPAL OFFICER. I. L. R. 39 Bom. 600

See SCHOOL-MASTER. I. L. R. 44 Calc. 917

See WRONGFUL DISMISSAL

———— of an editor of a newspaper—

See COMPANY . I. L. R. 38 Mad. 991

DISMISSAL FOR DEFAULT.

See APPEAL . I. L. R. 45 Calc. 638

See CIVIL PROCEDURE CODE, 1882, ss. 10, 102 AND 103 I. L. R. 33 All. 560

s. 311. 14 C. W. N. 573

See CIVIL PROCEDURE CODE, 1908.

See s. 115 3 Pat. L. J. 250

ss. 141, 151 AND O. IX, R. 9. I. L. R. 1 Lah. 339

ss. 148, O. IX, R 89 AND 43. 4 Pat. L. J. 428

O. XVII, R. 3. 6 Pat. L. J. 650

O. IX, R. 8. I. L. R. 34 All. 426

O. XVIII, R. 3; O. XLI, R. 27. I. L. R. 33 All. 690

See DECREE . I. L. R. 44 Calc. 954

See EXECUTION OF DECREE (48). 4 Pat. L. J. 330

See SMALL CAUSE COURT SUIT. I. L. R. 44 Calc. 950

See TRANSFER OF PROPERTY ACT (IV OF 1882), s. 10 . I. L. R. 38 Mad. 867

———— without notice or opportunity for defence—

See MUTT . I. L. R. 40 Mad. 177

———— Unless the facts indicate that there has in fact been an adjudication an order for dismissal whether for want of evidence or not should be treated as an order under O. IX. SHEIKH MD. BAHAR ALI *v.* CHALHAI MAHTO. L., ~19

DISMISSAL FOR DEFAULT—*contd.*

——————— Where an adjournment had been granted at the request of Plaintiff in order to enable latter to amend his plaint and on the date fixed the plaintiff's pleader again applied for time and the Court recorded following order "no step taken for prosecution. Suit dismissed thereon." *Held* that the Court acted without authority and without applying its mind to any provision of law it amounted to a refusal to exercise jurisdiction and therefore s. 115 of Civil Procedure Code and s. 107 of Government of India Act applied. NAURANG RAM SAHU *v.* BHAKHORI MANDAR **4 Pat. L. J. 277**

——————— When a Plaintiff is appearing through Pleader but pleader is absent the mere presence of Plaintiff is not sufficient appearance within O. XLI, r. 17. RAMDHAN TEWARI *v.* BISHUN PARGASH NARAIN SINGH **5 Pat. L. J. 17**

——————— *Appearance of plaintiff but refusal to prosecute, whether amounts to non-appearance.* Where the plaintiff is not appearing in person, and his Pleader is absent, the presence of the plaintiff in Court is not an appearance. LALJI SAHU *v.* LACHMI NARAIN SINGH **5 Pat. L. J. 355**

——————— *Pleader instructed to apply for time only—Whether presence of Pleader in Court amounts to appearance—Code of Civil Procedure (Act V of 1908), O. IX, r. 13, O. XVII, rs. 2 and 3.* Where a Pleader has only been instructed to ask for time his sitting in the Court room is not an apperance. RAM KISHUN LALL *v.* JATADHARI LAL **3 Pat. L. J. 481**

DISMISSAL FROM ROLLS.

See MUKTEAR . **I. L. R. 38 Calc. 309**

DISMISSAL OF COMPLAINT.

See FURTHER INQUIRY. **5 Pat. L. J. 47**

——————— reason for—

See CRIMINAL REVISIONAL JURISDICTION **I. L. R. 40 Calc. 41**

DISMISSAL OF SUIT.

See ATTACHMENT BEFORE JUDGMENT. **I. L. R. 45 Calc. 780**

See CIVIL PROCEDURE CODE, 1882, s. 311. **14 C. W. N. 573**

See DISMISSAL FOR DEFAULT.

See PRACTICE **I. L. R. 48 Calc. 902**

See RES JUDICATA. **I. L. R. 35 Bom. 38**

——————— application to set aside an order of—

See APPEAL . **I. L. R. 43 Calc. 857**

See CIVIL PROCEDURE CODE, 1908, O. IX, R. 8 AND 9 . **I L. R. 44 Bom. 82**

——————— improper proceudre in—

See APPEAL . **I. L. R. 37 Calc. 426**

DISOBEDIENCE OF ORDER.

See JOINT PENALTY. **I. L. R. 37 Calc. 895**

DISOBEDIENCE OF ORDER—*contd.*

See PENAL CODE (ACT XLV OF 1860), SS. 188 AND 269. **I. L. R. 38 Mad. 602**

See SANCTION FOR PROSECUTION.. **14 C. W. N. 234**

DISOBEDIENCE OF REQUISITION.

See CALCUTTA MUNICIPAL ACT (BENG. ACT III OF 1899), SS. 341 (*1*), ETC. **I. L. R. 37 Calc. 384**

DISORDERLY HOUSES ACT (II OF 1907, E. B. AND ASSAM).

——————— ss. 2, 7—*House, use of, as brothel or for habitual prostitution—S. 7, object of—Order under cl.* (b) *of s. 2, effect of—Proceedings under, how instituted—Criminal Procedure Code, s. 190.* S. 7 of Act II of 1907 (E. B and Assam) is an enabling section and is not a necessary part of the procedure of the Act prior to the prosecution being instituted. It is not necessary to have recourse to that section if the Magistrate can be satisfied in other ways that the nuisance complained of is continuing. S. 6 of the Act creates an offence under a local law and proceedings relating to such offence should be taken under s. 190 of the Criminal Procedure Code. Where a Magistrate authorised an Inspector of Police to enter and inspect the houses and the Inspector asked the Sub-Inspector to make the enquiry: *Held*, that the Magistrate had no jurisdiction to take cognizance of the case on the Sub-Inspector's report. The Magistrate could either treat the Sub-Inspector's report as a complaint under s. 190 (*a*), in which case he would have to call upon the Sub-Inspector to appear and substantiate the report on oath; or under s. 155 direct the Police to investigate the case and submit a charge-sheet if they thought proper. Where the Sub-Inspector stated in his report that he was satisfied that a woman "was going on with her profession of prostitution" but did not say that she was using her house to the annoyance of the inhabitants of the vicinity: *Held*, that although the report might furnish a basis to the Magistrate to call upon the Sub-Inspector to depose on oath as complainant, the report itself did not disclose a complete case under s. 2 of the Act. FEROJA PESHAKAR *v.* AMIRUDDIN (1912) **16 C. W. N. 1049**

DISPOSSESSION.

See CIRMINAL PROCEDURE CODE, S. 145 **25 C. W. N. 601**

See DILUVION . **I. L. R. 44 Calc. 858**

See LIMITATION ACT (XV OF 1887), SCH. II, ARTS. 142, 144 **I. L. R. 35 Bom. 79**

See LIMITATION ACT (IX OF 1908), SCH. I, ARTS. 62 AND 97. **I. L. R. 38 Mad. 887**

See MORTGAGE . **I. L. R. 46 Calc. 448**

See SPECIFIC RELIEF ACT, S. 9. **14 C. W. N. 403**
15 C. W. N. 294; 715

DISPUTE.

See ARBITRATION. **I. L. R. 46 Calc. 534**

DISPUTE CONCERNING EASEMENT.

———————— *Right of passage of surplus water through an ál—Jurisdiction of Magistrate to direct an opening in the ál to be made by a party, and; on failure, by the Police—Criminal Procedure Code (Act V of 1898), s. 147.* The Magistrate has Jurisdiction, under s. 147 of the Criminal Procedure Code, on being satisfied that a party has a right to have an opening in an *ál*, for the purpose of draining off the surplus water from his lands, and that he has exercised the right for several years, and also on the last occasion, when it was exercisable, to pass an order requiring the opposite party to make the opening within a reasonable time from its date, and, on his failure to do so, directing the Police to make the same: *Dowlat Koer* v. *Siva Pershad Pandit, 12 Ind. Cas. 615*: *Pashupati Nath Bose* v. *Nando Lal Bose, 5 C. W. N. 67*, and *Lalit Chandra Neogi* v. *Tarini Pershad Gupta, 5 C. W. N. 335*, followed. *Dalmir Puri* v. *Khodadad Khan, I. L. R. 36 Calc. 923*, distinguished. *In re Lindsay, I. L. R. 4 Mad 121*, not followed. AMBICA PRASAD SINGH *v.* GUR SAHAY SINGH (1912)

I. L. R. 39 Calc. 360

DISPUTE CONCERNING LAND.

See OFFERINGS . **I. L. R. 38 Calc. 387**

1. ———— Jurisdiction—*Order based on local inquiry without taking evidence—Legality of the order—Criminal Procedure Code (Act V of 1898), s. 145.* An order under s. 145 of the Criminal Procedure Code made only on local inspection and inquiry from persons present at the time, without taking any evidence in the case, is without jurisdiction. SAHADAT KHAN *v.* TAIJUDDI SHEIKH (1919)

I. L. R. 46 Calc. 1056

2. ———— Attachment of subject of dispute—*Order of Settlement Court in a proceeding between the same parties and relating to the attached lands—Effect of such order—Release of attachment by Magistrate—Criminal Procedure Code (Act V of 1898), s. 146—Bengal Survey Act (Beng. Act V of 1875), s. 41.* An order of the Survey and Settlement Courts, under the Bengal Survey Act, 1875, s. 41, is a determination by a competent Court of the rights of the parties entitled to possession of the land within the meaning of s. 146 of the Criminal Procedure Code. Where the Magistrate attached certain lands under s. 146 of the Code, and in a proceeding under s. 41 of the Bengal Survey Act, 1875, between the same parties, the same lands were found to be in the possession of the petitioner:—*Held*, that the Magistrate was bound to follow such order and to release the lands from attachment. AMBLER *v.* SAMI AHMED (1910)

I. L. R. 37 Calc. 331

3. ———— Tenant interested in the subject of dispute—*Addition of the tenant to the proceedings to show that there is no dispute likely to cause a breach of the peace—Criminal Procedure Code (Act V of 1898), s. 145, cl. (5).* A person claiming to be interested in the subject of dispute as a tenant, who was not required to attend as a party, should be heard under s. 145 (5), of the Criminal Procedure Code in order to show that no dispute likely to cause a breach of the peace exists. HARAN MANDAL *v.* MOHIM CHANDRA PRAMANICK (1910) **I. L. R. 37 Calc. 285**

DISPUTE CONCERNING LAND—*contd.*

4. ———— Joint Estate—*Dispute concerning land—Joint-owners—Claim of exclusive possession to subject of dispute, by each party—Jurisdiction of Magistrate—Criminal Procedure Code (Act V of 1898), s. 145.* A dispute between two sets of joint-owners, each claiming exclusive possession of the land forming part of the joint estate, through their respective tenants, is within the scope of s. 145 of the Criminal Procedure Code. An order declaring the exclusive possession of a tenant of

diction.

. W. N.

CHOW-

DHURY *v.* KEDAR NATH KUNDU CHOWDHURY (1911) . . . **I. L. R. 37 Calc. 889**

5. ———— Duty of Magistrate to summon Witnesses at the instance of the parties—*Dispute relating to land—Witnesses—Failure of witnesses summoned to attend—Denial of justice—Interference by High Court—Criminal Procedure Code (Act V of 1898), s. 145 (4)* S. 145 of the Criminal Procedure Code does not render it obligatory on the Magistrate to summon witnesses at the instance of the parties, or to compel their attendance after they have been summoned but failed to appear. *Tarapada Biswas* v. *Nurul Huq, I. L. R. 32 Calc. 1093*, followed. Where a Magistrate has acted in accordance with law, it would be necessary to show the High Court very clearly, in order to warrant its interference, that the procedure adopted, though right in law, has in fact amounted to an absolute denial of justice. Where it did not appear what evidence the absent witnesses would be able to give regarding the question of actual possession, and there was nothing to show what efforts the party had made to procure their attendance, the High Court refused to interfere. HARENDRA KUMAR BOSE *v.* GIRISH CHANDRA MITRA (1910) . . **I. L. R. 38 Calc. 24**

6. ———— Evidence not recorded according to law, *but memorandum taken down and signed by the Magistrate personally—Legality of final order—Criminal Procedure Code (Act V of 1898), ss. 145, 356 (1) and (3).* The provisions of sub-s. (*1*) of s 356 are mandatory. Sub-s. (*3*) applies only where evidence has been recorded in accordance with sub-s. (*1*) but not personally by the Magistrate. Where the Magistrate did not take down the evidence himself nor was it taken down in his presence and hearing and under his personal direction and superintendence nor signed by him, but he made a memorandum thereof and signed the same.—*Held*, that the provisions of s. 356 had not been complied with, and that the order declaring the opposite party to be in possession was bad in law. SADANANDA MANDAL *v.* KRISHNA MANDAL (1914)

I. L. R. 42 Calc. 381

7. ———— Likelihood of breach of the peace—*Jurisdiction of Magistrates—Criminal Procedure Code (Act V of 1898), ss. 107, 145.* There is no conflict between ss. 107 and 145 of the Criminal Procedure Code. The fact that there is a dispute concerning land, likely to cause a breach of the peace, does not deprive a Magistrate of jurisdiction under s. 107 of the Criminal Pro-

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may probably occasion a breach of the peace or disturb the public tranquillity. Whether, after

DISPUTE CONCERNING LAND—*contd.*

proceeding under s. 107 of the Criminal Procedure Code, it will be proper for Magistrate to act under s. 145 of the Code, must depend on the circumstances of each case as it arises, *viz.*, whether likelihood of a breach of the peace continues or not. The competence of the Magistrate to proceed under s. 107 of the Code against persons not in possession must depend upon whether as against those persons the conditions specified in the section have been established. EMPEROR *v.* ABBAS (1911) . . I. L. R. 39 Calc. 150

8. ———— Ijmali property—*Claim by co-sharers to exclusive possession of specific plots—Jurisdiction of Magistrate—Criminal Procedure Code (Act V of 1898), s. 145.* A Magistrate has jurisdiction, under s. 145 of the Criminal Procedure Code in the case of *ijmali* land, where each party claims to be in exculsive possession of specific portions of the same. Under s. 145 the question for the Magistrate's decision is not whether the parties have a title to possession jointly, or a title to possession separately, but whether either of them is in actual possession. Co-sharers in an *ijmali* estate may, by express or tacit arrangement, be each separately in actual possession of specific or demarcated portions of the same, and s. 145 applies to such a case. When, however, the parties are found to be not constructively but actually in joint possession, the section has no application. *Makhan Lal Roy* v. *Barada Kanta Roy, 11 C. W. N. 512,* explained and distinguished. *Per* HARINGTON, *J.* Where a party alleges exclusive possession and acquiesces in the hearing of the case on that footing, he cannot afterwards be heard to say that the whole proceedings are bad because the land is *ijmali.* BASANTA KUMARI DASI *v.* MAHESH CHANDRA LAHA (1913) . . I. L. R. 40 Calc. 982

DISQUALIFICATION.

See PLEADER . I. L. R. 44 Calc. 290

DISQUALIFIED PROPRIETOR.

See LIMITATION I. L. R. 46 Calc. 694

See NORTH-WEST PROVINCES LAND REVENUE ACT, 1873.
I. L. R. 42 All. 509

See OUDH LAND REVENUE ACT (XVII OF 1876), SS. 173, 174.
I. L. R. 38 All. 271

See UNITED PROVINCES COURT OF WARDS ACT, 1902, SS. 8 AND 11.
I. L. R. 43 All. 478

———— manager of—

See MAHOMEDAN LAW—PRE-EMPTION.
I. L. R. 39 Calc. 915

DISSOLUTION.

See COMPANY . I. L. R. 47 Calc. 620

DISSOLUTION OF MARRIAGE.

———— suit for—

See MAHOMEDAN LAW—MARRIAGE.
I. L. R. 41 All. 278

DISSOLUTION OF PARTNERSHIP.

See APPEAL (MISC.) I. L. R. 42 Calc. 914

See MINOR . I. L. R. 42 Calc. 225

See PARTNERSHIP.
I. L. R. 42 Bom. 380

DISTRAINT OR DISTRESS.

See AGRA TENANCY ACT (II OF 1901), S. 124 . . I. L. R. 38 All. 40

See MADRAS ESTATES LAND ACT (I OF 1908) . I. L. R. 39 Mad. 1018

s. 53 (2) . I. L. R. 38 Mad. 1140

s. 77. I. L. R. 37 Mad. 319

ss. 189, ETC. I. L. R. 39 Mad. 239

s. 192 . I. L. R. 38 Mad. 655

DISTRIBUTION.

———— by Liquidation—

See LIQUIDATOR I. L. R. 43 Calc. 586

———— period of, under a will—

See WILL . I. L. R. 40 Calc. 274

DISTRICT BOARD.

———— sale by—

See SALE . I. L. R. 43 Calc. 790

DISTRICT BUILDING-SURVEYOR.

———— sanction by—

See DEMOLITION OF BUILDING.
I. L. R. 37 Calc. 585

DISTRICT COLLECTOR.

See MAMLATDARS' COURTS ACT (BOM. ACT II OF 1906), S. 23.
I. L. R. 37 Bom. 595
I. L. R. 39 Bom. 552

DISTRICT COURT.

———— jurisdiction of—

See GUARDIANS AND WARDS ACT (VIII OF 1890), SS. 12, 13, 17, 19, 24, 25.
I. L. R. 40 Bom. 600

———— power of giving directions to an administrator—

See SUCCESSION ACT X OF 1865, SS. 264 AND 239 . I. L. R. 44 Bom. 682

———— right of, to recall a case sent to a subordinate Court for execution—

See CIVIL RULES OF PRACTICE, S. 161 (*a*)
I. L. R. 39 Mad. 485

DISTRICT GAZETTEER.

See ITMAM . I. L. R. 47 Calc. 979

DISTRICT JUDGE.

See CRIMINAL PROCEDURE CODE, S. 195.
I. L. R. 39 All. 657

See RELIGIOUS ENDOWMENT ACT (XX OF 1863), S. 10.
I. L. R. 38 Mad. 594

See SANCTION FOR PROSECUTION.
I. L. R. 37 Calc. 13

DISTRICT JUDGE—*contd.*

——— jurisdiction of—

See WAKF . I. L. R. 43 Calc. 467

——— powers of—

See BENGAL, N.-W. P., AND ASSAM CIVIL COURTS ACT (XII OF 1887), ss 8, 21. I. L. R. 34 All. 205

See PROVINCIAL INSOLVENCY ACT (III OF 1907), s. 36 I. L. R. 36 All. 549

See TRANSFER . I. L. R. 39 Calc. 146

——— transfer by—

See TRANSFER I. L. R. 42 Calc. 842

DISTRICT MAGISTRATE.

See BOMBAY DISTRICT POLICE ACT, s. 42 I. L. R. 36 Bom. 504

See CRIMINAL PROCEDURE CODE, s. 17. I. L. R. 36 All. 468

See CRIMINAL TRIBES I. L. R. 47 Calc. 843

——— power of—

See CRIMINAL PROCEDURE CODE, s. 520. I. L. R. 35 Bom. 253

See FURTHER INQUIRY. I. L. R. 39 Calc. 238

See MAGISTRATE, POWERS OF. I. L. R. 37 Calc. 72

See BOMBAY VILLAGE POLICE ACT, 1867, s. 9 . I. L. R. 44 Bom. 377

——— reference to High Court by—

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), ss. 435, 438. I. L. R. 41 Bom. 47

——— service of notice of appeal on—

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), ss. 439, 422, 423. I. L. R. 39 Mad. 505

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DISTRICT MUNICIPAL ACT.

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DIVESTING OF PROPERTY.

——— by adoption—

See HINDU LAW—ADOPTION. I. L. R. 38 Mad. 119
I. L. R. 40 Bom. 429

DIVISION.

See PALA OR TURN OF WORSHIP. I. L. R. 47 Calc. 993

DIVISION BENCH.

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), ss. 421, 233, 537. I. L. R. 39 Mad. 527

DIVISION BENCH—*contd.*

——— jurisdiction of—

See PRACTICE . I. L. R. 37 Calc. 173

——— power of—

See REVIEW IN CRIMINAL CASES. I. L. R. 38 Calc. 828

DIVORCE.

See DIVORCE ACT (IV OF 1869).

See HINDU LAW—MARRIAGE. I. L. R. 37 *Bom.* 295
I. L. R. 39 Bom. 538

See HUSBAND AND WIFE. I. L. R. 38 Calc. 629

See JEWISH LAW I. L. R. 38 Calc. 708

See KIDNAPPING I. L. R. 41 Calc. 714

See MAHOMEDAN LAW—DIVORCE.

See MARRIAGE.

——— concealment of pregnancy—

See MAHOMEDAN LAW—DOWER I. L. R. 45 Bom. 151

——— for consideration—

See MAHOMMEDAN LAW—DIVORCE. I. L. R. 1 Lah. 402

——— *Attachment before judg-m* [illegible] *P* [illegible] *5,* [illegible] ju[illegible] Attachment before judgment being a matter of relief and not of procedure, is governed by s. 7 of the Divorce Act and the principles and rules of the English Divorce Court and not by s. 45 of the Divorce Act and the Civil Procedure Code. Order XXXVIII, rules 5 and 6, have no application in divorce proceedings. PHILLIPS, *v.* PHILLIPS (1910) I. L. R. 37 Calc. 613

——— *Wife's petition—. Admission by respondent—Effect of husband's admission of adultery and cruelty, supported by confirmatory evidence.* In a suit for dissolution of marriage, in the absence of collusion, an admission of guilt by one of the parties is cogent evidence which the Court will act on, especially if the admission is corroborated by other evidence. *Robinson* v. *Robinson* and *Lane, 1 Sw. and Tr. 362,* followed. ARNOLD *v.* ARNOLD (1911) I. L. R. 38 Calc. 907

——— *Condonation of incestuous adultery—Cruelty, decree of, necessary to revive condoned adultery—Subsequent conduct, without physical violence, causing injury to health.* Where a husband had committed incestuous adultery which the wife had condoned, and subsequently the husband, without actually using physical violence, was guilty of such treatment and conduct as caused his wife's health to suffer: *Held*, that such treatment amounted to cruelty, and the incestuous adultery had been revived. A lesser degree of cruelty is necessary to revive a condoned offence than to found an original charge. *Durant* v. *Durant, 1 Hag. Eccl. Reg. 733, Bramwell* v. *Bramwell, 3 Hag. Eccl. Rep. 618, Cooke* v. *Cooke, 3 Sw. and Tr. 126, Ridgway* v. *Ridgway, 29 W. R. (Eng.) 612,* approved and followed. THOMPSON *v.* THOMPSON (1911) I. L. [illegible] Calc. [illegible]

DIVORCE—*contd.*

——— *Husband's petition—Foreign domicile—Divorce Act (IV of 1869)—Territorial jurisdiction.* The husband, who was an Italian subject with an Italian domicile, instituted proceedings for divorce on the ground of his wife's adultery. The marriage had been solemnized in India, and the parties were residing in British India : *Held,* that, under the provisions of the Indian Divorce Act, the Court was bound to grant a divorce on proof of adultery, although the divorce would have no effect outside India. *LeMesurier* v. *LeMesurier, [1895] A. C. 517,* and *Shaw* v. *Gould, L. R. 3 E. and I. App. 55,* referred to. GIORDANO *v.* GIORDANO (1912)

I. L. R. 40 Calc. 215

——— *Husband's petition—Security for wife's costs—Practice.* In a husband's petition for dissolution of marriage, where both parties are subject to s. 4 of the Indian Succession Act (X of 1865), and the wife has no means of her own, the Court has a discretion to order the petitioner to furnish security for the respondent's costs. *Proby* v. *Proby, I. L. R. 5 Calc. 357, Young* v. *Young, I. L. R. 23 Calc. 916n, Thomas* v. *Thomas I. L. R. 23 Calc. 913, Thomson* v. *Thomson, I. L. R. 14 Calc. 580, Watling* v. *Watling, (1910) April 22* (unreported), *Jahans* v. *Jahans, 6 C. W. N. 414,* and *Mayhew* v. *Mayhew, I. L. R. 19 Bom. 293,* considered. BATEMAN *v.* BATEMAN AND NICACHI (1914)

I. L. R. 41 Calc. 963

——— *Evidence Act (I of 1872), ss. 60, 112, 118 and 120—Non-access, competency of parties to testify to—Legitimacy of child—Expert opinion on legitimacy, relevancy of.* When in a suit for divorce the petitioner (husband) did not make any person a co-respondent but simply averred that his wife was generally leading an immoral life, a judge would be wrong in adding a person as co-respondent *suo motu* without calling on the petitioner to amend the petition by making the necessary allegations against him. In the absence of the adoption of such a course the proper order to make is to strike out the co-respondent's name from the proceedings. Whatever might be the English common law on the subject, under ss. 118 and 120 of the Indian Evidence Act both the parties to proceedings for divorce are competent to give evidence as to non-access and illegitimacy of the child: *Held* on the evidence in the case that a child born 11 months after the cessation of marital intercourse was illegitimate and that the petitioner was entitled to a divorce. *Rosario* v. *Ingles, I. L. R. 18 Bom. 468,* referred to. Under s. 60 of the Evidence Act a Court can consider and act upon the opinions of experts contained in treatises as regards the question whether a particular child could or could not have been begotten just before the period of non-access. JOHN HOWE *v.* CHARLOTTE HOWE (1913) . **I. L. R. 38 Mad. 466**

——— *Co-respondent, absence of—Leave of Judge for dispensing with co-respondent, when to be obtained—Jurisdiction of Court, in case of want of such leave—Matrimonial Causes Act of 1857 (20 and 21 Vict. c. 85), s. 28—Divorce Court Rules (English) 4, 5 and 6—Indian Divorce Act (IV of 1869), ss. 7, 11.* Where the husband was petitioner for divorce but could not name

DIVORCE—*contd.*

the alleged co-respondents (the Master having issued citation), and at the hearing applied for leave to dispense with the co-respondents: *Held,* that the direction for such leave must be by application to the Judge on motion founded on affidavit *before the hearing* of the petition: *Held,* further, that the Court had no jurisdiction to entertain the petition where such leave had not been obtained. COX *v.* COX (1910)

I. L. R. 15 Calc. 525

——— *Petition for divorce by wife—Husband and wife not living together but separately from each other at the date of the petition—High Court's jurisdiction to hear the petition—Indian Divorce Act (IV of 1869), s. 3 (1)—Practice of Bombay High Court*—Under the Indian Divorce Act the High Court has jurisdiction to hear a petition if both parties are resident within its jursdiction at time of presentation notwithstanding they were living separately. *Durand* v. *Durand, 1870, 14 W. R. 416,* referred to. *Xavier* v. *Xavier, 1892 P. J. 153* not followed. BORGANHA *v.* BORGANHA (1920) . **I. L. R. 44 Bom. 924**

——— *Petition by wife—Husband and wife not having permanent residence· "Last resided together" in Bombay—Jurisdiction—Indian Divorce Act (IV of 1869), s. 3 (1)—Practice.* In a petition for divorce by wife, the Court found (1) that the husband and wife had no permanent residence they having lived at several places since their marriage, (2) that they last lived together at an Hotel in Bombay for a greater portion of a month, the husband being then on leave from war service in Mesopotamia and (3) that both the parties were within the jurisdiction when the petition was filed and served on the respondent: *Held, that there was a sufficient reason within* the meaning of the Indian Divorce Act, 1869, to give the Court jurisdiction to entertain the petition. *Bright* v. *Bright (1909) 36 Calc. 964,* followed. *Flowers* v. *Flowers (1910) 32 All. 203 and Wadia* v. *Wadia (1913) 38 Bom. 125,* distinguished. MURPHY *v.* MURPHY (1920)

I. L. R. 45 Bom. 547

——— *Husband and wife —Petition by husband—Adultery—Condonation—Collusion—Conduct conducing to adultery—Desertion—Divorce Act (IV of 1869), ss. 12, 13, 14.* Condonation is a conclusion of fact, not of law, and means the complete forgiveness and blotting out of a conjugal offence followed by cohabitation, the whole being done with full knowledge of all the circumstances of the particular offence forgiven. The forgiveness which is to take away the husband's *right to a divorce must not fall* short of reconciliation and this must be shown by a re-instatement of the wife in her former position which renders proof of conjugal cohabitation with restitution of conjugal rights necessary. Collusion is held to exist where the initiation of the proceeding for dissolution of marriage is procured and its conduct (especially if abstention from defence be a term) provided for by agreement or bargain between the spouses or their agents, although it does not appear that any specific fact has been falsely dealt with or withheld. The mere fact that the husband refused marital intercourse to the wife by itself is not such wilful neglect or misconduct as conduced to the adultery; nor can the fact that the parties went their own way, in the sense that they had

DIVORCE—*contd.*

their own friends and interests, be said to be conduct conducing to adultery, even when coupled with the abstinence by the husband from marital intercourse. The fact that the husband had abstained from marital intercourse without reasonable cause and that the parties went their own way in the sense that they had their own friends and interests would not justify a finding of desertion on the part of the petitioner. STE. CROIX v. STE. CROIX (1917) . **I. L. R. 44 Calc. 1091**

——— *Suit against wife—Wife found guilty of adultery—Decree* nisi *on husband's petition—Appeal—Wife's costs, application for—Liability of husband—Practice and procedure.* Where the wife has been herself found guilty of adultery by the Court of first instance and then actively brings the matter before the Court on appeal, the husband cannot be justly called upon by her as a matter of right to provide for her costs. *Robertson* v. *Robertson, 6 P. D. 119, Otway* v. *Otway, 13 P. D. 141. Holt* v. *Holt, 28 L. J. (P. and M.) 12,* referred to. *Per* MOOKERJEE, J. It is plain, however, that the doctrine in question is an encroachment upon the ordinary rule that costs follow the event, and, speaking for myself, I am of opinion that every attempt to extend its operation should be cautiously scrutinised. STE. CROIX v. STE. CROIX (1916) . . **I. L. R. 44 Calc. 35**

——— *Adultery—Condonation—Desertion—Unreasonable delay—Indian Divorce Act (IV of 1869), ss. 12, 13 and 14.* Condonation of past matrimonial offences is impliedly conditioned upon the future good behaviour of the offending spouse, so that if after condonation the offences are repeated, the right to make the condoned offences a ground for divorce revives. To constitute a revival of condoned offences, the offending spouse need not be guilty of offences of the same character as those condoned. *Peacock* v. *Peacock, 1 Sw. and Tr. 183, Keats* v. *Keats, 1 Sw. and Tr. 334, Ellis* v. *Ellis, 4 Sw. and Tr. 154, Ste. Croix* v. *Ste Croix, I. L. R. 44 Calc. 1091, Windham* v. *Windham 32 L. J. P. M. and A. 89 ; 9 Jurist N. S. 82, Thompson* v. *Thompson, I. L. R. 39 Calc. 395, Price* v. *Price, [1911] P. 201, Moss* v. *Moss, [1916] P. 135, Roberts* v. *Roberts, 117 L. T. 157, Blandford* v. *Blandford, 8 P. D. 19,* referred to. Although poverty is almost always a sufficient excuse for delay, it is not to be supposed that there is no lapse of time where a line may be drawn. *Mortimer* v. *Mortimer 2 Hag Con. 310, Coode* v. *Coode, 1 Curt. 755, Short* v. *Short, L. R. 3 P. and D. 193, Harrison* v. *Harrison, 3 Sw. and Tr. 362, Nicholson* v. *Nicholson, L. R. 3 P. and D. 53, Mason* v. *Mason, 7 P. and D. 233 ; 8 P. and D. 21, Edwards* v. *Edwards, 17 T. L. R. 38, Pears* v. *Pears, 107 L. T. 505, Hughes* v. *Hughes, 32 T. L. R. 62, Coppinger* v. *Coppinger, 34 T. L. R. 588,* and *Mitter* v. *Mitter, 12 C. W. N. 1009,* referred to. MORENO v. MORENO (1920) . . . **I. L. R. 47 Calc. 1068**

——— *Nullity of marriage—Impotency—Syphilis—Fraud—Indian Divorce Act (IV of 1869), ss. 18, 19.* On a husband's petition for a declaration of nullity of marriage

[illegible]

obtained by fraud : *Held,* that permanent and incurable impotency, existing at such time and of such nature as to render complete and natural sexual intercourse between the parties practically impossible, was a good ground for annulment of marriage. Impotency has been taken to mean physical and incurable incapacity from entering into the marriage, that is, incapacity to consummate the marriage. *Allen* v. *Baker, 41 Am. Rep. 444, A. B.* v. *C. B., 8 F. 603 , 43 Scot. L. R. 441 Ryder* v. *Ryder, 44 Am. St. Rep. 833,* referred to. BIRENDRA KUMAR BISWAS v. HEMLATA BISWAS, (1920) . . **I. L. R. 48 Calc. 283**

——— *Re-marriage, validity of—Indian Divorce Act (IV of 1869), ss. 7, 57—Alimony.* A successful petitioner in a suit for dissolution of marriage entered into a second marriage, within six months from the decree for dissolution [illegible] *Held,* that the [illegible] ond. *Warer* v. [illegible] to. *Held,* also, [illegible] to any permanent alimony. TURNER v. TURNER (1921) . . . . **I. L. R. 48 Calc. 636**
25 C. W. N. 710

DIVORCE ACT (IV OF 1869).

See DIVORCE . **I. L. R. 40 Calc. 215**

——— **ss. 2, 4, 7, 45**—*High Courts Act 24 and 25 Vict, c. 104, s. 9—Amended Letters Patent of the Bombay High Court, cl. 35—Restitution of conjugal rights—Jurisdiction of the Bombay High Court to entertain a suit for the restitution of conjugal rights as against (a) a non-Christian respondent and (b) a respondent not residing within the Presidency—Principles and Rules of English Court for Divorce and Matrimonial Causes acted on in India—Refusal of Court to grant relief by restitution of conjugal rights when the respondent is absent from the jurisdiction when the suit is instituted and remains absent —Civil Procedure Code (Act V of 1908, s. 20 (corresponding to Act XIV of 1882, s. 17), applicability of to matrimonial suits—Residence, what amounts to, in order to give the Bombay High Court jurisdiction to pronounce a decree for the restitution of conjugal rights—Costs of unsuccessful petition by wife, rights of the petitioner's solicitors over monies deposited in Court by the respondent as security for the petitioner's costs and over monies deposited by a respondent-appellant as security for the costs of the appeal.* The respondent,

[illegible]

in London, at Victoria Railway Station, the respondent deserted the petitioner and never [illegible] the respondent [illegible] that time that [illegible]. The respondent remained in England but the petitioner returned to Bombay with the intention of taking legal proceedings against the respondent there and did sue the respondent in the Bombay High Court claiming restitution of her conjugal rights : *Held* that under s. 9 of the High Court's Act and cl. 35 of the Amended Letters Patent of the Bombay High Court, the jurisdiction exercised by the High Court in matrimonial matters previous to the coming into force of the Indian Divorce

DIVORCE ACT (IV OF 1869)—*contd.*

——— ss. 2,4,7,45—*contd.*

Act had been confined to matters between British subjects professing the Christian religion: *Held*, further, that as regards the jurisdiction confirmed to the Bombay High Court by s. 4 of the Indian Divorce Act (which included jurisdiction to entertain suits for the restitution of conjugal rights) the powers of the Bombay High Court were still limited to Christian subjects within the Presidency so that the High Court had no jurisdiction to grant a decree of restitution either against a Parsi respondent or against any respondent not within the Presidency: *Held*, further, that following the principles on which the Courts for Divorce and Matrimonial Causes in England have acted and given relief, which principles are made applicable in India under s. 7 of the Indian Divorce Act, the Bombay High Court could not give relief by way of restitution of conjugal rights if the respondent named in the petition were absent from the jurisdiction at the time the suit was instituted and remained absent, although residence at the date of the suit of both spouses, whatever their domicile might be, would be sufficient to give jurisdiction in suits of this nature. *Firebrace* v. *Firebrace, 4 P. D. 63, Chichester* v. *Chichester, 10 P. D. 186*, and *Armytage* v. *Armytage, [1898] P, 178*, followed. *Semble:* In the case of matrimonial offences including those other than adultery, the application of the Civil Procedure Code, s. 20 (corresponding to s. 17 of Act XIV of 1882), under s. 45 of the Indian Divorce Act involves the necessity of either residence on the part of the defendant or the accrual of the cause of action within the jurisdiction in order to enable the Court to entertain the suit. *Thornton* v. *Thornton, I. L. R. 10 Bom. 422*, referred to. *Semble:* Also, that mere residence in India at the time of the institution of a suit is not residence within the meaning of s. 2 of the Indian Divorce Act and that the residence of the petitioner should be *bonâ fide* and not casual or as a traveller: *Held*, however, that moneys deposited by a husband respondent as security for his wife's costs of a petition constituted a fund paid in for the benefit of her attorney who was entitled to have it applied for his benefit whatever the result of the petition, provided that he had been in no way to blame and that that rule applied to moneys deposited by a respondent appealing from the decision of the lower Court as security for the costs of the appeal in accordance with the rules of the Bombay High Court. NUSSERWANJEE WADIA *v.* ELEONORA WADIA (1913)

I. L. R. 38 Bom. 125

——— s. 3—

See DIVORCE. **I. L. R. 45 Bom. 547**

——— Residence—*Divorce—Jurisdiction—"Reside."* *Held*, that a mere temporary sojourn in a place, there being no intention of remaining there, will not amount to residence in that place within the meaning of s. 3 of the Indian Divorce Act, 1869, so as to give jurisdiction under the Act to the court within the local limits of whose jurisdiction such place is situated. FLOWERS *v.* FLOWERS (1910) . **I. L. R. 32 All. 203**

——— *Political Resident at Aden—District Judge—Jurisdiction to try suits under Indian Divorce Act—Aden Courts Act (II of 1864), s. 3.* The Political Resident at Aden, not having been appointed "a Commissioner of a Division" is not a District Judge as defined in s. 3, sub-s. (2), of the Indian Divorce Act, 1869, and has no jurisdiction to try suits under the Act. MOUNA *v.* MOUNA (1912) **I. L. R. 37 Bom. 57**

——— ss. 3, 16, 37 and 44—*Dissolution of marriage—Alimony—Jurisdiction—Nature of High Court's jurisdiction—Civil Procedure Code (Act V of 1908), s. 24 (1) (a)—Transfer of proceedings.* In a suit for dissolution of marriage under the Divorce Act (IV of 1869) a decree was passed in favour of the petitioner by the Divisional Judge, Nagpur Division. The said decree was confirmed by the High Court on the 20th November 1914. The successful petitioner, thereupon, having applied to the High Court, praying that the opponent may be ordered to pay her proper sums by way of alimony: *Held*, that the Court which was empowered to make the order either for alimony or for the maintenance and education of the children was the Court of the Divisional Judge and not the High Court: *Held*, further, that having regard to the nature of the personal jurisdiction which the High Court possessed over European British subjects under s. 3 of the Divorce Act, 1869, the Court of the Divisional Judge was not a Subordinate Court in the sense in which that expression was used in s. 24 (*1*) (*a*) of the Civil Procedure Code, so as to enable the High Court to transfer the proceedings of which notice had been served upon the respondent to the Divisional Court for disposal. WALLACE *v.* WALLACE (1915) . . **I. L. R. 40 Bom. 109**

——— s. 3, 7—*Practice—Alimony—Discretion of Court.* *Held*, that the power to make an order for alimony in favour of the wife after a decree for divorce obtained by the husband on the ground of adultery is discretionary. In a case where there was no suggestion that the husband's conduct had led to the wife's misconduct and the wife was in fact under the roof of the co-respondent, the Court refused to exercise its discretion. *Kelly* v. *Kelly, 5 B. L. R. 71*, referred to. McGOWAN *v.* McGOWAN (1916)

I. L. R. 38 All. 688

——— ss. 4, 6, 7, 8 and 15—

See BOMBAY CIVIL COURTS ACT (XIV OF 1869), s. 16 . **I. L. R. 39 Bom. 136**

——— ss. 7, 45—

See DIVORCE . **I. L. R. 37 Calc. 613**

——— ss. 7, 11—

See DIVORCE . **I. L. R. 45 Calc. 525**

——— ss. 12, 13, 14—

See DIVORCE . **I. L. R. 44 Calc. 1091**
I. L. R. 49 Calc. 1068

——— s. 14—*Husband and Wife—Dissolution of marriage—Misconduct of husband petitioner—Grave and unexplained delay in filing petition—Discretion of the District Judge—High Court's power to interfere with the discretion.* The petitioner, who was the husband, prayed for a dissolution of the marriage on the ground of his wife's adultery. The District Judge, exercising the discretion confided to him under s. 14 of the Indian Divorce Act, 1869, refused to grant a decree *nisi* in view of the following circumstances: (*i*) that there was grave and unexplained

DIVORCE ACT (IV OF 1869)—*contd.*

——— **s. 14**—*contd.*

delay before any complaint was made by the husband as regards his wife's abandonment of him; (ii) that both husband and wife had combined to withhold facts from the Court; (iii) that husband had been guilty not of an isolated act, but of a persistent course of adultery: Held, that it was impossible for the High Court as a Court of Appeal to say that the District Judge's discretion was wrongly or improperly exercised adversely to the petitioner. PALMER *v.* PALMER (1916) . . . **I. L. R. 41 Bom. 36**

——— **ss. 16, 17**—*Decree of dissolution of marriage—Recision of, by High Court—Withdrawal of petition on coming up for confirmation—English Procedure.* A decree of dissolution of marriage passed by a District Court under s. 14 of the Indian Divorce Act may be rescinded by the High Court at the request of the decree-holder when it comes up for confirmation under s. 17. The High Court has jurisdiction to rescind the decree of the District Court and allow the petition to be withdrawn. There is nothing in the Divorce Act which requires a distinction to be drawn between ss. 16 and 17 with reference to the power of the Court to rescind a decree where the relations of husband and wife have been resumed before the decree has been confirmed. The power "to make such order as to the Court seems fit" is not limited to cases where further enquiry has been ordered. The analogy of English procedure whereby on a petitioner withdrawing his petition the Court may set aside the decree *nisi* may be invoked in construing the Indian Divorce Act. WILLIAM DARE *v.* BELLE DARE (1910) . **I. L. R. 34 Mad. 339**

——— *ss. 17, 43, 57*—

See KIDNAPPING **I. L. R. 41 Calc. 714**

——— **ss. 18, 19, 20 and 57**—

See DIVORCE . **I. L. R. 48 Calc. 283**

——— **s. 19**—*Consummation of marriage when practically impossible—Syphilis in one of the parties, if it amounts to impotency—Syphilis as a ground for refusing performance of a promise to marry or a ground for nullity or divorce—Fraudulent concealment—Incurability of the disease—Physical examination—Inference when such examination is not allowed.* Where syphilis was contracted prior to, but was not known to exist at, the time that the contract to marry was entered into, or where such disease was contracted subsequent to the making of the contract to marry but through no wrongful act of the Defendant, its existence furnished a good defence to an action for breach of promise. *Atchison* v. *Baker, 2 Peake 103 (1796), Allen* v. *Baker, 41 Am. Rep. 444: 86 N. C. 91 (1882), Hall* v. *Wright. E. B. and E. 746; 113 R. R. 861 (1858), Boast* v. *Firth, L. R. 4 C. P. 1 (1868),* and *Robinson* v. *Davison, L. R. 6 Exch. 267 (1871),* referred to. Capacity for sexual intercourse must exist at least *in posse,* at the time that the marriage is entered into. It is for this reason that permanent and incurable impotency existing at such time and of such nature as to render complete and natural sexual intercourse between the parties practically impossible is recognised as a ground for the annulment of the marriage. A. B. *v* C. B., *8 F. 603; 43 Scot. L. R. 411 (1906)* and *A. B.* v. *C .B., 12 Rettie 36; 22 Scot. L. R. 461 (1885),* referred to. Impotency means physical and incurable incapacity to consummate the marriage. The capacity for sexual intercourse is not necessarily affected by the existence of syphilis, and yet such disease may render coition practically impossible. *Ryder* v. *Ryder, 44 Am. St. Rep. 833, 66 Vermont 158 (1894),* and *Smith* v. *Smith, 171 Mass. 404; 68 m. St. Rep. 440, 41 L. R. A. 800 (1898).* The existence of syphilis in one of the parties to the marriage may furnish good ground for divorce to the other on the ground of cruelty. To constitute such a ground of cruelty it is usually required that the disease should have been actually communicated to the complainant, that the complainant should have been ignorant of the existence or nature of the Defendant's disease at the time of its communication, and that the Defendant should have infected the Petitioner knowingly and wilfully. *Popkin* v. *Popkin, 1 Hagg. Eccl. 733 (note) (1794), Collect* v. *Collect, 1 Curt. 678 (1837), Jones* v. *Jones, [1860] Searle and Smith 138 Brown* v. *Brown L. R. 1 P. and D. 46 (1865), Strain* v. *Strain, 13 Rettie 132 (136); 23 Scot L. R. 90 (1885)* and *R.* v. *Clarence, 22 Q. B. D. 23 (1888),* referred to. Concealment of a loathsome and incurable form of syphilis is recognised as a fraud sufficient to warrant divorce or annulment, specially where the existence of the disease is discovered by the other party before the marriage is consummated and the parties immediately separate. Such disease must be actually and probably incurable but annulment has been granted notwithstanding a mere remote possibility of a cure. *Smith* v. *Smith, 171 Mass. 404; 68 Am. St. Rep. 440; 41 L. R. A. 800 (1898), Vondal* v *Vondal, 175 Mass. 383, 78 Am. St. Rep. 502 (1900), State* v. *Lowell, 79 Am. St. Rep. 358 at p. 373 (1899), Lyon* v. *Lyon, 230 Ill, 366; 13 L. R. A. (N. S) 996; 12 Am. St. Rep. 25 (28) (1907)* and *Bunger* v *Bunger, 85 Kan. 564; 26 Am. St. Rep. 126 (134) (1911).* The Courts have a wide discretion in ordering physical examination of the party suffering from the disease and always do so, subject to such conditions as will afford protection from violence to natural delicacy and sensibility. *Briggs* v. *Morgan, 3 Phill 325; 2 Hag Con. 324 (1820)* and *Harrison* v. *Harrison, 4 Moo. P. C. 96.* Where a party refuses to attend for medical inspection, the Court may probably draw an unfavourable inference, *F.* v. *P., 75 L. T. 192 (1896), B.* v. *B. [1901] P. 39* and *W.* v. *S. [1905] P. 231.* BIRENDRA KUMAR BISWAS *v.* HEMLATA BISWAS

24 C. W. N. 914
25 C. W. N. 706

——— **s. 20**—

See DIVORCE. **25 C. W. N. 710**

——— **s. 23**—*Discretion of Court—Petitioner's adultery a ground for refusing a decree for judicial separation.* Where the petitioner (the wife) in a suit for divorce or in the alternative for a judicial separation was found to have herself committed adultery, to which the conduct of the respondent had in no way conduced, it was *held* that this was a good ground for the refusal of a decree for judicial separation. *Otway* v. *Otway, L. R. 13 P. D. 141,* followed. *Cons-*

DIVORCE ACT (IV OF 1869)—*contd.*

——————— s. 23—*contd.*

tantinidi v. *Constantinidi,* [*1903*] *P. D. 248,* distinguished. RHINE *v.* RHINE (1911)
I. L. R. 33 All. 500

——————— s. 37—*Decree for divorce—Permanent maintenance—Award of a lump sum—Payment.* In a suit for divorce brought by the wife, the District Judge has, under s. 37 of the Indian Divorce Act (IV of 1869), power to make the order for payment of a lump sum for the permanent maintenance of the wife. *Per* HAYWARD J.:—The plain meaning of the words of s. 37 of the Indian Divorce Act (IV of 1869) is that the gross sum of the money should be paid absolutely to the wife and that the annual sum of money should be limited for the period of her life. TAYLOR (MISS) *v.* CHARLES BLEACH (1914).
I. L. R. 39 Bom. 182

——————— *Decree absolute dissolving marriage—Petition for alimony, 15 years after decree—Power of Court to grant after such delay—Delay, whether reasonable, how determined—"On any decree absolute" in s. 37, meaning of.* A wife whose marriage was dissolved by a decree absolute passed in 1905, petitioned to the Court in 1920 for grant of permanent alimony; *Held,* that the Court had no power to pass an order in her favour under s. 37 of the Indian Divorce Act after such unreasonable delay after the passing of the decree absolute. The words "on any decree" in s. 37 of the Act should be construed as meaning "at the same time as or after a reasonable time after the passing of the decree." "What is reasonable time" must be determined upon all the circumstances of each case. *Scott.* v. *Scott* (*1921*) *P., 197,* followed. LLOYD *v.* LLOYD, (1921)
I. L. R. 44 Mad. 989

——————— *Held,* that the power to make an order for alimony after decree obtained by husband for adultery is discretionary. W. E. MCGOWAN *v.* JOHN GEORGE MCGOWAN
I. L. R. 38 All. 688

——————— s. 57—*Marriage—Remarriage petitioner in divorce proceedings within six months of the decree becoming absolute.* Where the successful petitioner in a suit for dissolution of marriage entered into a second marriage within six months of the decree for dissolution of marriage becoming absolute, it was *held* that the second marriage was void. *Warter* v. *Warter, L. R. 15 P. D. 152 ; 59 L. J. P. & M. 87,* followed. JACKSON *v.* JACKSON (1911) . . . **I. L. R. 34 All. 203**

——————— *Marriage solemnized before the expiry of six months as required by, validity of.* S. 57 of the Divorce Act (IV of 1869) expressly prohibits remarriage within six months of the making of the decree-absolute; the Indian Law does not completely dissolve the tie of marriage until the lapse of a specified time after a decree of dissolution and the marriage is still in force within the meaning of s. 19 (4), so as to give the Court jurisdiction under s. 19 to pronounce a decree of nullity regarding such prohibited marriage. *Jackson* v. *Jackson, I. L. R. 34 All. 203,* followed. *Chichester* v. *Mure, 32 L. J. 146,* and *Warter* v. *Warter, L. R. 15 P. D. 152,* referred to. BATTIE *v.* BROWN (1913) . . **I. L. R. 38 Mad. 452**

DIVORCE COURT RULES (ENGLISH).

——————— rr, 4, 5, 6—

See DIVORCE . **I. L. R. 45 Calc. 525**

DOCTRINE OF PROTECTION.

See OCCUPANCY HOLDING.
I. L. R. 42 Calc. 745

DOCTRINE OF SATISFACTION.

——————— *Inapplicability in India of doctrine of satisfaction—Indian Succession Act (X of 1865), s. 164—General applicability in India of the principles of the Indian Succession Act in so far as they are not overriden by some special provision of local law or usage—Khojas—Law applicable to Khoja wills—The Indian Evidence Act (I of 1872), s. 92.* The plaintiff claimed to be entitled to a sum of money deposited by him with one Karmali Moledina, deceased, a Khoja Mahomedan, and also to a legacy under the will of Karmali Moledina. He therefore sued the executors of the will of Karmali Moledina for a declaration to that effect and for the administration, if necessary, of the estate of Karmali Moledina. The defendants maintained, *inter alia* that the legacy must be taken as intended as payment of the balance due on the deposit by the plaintiff from Karmali Moledina and that the plaintiff could not claim both the legacy and the debt. *Held,* that, inasmuch as the principles of interpretation announced in the Indian Succession Act were intended by the Legislature to be universally applicable unless overriden by some special provision of local law or usage, the doctrine of satisfaction which is abolished by s. 164 of the Indian Succession Act, must be considered as exploded in India. *Held,* further, that if it be considered that the wills of Khojas are governed by Hindu Law, the will of Karmali Moledina would be governed by s. 164 of the Indian Succession Act, but if such wills are governed by Mahomedan Law, the will would have to be interpreted in accordance with the provisions of the general law of evidence, and, in particular, would be governed by the provisions of s. 92 of the Indian Evidence Act, and that in either case the defence set up under the doctrine of satisfaction would be defeated. *Quære:* Whether the wills of Khojas are governed by Hindu or Mahomedan Law. HASSONALLY MOLEDINA *v.* POPATLAL PARBHUDAS (1912) . . . **I. L. R. 37 Bom. 211**

DOCUMENT.

See CONSTRUCTION OF DOCUMENT.

See DISCOVERY.

See DOCUMENTS, CONSTRUCTION OF.

See EVIDENCE ACT,
s. 92 **I. L. R. 35 Bom. 231**
I. L. R. 42 Bom. 512

See HINDU LAW—ADOPTION.
I. L. R. 39 Bom. 441

See REGISTRATION OF DOCUMENTS.
L. R. 46 I. A. 240

See SANAD, CONSTRUCTION OF.
I. L. R. 36 Bom. 639

See SEARCH BY POLICE OFFICERS.
I. L. R. 41 Calc. 261

See TRANSFER OF PROPERTY ACT (IV OF 1882), s. 54
I. L. R. 41 Bom. 550

DOCUMENT—*contd.*

——— admissibility of—

See Civil Procedure Code (1908), Sch. II, cl. 11 . **I. L. R. 38 Bom. 60**

See Evidence Act (I of 1872), s. 68. **I. L. R. 40 All. 256**

——— attested by one witness only—

See Transfer of Property Act (IV of 1882), s. 59 **I. L. R. 38 All. 461**

——— alteration of—

See Forgery . **I. L. R. 38 Calc. 75**

——— bearing forged signature—

See Penal Code (Act XLV of 1860), ss. 30, 467 **I. L. R. 38 All. 430.**

——— construction of—

See Construction of Document.

——— execution of—

See Attestation. **I. L. R. 37 Calc. 526**

——— exhibiting during cross-examination—

See Right of Reply. **I. L. R. 43 Calc. 426**

——— granting exemption from assessment of rent—

See Transfer of Property Act, ss. 55, 123 . **I. L. R. 34 Bom. 287**

——— of title—

See Vendor and Sub-Vendor. **I. L. R. 38 Calc. 127**

——— production of in Court—

See Sanction for Prosecution. **I. L. R. 44 Calc. 1002**

——— proof of—

See Evidence Act (I of 1872), ss. 68, 69 . **I. L. R. 39 All. 109, 112**

——— secondary evidence of—

See Evidence Act (I of 1872), ss. 65, 66, 90 . **I. L. R. 41 All. 592**

——— *Non-production of, where not called upon by opponent, if matter for comment.* It is open to a litigant to refrain from producing any documents, not forming part of his case, that he considers irrelevant; if the other litigant is dissatisfied it is for him to apply for an affidavit of documents and he can obtain inspection and production of all that appears to him in such affidavit to be relevant and proper. If he fails to do so neither he nor the Court at his suggestion is entitled to draw any inference as to the contents of any such documents. Bilas Kunwar v. Desraj Ranjit Singh (1915) **I. L. R. 37 All. 557** **19 C. W. N. 1207**

——— *Release, document written but not signed by executant if operates as —Name written at the commencement of document, if sufficient.* The place and manner of signature of a document is immaterial provided that the signature is inserted in such a manner as to authenticate the document, and where the instrument is in the handwriting of the party to be charged, it is sufficient if his name is inserted at

DOCUMENT—*concld.*

the commencement. Where this was the case: *Held*, that the document was operative as a release though not signed by the executant. Gangaram Agarwala v. Lachiram Kishen Dyal (1914) **19 C. W. N. 611**

——— *Disclosure of, duty of an attorney with regard to—Discovery—Affidavit of documents—Duty of the attorney to disclose—Non-disclosure when amounts to a breach of duty—Documents subsequently discovered, when to be disclosed* It is the duty of an attorney to be extremely careful in ascertaining from his client who has to make an affidavit of documents, exactly what materials and documents are in his possession. It is further his duty, the moment he finds that there are other documents which have not been disclosed, at the very earliest moment to bring those documents to the notice of his opponent and give him an opportunity of inspecting them. *Held*, that though in this case the attorney was wrong in not disclosing the documents subsequently when they came to his knowledge his conduct was not such as to justify any further investigation by a Special Bench. In the matter of an Attorney **25 C. W. N. 99**

DOCUMENTS, CONSTRUCTION OF.

See Construction of Documents.

See Hindu Law—Adoption. **I. L. R. 40 Bom. 668**

——— mortgage by conditional sale—

See Sale Deed **I. L. R. 44 Bom. 964**

DOCUMENTS, INSPECTION OF.

——— *Caste—Trustee of caste funds—Extent of right to inspect documents—Demand and refusal—Jurisdiction of Civil Courts in caste question—Application of Indian Trusts Act (II of 1882), ss. 5 and 6, to creation of trusts of caste funds—Civil Procedure Code (Act V of 1908), s. 151.* As a result of dissensions in a Hindu caste a suit was filed by the plaintiff, a trustee of certain caste funds and member of the Managing Committee, against the defendant, a co-trustee and the President of that Committee. The plaintiff prayed for a declaration that he had the right to inspect all books and documents of the Mahajan Managing Committee, Sub-Committee and Trustees, and for an injunction res- [illegible]

[illegible] correspondence-file of the Mahajan. *Held*, that as trustee of the Deraser and Sadharan funds, the plaintiff had no right, either in law or by virtue of any caste rules, to the roving inspection claimed. *Bank of Bombay* v. *Suleman*, *I. L. R. 32 Bom. 466, 474*, referred to. *Held*, further, that the Mahajan fund of this caste being a purely secular fund the Indian Trust Act applied, and the plaintiff could not claim to have been made a trustee of that fund merely by virtue of a caste resolution and his own letter of acceptance. *Held*, further, on the evidence, that there has been no express demand addressed by the plaintiff to the proper quarter, and no refusal by the defendant such as would be necessary to [illegible] suit of this character to succeed. [illegible]

DOCUMENTS, INSPECTION OF—*contd.*

where rights to property are not involved, all matters of internal management must be left to the decision of the caste. The question in dispute was in reality a question between the caste and a section, apparently a small section, of the caste led by the plaintiff, and as such it was outside the Court's jurisdiction in accordance with the decision in *Nemchand* v. *Savaichand, I. L. R. 5 Bom. 84 note. Lalji Shamji* v. *Walji Wardhman, I. L. R. 19 Bom. 507*, referred to and distinguished. *Held,* lastly, that when according to well established principles certain questions have been removed from the jurisdiction of the Court, they cannot be brought within the jurisdiction under s. 151 of the Civil Procedure Code (Act V of 1908). JETHABHAI NARSAY, *v.* CHAPSEY COOVERJI (1909)

I. L. R. 34 Bom. 467

DOCUMENTARY EVIDENCE.

See EVIDENCE.

See MAHOMEDAN LAW—MARRIAGE.

I. L. R. 45 Calc. 878

————————, *proof of—Documents admitted in evidence without objection, if can be objected to in the appellate stage—Civil Procedure Code (Act V of 1908), s. 100, findings of fact, when can be challenged in second appeal—Res judicata, necessity of specifically raising the plea.* In a suit for *Khas* possession the Defendants pleaded that they held under a lease. The Court of Appeal below found that the lease required to be proved, that there was no document evidencing settlement, nor in fact any evidence of settlement at all, and that though there were two rent receipts they were not properly proved. In the Court of first instance the said rent receipts were admitted in evidence without objection by the Plaintiffs. Further, as a matter of fact there was evidence both oral and documentary about the settlement: *Held,* that the rent receipts having been admitted in evidence without objection in the Court of first instance, no objection could be taken in the Appellate Court that they were not properly proved. *Held,* further, that when there was evidence of the settlement in question, the finding of fact arrived at by the lower Appellate Court on the point could be successfully challenged in second appeal. The question of *res judicata,* though not specifically raised by the parties, may be gone into by the Court. RAJESWARI DASI *v.* PULIN BEHARI MITTER

25 C. W. N. 881

DOMICILE.

See DIVORCE . **I. L. R. 40 Calc. 215**

See GUARDIANS AND WARDS ACT, 1890, 8, 9 . . **I. L. R. 34 Bom. 121**

See MEMONS . **I. L. R. 43 Bom. 647**

See PRIZE COURT **I. L. R. 44 Bom. 61**

See SUCCESSION ACT (X OF 1865), ss. 7, 9, 10 . . **I. L. R. 41 Bom. 687**

DONEE.

———————— *Donee, alienation by—Gift burdened with an obligation—Restrictions on alienation.* When it is doubtful, whether a deed embodies a complete dedication of property to a religious trust or merely creates a gift of that property, subject to an obligation to perform

DONEE—*contd.*

certain services, the question should be decided by reference to the deed itself. In the former case the property would be inalienable and in the latter alienable, subject to the obligation, and notwithstanding restrictions as to selling or mortgaging the said property. DASSA RAMCHANDRA *v.* NARSINHA (1910) . **I. L. R. 35 Bom. 156**

DONORS FAMILY.

———— **benefit to—**

See MAHOMEDAN LAW—WAKF.

L. R. 44 I. A. 21

DOWER.

See COURT FEES ACT (VII OF 1870) SCH. I, ART. I **I. L. R. 36 All. 32**

See LIMITATION ACT 1908, s. 4.

I. L. R. 44 Mad. 817

See MAHOMEDAN LAW—DOWER.

See MAHOMEDAN LAW—GIFT.

I. L. R. 42 Calc. 36

See MAHOMEDAN LAW—MARRIAGE.

I. L. R. 32 All. 477

See MAHOMEDAN LAW—PRE-EMPTION.

I. L. R. 37 All. 522

See MAHOMEDAN LAW—WIDOW.

I. L. R. 32 All. 551, 563

See SUCCESSION CERTIFICATE ACT (VII OF 1889), ss. 2, 4 AND 7.

I. L. R. 32 All. 335
I. L. R. 33 All. 327

s. 4 . **I. L. R. 43 All. 341, 498**

———— **payment of (discretion of Court)—**

See MUHAMMADAN LAW.

I. L. R. 1 Lah. 597

———— **possession in lieu of—**

See MAHOMEDAN LAW.

I. L. R. 36 All. 558

———— **relinquishment of—**

See MAHOMEDAN LAW.

24 C. W. N. 335

———— **Marriage of a Sunni with a pregnant woman—**

See MAHOMEDAN LAW.

I. L. R. 45 Bom. 151

DOWL BANDOBUST.

See NAVIGABLE RIVER.

I. L. R. 46 Calc. 390

DOWL KABULIAT.

See KHOD KAST JOTES.

I. L. R. 48 Calc. 359

———————— *The mere fact that a document is called a dowl Kabuliyat does not decide its nature.* The document should be looked at as a whole and any evidence designed to shew customary incidents of tenure as attaching to the jotes must be rejected if and so far as it conflicts with what is contained in the dowls themselves. Evidence of custom of transferability is thus excluded by an express statement in the dowl, that is no

DOWL KABULIAT—*contd.*

right of sale, etc., without the landlord's consent. MAHOMED AYEJUDDIN MIA *v.* PRODOYOT KUMAR **25 C. W. N. 13**

DOWRY.

See CONSTRUCTION OF DOCUMENT. **I. L. R. 41 Bom. 5**

DRAINS.

———— **right of municipality to—**

See MUNICIPAL COUNCIL. **I. L. R. 38 Mad. 6**

———— *Calcutta Municipal Act (Bengal III of 1899), ss. 299 and 574—Place lawfully set apart for the discharge of drainage—Private common drain belonging to the landlord not subject to right of user as public drain by the Corporation—Liability of tenant.* A place lawfully set apart for the discharge of drainage, by the Corporation within the meaning of s. 299 of Calcutta Municipal Act, must be a place over which the Corporation have acquired by some procedure under the Act a right to make use of private property as a public drain. A tenant of premises is not bound, under s. 299, to convey the drainage therefrom into a drain belonging to his landlord over which the Corporation have no such right. GOBIND CHANDRA ADDY *v.* CORPORATION OF CALCUTTA (1910) . . **I. L. R. 38 Calc. 268**

DRAWER.

———— **right of—**

See BILLS OF EXCHANGE. **I. L. R. 46 Calc. 584**

DRINK.

———— **unwholesome, exposing for sale—**

See MADRAS CITY MUNICIPAL ACT (II OF 1904), BY-LAW 169. **I. L. R. 39 Mad. 362**

DRUGS.

See EXCISABLE ARTICLES. **I. L. R. 39 Calc. 1053**

DRUNKENNESS.

See PENAL CODE (ACT XLV OF 1860), s. 86 . . **I. L. R. 38 Mad. 479**

DUNNAGE.

See CHARTER-PARTY. **I. L. R. 41 Bom. 119**

DUPLICITY.

See CHARGE . **I. L. R. 41 Calc. 66**

DVYAMUSHYAYANA ADOPTION.

See HINDU LAW—ADOPTION. **I. L. R. 41 Bom. 315**
I. L. R. 42 Bom. 277

DWELLING.

See JURISDICTION **I. L. R. 34 Mad. 257**

DWIRAGAMAN CEREMONY.

———— **gift at—**

See HINDU LAW—GIFT. **I. L. R. 37 Calc. 1**

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EARNEST MONEY.

———— **credited on recovery of damages—**

See CONTRACT, BREACH OF. **I. L. R. 38 Mad. 801**

———— **forfeiture of—**

See AGREEMENT TO SELL. **24 C. W. N. 967**

See CONTRACT **I. L. R. 33 All. 166**
I. L. R. 41 All. 324

———— **receipt of—**

See CONTRACT . **I. L. R. 46 Calc. 771**

———— A deposit unless paid on any special terms is *prima facie* by way of earnest money but in each case the intention of the parties must be gathered from all the terms of the contract. NAWAB KHAJA HABIBULLAH *v.* ASMAN DEWAN . . . **24 C. W. N. 40**

EASEMENT.

See BENGAL FERRIES ACT, 1888, s. 11. **5 Pat. L. J. 500**

See EASEMENTS ACT.

See INCORPORATE RIGHTS.

See LIMITATION ACT (IX OF 1908), s. 20; SCH. I, ART. 144. **I. L. R. 40 All. 461**

See LIGHT AND AIR.

See MADRAS IRRIGATION CESS. **L. R. 46 I. A. 302**

See PROFIT *a prendre* **2 Pat. L. J. 323**

See WATER FLOW. **I. L. R. 38 Mad. 149**

———— **adverse Possession—**

See BENGAL FIRMS ACT, 1885. **5 Pat. L. J. 500**

———— **dedication of Road—**

See PUNJAB MUNICIPAL ACT, 1911. **I. L. R. 1 Lah. 117**

———— **infringement of—**

See EASEMENT. **I. L. R. 38 Mad. 280**

———— **of necessity—**

See EASEMENTS ACT (V OF 1882), s. 13 **I. L. R. 33 All. 467**

———— **over Land forfeited to Government—**

See MADRAS IRRIGATION CESS ACT, 1865. **I. L. R. 43 Mad. 529**

———— Suit relating to—*Easement—Servient owners, if all must be parties.* A decree based on an easement cannot be passed when all the servient owners are not parties. MADAN MOHAN CHATTOPADHYA *v.* AKSHOY KUMAR BARUR (1909) **14 C. W. N. 15**

easement under s. 38 or 47 of the Act. A drain from one land to another is a continuous easement within the Easement Act. Where such a right of easement by drainage has been granted but was not possessed or enjoyed for more than twenty years from the date of but no

EASEMENT—*contd.*

obstruction to such use existed more than three years prior to the institution of the suit, such non-user without anything more, does not extinguish the right under s. 38 or s. 47 of the Easement Act. The non-user without anything more, is not an implied release or abandonment of the right. The period of twenty years of non-enjoyment which will extinguish the right under s. 47 begins when the enjoyment was obstructed by the servient owner or rendered impossible by the dominant owner. CHINTAKINDY PARVATAMMA *v.* LANKA SANYASI (1910) [I. L. R. 34 Mad. 487

——— Prescription—*Continuous user for irrigation purposes of water of bundh—Annual user if to be proved—Water taken from bundh at different points in different years—User, if indefinite—Permissive user.* Where it was proved that the defendant had been taking water from plaintiff's *bundh* for irrigating his paddy lands, whenever occasion required, for more than twenty years:—*Held,* that the defendant had acquired the right to the easement by prescription. That it was not necessary for him to prove an annual user, the statute only requiring enjoyment without interruption for twenty years and not actual user. *Hollings* v. *Verney, L. R. 13 Q. B. D. 304,* not followed. *Budhu Mandal* v. *Maliat Mandal, I. L. R. 30 Calc. 1077,* and *Krista Das Chowdhry* v. *Joy Narain Panja, 8 C. W. N. 158,* relied on. The mode of user of the water by the defendant was not indefinite merely because openings were made by him at different points in the embankment in different years according to the height of the water in the *bundh.* The fact that the defendant had years ago paid Rs. 50 for repair of the *bundh* did not prove the user to be permissive. GHASIRAM MANDAL *v.* ASIRBAD MAHTO (1910) . . . . 15 C. W. N. 259

——— Natural channel—*Flow of water—Duty of owner of land through which a natural channel runs.* The owner of land through which a river or other natural channel flows is bound within certain limits, as between himself and other riparian owners, not to do anything which shall obstruct the flow of the water or materially interfere with their rights. But such owner is not bound to keep the channel clear so that the amount of water that can pass down it may not be diminished. BALDEO SINGH *v.* JUGAL KISHORE (1911) . . . I. L. R. 33 All. 619

——— Flow of water—*Over servient tenement in a definite channel, if necessary for acquiring right of easement.* The fact that water flows over the surface of the servient tenement without a definite channel for its carriage, cannot prevent the acquisition of an easement. *Bidhu Bhusan Palit* v. *Beny Madhab Mazumdar, 8 C. W. N. 244,* overruled. MUNSHI MISSER *v.* BHIMRAJ RAM (1913) . I. L. R. 40 Calc. 458

——— Overhanging eaves—*for discharge of water—Easement and not tresspass.* The possession of a *panch* or eaves for discharge of water overhanging the defendant's land is an easement and not an occupation of defendant's property. CHOTALAL HIRACHAND *v.* MANILAL GAGALBHAI (1913) . I. L. R. 37 Bom. 491

——— Discharge of water—*Stopped by owner of dominant tenement—Servient owner if may complain—Defined channel on dominant tenement, effect of.* An easement exists for the benefit of the dominant tenement alone, and the servient owner acquires no right to insist on its continuance or to ask for damages on its abandonment. The principle does not cease to be applicable where water has flowed in a defined channel on the dominant tenement before it reaches the servient tenement. AFTAB CHOWDHURY *v.* ASOKHADEM (1913) . . . 17 C. W. N. 1066

——— Ancient Lights—*Actionable Interference—Principle to be applied —Nuisance.* The owner or occupier of a tenement in respect of which an easement of light has been acquired by prescription, is entitled to a quantity of light the measure of which is what is required for the ordinary purposes of inhabitancy or business of the tenement, according to the ordinary notions of mankind. The actual user will neither increase nor diminish the right. The question, in an action for obstruction, is whether the obstruction amounts to a nuisance. The effect of *Jolly* v. *Kine, [1907] A. C. 1,* is to establish that the law laid down in *Colls* v. *Home and Colonial Stores, [1904] A. C. 179,* is as formulated by Lord Davey in that case at p. 204, and as above stated. PAUL *v.* ROBSON (1914) . . . I. L. R. 42 Calc. 46
L. R. 41 I. A. 180

——— Light and Air—*Damages for infringement.* A mandatory injunction will be granted to remove an obstruction of an easement of light and air where the consequence is to darken the Plaintiff's house so as to make it uncomfortable and partly useless. In such a case damages are not an adequate remedy. MUTHU KRISHNA AYYAR *v.* SOMALINGA MUNINAGANDREIN
I. L. R. 36 Mad. 11

——— Water rights—*Distinction between surface water, and water flowing in a definite channel.* No claim can be made either as a natural right or as an easement by prescription, to water which does not flow in a definite course, but which should be regarded as surface water or surface drainage, The right to the water of a stream does not cease, when it ceases to flow in a confined water-course unless it exhausts itself as a stream, and merely soaks into the ground. The chief characteristic of surface water is its inability to maintain its identity and existence as a water body. When the flow of water on one person's land can be identified with that on another, a right to such flow can arise, although the water may flow along an intervening piece of land. Water flowing into a field from a known channel and passing along the field onwards into another field though not over a confined track in the former field, but along its whole area, is not surface water. Well-defined existence arising from an ascertained course is the real test in coming to a conclusion against any body of water being regarded as surface water. The question whether or not particular water is surface water is one of fact to be determined by the circumstances attending its origin and continued existence. The right to the water of a stream is sustainable notwithstanding the fact that the water in the stream is not always sufficient for the purpose for which the right is claimed, or that it reaches the plaintiff's land not directly but indirectly by flowing into another channel. A river channel supplied the means of irrigation for the lands of the parties to the suit, and the other ryots of the village. A branch leading from the main channel passed

EASEMENT—*contd.*

through the lands of defendants Nos. 1, 2 and 3 *in a definite water-course, up to the fourth defendant's* lands when it entered the fourth defendant's field, and after irrigating it, flowed, over its *bunds*, and joined another channel which irrigated the plaintiff's lands. Defendants Nos. 1, 2 and 3 blocked up the channel at a point higher than the fourth defendant's lands. In a suit by plaintiff for declaration of his right to the customary supply of water through the channel, and for an injunction restraining the defendants from obstructing the water-course: *Held*, that the water of the channel when it entered the fourth defendant's field could not be regarded *as surface water, but continued in a definite water-*course, and plaintiff was entitled to the usual supply of water unobstructed. ADINARAYANA *v.* RAMUDU (1914) . **I. L. R. 37 Mad. 304**

———— Right of support—*Disturbance—Actual damage when necessary, to support action—Temporary structure, whether an easement of support acquirable in respect of.* No actual damage is necessary to support an action for the disturbance of an easement of support for a building. *Contra* where the disturbance is of a natural right. *Backhouse* v. *Bonomi, 9 H. L. C. 503,* referred to. The rule requiring actual damage is applicable only to an action for damages, but actual damage is not necessary to entitle a person having a right of support, to relief by way of injunction: *Corporation of Birmingham* v. *Allen, 6 Ch. D., 284,* followed. The question whether a right of support can be claimed for a temporary structure, which has been in existence for the statutory period, was not decided. *Maberley* v. *Dowson, 5. L. J. K. B. 261,* referred to. RAMAKRISHNA *v.* SEETHARAMA (1914) . **I. L. R. 37 Mad. 527**

———— Right to discharge surplus water across a public way.—*If may be acquired by prescription—Right acquired before dedication of way to*

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between the two tenements. To establish such a *right he must prove that the public way was* formerly private property, and the easement claimed had been acquired while it was still private property. KAILASH CHANDRA NANDY *v.* SURENDRA NATH SAMANTA (1913) . **18 C. W. N. 378**

———— Light and Air—*An action for the infringement of the easement of light and air is founded not on trespass but on nuisance.* To amount to an actionable nuisance the interference in the case of a house suitable for residence and business purposes

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ment of the dominant tenement must be taken into consideration but it does not furnish the decisive measure of the "unlawful hurt or annoyance" To determine whether a nuisance has

right has not been acquired by grant or prescription ought not to be taken into account. PAUL *v.* ROBSON **I. L. R. 39 Calc. 59**

EASEMENT—*contd.*

———— Prescriptive right to take water—*By means of definite mode of access—Whether owner of servient tenement may substitute some other means of access.* When the owner of a dominant tenement has acquired a prescriptive right to take water from a tank on the servient tenement, and has for this purpose used a particular means of access for the statutory period, he has acquired a right to reach the water by means of such definite mode of access: the servient owner, at his own discretion, may not substitute for his use some other means of access. JIBANANDA CHAKRABARTY *v.* KALIDAS MALIK (1914) **I. L. R. 42 Calc. 164**

———— User of easement—*For less than the prescriptive period—No right to sue for infringement.* Incorporeal rights such as easements are not capable in an exact sense of being possessed; and unless an easement had ripened into a prescriptive one, mere enjoyment of the easement for any length of time short of the full period of prescription

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I. L. R. 38 Mad. 280

———— Right to discharge water—*Not claimed as easement but as ancillary to ownership of land.* The plaintiffs were the owners of

dants who built a bund on their land so as to obstruct the water accumulated on the plaintiff's land from flowing towards the north through the defendants' land. The plaintiffs alleged that they were entitled to have the water on their land discharged through the defendants' land; but they did not claim it as an easement but as a right ancillary to their property which they had not parted with: *Held*, that there was such a right as that claimed by the plaintiffs, although the plaintiffs did not claim the right to discharge *their water and did not in fact discharge their* water on to the defendants' land by any definite channel. That the duty of the defendants was to allow the water from the plaintiffs' land to pass on through their land. It was then opened to them to dispose of it in the way they thought best. RAMADHIN SINGH *v.* JADUNANDAN SINGH (1914) . . . . **19 C. W. N. 54**

———— Right of way—*Permanent tenures held under same landlord—One, if may acquire right by prescription against the other—Prescription by tenant in possession inuring to owner's* *in cases of* *ment, rig* *n of tenement—Grant inferred from long user alone—Easement of necessity—Grant if may be presumed upon severance—Suit for declaration of right of easement—All servient owners, if necessary parties—Cause of action.* A dominant owner has no cause of action against servient owners who have *neither caused obstruction nor raised any objec*tion to the exercise of his right of easement. In

EASEMENT—*contd.*

a suit for a declaration of his sight of way he is not bound to make parties any servient owners other than those who have so obstructed or challenged his right. *Madan Mohan Chattopadhya* v. *Akshoy Kumar Baruri, 14 C. W. N. 15*, explained. The enjoyment by the tenant in possession of the dominant tenement under a claim of right in respect of the dominant heritage may give the owner a prescriptive right. *Quære :* Whether the holder of a permanent tenure can acquire by prescription in respect of his tenure a right of easement against another permanent tenure held by another tenant under the same landlord. *Held*, however, upon the facts proved in the case which showed that the two tenements had at one time belonged to the same person, that the Court was justified in presuming an implied grant, and this notwithstanding that the right claimed was a right of way along a path which was a formed road though neither paved nor metalled, but which otherwise appear to have been intended to be permanently attached to and for the use of the dominant tenement. That assuming that the path came into existence after the severance, the fact that for about sixty years since, the tenant in possession of the dominant tenement had been using the path was sufficient to justify the Court in inferring that the user had its origin in a grant, not as a matter of legal presumption, but as an inference of fact. On a severance of property a grant by the owner of one of the severed portions to the owner of the other can be presumed, and where the easement appears to be one of absolute necessity, such a presumption legitimately arises in the case. MADAN MOHAN CHAKRAVARTY *v.* SASHI BHUSAN MUKERJI (1915)

19 C. W. N. 1211

———— **Unknown to law**—*Right to use another's land as latrine, if may be acquired by prescription.* Where plaintiff alleged that he along with the defendants erected latrines on land which did not belong to them and used them for a long series of years and thus acquired a right of easement : *Held*, that an easement of this description was unknown to law and the Court will not create a new species of easement. HIRALAL RAY CHAUDHURI *v.* LOKENATH SAHA (1915)

19 C. W. N. 864

———— **creation of**—*If must be in writing registered—Transfer of Property Act (IV of 1882)—Preamble, ss. 3, 6 (c), 54, 123—Easement, if immoveable property—General Clauses Act (X of 1897), s. 3, cl. (25)—Registration Act (XVI of 1908), s. 2 (6).* The provisions of the Transfer of Property Act have no application to the creation of easements. No writing was necessary for the imposition of an easement before the Transfer of Property Act was passed; and ss. 54 and 123 of that Act were not intended to change and did not change the pre-existing law regarding easements so as to require a writing for their creation or imposition where no writing was previously necessary. Where a right of way is created in writing, s. 2 (6) of the Registration Act may require registration but not if the value of the right is less than one hundred rupees : *Held*, therefore, that the Courts below were right in decreeing the plaintiff's claim of a right of way by grant upon parol evidence only. *Bhagawan* v. *Narsingh, I. L. R. 31 All. 612*, referred to. Though a right of way over other lands of the landlord cannot be acquired by prescription under s. 26, Limitation Act, it can be created by grant. *Madan Mohan* v. *Sashi Bhusan, 19 C. W. N. 1211, 1214*, followed. It is extremely doubtful whether a tenant who uses a pathway by the mere leave and license of the landlord is invested with anything in the nature of a right enforcible by suit. SITAL CHANDRA CHOWDHURY *v.* A. J. DELANNEY (1916) . . **20 C. W. N. 1158**

———— **Right of privacy**—*Customary right of privacy in Gujarat—Invasion of privacy an actionable wrong—Injunction.* The plaintiff, a resident of Ahmedabad, sued for an injunction to restrain the defendant from invading the privacy of his bed room by opening a window in the additional storeys erected by him. The District Judge found that the plaintiff had a right of privacy to the particular room and granted the injunction prayed for. On appeal to the High Court. *Held*, that in the province of Gujarat the customary right of privacy must be taken to have been proved and the invasion of the right was an actionable wrong. *Manishankar Hargovan* v. *Trikam Narsi (1867), 5 Bom. H. C. (A. C. J.) 42*, relied on. MANEKLAL MOTILAL *v.* MOHANLAL NAROTUMDAS (1919) . **I. L. R. 44 Bom. 496**

———— **Tree growing on the boundary**—*Between two fields—Right of one proprietor to cut off projecting branches and roots—Injunction.* Where a tree belonging to the defendant has been growing partly on his land and partly on plaintiff's land for a number of years past, it is not permissible to the plaintiff to cut off the overhanging branches or the penetrating roots of the tree. *Vishnu Jagannath* v. *Vasudeo Raghunath (1918), 43 Bom. 164* and *Hari Krishna Joshi* v. *Shankar Vithal (1894), 19 Bom. 420*, distinguished. SOMESHWAR JETHALAL *v.* CHUNILAL NAGESHWAR (1919) . . . **I. L. R. 44 Bom. 605**

———— **Water flowing and carrying fish**—*From higher to lower paddy-land—Owner of lower land, if after 20 years' user, can prevent owner of higher land from intercepting fish when on his own land.* By catching fish in paddy-land belonging to himself peaceably and uninterruptedly for over 20 years, a plaintiff does not acquire a right of easement which entitles him to restrain the defendant, the owner of paddy-land on a higher level, from catching on his land fish which by reason of the water on plaintiff's land being fed by water flowing down from defendant's land would have come with the water into plaintiff's land. KALANDAR MANDAL *v.* AJIMODDI MANDAL (1917)

21 C. W. N. 599

———— **Right of way**—*Presumption of right from user—Indian Limitation Act, IX of 1908, s. 26—error in law in not making the presumption—Second Appeal.* The plaintiff and defendants are co-sharers in a well. In order to gain access to this well from the road it is necessary for the plaintiffs to go across certain fields belonging to some of the defendants. It was found that plaintiff had used this road without let or hindrance for a period of 20 years and that this road was the only road they could use to gain access to the well. The lower Appellate Court however held that the plaintiffs had not proved user "as of right." *Held*, that having regard to the habits of the people of this country the enjoyment of the road "as of right" within the meaning of s. 26 of the Limitation Act should have been

EASEMENT—*contd.*

presumed. *Rana Ganpat Singh* v. *Kangra Valley State Company* (*62 P. R. 1898*), *Kyinan* v. *Set Lan* (*8 Indian Cases 1196*) and *Sahib Ditta* v. *Daya Singh* (*3 Indian Cases 271*), referred to, also Galé on Easement. *Baroda Kant Karmakar* v. *Sreenath* (*18 Indian Cases 211*), *Shaikh Khuda Bakhsh* v. *Shaikh Taj-ud-din* (*8 Cal. W. N. 359*), *Meser Mullick* v. *Hafizuddi Mullick* (*13 Cal. L. J. 316*) and *Muhammad Ali* v. *Jogal Ram* (*14 W. R. 124*), distinguished. *Held also*, that in not making the presumption the lower Appellate Court had committed an error in law and a second appeal was competent. DIWAN *v.* JAGTA

I. L. R. 1 Lah. 206

———— *Prescription—Right of way—Easement not admissible if its use as claimed*

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prescribed and definite route, but generally and [illegible] ds. *Held*, [illegible] inasmuch [illegible] e of all the ordinary uses of the servient property. *Joy Doorga Dossia* v. *Juggernath Roy*, *15 W. R., C. R., 295*, followed. LAL BAHADUR *v.* RAMESHWAR DAYAL **I. L. R. 43 All. 345**

———— **Increased burden**—*Right of—Dominant owner whether can increase the burden upon servient owner by altering his dominant tenement.* It is well-settled that no man can impose a new or increased restriction or burden on his neighbour by his own act and for this reason an owner of an easement cannot, by altering his dominant tenement, increase his right. *Harvey* v. *Walters*, *L. R. 8 C. P. 162* (*1873*) and *Thomas* v. *Thomas*, *2 C. M. & R. 34*, followed. The Defendant had a hut on the disputed land which had been replaced by a two-storied building. The Defendant made the cornice and the string course at two places, one at a distance of 12 feet and the other of 22 feet from the ground while the eaves of the tiled hut stood at a distance of only 8 feet from the ground and hung over the Plaintiff's land along one line. The accumulated water therefore trickled down from the cornice with greater force than the water which formerly came down: *Held*, that the cornice had created additional burden on the Plaintiff's land. SURESH CHANDRA BISWA *v.* JOGENDRA NATH SEN **24 C. W. N. 896**

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dant's field. The defendant prevented the plaintiff in June 1 [illegible] shorter way; 1912 to restra[illegible] obstructing him in his user. *Held*, that the [illegible] by immemorial [illegible] did not rest on [illegible] Indian Easements Act, 1882, it was unaffected by the defendant's obstruction in 1909. RAMBHAI DAPHAI *v.* VALLABHBHAI JHAVERBHAI **I. L. R. 45 Bom. 1027**

EASEMENT—*concld.*

———— **Right of Way**—*Prescription.* The plaintiffs claimed a right of way by prescription *to drive their cattle through the waste lands of an* adjoining village not by any prescribed or definite route but generally and promiscuously all over the waste lands: *Held*, that such a right could not be admitted as its recognition would be destructive of all *ordinary uses of the servient property.* LAL BAHADUR *v.* RAMESHWAR DAYAL

I. L. R. 33 All. 347

EASEMENTS ACT (V OF 1882).

———— scope of—

See EASEMENTS. **20 C. W. N. 1158**

———— ss. 2 (c), 17 (c)—*Non-riparian owner—Right to the flow of river water over another's lands—Ancient and uninterrupted user—Presumption of a lost grant—Prescription.* The plaintiff sued for a declaration that he had a right to take the water of a river for cultivating his lands by making it flow over the paddy lands of the defendants. The facts proved showed that from time immemorial the plaintiff and his ancestors as owners of certain non-riparian lands had been taking water from the river at or about a certain spot on the river banks, and thence over the lands of the defendants successively till the plaintiff's lands were reached. The defendants' objection was that the right claimed was really one "to surface water not flowing in a stream" and hence could not be acquired as an easement under s. 17 (c) of the Indian Easements Act, 1882, nor be the subject of a presumed lost grant. *Held* (*per* BEAMAN, *J.*), that the plaintiff having acquired the right claimed by him before the Indian Easements Act came into force, and having enjoyed such right from time immemorial, the case was saved by *s. 2, cl. (c)* of the Act. *Held* (*per* MARTIN, *J.*), (*i*) *that s. 17 (c) of the Act did not apply as* the plaintiff's claim was to river water and not to mere surface water on the defendant's lands; (ii) alternatively, that the plaintiff was protected by *s. 2 (c) if he could show that he had acquired* any legal right before the Act came into force; (iii) that the right he claimed could have been the subject of a grant and had a lawful origin, notwithstanding that such grant involved the passage of river water over the defendants' lands in no definite channel and that the plaintiff was a non-riparian owner; (iv) that consequently a lost grant could be presumed, and that having regard to the immemorial user it ought to be presumed, and therefore the plaintiff was legally entitled to the right he claimed. *Per* MARTIN, *J.* "The presumption of a *lost grant is one* which may be made in India as well as in England. The presumption arises out of the strong desire of the Courts to find a legal origin for an ancient and uninterrupted user. The presumption may be *rebutted like other presumptions. It also* requires certain conditions and one is that the right could have been the subject of a grant." JANARDAN GANESH *v.* RAVJI BHIKAJI (1917)

I. L. R. 42 Bom. 288

———— s. 4—

———— **Eaves overhanging**—*The possession of* a pankh or eaves overhanging another's land is an easement and not an occupation of his property. CHOTALAL HIRACHAND *v.* MANILAL JAGALBHAI

I. L. R. 37 Bom. 491

EASEMENT—*contd.*

—— s. 7—

See WATERFLOW **I. L. R. 33 Mad. 149**

—— The owner of land through which a natural channel flows is bound within certain limits and as between himself and other riparian owners not to do anything to obstruct the flow of water or which would materially affect their rights. BALDEO SINGH AND OTHERS *v.* JUGAL KISHORE DASS

I. L. R. 33 All. 619

—— The fact that water discharged from a dominant tenement flows over the servient tenement in a definite channel cannot prevent the acquisition of an easement. MUNSHI MISSER *v.* BHIMRAJMAN **I. L. R. 40 Calc. 458**

—— s. 8—

See MADRAS IRRIGATION CESS ACT, 1865, SS. 1 AND 4. **L. R. 46 I. A. 302**

—— s. 12—

—— Tenant's enjoyment as of right enures for the benefit of the Landlord. MAHAN MOHUN *v.* SASHI BHUSAN

19 C. W. N. 1211

—— s. 13—**Channel**—*Right to channel cut subsequent to severance of tenements.* Land belonging to Government was granted to *A*, who dug and used a channel across other Government land. The lands across which the channel was dug was subsequently granted to *B*. *B* thereupon filled up the channel, which had been in existence for 16 years. In a suit by *A* to establish his right to such channel: *Held*, that *A* had no claim to an apparent and continuous easement under s. 13 of the Easements Act, and had not acquired a prescriptive right by user of the channel. KUTTATH KRISHNAN *v.* CHATHU MENON (1909)

I. L. R. 33 Mad. 207

—— **Easement of necessity**—*Definition.* An easement of necessity is an easement without which a property cannot be used at all, and not one merely necessary to the reasonable enjoyment of the property. *Wheeldon* v. *Burrows, L. R. 12 Ch. D. 31*, followed. *Union Lighterage Company* v. *London Graving Dock Company, (1902) 2 Ch. D. 557*, and *Ray* v. *Hazeldine (1904), 2 Ch. D. 17*, referred to. SUKHDEI *v.* KEDAR NATH (1911)

I. L. R. 33 All. 467

—— *Easement of taking water from a well—Easement of necessity—Discontinuance of easement —Extinguishment of easement —Right to take the water is not an interest in immoveable property within the meaning of Article 144 of the Indian Limitation Act (IX of 1908)—Rebuilding the well with permission of the owner—Fresh grant of easement—Estoppel against the owner from denying the right to take the water—Indian Evidence Act (I of 1872), s. 115.* On the plaintiff's land was a well from which the defendants had a right to take half of the water for irrigating their land; but by non-user for a period of more than twenty years the easement had been extinguished. Subsequently, the defendants rebuilt the well at their own expense, with the permission of the plaintiff, with a view to the irrigation of their land and proceeded to use the water for the purpose. The plaintiff having sued to restrain the defendants from so using the water, the lower Court held that the easement being one of necessity was not extinguished by non-user, and that the defendants' right was an interest in immoveable property which would only be lost by adverse possession of more than twelve years under Article 144 of the Indian Limitation Act. On appeal. *Held*, that the easement in question was not an easement of necessity but was an ordinary easement liable to be extinguished by non-user for more than twenty years under s. 47 of the Indian Easements Act. *Held*, also, that the right in question was not an interest in immoveable property which would only be liable to be lost by proof of twelve years' adverse possession against the defendants, under Article 144 of the Indian Limitation Act. *Held*, however, that the plaintiff had by his conduct permitted the defendants to believe that they would have the right of easement upon the repair of the well and that the plaintiff was accordingly estopped from denying the said right of the defendants by the provisions of s. 115 of the Indian Evidence Act. ANANTA *v.* GANU (1920)

I. L. R. 45 Bom. 80

—— ss. 13, 28, 33—**Light and Air**—*Right of way not apparent and continuous easement —Air and light, extent of prescriptive ight acquired in—When action for compensation for obstruction will lie—What relief appropriate to be granted.* A right of way is not an apparent and continuous easement within the meaning of s. 13 of the Indian Easements Act. The extent of prescriptive right to the passage of light or air to a certain window is the quantity of light or air which has been accustomed to enter that opening during the prescriptive period under s. 28 of the Easements Act; no invasion of such right will give a right to compensation unless substantial damage is caused within the meaning of s. 33 of the Act. Where the injury caused by the invasion of the right is not small and a mandatory injunction will not cause serious loss or damage to the defendant, an injunction and not merely compensation will be the appropriate relief to be granted. The fact that the owner of the dominant tenement has acquired light from other sources will not justify an interference with the prescriptive right acquired by him. *Dyers Company* v. *King, L. R. 9 Eq. 438, 442*, referred to. ESA ABBAS SAIT *v.* JACOB HAROON SAIT (1909)

I. L. R. 33 Mad. 327

—— s. 15—

See EASEMENT **I. L. R. 45 Bom. 1027**

See NUISANCE . **I. L. R. 40 Bom. 401**

—— *Essentials for the acquisition of an easement—Adverse enjoyment in assertion of ownership can create a right of easement.* If a person walks along the land of another for the beneficial enjoyment of other land, and if the enjoyment of the other's land does not amount to exclusive possession, there is no reason why his walking along the land without the permission of the true owner and in the assertion of a right to walk should not create in favour of the enjoyer a prescriptive right of easement, simply because he mistakenly supposes that he is the owner of the land or asserts that his act of enjoyment is sufficient to give him the ownership by prescription. The mere claim of the higher right of ownership would not prevent a person from acquiring the lesser right of easement provided he could show

EASEMENT—*contd.*

———— s. 15—*contd.*

that he asserted certain rights of enjoyment over the land in question for the benefit of another land belonging to him. S. 15 of the Easements Act does not require that the *title* should be claimed as an easement, but only requires that the *enjoyment* should possess two properties, *viz.*, (i) that it must be as of right without interruption and (ii) that it must be as an easement. The first quality is intended to show that enjoyment by license or under a contract which would not amount to a grant of an easement, would be ineffectual to create a right by prescription. The other quality is that the enjoyment should be as an easement, and not that it should be in the assertion of a claim of an easement. *Narendra Nath Barari* v. *Abhoy Charan Chattopadhya, I. L. R. 34 Calc. 51,* referred to. *Chunilal Fulchand* v. *Mangaldas Goverdhandas, I. L. R. 16 Bom. 592,* commented on. KONDA *v.* RAMASAMI (1912)

I. L. R. 38 Mad. 1

———— *Prescriptive user, period necessary for—Indian Evidence Act (I of 1872), ss. 123, 124 and 163—Confidential communications, test of.* In a suit to establish right of user by prescription against Government, the plaintiff is bound to prove under the last clause of s. 15 of the Indian Easements Act, sixty years' user. *The Secretary of State for India* v. *Kota Bapanamma Garu, I. L. R. 19 Mad. 165,* distinguished. The object of s. 124 of the Evidence Act is to prevent disclosures to the detriment of public interests and the decision as to such detriment rests with the officer to whom the communication is made and does not depend on the special use of the word "confidential." *Venkatachella Chettiar* v. *Sampathu Chettiar, I. L. R. 32 Mad. 62,* followed. NAGARAJA PILLAI *v.* THE SECRETARY OF STATE (1914) . . . **I. L. R. 39 Mad. 304**

———— *Easements—Prescription against Government—Right of way, and to surface water over land belonging to Government—Enjoyment for thirty or forty years against Government—Assignment, by Government to private person—Suit against latter within two years of assignment—Right of easement against assignee, whether acquired by prescription—"Belongs to Government" in s. 15 of the Easements Act, meaning of.* Where an easement had been exercised by the plaintiff over land belonging to Government for thirty or forty years before the land was assigned by the Government to the defendant, and the plaintiff sued within two years of the assignment to enforce the right of easement against the defendant. *Held,* that the plaintiff had not acquired a right to the easement by prescription against the defendant. The words "belongs to Government" in the last paragraph of s. 15 of the Indian Easements Act (V of 1882), must refer not to the time of suit but to the time during which the easement is enjoyed. SRINIVASA UPADYA *v.* RANGANNA BHATTA (1917) **I. L. R. 41 Mad. 622**

———— ss. 15, 16, 19—*Easement of lights and air—Acquisition by prescription—Easement for a limited period, whether can be acquired by prescription under the Act—English Common Law and English Prescription Act (2 & 3, Will. 4, c. 71)—Grant of land for maintenance to a tavazhi, whether an interest for life—Demise on kanom—No resistance to easement within three years after expiry of kanom, effect of—Acquisition by prescrip-*

EASEMENT—*contd.*

———— ss. 15, 16, 19—*contd.*

tion of absolute right against owner—Prescription for an easement for a limited period against a tenant, whether possible in law. Where a tarwad, which was the absolute owner of the suit land, granted it for maintenance to a tavazhi in 1877, and the latter demised it on kanom in 1887 to the defendants who held over possession after its expiry in 1899 and subsequently obtained from the tavazhi a fresh lease for twelve years commencing from 1905, and where the plaintiffs, the owners and occupiers of adjacent lands claimed to have acquired a right of easement of light and air over the suit land by prescriptive enjoyment since 1877 till a few months before they instituted the present suit in 1913 for an injunction restraining the defendants from interfering with their right of easement. *Held,* that the plaintiffs had acquired in law *an absolute* right of easement of light and air by *prescription* for over the statutory period, as under s. 16 of the Indian Easements Act, the plaintiffs' enjoyment of the easement from 1877 was not resisted by the tarward *or the tavazhi within three years after the expiry* of the kanom in 1899, and the grant for maintenance to a tavazhi was not in law a grant of an interest for life; and that consequently the plaintiffs were entitled to an injunction against the defendants. *Per* ABDUR RAHIM, J.—There

Law and the English Prescription Act (2 & 3 Will. IV, cap. 71), in this respect. *Wheaton* v. *Maples & Co. (1893), 3 Ch. 48,* referred to. *Per* PHILLIPS, J., *contra.* There can be an acquisition by *prescription* of an easement for a *limited* period under the Indian Easements Act, and that consequently the plaintiffs in this case were in any event entitled to a right of easement as against *the defendants during the period of the latter's* interest in the property. KOYYAMMU *v.* KUTSTIAMMOO (1919) . **I. L. R. 42 Mad. 567**

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eave

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easement—Privacy—Invasion The term "easement" as defined in the Easement Act (V of 1882) applied just as much to a projection of eaves in a dry country where there is no discharge of water as in a country where there is abundant rainfall and there is discharge of water. If a man has acquired an easement from a projection of his eaves to a fixed extent over his neighbour's land, he can raise the height of those eaves so long as he does not throw an increased burden on the servient tenement. The defendant constructed a window and apertures *(jalis)* in the back wall of his house and they commanded the plaintiff's *khadki* or courtyard which could be used for females to bathe and similar purposes of privacy. From the defendant's window the people sleeping in the plaintiff's house could be seen and from the apertures, though above a man's height, a person, if he was so inclined, could

ing the defendant from making any openings in his wall: *Held,* that though it was doubtful whether the plaintiff was entitled to relief on the ground of the invasion of his privacy, still as

EASEMENT—*contd.*

——— ss. 18, 23—*contd.*

there was a written agreement between the parties in the year 1870 whereby the defendant's father agreed that he would not make any opening in his back wall, the plaintiff had the right to require the defendant to close the said apertures and window. MULIA BHANA *v.* SUNDAR DANA (1913) . . . I. L. R. 38 Bom. 1

See also EASEMENT . I. L. R. 44 Bom. 496

——— s. 24—*Accessory easement—Extension of the doctrine of accessory easement.* The plaintiff and the defendant owned neighbouring houses. The wall of the plaintiff's house abutted on the defendant's land. The plaintiff had acquired an easement of discharging rain water from eaves of his roof on to the defendant's land. On the strength of the easement the plaintiff sued for an injunction to restrain the defendant from making any use of his land which would prevent the plaintiff from going upon it for the purpose of repairing the wall of his house. The trial Court refused to grant the injunction. The lower appellate Court found that the case fell under s. 24 of the Easements Act, 1882, and that the repair of the wall was an accessory easement to the admitted easement of discharging the water through the eaves. On appeal to the High Court. *Held*, that the right to enter upon the defendant's land to repair the wall which would preclude the defendant from making any use of his land, was not such an easement as the plaintiff was entitled to or was contemplated by s. 24 of the Easements Act, 1882. HIMATLAL MAGANLAL *v.* BHIKABHAI AMRITLAL (1918) . . . I. L. R. 42 Bom. 529

——— s. 28—

See EASEMENT. I. L. R. 42 Calc. 46

——— s. 33—

See DAMAGES IN ACTIONS ON TORT. I. L. R. 36 Mad. 580

——— s. 47—

See s. 13 . I. L. R. 45 Bom. 80

———ss. 59, 60—*License—Revocation—Rights of transferee of property in respect of which a license has been given. Held*, that the rule laid down by s. 59 of the Indian Easements Act, 1882, is not independent of that laid down by s. 60, and does not confer upon the transferee any higher rights than those possessed by the transferror. RAS BEHARI LAL *v.* AKHAI KUNWAR (1914)

I. L. R. 37 All. 91

——— s. 60—*License—Denial by licensee of licensor's title. Held*, that a licensee in possession does not, like a tenant, by denying the title of the grantor of the licence, forfeit the license and become liable to immediate ejectment. *Dharam Kunwar* v. *Fakira, All. Weekly Notes, 1901, p. 157*, followed. MALIK AKBAR ALI KHAN *v.* SHAH MUHAMMAD (1917) I. L. R. 39 All. 621

EASTERN BENGAL AND ASSAM DISORDERLY HOUSES ACT (II OF 1907).

——— ss. 2, 3—

See BROTHEL . I. L. R. 45 Calc. 301

EASTERN BENGAL AND ASSAM DISORDERLY HOUSES ACT (II OF 1907)—*contd.*

——— ss. 2 to 6—

See HIGH COURT, JURISDICTION OF. I. L. R. 37 Calc. 287

——— ss. 2 and 7—

See DISORDERLY HOUSES ACT. 16 C. W. N. 1049

——— ss. 3 and 5 (e)—*The District Magistrate, power of, to interfere with order by a Criminal Court under s. 3 of the Act.* The District Magistrate has no power either under the E. B. and Assam Disorderly Houses Act or any other law to interfere with an order passed by a Criminal Court in the exercise of its jurisdiction under s. 3 of the Act. LOLIT MOHUN CHAKRAVARTY *v.* HARENDRO KUMAR DEY (1917)

21 C. W. N. 1135

——— ss. 6 and 7— Inquiry—Authority if can be delegated. S. 7 does not authorise any one to enter the house, if Magistrate can be satisfied in other ways that the nuisance still exists. FEROJA PESHKAR *v.* KING-EMPEROR

16 C. W. N. 1049

EASTERN BENGAL AND ASSAM TENANCY ACT (I OF 1908).

———In a suit for rent a decree was made on compromise and the tenant took some extra land, a new rent being fixed when an execution was sought and objection was taken that s. 147 had not been complied with. *Held*, that objections raised to the validity of the decree could not be raised in execution proceedings. HEM CH. CHOUDHUY *v.* CHANDRA MOHAN NAMODAS

24 C. W. N. 1070

EAST INDIA COMPANY.

See SECRETARY OF STATE.

——— non-liability of—

See TORT . I. L. R. 39 Mad. 351

——— rights of—

See HABEAS CORPUS. I. L. R. 44 Calc. 459

EAVES.

See EASEMENT I. L. R. 37 Bom. 491

See EASEMENTS ACT (V OF 1882), ss. 18, 23 . . I. L. R. 38 Bom. 1

EDITOR, PRINTER AND PUBLISHER.

See CONTEMPT . 15 C. W. N. 771

——— duties of Editor—

See COMPANY. . I. L. R. 38 Mad. 991

——— registration and liabilities of—

See CONTEMPT OF COURT. I. L. R. 45 Calc. 169

EJECTMENT.

See AGRA TENANCY ACT (II OF 1901),
ss. 19 AND 58 . I. L. R. 42 All. 36
ss. 58, 167 . I. L. R. 41 All. 28
s. 194 . I. L. R. 36 All. 441

See BENGAL TENANCY ACT, s. 106. 15 C. W. N. 974

See BOMBAY LAND REVENUE CODE, 1879, s. 83 . I. L. R. 45 Bom. 303, 350

See CANTONMENT PROPERTY. I. L. R. 36 Bom. 1

EJECTMENT—*contd.*

See CIVIL PROCEDURE CODE, 1882, s. 539.
I. L. R. 35 Bom. 470
I. L. R. 36 Bom. 29

See CIVIL PROCEDURE CODE, 1908, s. 11, EXPL. IV . I. L. R. 35 Bom. 507

O. XXXIII, R. 1.
I. L. R. 42 Bom. 155

See FAZENDARI TENURE.
I. L. R. 39 Bom. 316

See LAMBARDER.
I. L. R. 37 Calc. 694

See JURISDICTION.
I. L. R. 41 Calc. 915
I. L. R. 38 Mad. 795

See LANDLORD AND TENANT.
14 C. W. N. 339
I. L. R. 34 Mad. 161
I. L. R. 39 Calc. 903
I. L. R. 43 Calc. 164
I. L. R. 41 All. 654
I. L. R. 43 Bom. 795
I. L. R. 44 Calc. 403
I. L. R. 44 Bom. 950

See LIMITATION. I. L. R. 48 Calc. 65

See LIMITATION ACT, 1908.
ART. 44 . . I. L. R. 41 Mad. 102
ART. 142 . . 5 Pat. L. J. 724

See MADRAS ESTATE LAND ACT (I OF 1908) I. L. R. 38 Mad. 163, 608, 843

See OCCUPANCY HOLDING.
I. L. R. 44 Calc. 272

See OCCUPANCY RIGHT.
I. L. R. 46 Calc. 43

See SUB-LEASE I. L. R. 48 Calc. 783

See TENANTS IN COMMON.
I. L. R. 39 Mad. 1049

See TRANSFER OF PROPERTY ACT (IV OF 1882), s. 111 I. L. R. 35 All. 145

See UNDER-RAIYAT.
I. L. R. 39 Calc. 278

See WAIVER . . 2 Pat. L. J 595

———— conversion of suit for, into one for partition—

See HINDU LAW—ADOPTION
I. L. R. 37 Mad. 529

———— from "old waste" grounds—

See TRANSFER OF PROPERTY ACT (IV OF 1882), s. 111, CL. (*g*).
I. L. R. 35 All. 145
I. L. R. 42 Bom. 195

See UNDER RAIYAT. 23 C. W. N. 437

———— property acquired by wife trading with husband—

See HINDU LAW.
I. L. R. 38 Mad. 1036

———— suit for, subsequent to alienation—

See MADRAS PROPRIETARY ESTATES VILLAGE SERVICE ACT (II OF 1894), ss. 5 AND 10, CL. (*12*).
I. L. R. 39 Mad. 930

EJECTMENT—*contd.*

———— suit in, against trespasser—

See RIGHT OF SUIT.
I. L. R. 39 Mad. 501

———— tenant on sufference—

See LAND ACQUISITION.
I. L. R. 45 Bom. 725

———— By Inamdar—*Right of, to eject tenants —Presumption of such right.* There is no presumption that an inamdar has a right to eject persons in possession of inam lands. He must prove such a right. MADDU YERRAYYA *v.* YADULLA KANGALI NAIDU (1910)
I. L. R. 34 Mad. 246

———— Chota Nagpur Tenancy Act—(*Beng. VI of 1908,*) *ss. 4* (*3*), *41—Non-occupancy raiyats —Under-raiyats, ejectment of—Transfer of property Act* (*IV of 1882*), *s. 106—Incidents of tendency created by contract or custom—Verbal notice, sufficiency of.* Where a raiyat sued an under-raiyat in ejectment and got a decree but, on appeal, the Judicial Commissioner of Chota Nagpur dismissed rights of a non-occupancy raiyat: *Held*, that the view taken by the Judicial Commissioner was erroneous. An under-raiyat must, for the purposes of that Act, be treated as belonging to a class of tenants quite distinct from the class of non-occupancy raiyats. Those portions of that Act which dealt with tenants generally could be applied to under-raiyats. In a suit for ejectment of an under-raiyat, by a raiyat the Court can have regard only to the relations established between the parties either by contract or custom. Where there is no evidence of a lease, the tenancy would no doubt be ordinarily held to be a tenancy from year to year. There is no statutory provision that the tenancy of an under-raiyat in Chota Nagpur can be terminated only by a notice in writing. GURU CHARAN HAJAM *v.* SUKLAL HAJAM (1913)
I. L. R. 40 Calc. 858

———— Previous suit for compensation —*For use and occupation without prayer for ejectment, effect of—Acquiescence—Limitation.* That the effect of the plaintiff's predecessor bringing a suit for compensation for use and occupation without a prayer for ejectment was not a waiver of the right to eject and a recognition of the defendants as tenants. It is open to an owner of land first to sue a trespasser for compensation and then to bring a suit for ejectment to assert his right to the land. RAJ KRISHNA RUDRA *v.* PHAKIR DOME (1913) . . . 19 C. W. N. 478

———— Plaintiff to prove title—In order to succeed in an action of ejectment the plaintiff must strictly prove his title. RAMCHANDRA MARTAND WALKER *v.* VINAYAK VENKATESH KOTHEKAR (1914) I. L. R. 42 Calc. 384
18 C. W. N. 1154

———— Landlord and Tenant—*Right of lessee after expiry of lease, to eject a trespasser.* Where a lessee whose lease had expired prior to suit, sued for possession of the land leased to him from a trespasser: *Held*, that the expiration of the lease did not necessarily imply the expiration of the lessee's right of possession, and the lessee was entitled to a decree for possession as against trespassers *a fortiori* where the landlord

EJECTMENT—*contd.*

acquiesced in plaintiff getting a decree. *Gibbins* v. *Buckland, L. J. 32 Exch. 156* and *Knight* v. *Clarke, 15 Q. B. D. 294*, referred to. VENKAYYA *v.* SATTEYYA (1914) . . **I. L. R. 37 Mad. 281**

—————— **Non-transferable holding**—*Transfer—Ejectment by landlord—Limitation Act (IX of 1908), s. 18.* A landlord suing in ejectment a purchaser of a non-transferable holding cannot succeed unless he makes out a case under s. 18 of the Indian Limitation Act, where the purchase took place more than 12 years before the suit. *Probhabati Dassi* v. *Tiabatunnessa, 17 C. W. N. 1088*, followed. PANCHKARI CHATTERJI *v.* MAHARAJ BAHADUR SING (1914)

19 C. W. N. 136

—————— **By landlord**—*Notice to quit, sufficiency of—Inaccurate statement in notice—Service on one member of a joint family, if service on all—Service by registered post—Transfer of Property Act (IV of 1882), s. 106.* The plaintiffs, landlords, sued for ejectment on the ground that the tenancy had been determined by an effective notice to quit duly served. The notice correctly mentioned the amount of rent of the land in question as also the name of the tenant recorded in the landlord's books and stated that the entire holding was to be vacated but wrongly gave the quantity of land to be much less than what it actually was : *Held*, that notices to quit though not strictly accurate or consistent in the statements embodied in them may still be good and effective in law. The test of their sufficiency is not what they would mean to a stranger ignorant of all the facts and circumstances touching the holding to which they purport to refer but what they would mean to tenants presumably conversant with all those facts and circumstances. They are to be construed not with a desire to find faults in them which would render them defective but to be construed *ut res magis valeat quam pereat*. S. 106 of the Transfer of Property Act only requires that a notice to quit should be tendered or delivered to the party intended to be bound by it either personally or to one of his family or servants at his residence or if such a tender or delivery be not practicable affixed to a conspicuous part of the property. The personal tender or delivery may take place anywhere : the vicarious tender or delivery must take place at the residence of the person intended to be bound by the notice. In the case of joint tenants each is intended to be bound and service of a notice to quit upon one joint tenant is *primâ facie* evidence that it has reached the other joint tenants. If a letter properly directed containing a notice to quit is proved to have been put into the Post Office, it is presumed that the letter reached its destination at the proper time, according to the regular course of business of the Post Office and was received by the person to whom it was addressed. That presumption would apply with greater force to registered letters. Service of a notice upon or delivery to an agent would be good service or delivery to the principal though in fact the notice was destroyed by the agent and never was seen or heard of by the principal. It is an entire mistake to suppose that the addressee must sign the receipt for a registered letter himself or that he cannot do so by the hand of another person or that if another does sign it on the addressee's behalf, the presumption is that it never was delivered to the addressee himself mediately or immediately. HARIHAR BANNERJI *v.* RAMSOSHI ROY (1918) . **23 C. W. N. 77**

—————— *Suit for ejectment by tenant, effect of landlord's support of trespasser.* Plaintiff sued for a declaration of title to possession as against the defendant of a tank of which a third party was the admitted landlord. He based his claim on 12 years' possession and that his predecessors had excavated the tank and held same rent free and the fact that defendants were trespassers. Defendants pleaded that he was in possession of the tank with the permission of the landlord. It was found as a fact that the landlord had made no settlement with defendants but that he was supporting the latter in resisting the plaintiff's claim. *Held*, that the fact that the landlord was assisting the defendants in their defence did not give the latter a right to retain the tank as against the plaintiff. KARTIC REWANI *v.* THE CENTRAL KARKEND COAL COMPANY, LTD.

1. Pat. L. J. 430

—————— **Onus—Plaintiff's title proved**—*Held*, by a Full Bench (JWALA PRASAD, *J.* dissentient) that in a suit for ejectment the plaintiff must not only prove his title but also that he has been in possession within 12 years, form the date of the institution of the suit. If it is found that the evidence produced both by plaintiff and defendant as to possession is unworthy of credit the plaintiff's suit must fail inasmuch as the presumption which arises upon proof of title cannot be called in aid to give weight to evidence unworthy of credit any more than if no evidence at all had been given. Authorities reviewed. *Bhikhad Bhunjan Narain Tewari* v. *Upendra Nath Roy, 4 Pat. L. J. 463*, overruled. RAJA SHIVA PRASAD SINGH *v.* HIRA SINGH. . . . . **6 Pat. L. J. 479**

—————— **Homestead within Municipal limits** *forming part of non-transferable occupancy holding sold to a pleader for residential and professional purposes—Recognition by landlord on receipt of* salami, *rent previously paid being quadrupled—Settlement whether fresh or in continuation of the old tenancy—Transfer of Property Act (IV of 1882) or Bengal Tenancy Act (VIII of 1885), which applicable.* Where a raiyat occupying his homestead within the residential suburb of the Narayingunj Municipality as part of his non-transferable occupancy holding first sold the rest of the holding to a certain person, and next sold his homestead to the defendant a pleader who purchased it for the purpose of residence and for carrying on his profession as a pleader in the local Civil Courts, was recognized by the plaintiffs, landlords, on payment of *salami* and was granted rent receipts in the forms prescribed in the Bengal Tenancy Act as for a *karsha* holding, while the rent previously paid was now quadrupled. *Held*, in a suit brought by the plaintiffs for ejectment of the defendant after service of six months' notice to quit terminating with the end of a year of the tenancy—That the defendant's contention that his tenancy was in continuation of the old tenancy of the outgoing raiyat was not maintainable, that the tenancy originated in a fresh settlement with the plaintiffs and that in view of the purpose for which the new tenancy was created it was governed by the provisions of the Transfer of Property Act. HARENDRA KUMAR ROY CHOWDHURY *v.* HARA KISHORE PAL

26 C. W. N. 389

EJECTMENT—*contd.*

f—*Transfer of* *cl. (g)—Breach* *, overt act necessary for—Waiver.* Where the rights and obligations of the parties are regulated by s. 111, cl. (*g*), of the Transfer of Property Act, there is no determination of a lease by forfeiture immediately on breach of covenant, but such breach must be followed by an overt act on the part of the lessor before the tenancy can be deemed to have determined in the eye of the law. *Anandamoyee* v. *Lakhi Chandra Mitra, I. L. R. 33 Calc. 339; 3 C. L. J. 274, Kadir Bakhsh* v. *Prag Narain, 9 All. L. J. 794,* followed. *Held,* further, that the institution of a suit for ejectment cannot be rightly regarded as the requisite act to show the intention of the landlord to determine the lease within the meaning of s. 111, cl. (*g*). The forfeiture must be completed and the lease determined before the commencement of the action for ejectment. *Deo Nandan Pershad* v. *Meghu Mahton, I. L. R. 34 Calc. 57,* referred to. NOWRANG SINGH *v.* JANARDAN KISHORE LAL SINGH 1917) . . . **I. L. R. 45 Calc. 469**

———— **Decree directing payment of compensation**—*Decree allowed to be barred by limitation—Subsequent suit on title to recover the property, maintainability of.* The plaintiff's father sued the defendant on a lease deed and obtained a decree in ejectment directing payment of compensation under the Malabar Compensation for Tenants' Improvements Act. He allowed the decree to become barred. Plaintiff then sued on his jenm title. *Held,* that the plaintiff was not *entitled to maintain another suit to recover the* property. *Kutti Ali* v. *Chindan, I. L. R. 23 Mad. 629,* dissented from and *Vedapuratti* v. *Vallabha Vallia Raja, I. L. R. 25 Mad. 300,* approved. MAYAN KUTTI *v.* KUNHAMMAD (1917) **I. L. R. 41 Mad. 641**

———— **Suit for**— *Onus of proof—Proof of title.* Where in a suit in ejectment, the plaintiff fails to prove title, but succeeds in proving that he was in possession of the lands in dispute for a brief period within twelve years of suit, the onus of proving title is not thereby shifted to the defendant. BAPUJI NARAYAN *v.* BHAGWANT BALWANT (1918) . . **I. L. R. 42 Bom. 357**

———— *Suit based on title to recover possession—Presumption of right arising from possession applies as much to defendant as*

tiff and the fact of possession within twelve years of suit will not avail the plaintiff unless it is shown to be such a possession as gives a better title to the land than the defendant can show. To succeed in ejectment it is only necessary for the plaintiff to establish such title as carries a present right to possession. Ordinarily, unless there is an express agreement for the expiry of a tenancy on

right as yearly tenant for eight years, he must be taken to have abandoned the tenancy or to have

EJECTMENT—*contd.*

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ejectmen[illegible] defendant is entitled to rely on the *jus tertii* appearing from the facts adduced by the plaintiff to defeat his claim. SITARAM BHIMAJI *v.* SADHU (1913) . . . **I. L. R. 38 Bom. 240**

———— **Family Settlement**—*Parties.* Although the plaintiff in a suit for ejectment must prove his title he is not bound to do so in the presence of the person interested in denying his title so can sue the person in possession without *impleading the person from whom the latter claims.* When a dispute with regard to the rights of members of a family has been settled by fair compromise it will be upheld although perhaps resting on grounds, which would not have been considered satisfactory if the transaction had been between strangers but it must be proved that the right compromised could have formed the subject matter of a claim even though a doubtful one. So a reversionary heir cannot compromise *as regards a mere spes successionis.* MUSSAMMAT BHAGWATI KUER *v.* JAGDAM SAHAY **6 Pat. L. J. 604**

EKRARNAMA.

———— *Construction—Stipulation to pay a pension to manager on retirement from service—Clause in* ekrarnama *that the principal's heirs should continue pension after principal's death whether a recommendation or a binding promise.* B, after appointing S as manager of her estate, by *ekrarnama* stipulated to provide B with a certain pensionary allowance in the event

to the two parties respectively named to pay the pension and not a binding promise that they should pay it after her death. The successful appellant was deprived of the cost of printing in the paper-book documents which were irrelevant for the disposal of the appeal. MAHARAJA KESHO PRASAD SINGH *v.* SIV SARAN LAL (P. C.). **26 C. W. N. 690**

ELDEST SON.

See BURMESE LAW—INHERITANCE. **I. L. R. 44 Calc. 379**

ELECTION.

See MUNICIPAL COUNCILLORS. **I. L. R. 34 Bom. 659**

See MUNICIPALITY. **I. L. R. 34 All. 649**

See NORTH-WESTERN PROVINCES AND OUDH MUNICIPALITIES ACT (XV OF 1883), s. 10. . **I. L. R. 35 All. 308**

See SALE OF GOODS. **I. L. R. 40 Calc. 523**

———— **irregularity in recording notes**—

See BENGAL MUNICIPAL ACT, 1884, ss. 15, 69 AND R. 17 . **24 C. W. N. 189**

ELECTION—*contd.*

—— of mahant of temple—

See HINDU LAW—ENDOWMENT.

I. L. R. 37 All. 298

—— petition—

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), s. 195.

I. L. R. 37 Bom. 365

See UNITED PROVINCES MUNICIPALITIES ACT (II OF 1916), ss. 19 TO 26.

I. L. R. 41 All. 646

—— right of—

See BURMESE LAW.

I. L. R. 44 Calc. 379

—— roll—

See MUNICIPAL ELECTION.

I. L. R. 45 Calc. 950
I. L. R. 46 Calc. 132

—— **Calcutta Municipal Act**—*Beng. III of 1899, s. 56—Corrupt Practices—Impersonation—Coercion—Intimidation—Free election—Interference by the candidate or his agent.* The election of a candidate as a Municipal Commissioner was challenged under s. 56 of the Calcutta Municipal Act, 1899, on the following grounds, *viz.* :—(i) That five persons were impersonated, four of them being dead and one absent from Calcutta. (ii) That a voter was coerced to vote for the elected candidate. (iii) That certain grogshop owners had been dissuaded by Hem Chandra Lahiry, Inspector of Police, and did not vote through fear. (iv) That the said Inspector of Police interfered with the election, intimidated voters and freely canvassed for the elected candidate. *Held,* that the election must stand inasmuch as the charges were not substantiated. The Calcutta Municipal Act, 1899, contains no provision regarding corrupt practices in elections. *Mens rea* is an essential ingredient to constitute impersonation. In this case there was nothing to show that the elected candidate or his agent fraudulently and wrongfully caused improper personification and so the charge of impersonation could not stand. In order to avoid an election on the ground of intimidation and undue influence it must be shown either that (i) the rioting or violence was instigated by the candidate or his agents, for whom he is responsible. or that (ii) it prevailed to such an extent as to prevent the election from being an entirely free election. MONORANJAN MUKHERJI *v.* BROJO GOPAL GOSWAMI (1918) . . **22 C. W. N. 678**

—— **Public body**—*Vacancy—Election to fill up vacancy by less than a majority of voters, validity of—Appointment of a minor as Muthawalli of a mosque, validity of.* According to a scheme framed by the High Court, a mosque in Madras was governed by a managing committee of five members, including the President, and three *Muthawallis* working under them, and vacancies in the committee were to be filled by election by an electoral body consisting of the remaining committee members and the three *Muthawallis* and the committee was to appoint "competent men" as *Muthawallis* for the mosque. In 1906, one *M.M.* who was then eleven years of age was appointed by the committee as one of the *Muthawallis.* In 1914 the electoral body consisted of the president, three other members of the committee and two *Muthawallis* excluding *M.M.* Notice of a meeting to fill up a vacancy in the committee in 1914 was served on all the members of the electoral body except *M.M.* Three members of the electoral body attended the meeting at which the plaintiff was elected. There was no rule or practice fixing the quorum for meetings of the electoral body : *Held,* (i) that plaintiff having been elected at a meeting attended by less than a majority of those entitled to vote, his election was invalid, (ii) that the election of *M.M.* as *Muthawalli* while he was a minor was invalid *ab initio,* and (iii) that *M.M.* even though a major at the time of plaintiff's election, was not entitled to vote, and want, of notice to him of the meeting was immaterial. RAZA *v.* ALI (1916) . . . **I. L. R. 40 Mad. 941**

—— **Specific Relief Act**—*I of 1877, s. 42—Civil Procedure Code (Act V of 1908), s. 9—Discretionary Relief, principles on which granted—Delay—Indian Councils Act, 1909 (9 Edw. VII, c. 4), s. 6—Power of Governor-General in Council to make Regulations—Civil Court, jurisdiction of.* When a plaintiff seeking to impugn the validity of an election held on February 14, 1913, first made an application to the Governor-General in Council in accordance with Regulations framed under s. 6 of the Indian Councils Act, 1909, which Regulations provided that the decision of the Governor-General in Council on the intention, construction or application of the Regulations should be final ; and afterwards, when the election of the defendants had been declared to be valid by the Governor-General in Council, filed a suit on June 19, 1913, praying for a declaration that the election was invalid, and for an injunction restraining the defendants from exercising the function of the office to which they had been elected, *Held,* without deciding the question as to the jurisdiction of the Court and the power of the Governor-General in Council to make Regulations excluding that jurisdiction, that in the circumstances the Court should not exercise its discretionary jurisdiction under s. 42 of the Specific Relief Act in favour of the plaintiff. The Court in interfering in cases of disputed elections, should apply the principles followed by the Courts of Common Law in granting or refusing prerogative writs. BHUPENDRA NATH BASU *v.* RANJIT SINGH, (1913) . . . **I. L. R. 41 Calc. 384**

ELECTRICITY ACT (IX OF 1910).

—— **ss. 14, 19**—*Responsibility of licensee to make full compensation for any damage, detriment or inconvenience caused by him or by any one employed by him—Damage, whether caused in the exercise of the powers granted to the licensee.* A gas company laid a 3-inch main in a street in Bombay. Subsequently an electric supply company caused cables contained in troughing to be laid over this main in such a manner that the main for the distance of some 36 feet was rendered inaccessible for the purpose of removing the same except by slinging the electric company's cables, by reason of the position of the cables. It was found that the work of laying the cables had not been executed, nor must it be deemed to have been executed, to the reasonable satisfaction of the gas company. Subsequently the gas company desired to replace their 3-inch main with a 4-inch main and for this purpose opened up the street in question, when they discovered the position of the cables. On account of the position

ELECTRICITY ACT (IX OF 1910)—*contd.*

———— ss. 14, 19—*contd.*

of these cables the gas company were compelled to make a diversion in the route taken by their 4-inch main and claimed that the electric supply company should pay the cost thereof; the latter company refused to do so. *Held*, that the damages, if any, suffered by the gas company were damages recoverable under s. 19 of the *Indian Electricity Act of 1910 as the damage* alleged lay in the gas company being deprived of access to its own property (the main) which was inflicted once and for all when the electric supply company laid their cables over the main, and that it was a question of fact whether such damage had been committed. *Held*, further, that *the gas company were not compelled to proceed* under s. 14 of the Act and did not lose their remedies against the electric supply company by ... emselves of ... : whether ..., detriment and inconvenience as may be is liable for damages *under s. 19 of the Indian Electricity Act (IX of* 1910). *In re* BOMBAY GAS COMPANY, LTD. AND BOMBAY ELECTRIC SUPPLY AND TRAMWAYS COMPANY, LTD. (1914) . I. L. R. 39 Bom. 124

———— s. 33—

See CRIMINAL PROCEDURE CODE.
s. 432 . . I. L. R. 39 Mad. 686

ELEPHANT.

———— *Nature and extent of liability for damage done by elephant—An elephant belongs to a dangerous class of animals. Liability of owner and person in possession.* It may be laid down as a rule of law that in India the elephant belongs to a dangerous class of animals A person who keeps an animal belonging to a class that is dangerous takes the risk of any damage it may do. The absolute liability of a person for any harm done by his animal independently of any intent or negligence on his part does not depend on the manner or extent to which such animals are employed, but upon the nature of the class to which such animal belongs or the particular kind of mischief committed. Liability for damage done by an elephant attaches to the owner of the elephant as well as to a person in whose possession the elephant happens to be when it commits such damage. VEDAPURATTI *v.* KAPPAN NAIR (1912)
I. L. R. 35 Mad. 708

EMBANKMENT.

See SALE FOR ARREARS OF REVENUE.
I. L. R. 42 Calc. 765

———— *Bengal Embankment Act (II of 1882), s. 76, cls. (a), (b)—" Addition to existing embankment," meaning of—Increasing height of embankment—Essentials of offence under s. 76 (b).* The words "existing embankment" in s. 76 (b) of Beng. Act II of 1882 mean an embankment existing at the time the addition is made. *Ajodhya Nath Koila* v. *Raj Krishto Bhar, I. L. R. 30 Calc. 481,* followed. *Goverdhan Sinha* v. *Queen-Empress, I. L. R. 11 Calc. 570,* explained as overruled. The only offence constituted by cl. (*b*), as distinguished from cl. (*a*) of s. 76, is the *omission* to obtain the sanction of the Collector to the addition to an existing embankment within a prohibited area irrespective of the question whether such act is likely to interfere with, counteract, or impede any public embankment and public watercourse. RAMNATH PANDIT *v.* EMPEROR (1911) . . . I. L. R. 38 Calc. 413

———— *Poolbundi charges—* ...

... of 1855 and Beng. Act, VII of 1866) were in force, that the *putnidar* was to be exempt from all *charges to which the term poolbundi could be* reasonably applied, is operative even after those Acts were superseded by the Bengal Embankment Act of 1882. There is nothing in the Act of 1882 to render such an agreement contrary to the policy of the law or void for any other reason. The *putnidar* is entitled to come to Court for the ... rights vindi- ... apprehend the ... relies. SHIBA PROSAD SAMANTA *v.* RAKHALMANI DASEE (1913)
I. L. R. 41 Calc. 130

———— *Addition to embankment—Proof of notification and due publication thereof—Failure to comply with the prescribed mode of publication—Effect of failure—" Existing embank-* ...

... one existing when the addition is made *Ramnath, Pandit* v. *Emperor, I L. R. 38 Calc. 413,* followed. *The provisions of s. 76 (b)* apply to, and supersede, the terms of a lease granted by the Collector, before the passing of the Act, giving the lessee the power to erect and repair embankments. LAKSHMI KANTA HAZRA *v.* EMPEROR (1919).
I. L. R. 46 Calc. 825

EMBARRASSMENT.

———— of debtor—

See INTEREST I. L. R. 42 Calc. 652

EMBEZZLEMENT.

See PENAL CODE ACT (XLV OF 1860),
s. 408 . I. L. R. 40 All. 565

EMERGENCY LEGISLATION.

See COMMERCIAL INTERCOURSE WITH ENEMY.

See HABEAS CORPUS.
I. L. R. 44 Calc. 459

EMERGENCY LEGISLATION CONTINUANCE ACT (I OF 1915).

See HABEAS CORPUS.
I. L. R. 44 Ca[illegible]

EMERGENCY LEGISLATION CONTINUANCE ACT (I OF 1915)—*contd.*

————————, *if ultra vires Ordinances III and V of 1914—Power of Governor-General in Council to pass Act embodying provisions of ordinances—Ordinance III of 1914, s. 11, effect of—Jurisdiction of Courts to question orders of internment passed under Emergency Legislation Continuance Act—Indian Councils Act, 1861 (24, 25 Vict. c. 67), ss. 22, 23.* Under s. 23 of the Indian Councils Act, 1861 (24, 25 Vict., c. 67), no ordinance can have any force of law for more than six months from its promulgation but the power of the Governor-General in Council to pass an Act embodying the provisions of an ordinance is in no matter controlled or taken away by that section. It is clear that the Governor-General in Council has power to pass an Act like the Emergency Legislation Continuance Act (I of 1915) which embodies the provisions of Ordinances III and V of 1914: 1914 which is embodied in the Emergency as s. 11 of the Ordinance No. III of 1914 which is embodied in the Emergency Legislation Continuance Act of 1915 seeks to oust the jurisdiction of the Courts it offends against s. 22 of the Indian Councils Act, 1861, that the Emergency Legislation Continuance Act of 1915 is not *ultra vires* of the Governor-General in Council and the High Court has not power to call in question orders passed thereunder. It is for the Governor-General in Council to be satisfied on the materials before them and the Court cannot call for the materials or examine them. In England the common law rule that when an Act is repealed and the repealing Act is repealed by another which manifests no intention that the first shall continue repealed the repeal of the second Act revives the first does not apply to repealing Acts passed since 1850 and the last repeal does not now revive the Act or provisions before repealed unless words be added reviving them. The same principle, or rule of law applies to this country. S. 3 of the General Clauses Act (I of 1868) expressly provided that for the purpose of reviving either wholly or partially a Statute, Act or Regulation repealed, it shall be necessary expressly to state such purpose, and the same is the effect of ss. 6 and 7 of the General Clauses Act (X of 1897). *In the matter of* JEWA NATHOO (1916)
20 C. W. N. 1327

EMIGRATION.

See HINDU LAW—INHERITANCE.
I. L. R. 48 Calc. 30

———— **inducing**—

See ASSAM LABOUR AND EMIGRATION ACT, 1901. ss. 20, 164 **1 Pat. L. J. 388**

———— **Unlawful recruitment**—*Assam Labour and Emigration Act (VI of 1901), s. 164—"Emigrate," meaning of—Inducement to go from a place in British India to Fiji—Subsequent inducement at another place to proceed to Sylhet—Locus delicti—Jurisdiction of Criminal Court—Criminal Procedure Code (Act V of 1898), s. 177.* A recruiter, who induces a person at Cawnpore to go to Fiji, but on the way takes him to a cooly depôt at Arrah and induces him to proceed to Sylhet, in contravention of the Assam Labour and Emigration Act, commits no offence under s. 164 of Act VI of 1901 at Cawnpore, but only at Arrah, and a Magistrate of the latter place has jurisdiction to try such offence. FAIZ ALI *v.* EMPEROR (1909) . . . **I. L. R. 37 Calc. 27**

EMOLUMENTS.

———— **partition of**—

See MADRAS PROPRIETARY ESTATES VILLAGE SERVICE ACT (II OF 1894), SS. 5 AND 10, CL. (2).
I. L. R. 39 Mad. 930

ENCROACHMENT.

See BOMBAY DISTRICT MUNICIPAL ACT (III OF 1901), SS. 113, 122.
I. L. R. 38 Bom. 152

See BUILDING . **I. L. R. 39 Calc. 84**

See MADRAS DISTRICT MUNICIPALITIES ACT (IV OF 1884), S. 168.
I. L. R. 38 Mad. 456

See MUNICIPAL COUNCIL.
I. L. R. 38 Mad. 6

See PUBLIC NUISANCE.
I. L. R. 42 Calc. 702

———— **on public street.**

See PROSECUTION.
I. L. R. 37 Calc. 545

———— *Bengal Local Self-government Act (Beng. Act III of 1885), s. 140—Infringement of bye-law—Erection of fence on the slope and edge of a road without impeding the passage along it—Continuing Offence—Daily Fine.* Where a bye-law passed by the District Board prohibited encroachment on any part of a road maintained by it, or its slopes or side-ditches, by the placing of fences thereon: *Held*, that the erection of a fence along the slope and the edge of such road, without impeding the passage over it, is an infringement of the bye-law; though the Board has no proprietary right in the road, or in the land on which its slopes or side-ditches stand. A sentence of a daily fine in anticipation, in the case of a continuing offence which may be committed after the date of the proceeding in which it was passed, is illegal. NILMANI GHATAK *v.* EMPEROR (1910) . **I. L. R. 37 Calc. 671**

———— *Municipal Act, (Bengal III of 1884), s. 217—Encroaching on a public road—Materials sufficient to determine road to be public.* Where the petitioner was convicted under s. 217, Bengal Municipal Act, of encroaching on a public road, upon a finding that the road in question, which was given a name by the Municipality, was made over the petitioner's land to a trenching ground and so used for some time and was subsequently given up with the closing of the trenching ground. *Held*, that this alone was not sufficient for the conclusion that the road was a public one. NANDO LAL NEOGY *v.* GORALIA MUNICIPALITY (1910) . . **22 C. W. N. 599**

ENCUMBRANCE.

See EXECUTION OF DECREE.
I. L. R. 40 Calc. 623

See GUARDIANS AND WARDS ACT (VIII OF 1890), SS. 7 (2), 29, 30.
I. L. R. 37 Mad. 38

See SALE . **I. L. R. 43 Calc. 263**

———— **by co-sharer**—

See JOINT ESTATE.
I. L. R. 43 Calc. 103

ENCUMBRANCE—*contd.*

——— discharge of—

See MADRAS REVENUE RECOVERY ACT (II OF 1864), ss. 1, 42.
I. L. R. 37 Mad. 49

——— *Transfer of portion of non-transferable occupancy holding if encumbrance—Exchange, if for all purposes a sale—Bengal Tenancy Act (VIII of 1885), s. 161.* The transfer of a portion of a non-transferable occupancy holding is not an encumbrance within the meaning of s. 161 of the Bengal Tenancy Act. *Abdul Rahaman Chowdhuri* v. *Ahmadar Rahman, I. L. R. 43 Calc. 558,* followed. *Rameshwar Singh* v. *Raghunandan Khabas, 1 Pat. L. J. 403,* and *Tamizuddin Khan* v. *Khoda Nawaz Khan, 14 C. W. N. 229,* referred to *Chundra Sakai* v. *Kalli Prasanna Chuckerbutty, I. L. R 23 Calc. 251,* distinguished. An exchange is not for all purposes a sale. BIJOY KRISHNA MUKHERJI *v* SURENDRA NATH BANERJI (1919) **I. L. R. 46 Calc. 891**

ENDORSEMENT.

See RAILWAY RECEIPT
I. L. R. 38 Bom. 659

See VAKALATNAMA.
I. L. R. 43 Calc. 884

——— fraudulently obtained, suit on—

See SPECIFIC RELIEF ACT (I OF 1877), ss. 39, 40, 45 .
I. L. R. 39 All. 103

——— of document (admitted as evidence)—

See MAHOMEDAN LAW—GIFT.
I. L. R. 38 All. 627

——— of payments by mortgagor—

See MORTGAGE. **I. L. R. 37 Calc. 589**

See MORTGAGE BY MINOR.
I. L. R 38 Mad. 1071

ENDOWMENT.

See CONSTRUCTION OF DOCUMENT.
I. L. R. 39 All. 311

See COURT-FEE . **I. L. R. 40 Calc. 245**

See HINDU LAW—ENDOWMENT.

See HINDU LAW—SUCCESSION.
I. L. R. 32 All. 461

See LIMITATION **I. L. R. 37 Bom. 231**

See MAHOMEDAN LAW.
I. L. R. 37 Calc. 263

See MAHOMEDAN LAW—ENDOWMENT.
I. L. R. 40 Calc. 297

See RELIGIOUS TRUST.
I. L. R. 40 Calc. 251

——— *Conditions of valid endowment—Hindu Law—woman's estate—dedication to idol, whether valid—Occupancy right, acquisition of by firm.* Where it is sought to establish that certain lands are the subject of a valid endowment, it must be shewn (i) that an absolute grant of the lands was made with the intention that t [illegible] poses [illegible] have [illegible] the m[illegible] treated the property as one the profits of which were mainly intended to be applied for their own

ENDOWMENT—*contd.*

benefit. The dedication must be held to be nominal when there is no proof of the application of the income of the property for the purposes of the endowment and when the whole conduct of the parties is inconsistent with the hypothesis of a valid trust. A woman having the estate of a Hindu mother cannot create a valid title in favour of an idol. The members of a firm are capable of acquiring rights of occupancy in land. SIRI THAKUR PARMOD BANABIHARI *v.* C G. ATKINS . . . **4 Pat. L. J. 533**

——— *property—Alienation by trustee (Acharjya), to wife—Property claimed to be acquisition of Acharjya out of perquisites, claim not proved* The head of an endowment having conveyed some properties to his wife his successor brought this suit for recovery on the allegation that the property was part of the endowed property. The donee failed to prove that the property was acquired by the Acharjya with funds which belonged exclusively to him or which might be regarded as his official perquisites and the other evidence pointed to the property being part of the endowed property · *Held,* that the suit was rightly decreed. MUSAMMAT KAMLA LACHMI *v.* MAHANT BASDEO PRASAD (P. C.)
25 C. W. N. 217

See COMMERCIAL INTERCOURSE WITH THE ENEMY

ENEMY.

See SALE OF GOODS.
I. L. R. 45 Calc. 28

——— attempting to trade with—

See TRADING WITH THE ENEMY.
I. L. R. 40 Mad. 34

——— ship—

See CARGO . **I. L. R. 42 Calc. 334**

ENEMY TRADING ACT (X OF 1916).

See CONTRACT WITH ENEMY.
I. L. R. 44 Bom. 631

See ENEMY . .

See WAR LEGISLATION.

ENFORCEMENT OF RIGHT.

See MAHOMEDAN LAW—PRE-EMPTION.
I. L. R. 44 Calc. 47

ENFRANCHISEMENT.

——— and resumption—distinction between—

See CHARITABLE INAMS.
I. L. R. 40 Mad. 939

——— of Shrotriyam villages, effect of—

See INAM . . **I. L. R. 40 Mad. 268**

ENGAGEMENTS.

——— construction of—

See MADRAS IRRIGATION CESS ACT (VII OF 1868), s. 1.
I. L. R. 38 Mad. 997

ENGLISH LAW.

——— applicability of—

See DEFAMATION.
I. L. R. 40 Calc. 433

ENGLISH LAW—*contd.*

——— applicability of—*contd.*

See FISHERY. I. L. R. 42 Calc. 489

See LIBEL . . 15 C. W. N. 995

See PUBLIC NUISANCE.
I. L. R. 46 Calc. 515

See STANDARD OF PROOF.
I. L. R. 40 Calc. 898

——— Decisions under—*How far applicable in India.* Courts in this country are not bound by isolated *dicta* in English cases not directly in point. Their applicability will depend upon their being consistent with principles of justice, equity and good conscience. MANJHOORI BIBI *v.* AKEL MAHUMED (1913) . . . 17 C. W. N. 889

ENHANCEMENT OF PUNISHMENT.

——— Power of High Court—

See CRIMINAL PROCEDURE CODE, 1898, s. 439 . I. L. R. 1 Lah. 453

ENHANCEMENT OF RENT.

See BOMBAY LAND REVENUE CODE 1879, s. 216.
I. L. R. 45 Bom. 994

See CHOTA NAGPUR TENANCY ACT, 1908 s. 27 . I. L. R. 40 Calc. 518

See LANDLORD AND TENANT.
I. L. R. 47 Calc. 280

See LAND TENURE IN BENGAL.
L. R. 46 I. A. 279

See LESSOR AND LESSEE.
I. L. R. 38 Mad. 86

See MADRAS RENT RECOVERY ACT, 1865, s. 11 . . L. R. 45 I. A. 195

See OCCUPANCY RAIYAT.
5 Pat. L. J. 406

See SUIT . I. L. R. 40 Calc. 428

——— ground for—

See LANDLORD AND TENANT.
I. L. R. 45 Calc. 930

——— suit for—

See BENGAL TENANCY ACT, s. 188.
I. L. R. 38 Calc. 270

See LANDLORD AND TENANT.
I. L. R. 37 Calc. 449, 610, 742

——— Bengal Tenancy Act (VIII of 1885), s. 30—*Landlord of a holding, meaning of—Res judicata—Civil Procedure Code (Act XIV of 1882) s. 13—Matter directly and substantially in issue what constitutes.* The plaintiff and the defendants were howladers of a property. The defendants took a raiyat, lease from the plaintiff of his undivided share of the howla. Upon a suit brought by the plaintiff under s. 30 of the Bengal Tenancy Act for enhancement of rent against the defendant: *Held,* that the plaintiff was not the landlord of a "holding" within the meaning of s. 30 of the Act, and as such the suit was liable to be dismissed. *Haribole Brohmo* v. *Tasimuddin Mondal, 2 C. W. N. 680,* followed. In a previous suit between the parties for enhancement of rent, it was decided that the plaintiff had the right to enhance the rent of the defendants; but the suit was dismissed on the ground that the rent paid by the defendants, was not lower than the rate at which rent was paid by tenants of adjoining lands. In a subsequent suit between the same parties, the question was raised by the plaintiff that his right to enhance the rent of the defendants was *res judicata: Held,* that inasmuch as the decision upon the question of the right of the plaintiff to enhance the rent was not the basis of the decree ultimately made in the previous suit, it was not *res judicata* between the parties. PARBATI DEBI *v.* MATHURA NATH BANERJEE (1912) . . I. L. R. 40 Calc. 29

——— Bengal Tenancy Act s. 52—*Admeasurement—Onus of proof.* In a proceeding for enhancement of rent under this section, if the landlord shows that by a contract between himself and the tenants, it was agreed that a certain rental at a certain rate per bigha was to be paid for a certain area, then he is entitled to an enhancement of the rent even if that area was agreed upon without any actual measurement or even though there is no practice of measurement within the *pargana* within which the land is situated. It is not incumbent upon landlord to prove that there was an actual measurement or that there is a practice of measurement. A second appeal lies in a proceeding to enhance rent under s. 52. MAHARAJA KESHO PRASAD SINGH *v.* TRIBHUAN (1917) . . . . 2 Pat. L. J. 276

——— Bengal Tenancy Act ss. 30, 52 and 109 (*a*)—*Enhancement given for a rise in price when applied for on account of area.* No second appeal lies from an order under s. 3 (*b*) of the Bengal Tenancy Act, 1885, enhancing the rent of a holding by reason of a rise in the price of staple food crops, even though such order was passed on an application for enhancement of rent under s. 52. JALDHARI SINGH *v.* SHAM LAL MAHTO (1917) . . . 2 Pat. L. J. 574

——— Undivided share—*Of holding, maintainability of suit to enhance rent of.* A suit does not lie to enhance the rent of an undivided share in a holding. HARNANDAN RAI *v.* MAHARAJA KESHO PRASAD SINGH (1917) . 2 Pat. L. J. 553

——— Practice—*Form of suit.* It is not necessary to sue for a declaration that an entry in the Record-of-Rights that the defendants are *raiyats* at fixed rates is wrong, before instituting a proceeding for enhancement of rent under the Bengal Tenancy Act, 1885. Such record constitutes merely a rebuttable piece of evidence. A claim to enhanced rent is a recurring cause of action and is governed by article 131 of the Limitation Act, 1908, and not by article 120. Limitation runs from the date of refusal to pay rent at the enhanced rate. BRIJ BEHARI SINGH *v.* SHEO SANKAR JHA (1917) . 2 Pat. L. J. 124

——— *Illegal agreement to enhance—whether a bar to false and rent enhancement.* An illegal or invalid contract does not come within the provisions of the s. 37 of Bengal Tenancy Act, so as to operate as a bar to the institution of a suit for enhancement of rent although a valid contract would. BUDHAN MAHTO *v.* MUSAMMAT WAZIHUNNISSA BEGUM
4 Pat. L. J. 106

——— suit for—*Tenant shown to have asserted right to hold at unalterable rent more than 12 years before suit—Title by adverse possession, if arises.* Where the rent of a tenancy is enhancible, an

ENHANCEMENT OF RENT—*contd.*

assertion by the tenant that his rent cannot be enhanced not followed within 12 years by a suit for enhancement does not confer on the tenant a right to hold the land at a permanent rent. BIRENDRA KISHORE MANIKYA *v.* DOULAT KHAN (1917) . . . 22 C. W. N. 856

———————— *Bengal Tenancy Act (VIII of 1885) ss. 105, 109—Case under s. 105 dismissed for non-prosecution—Subsequent civil suit for same matter, if barred under s. 109.* An application made under s. 105 whether it is withdrawn or whether it is dismissed for non-prosecution, is nevertheless an application made within the meaning of the provisions of s. 109 of the Bengal Tenancy Act (VIII of 1885). The provisions of s. 109 of the Bengal Tenancy Act (VIII of 1885) should be strictly enforced and

tion. ABEDA KHATUN *v.* MAJUBALI CHOWDHURY (1920) I. L. R. 48 Calc. 157

ENHANCEMENT OF SENTENCE.

See CRIMINAL PROCEDURE CODE, S. 423 I. L. R. 36 All. 485

See RAILWAY PASSENGER. I. L. R. 44 Calc. 279

See SENTENCE, ENHANCEMENT OF.

ENJOYMENT.

———— adverse—

See EASEMENTS ACT (V OF 1882), S. 15. I. L. R. 38 Mad. 1

ENMITY OR HATRED.

———— dissemination of—

See SECURITY FOR GOOD BEHAVIOUR. I. L. R. 43 Calc. 591

ENQUIRY.

See CRIMINAL PROCEDURE CODE, SS. 117 242. . I. L. R. 34 Mad. 139

ENTICING AWAY MARRIED WOMEN.

See PENAL CODE, S. 498. I. L. R. 42 All. 401

EPIDEMIC DISEASES ACT (III OF 1897).

———— ss. 2, 3—

See PENAL CODE (ACT XLV OF 1860), SS. 188 AND 269. I. L. R. 38 Mad. 602

EQUITABLE ASSIGNMENT.

See ADMINISTRATOR-GENERAL'S ACT (II OF 1874), SS. 28, 34 AND 35. I. L. R. 38 Mad. 500

EQUITABLE ESTOPPEL.

See ESTOPPEL BY JUDGMENT. I. L. R. 37 Mad. 270

EQUITABLE ESTOPPEL—*contd.*

See LETTERS OF ADMINISTRATION. 3 Pat. L. J. 415

See WILL. . . 24 C. W. N. 529

EQUITABLE LIEN.

See TRANSFER OF PROPERTY ACT, SS. 82, 100. . I. L. R. 33 All. 708

EQUITABLE MORTGAGE.

See MORTGAGE. I. L. R. 43 Calc. 895

See TRANSFER OF PROPERTY ACT (IV OF 1882), S. 59 I. L. R. 38 Bom. 372

———————— *Transfer for Property Act (IV of 1882), s. 59—One of several joint-mortgagors possessing no property comprised in the title-deeds deposited, of properties within Ordinary Original Civil Jurisdiction of the High Court—Jurisdiction—Letters Patent, cl. 12—Mortgage-decree.* Where several joint-mortgagors had effected an equitable mortgage by deposit of title-deeds, one of them having no interest in any of the properties covered by the deposited title-deeds, within the Ordinary Original Jurisdiction of the High Court:—*Held*, that the defendants having incurred a joint debt and that debt having been secured by them by a deposit of title-deeds, they were jointly responsible, and the question whether one of the defendants was interested or not in any of no properties covered by the deposited deeds in the way affected the question of jurisdiction of the Court. It is not relevant in such a suit to enquire what interest each one of the mortgagors had in the properties comprised in the title-deeds jointly deposited by them. MATIGARA COAL CO. LD. *v.* SHRAGERS, LD. (1911) I. L. R. 38 Calc. 824

———————— *Deposit of title deeds—whether all title deeds should be deposited—what interest passes on for closure.* The Transfer of Property Act, 1882, is not exhaustive. There are many mortgages known to English Law, which it is difficult or impossible to bring within the terms of the Transfer of Property Act, 1882. There is no technical rule that in an equitable mortgage all the title deeds should be deposited. It is merely a question of intention. Where a share in an indigo concern is mortgaged the parties must be taken to intend that when foreclosure or sale takes place at some subsequent date, the share shall pass to the purchaser as it stands at the date of foreclosure or sale. This would include not only what strictly could be held to be accessions but also changes in good will, rights under contracts, *etc.* *West v. Lawday, 11 H. L. C. 375* approved. BHUPENDRA NATH BASU *v.* MUSSAMMAT WAJIHUNNISSA BEGAM 2 Pat. L. J. 293

EQUITABLE RELIEF.

See CONSENT DECREE. I. L. R. 44 Bom. 544

EQUITABLE SECURITY.

See MORTGAGE. I. L. R. 39 Calc. 810

EQUITABLE SET-OFF.

See CONTRACT . I. L. R 37 Calc. 334

———————— *Order disallowing plea before remand, if may be reviewed at final hearing.* *Held*, that in the circumstances of the case the Court of the Judicial Commissioner was right in

EQUITABLE SET-OFF.—*contd.*

allowing the defendant's plea of equitable set-off at the final hearing after a remand it had ordered for certain inquiries, although at the previous hearing it had upheld the decision of the lower Court rejecting the plea. SHEO NARAIN SINGH *v.* BISHUNATH SINGH (1913) . **18 C. W. N. 426**

EQUITIES ON PARTITION.

See TRANSFER OF PROPERTY ACT (IV OF 1882), SS. 60 AND 91.
I. L. R. 38 Mad. 310

EQUITY, JUSTICE AND GOOD CONSCIENCE.

———— rule of—

See HINDU LAW—MAINTENANCE.
I. L. R. 37 Mad. 396

EQUITY OF REDEMPTION.

See MORTGAGE **I. L. R. 34 Mad. 115**
I. L. R. 39 Bom. 55
I. L. R. 38 All. 411
I. L. R. 44 Bom. 723

See MORTGAGOR AND MORTGAGEE.
I. L. R. 41 Bom. 357

See REDEMPTION.

See TITLE . **I. L. R. 37 Calc. 239**

———— acquisition of, by trespassers—

See TRANSFER OF PROPERTY ACT (IV OF 1882), S. 65 (*c*).
I. L. R. 39 Mad. 959

———— assignment of, to sureties—

See MORTGAGE **I. L. R. 45 Calc. 702**

———— clog on—

See MORTGAGE **I. L. R. 32 All. 651**

See MORTGAGE . . **5 Pat. L. J. 423**

———— sold and pre-empted—

See BUNDELKHAND ALIENATION ACT (II OF 1903), S. 3. **I. L. R. 37 All. 467**

———— suit by Transferer of—

See CIVIL PROCEDURE CODE, O. XXXIV, RR. 2, 3, 4 AND 5. **5 Pat. L. J. 595**

———— Transferee of part of—

See MORTGAGE.
I. L. R. 48 Calc. 22

———— *Entry in Revenue records more than 12 years old—whether sufficient for acquisition of title—adverse possession.* In 1888, on the death of *Mussammat* Bhuri, the surviving widow of Kasam Shah, plaintiff, succeeded in having his name entered in the Revenue records as owner of the land originally owned by Kasam Shah and mortgaged by *Mussammat* Tajo, one of his widows, in 1868, with possession to the defendants 1 to 3's predecessors. Plaintiff sued in 1911 for redemption of the mortgage and the question was whether he had acquired a title to the equity of redemption by reason of the entries in the Revenue records in his favour since 1868. *Held,* that the plaintiff could not and did not acquire ownership of the equity of redemption by merely having an entry in his favour in the Revenue records. *Kanwar Sen* v. *Darbari Lal* (*34 Indian Cases 171*), followed. *Kanhoo Lal* v. *Mussammat Manki Bibi* (*6 C. W. N. 601*) and *Hubdar Khan* v. *Gajadhar Chaube* (*25 Indian Cases 600*), distinguished. SHAH NAWAZ *v.* SHEIKH AHMAD
I. L. R. 1 Lah. 549

———— *Purchase of, by mortgagee—Right of mortgagor to redeem.* A purchase of mortgaged property by a mortgagee at a sale held in contravention of s. 99 of the Transfer of Property Act, 1882, voidable not void. The mortgagor must therefore have the sale set aside before he can redeem the property. PANDIT SHEO NARAIN OJHA *v.* RAM JATAN OJHA (1917)
2 Pat. L. J. 587

———— *Extinguishment—Mortgagor passing a rajinama to mortgagee for the land—Mortgagee executing kabuliyat to pay Government assessment.* In 1876, the plaintiff mortgaged the land in dispute to the defendants; and in 1879 passed a *rajinama* relinquishing all his occupancy rights in the said land in favour of the defendants. The latter at the same time gave a complementary *kabuliyat* agreeing to pay Government assessment on the land. The plaintiff having sued to redeem the mortgage. *Held,* dismissing the suit, that the *rajinama* and *kabuliyat* effectually extinguished the plaintiff's equity of redemption. VENKAJI NARAYAN *v.* GOPAL RAMCHANDRA (1914)
I. L. R. 39 Bom. 55

ERRONEOUS DECISIONS AND ORDERS.

———— on a question of law—

See LIMITATION ACT (XV OF 1877), SCH. II, ARTS. 178 AND 179.
I. L. R. 36 Mad. 553

See RES JUDICATA.
I. L. R. 39 Calc. 848

ERROR.

———— of fact—

See SALE BY GOVERNMENT.
I. L. R. 44 Calc. 328

———— of Law—

See CHARGE . **I. L. R. 40 Calc. 168**

ERROR, OMISSION OR IRREGULARITY.

See CHARGE . **I. L. R. 40 Calc. 16**

———— correction of—

See REMAND . **I. L. R. 44 Calc. 929**

ESCAPE FROM CUSTODY.

See ARREST BY PRIVATE PERSON.
I. L. R. 41 Calc. 17

See PENAL CODE, S. 225B.
I. L. R. 32 All. 116
I. L. R. 43 All. 185

ESCHEAT.

See MAHOMEDAN LAW.
I. L. R. 44 Bom. 947

See TRANSFER OF PROPERTY ACT (IV OF 1882), S. 91 **I. L. R. 33 All. 111**

———— failure of Husband's heirs on widow's death—

See HINDU LAW—WIDOW.
I. L. R. 45 Bom. 1106

ESTATE.

See MADRAS ESTATES LAND ACT (I OF 1908) s. 3 **I. L. R. 38 Mad. 33**

———— absolute or limited—

See HINDU LAW—WILL.
I. L. R. 38 All. 446

———— falling into possession—

See EXPECTANCIES.
I. L. R. 39 Mad. 554

———— In common Tenancy—

See SALE FOR ARREARS OF REVENUE.
I. L. R. 39 Calc. 353

———— of deceased person (Liability of)—

See MAINTENANCE.
I. L. R. 41 Calc. 88

———— Tanjore Palace—

See MADRAS ESTATES LAND ACT (I OF 1908), s. 3 (2), (*d*).
I. L. R. 40 Mad. 389

ESTATE LAND ACT.

See MADRAS, ACT I OF 1908.

ESTATES PARTITION ACT (BENG. VIII OF 1876).

tenancies without the consent of the tenants. RAMLOCHAN KUER *v.* AGERNATH MISSER
1 Pat. L. J. 270

———— ss. 7, 111, 149—

See TITLE, SUIT FOR.
I. L. R. 37 Calc. 662

———— ss. 23, 25, 29, 45, 46-119—525 does not bar a suit for a declaration that a 3rd person passing as a tenant is in reality not a tenant. LAKHI CHOWDHRANI *v.* AKLOO JHA
16 C. W. N. 639

———— s. 7—*Previous partition, when a bar to fresh*

the

if

been a previous partition—Civil Court, jurisdiction of to declare estate unfit for partition by Collector. S. 7 of the Estates Partion Act contemplates a formal division of the lands of an estate by metes and bounds agreed to by all co-owners and a possession

an *ijmali* share was retained and some co-owners who were ignored in that partition subsequently

as would bar partition under the Act. *Semble:* If a complete partition is once effected, no subsequent partition under the Act can take place except on a joint application by all the proprietors, even though after such partition each of the separate

be

perty at the time of application under the Act.

ESTATES PARTITION ACT (BENG. VIII OF 1876)—*contd.*

———— s. 7—*contd.*

———— ss. 11, 113 and 114—

———— Revisional Powers of the Board of Revenue discussed. BIRABHADRA RUTH AND ORS *v.* JANARDAN PROHERAJ NOHAPALIA . . . . . **1 Pat. L. J. 491**

———— s. 12—

See PARTITION **4 Pat. L. J. 29**

———— ss. 23, 24, 26, 77, 94 and 99—*Private partition of* bakasht *lands, effect of—sale of separated plot by proprietor in possession—rights of purchaser.* Ss. 23, 24, 26 and 77 show that a Civil Court has jurisdiction to decide a question of title or extent of interest not only between the proprietor and a stranger but also between the proprietors themselves, after a partition has been completed. BAHURIA KANAKKULARI KUER *v.* BINDESHWARI GIR . . . **5 Pat. L. J. 456**

———— ss. 25 and 29—

See LIMITATION. **6 Pat. L. J. 41**

See PARTITION . . **3 Pat. L. J. 188**

course of partition proceedings before the Collector

that there was no tenancy right of the defendants was not barred. LAKHI CHOUDHRY *v.* AKLOO JHA (1911) . . . **16 C. W. N. 639**

———— ss. 26, 29 and 94—

See ORDER-IN-COUNCIL. **2 Pat. L. J. 496**

———— s. 99—

See JOINT ESTATE.
I. L. R. 43 Calc. 103

———— ss. 82 and 119—Where a Revenue Court has passed an order under s. 82 refusing a partition on the ground that the land is rent free property s. 119 does not bar a suit for partition in the Civil Court. JITABANDHAN SINGH *v.* MUSAMMAT SUDHA KUER **6 Pat. L. J 689**

———— ss. 111, 149—*Decision of title in proceedings under, if bars civil suit—Miras tenure, cir-*

if proof

, of the

rmanent

by the tenure-holders and has no application where this is denied by any of them. S. 149 of the Estates Partition Act does not bar a separate suit for the establishment of a miras title found against by the revenue officer even though the

ESTATES PARTITION ACT (BENG. VIII OF 1876)—*contd.*

——— **ss. 111, 149**—*contd*

happens to be a part proprietor. The object of s. 149 is only to exclude the jurisdiction of Civil Courts in cases where the question relates to the determination of Government Revenue or to the details of partition; it does not oust the jurisdiction of the Civil Court in matters which involve a question of title. *Ananda Kishore* v. *Daije Thakurain, I. L. R. 36 Calc. 726*, relied on. Where it was found that a tenure had been in existence for at least 75 years, that the origin of the tenancy was unknown, that substantial structures were erected on the land, that the conveyance of the tenure referred to the tenure as *miras* tenure, that while the transferable character of a jote purchased along with the tenure was disputed, the purchasers were left in undisturbed possession of the tenure :—*Held*, that from these circumstances it could be legitimately inferred that the tenure was of a permanent character. *Upendra Krishna Mandal* v. *Ismail Khan I. L. R. 32 Calc. 41 ; s. c. 8 C. W. N. 889 ; Nilratan Mandal* v. *Ismail Khan, I. L. R. 32 Calc. 51 : s. c. 8 C. W. N. 895 ; Naba Kumari Debi* v. *Behari Lal Sen, I. L. R. 34 Calc. 902 : s. c. 11 C. W. N. 865*, relied upon. *Abdul Wahid* v. *Shaluka Bibi, I. L. R. 21 Calc. 496 ;* distinguished. JANOKI NATH CHOWDHURY *v.* KALI NARAIN RAY CHOWDHURY (1910)

15 C. W. N. 45
I. L. R. 37 Calc. 662

——— **ss. 119, 88**—*Suit against order of Revenue Court, when lies.* On the application of defendant, a co-sharer, for the partition of his share in a *tauzi* proceedings under the Estates Partition Act were taken. Throughout the proceedings no question was raised under s. 88 and no order was passed under that section. The plaintiff, another co-sharer, objected only to the mode in which the common lands were divided but never took the objection that more land was allotted to the estate under partition than that estate was entitled to. The plaintiff's objection was rejected by all the revenue authorities up to the Board of Revenue and the final order for partition was made. The plaintiff then brought a suit for declaration of title to and possession of certain land alleging that by reason of fraud practised by one of the defendants in connection with the preparation of the record-of-rights on which the partition proceedings were based, land belonging exclusively to him had been partitioned as joint land : *Held*, that under s. 119 of the Estates Partition Act the plaintiffs not being persons aggrieved by an order under s. 88 had no right of suit in the Civil Court. FLETCHER, *J.*—That the plaintiff could not be allowed to recover land allotted to defendant, whilst retaining lands allotted to him by the same partition. RICHARDSON, *J.*—Where there is no dispute as to the *quantum* of interest each co-sharer has in joint lands but the question is as to whether a particular piece of land is part of the joint lands or is the exclusive property of a co-sharer, the question is not one under proviso (i) to s. 119 of the Act. GURBUKSH PROSAD TEWARI *v.* KALI PROSAD NARAIN SINGH (1914)

19 C. W. N. 1322

ESTOPPEL.

See ADMINISTRATOR PENDENTE LITE.
I. L. R. 41 Calc. 771

See ADOPTION **I. L. R. 34 All. 8**

ESTOPPEL—*contd.*

See ADVERSE POSSESSION.
I. L. R. 40 Calc. 173
I. L. R. 37 Mad. 373

See AGRA TENANCY ACT (II OF 1901) s. 16 . **I. L. R. 41 All. 223**

See ARBITRATION ACT. 1998.
I. L. R. 43 All. 456

See BENAMI
I. L. R. 37 All. 557
I. L. R. 46 Calc. 566

See BOMBAY CITY LAND REVENUE ACT (BOM. II OF 1876), ss. 30, 35, 39, 40.
I. L. R. 39 Bom. 664

See BOMBAY CITY IMPROVEMENT ACT (BOM. ACT IV OF 1898), s. 48 (11).
I. L. R. 42 Bom. 54

See CHARITABLE TRUSTS.
I. L. R. 34 Mad. 406

See CHAUKIDARI CHAKARAN LANDS.
15 C. W. N. 976

See CIVIL PROCEDURE CODE 1882
s. 13. **I. L. R. 33 Mad. 459**
s. 43. **I. L. R. 34 All. 172**
s. 287 . **I. L. R. 35 All. 257**

See CIVIL PROCEDURE CODE, 1908 s. 60 O. XXI, R. 92.
I. L. R. 40 All. 680

O. XLI, R. 5 (3).
I. L. R. 41 Mad. 327

See COMPANIES ACT (VI OF 1882) ss. 76, 77 . **I. L. R. 36 All. 416**

See COMPANY **I. L. R. 42 Bom. 215**

See CUSTOM . **I. L. R. 39 Calc. 418**

See EASEMENT ACT, s. 13.
I. L. R. 45 Bom. 80

See EVIDENCE ACT (I OF 1872), ss. 115, 116 . **I. L. R. 38 All. 226**
I. L. R. 40 Mad. 561
1 Pat. L. J. 16
I. L. R. 41 Bom. 480

See EXECUTION OF DECREE.
3 Pat. L. J. 454

See EXECUTION SALE.
24 C. W. N. 269

See FRAUD . **I. L. R. 36 Bom. 185**

See HINDU LAW ADOPTION.
I. L. R. 37 Mad. 529
I. L. R. 40 All. 593

See HINDU LAW JOINT FAMILY.
I. L. R. 43 All. 703
26 C. W. N. 201

See HINDU LAW PARTITION.
I. L. R. 39 Mad. 587
L. R. 41 I. A. 247
I. L. R. 48 Calc. 1059

See HINDU LAW REVERSIONERS
I. L. R. 40 All. 487

See JURISDICTION.
I. L. R. 34 Mad. 257

See LANDLORD AND TENANT.
I. L. R. 36 Mad. 53
I. L. R. 32 All. 213
I. L. R. 46 Calc. 1079

ESTOPPEL—*contd.*

See LAND REGISTRATION.
I. L. R. 38 Calc. 512

See LEASE . I. L. R. 42 Bom. 103

See LETTERS OF ADMINISTRATION.
3 Pat. L. J. 415

See LIMITATION ACT (IX OF 1908) s. 19.
I. L. R. 40 Mad. 701

See MAHOMEDAN LAW. 24 C. W. N. 321

See MAHOMEDAN LAW—DOWER.
I. L. R. 33 All. 291

See MINOR . . 15 C. W. N. 239

See MORTGAGE. . 15 C. W. N. 572
22 C. W. N. 641
I. L. R. 34 All. 640
I. L. R. 40 Calc. 534
I. L. R. 35 All. 353
I. L. R. 36 All. 141
I. L. R. 47 Calc. 446

See MUNICIPAL ELECTION.
I. L. R. 47 Calc. 524

See NOTICE . I. L. R. 40 Calc. 503

See OCCUPANCY HOLDING.
24 C. W. N. 818

See PRINCIPAL AND AGENT.
14 C. W. N. 381

See RES JUDICATA.
I. L. R. 41 Calc. 69
I. L. R. 2 Lah. 88

See SALE OF GOODS.
I. L. R. 42 Bom. 16

See SPECIFIC RELIEF ACT 1877, s. 41.
I. L. R. 44 Bom. 175

See SUB LEASE.
I. L. R. 48 Calc. 783

See TITLE . I. L. R. 44 Calc. 771

See TRADE MARK.
I. L. R. 40 Calc. 814
I. L. R. 42 Calc. 262

See TRANSFER OF PROPERTY ACT, s. 107.
I. L. R. 36 Bom. 500

See VENDOR AND SUB-VENDOR.
I. L. R. 38 Calc. 127

See WAIVER I. L. R. 44 Calc. 10

See WAKF . I. L. R. 37 Bom. 447

See WILL . . 3 Pat. L. J. 199

———— doctrine of feeding the—

See EXPECTANCIES.
I. L. R. 39 Mad. 554

———— non user of right to take water from a well—

See EASEMENT ACT 1882, ss. 13 AND 47
I. L. R. 45 Bom. 80

———— *standing by while building operations are going on*—

See ACQUIESCENCE.
I. L. R. 2 Lah. 258

1. DENIAL OF TITLE . .
2. ESTOPPEL BY CONDUCT .
3. ESTOPPEL BY JUDGMENT .

ESTOPPEL—*contd.*

I. DENIAL OF TITLE

———— *Sarajam—Inam—Mir as (permanent tenancy)—Denial of Saranjamdar's title—Attornment to successive Saranjamdars.* In an ejectment suit brought by an Inamdar against persons claiming to hold as mirasi or permanent tenants, it was conceded that the inam rights in the land in suit appertained to a saranjam held on political tenure and that the present incumbent of the saranjam was the plaintiff. The defendants

saranjamdars approved by Government. The defendants had, however, been continuosly paying rent for their holding to the successive saranjamdars including the plaintiff. They were thus estopped by attornment from disputing the plaintiff's title. *Vasudev Daji* v. *Babaji Ranu, 8 Bom. H. C. R. (A. C.) 175,* and *Dœ dem. Marlow* v. *Wiggins, 4 Q. B. 367,* referred to. TRIMBAK RAMCHANDRA *v.* SHEKH GULAM ZILANI (1909)
I. L. R. 34 Bom. 329

tained by the Judge by questioning their legal advisers as to what is exactly their position in the matter. Where both parties to a suit are equally conversant with the true state of facts, it is absurd to refer to the doctrine of estoppel In the year 1871 Government granted to the defendants' predecessor-in-title a certain plot of land situate at Dhandhuka. The grant expressly stated that a strip of land belonging to Government was the southern boundary of the plot so granted. This statement was repeated in the mortgage-deed executed by the defendants' predecessor-in-title to the defendants themselves in the year 1893. In the year 1895 the defendants purchased the said plot and encroached on the strip by extending their

defendants' encroachment. The suit was brought in the year 1908 The defendants' plea was that

defendants' title-deeds having brought to their knowledge the title of the Government, the doctrines

CHODLAL VANDRAVANDAS *v.* THE SECRETARY OF STATE FOR INDIA (1910). I. L. R. 35 Bom. 182

ESTOPPEL—*contd.*

I. DENIAL OF TITLE—*contd.*

————————— *Unpaid vendor—Appropriation—Jute trade, usage of—Pucca delivery orders—Negotiability—Documents of title—Indian Contract Act (IX of 1872), s. 108—Transfer of Property Act (IV of 1882), s. 137—Damages.* A delivery order is recognised as a document of title under s. 108 of the Contract Act and s. 137 of the Transfer of Property Act, and under a delivery order the transferee acquires a title to the goods to which it relates. By the usage of the jute trade in Calcutta, *pucca* delivery orders are issued only on cash payment, are passed from hand to hand by endorsement, and are sold and dealt with in the market as absolutely representing the goods to which they relate. On the 1st March, 1909, the defendant company sold to J. & Co.'s principals certain Hessian cloth on the terms that "payments were to be made in cash in exchange for delivery order on sellers, and delivery of the goods was to be given and taken ready payment against *pucca* delivery order." A *pucca* delivery order was issued on the 2nd March by the defendant company in favour of J. & Co.'s principals or order, embodying the term "ready shipment." On the 3rd March J. & Co. requested the plaintiffs to advance money on the security of the delivery order. The plaintiffs on making enquiries at the mills were informed the delivery order was "all right." On the 4th March J. & Co. obtained an advance of money from the plaintiffs on the pledge of the delivery order and duly endorsed the delivery order to the plaintiffs. On the same date J. & Co. handed the defendant company a cheque in payment of the goods comprised in the delivery order. On the 8th March the defendant company presented the cheque for payment, but it was dishonoured. The defendant company thereupon refused to give delivery of the goods to the plaintiffs under the delivery order. The plaintiffs obtained an absolute release of all J. & Co.'s interest in the delivery order, and brought an action against the defendant company for delivery of the goods or their value or damages for conversion. *Held*, that the defendant company were estopped from denying that cash had been paid for the goods to which the delivery order related and they could not claim to be entitled to a lien as against the plaintiffs. The defendant company were further estopped from denying that they had appropriated goods of the required quantity and description to the delivery order, and that they held these goods for the plaintiffs. *Goodwin* v. *Roberts. L. R. 1 A. C. 476*, referred to. ANGLO-INDIA JUTE MILLS CO. *v* OMADEMULL (1910) . **I. L. R. 38 Calc. 127**

————————— *Evidence Act (I of 1872), s. 115—Sale to plaintiff by B, of land as his—Attestation by A with knowledge of the contents, when he was the owner, effect of—Civil Procedure Code (Act XIV of 1882), s. 317—'Fraudulently.'* If *A*, with the knowledge that the recital in a sale-deed that the land thereby conveyed belongs to *B* and is in his (*B*'s) enjoyment as owner, attests the sale-deed executed by *B* in favour of the plaintiff he is estopped from setting up thereafter his title to the land, even though he (*A*) might be the certified purchaser of the same in Court auction. *Sarat Chander Dey* v. *Gopal Chunder Laha, L. R. 19 I. A. 203, 215, 216* followed. *Cairncross* v. *Lorimer 3 Macq. 289*, and *Carr* v. *London and North-Western Railway Company, L. R. 10 C. P. 307, 317*, referred to. *Per* SUNDARA AYYAR, *J.*—No actual or verbal representation is necessary to give rise to estoppel. It is no contravention of the rule enacted in section 317, Civil Procedure Code (Act XIV of 1882), to hold that *A* is estopped in such a case as even a title acquired by a statute may be waived just like a title under a private conveyance. It is fraudulent within the meaning of s. 317, Civil Procedure Code, on *A*'s part to have obtained a sale certificate in his name after his attestation. *Abdul Aziz* v. *Kanthu Mullick, I. L. R. 38 Calc. 512, Krishnaswami Chetty* v. *Vellaichami Thevan, 21 Mad. L. J. 1077, Madras Hindu Mutual Benefit Permanent Fund* v. *Ragava Chetti, I. L. R. 19 Mad. 200, Bishan Dial* v. *Ghazi-ud-din, I. L. R. 23 All. 175, and Monappa* v. *Surappa, I. L. R. 11 Mad. 234*, distinguished. *Per* SADASIVA AYYAR, *J.*—*Obiter*: S. 317, Civil Procedure Code, will be a bar only if the plaintiff is obliged to set up as part of his case for relief the plea that *A* purchased in Court auction as *benamidar* for *B*. After the transfer of Property Act no waiver or transfer of rights can be recognised in the case of immoveable property in the absence of a registered instrument. Having regard to the ordinary course of conduct of Indians in this presidency, attestation by a person who has or claims any interest in the property covered by the document must be treated *primâ facie* as a representation by him that the title and other facts relating to title recited in the document are true and will not be disputed by him in favour of the oblige under the document. KANDASAMI *v.* NAGALINGA, (1913)

I. L. R. 36 Mad. 564

————————— *Mortgage—Registration—Property not in existence, inclusion of—Indian Evidence Act (I of 1872), s. 115—Estoppel, if could be invoked to defeat the provisions of the Registration Act—Fraud on the Registration Law—Onus to prove the existence of property mentioned in mortgage deed.* The predecessors of defendants-respondents executed a mortgage in favour of the plaintiffs-appellants on 15th April 1902. The mortgaged properties included a plot of rent-free land in the District of Burdwan about 1 bigha in area, and butted and bounded as described in the mortgage deed. The said deed of mortgage was registered at Burdwan. One of the defendants contended that the mortgagors never possessed the said plot of land nor did such a plot of land ever exist, that it was a fictitious plot mentioned in the said deed of mortgage in fraud of the law of registration and that the registration was thus invalid and so the plaintiffs could not get any relief in respect of the same: *Held*, that the onus lay on the defendants to disprove the existence of the plot of land in 1902. *Held*, further, that the defendants failed to discharge the onus and therefore the suit should be decreed with costs. There can be no doubt about the general rule that the principle of estoppel cannot be invoked to defeat the plain provisions of a statute. *Quære:* Whether the plaintiffs in the present case were invoking an estoppel to defeat the provisions of the Registration Act. SUDHIR CHANDRA SET *v.* SYED ABDULLA-UL-MUSAVI (1907)

22 C. W. N. 894

————————— *Parties* in part delicto. *Held*, that in the case of a contract where both the parties were *in pari delicto* the plaintiff was not entitled to estop the defendant from showing

ESTOPPEL—*contd.*

I. DENIAL OF TITLE—*contd.*

v. BABAJI MULA (1914) **I. L. R. 38 Bom. 709**

———— *Assignee of right enjoying it, if can question assignor's right to transfer.* The rule of estoppel which binds landlords and tenants, mortgagors and mortgagees, bailors and bailees, applies to employees and contracting parties generally who cannot accept the benefits of the contract and yet, when called upon to perform their duties under it, repudiate it as made without right or as otherwise wanting in force, provided the contract is not actually in violation of law or wholly void. The assignee or the licensee of any right accepted and acted under is accordingly estopped to deny the authority from which the right proceeds. LAKHAN JENA *v.* ARJUN NAIK (1914) . . . . **18 C. W. N. 1194**

———— *As between donor and donee—Estoppel in favour of executor or legatee as against testator.* The doctrine of estoppel cannot be applied as between donor and donee in every case. There is no estoppel in favour of the executor or legatee as against the testator There is no estoppel in favour of the executor or the legatee as against the heir-at-law of an occupancy raiyat so as to deprive him of what he is entitled to take by statute. AMULYA RATAN SIRKAR *v.* TARINI NATH DEY (1914) . . **18 C. W. N. 1290**
I. L. R. 42 Calc. 254

———— *Lessee inducted on land by a void lease, if may plead lease void and created no rights—Lease registered in contravention of the law—Suit for damages for breach of covenant—Estoppel.* In a suit for damages by a lessor against a lessee for breach of a covenant contained in a registered lease purporting to have been granted by the lessor as tenure-holder to the lessee as undertenure-holder, it was found that in fact the lessor was an occupancy raiyat, and the lessee urged that the lease, having been granted and registered in contravention of s. 85 of the Bengal Tenancy Act, was void and inoperative: *Held,* that the lessee was estopped from showing that the lease was void and that no interest passed to him. *Bhaignta Bewah* v. *Himmat Badyakar, 20 C. W. N. 1335,* followed. That the Court was not precluded from so holding by the previous decisions of the High Court. BAMANDAS BHATTACHARYYA *v.* NILMADHAB SAHA (1916) . . . . **20 C. W. N. 1340**

———— *Mortgage, suit for redemption of—Mortgagee if can deny mortgagor's title.* A mortgagee cannot resist a claim for redemption on the ground that the mortgagor had no title to the property included in the mortgage although he may establish that the title of the mortgagor has expired since the creation of the mortgage, it not being open to him to prove that the mortgagor lost his rights before the mortgage was executed. ABHURAM SIL *v.* HARA CHANDRA DAS (1915) **20 C. W. N. 1231**

———— *Will, by Hindu*

ESTOPPEL—*contd.*

I. DENIAL OF TITLE—*contd.*

children should be born to her (testatrix's) son (who survived her) they should succeed to the whole estate, and the daughter entered into possession under the will and carried out all its provisions. In a suit brought by the purchaser from the son's son against the purchaser from the daughter's son: *Held,* (i) that the will was invalid because the testatrix had no interest of which she could dispose by will, and it further contained an ineffectual bequest to unborn grandsons; (ii) that the daughter (legatee) and her successor in title by her acceptance of the will were estopped from disputing the title of the son's son (remainderman), and (iii) that the principle that a person who accepts a position conferred on him or her by a will cannot at the same time repudiate so much of the will as conveys an interest to another person, governed the case. *Board* v. *Board, L. R. 9 Q. B. 48,* and *Rupchand Ghose* v. *Sarbessur Chandra Chander, 3 C. L. J. 629,* referred to. DURGA DAS KHAN *v.* ISHAN CHANDRA DEY (1916)
I. L. R. 44 Calc. 145

———— *Mortgage including sir land—Decree for sale—Form of decree at instance of mortgagor—Sale—Subsequent claim by mortgagor that decree invalid.* By the Central Provinces Tenancy Act (IX of 1883), s. 42, every person whose proprietary rights in land comprising *sir* lands are sold in execution of any decree which does not expressly direct the sale of his rights in the *sir* lands shall become an occupancy-tenant of that *sir* land at a rent to be fixed by the revenue officer. In a suit for the sale of land in the Central Provinces under a registered mortgage made in 1891 a sale decree was made, an indorsement stating that the property to be sold included the cultivating right of *sir* lands, which lands were expressly comprised in the mortgage Upon appeal, the mortgagor contended that under the terms of the mortgage he could not be excluded from the cultivating rights. The parties agreed that the determination of that question should be left over, and that the sale decree should be altered by ating ng and rep The respondent bought the property at the sale, but

that in the circumstances in which the original decree was modified, the appellants were precluded from asserting that under its terms so modified the rights of the mortgagee under the original decree were taken away, and that the respondent was accordingly entitled to possession. In their Lordships' opinion the rights under the mortgage should have been determined upon the appeal in the suit for sale. Judgment of the Court of Judicial Commissioner affirmed. GULAB SINGH *v.* BALLABH DAS (1921) **I. L. R. 48 Calc. 591**

II. ESTOPPEL BY CONDUCT.

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), s. 258. **I. L. R. 34 Bom. 575**

See MORTGAGE **I. L. R. 40 Calc. 378**

———— after attaining majority—

See COMPANY . **I. L. R. 39 Bom. 331**

ESTOPPEL—*contd.*

II. ESTOPPEL BY CONDUCT—*contd.*

——— *Non-transferable occupancy holding—Mortgage of the holding—Purchaser of the holding at private sale—Subsequent lease by landlord to purchaser—Evidence (Act I of 1872), s. 115.* A person, having a raiyati interest in certain lands, mortgaged the same to the plaintiff without the landlord's consent. Subsequently various transfers of portions of the lands mortgaged were effected to different persons by the widow of the mortgagor. Finally, the widow sold a portion of the mortgaged lands with the consent of the landlord to one Radha Kanta Chakravarti, who after his purchase took a fresh lease of the same from the landlord at an enhanced rent on payment of a premium. A suit having been instituted by the mortgagee for recovery of the mortgage money, the widow and all the subsequent transferees, including the purchaser, were made parties. The purchaser pleaded that he was not a necessary party to the suit, and that the mortgage was invalid on the ground that the raiyati right was not transferable. The District Judge having decided against him on these points, the purchaser appealed to the High Court: *Held* (COXE, *J.* dissenting), that the purchaser claiming under a title party, at least created by the mortgagor, was estopped from raising the plea of non-transferability of the holding. *Krishna Lal Shaha* v. *Bhairab Chandra Rahat 9 C. W. N. ccxlviii, Asmatunnessa Khatun Saheba* v. *Harendra Lal Biswas, I. L. R. 35 Calc. 904; 12 C. W. N. 721, Doe* v. *Stone, 3 C. B. 176, Doe* v. *Vickers, 4 Ad. & E. 782, Hughes* v. *Howard 25 Beav, 575, Debendra Nath Sen* v. *Mirza Abdul Samed Seraji, 10 C. L. J. 150,* referred to. RADHA KANTA CHAKRAVARTI *v.* RAMANANDA SHAHA (1912)
I. L. R. 39 Calc. 513

——— *Rent free tank—Sanad—No mention of rent in the sanad—Tenants making improvement by re-excavating tanks, effect of—Inference of landlord's intention to grant rent-free right.* In a suit brought by the landlord to recover possession of a tank with its banks, and in the alternative to have the lands assessed with fair rent, the defendant pleaded that the tank had been *nishkar* (rent free) from a long time by virtue of a *sanad* granted by the predecessor of the plaintiff. The *sanad* was granted in the year 1850 to re-excavate an unclaimed silted-up tank, by which the grantee was required to excavate the tank by employing earth-cutters, and the only restriction imposed was that the limits of the ancient tank were not to be exceeded. There was no provision for the payment of any rent in the present or future, and nothing was said as to the duration of the grant. The ancestor of the defendant re-excavated the tank at considerable expense, and it has been in the exclusive possession of the family of the defendant from father to son, and still supplies good drinking water: *Held,* that under the circumstances, the plaintiff was estopped from asserting that the tank with its banks should come under a new liability of which there was no indication in the previous history of the tank and that, therefore, it could not be assessed with any rent. *Held, per* CHATTERJEE, *J.*, that according to Hindu *shastras,* digging new tanks and re-excavation of old ones being supremely meritorious, the ancestor of the plaintiff could never have meant that the grant made by the *sanad* was a mere license; and that the defendant was entitled to hold the tank with its banks without payment of rent as long as the tank served the purpose for which the grant was made. The possession of a party basing his title on a grant, and not on adverse possession as an alternative source of title, cannot be used for any purpose other than for explaining the grant on which he relies. BIRENDRA KISHORE MANIKYA *v.* AKRAM ALI (1912)
I. L. R. 39 Calc. 439

——— *Estoppel by conduct—Hindu Law—Adoption by Hindu widow under authority of her husband—Subsequent suit to set aside adoption as invalid—Denial of any valid authority to adopt—Adopted son having on faith of representations by widow married, performed shradh of adoptive father and incurred heavy liabilities in maintaining his change of status and privileges.* In this case, which was an appeal from the decision of the High Court in *Dharam Kunwar* v. *Balwant Singh, I. L. R. 30 All. 549,* their Lordships of the Judicial Committee, while expressing their opinion that the question in the case might well be decided as one of fact on the appellant's own statements without recourse to the doctrine of estoppel, did not differ from the view of the High Court as to the applicability of that doctrine. The appellant, they held, had asserted her authority to adopt in the most solemn manner under her hand and seal, and her conduct both before and after that assertion had been of a like unequivocal character. She could not now be allowed to change her story without grave injustice ensuing to the respondent, who had acted in reliance upon her deliberate and repeated representations. The estoppel, however, their Lordships said, must be taken as being purely personal, and did not bind any one claiming by an independent title. DHARAM KUNWAR *v.* BALWANT SINGH (1912) . . **I. L. R. 34 All. 398**

——— *Occupancy holding mortgaged to zamindar and sold in execution of a decree on the mortgage as a fixed-rate holding—Ejectment of purchaser—Right of purchaser to recover possession—Possessory title.* An occupancy holding was mortgaged to the zamindar as a fixed-rate holding; was sold as such in execution of a decree on the mortgage and purchased by a stranger, who remained in possession thereof for some eleven years, paying rent to the zamindar. Subsequently the purchaser was disposed by the judgment debtor: *Held,* on suit by the purchaser to recover possession that the defendant was estopped from setting up the plea that the holding was an occupancy holding and that, the defendant having no title at all, the plaintiff was entitled to regain possession on the strength of his possessory title. ASGHAR HUSAIN *v.* PAL AHIR (1912) . . **I. L. R. 34 All. 538**

——— *Person not in fact misled, if may urge.* The doctrine of estoppel by conduct does not apply in a case in which the party claiming that the other side is bound by the estoppel had express notice of the fact which he says was not represented to him by the other side as the true fact. SARAT CHANDRA MUKHOPADHYAY *v.* RAJENDRA LAL MITRA (1913)
18 C. W. N. 420

——— *Unregistered deed of exchange of two plots each worth more than Rs. 100*

ESTOPPEL—*contd.*

II. ESTOPPEL BY CONDUCT—*concld.*

—*Conduct confirming the exchange, whether an estoppel in a suit to recover possession—Transfer of Property Act IV of 1882, ss. 51, 54 and 118—Compensation.* The plaintiff and the defendant exchanged adjacent plots of land each worth more than a hundred rupees by means of an unregistered deed on 4th March, 1908, both believing that they had effected a valid transfer. Possession was taken by each party and defendant began to erect a very costly building placing a wall thereof on the land he had acquired in exchange. While the building was in progress, the plaintiff demanded and obtained Rs. 525 from the defendant on the ground that the plot he parted with was found to be more in extent than the defendant's. After the completion of the building, the plaintiff brought this suit in 1911 for recovery of his plot after removal of the defendant's building on it. The defendant pleaded *inter alia* that he had acquired a valid title to the plot, that the plaintiff was estopped by his conduct from recovering the plot and that if the plaintiff was to get a decree, he must pay compensation as a condition of recovery: *Held*

to the absence of a registered deed of exchange as required by ss. 54 and 118 of the Transfer of Property Act, and (ii) that the plaintiff must pay sufficient compensation before recovery, under s. 51 of the Transfer of Property Act. *Kurri Veerareddi* v. *Kurri Bapireddi, I. L. R. 29 Mad. 336,* followed. *Mahomed Musa* v. *Aghore Kumar Ganguli, I. L. R. 42 Calc. 801,* and *Venkayyamma Rao* v. *Appa Rao, I. L. R. 39 Mad. 509,* explained and distinguished. *Per* ABDUR RAHIM, *J.*—Plaintiff was estopped by his conduct from recovering his lot in spite of the want of a registered deed of exchange. *Per* SADASIVA AYYAR and NAPIER, *JJ.* The word '*transferee*' *in s. 51 of the Transfer of Property* Act, includes also a transferee under an invalid transfer and the words 'the person causing the eviction' include a transferor under an invalid transfer. RAMANATHAN *v.* RANGANATHAN (1917)
I. L. R. 40 Mad. 1134

———— *Erection of building on another's land—acquiescence of owner's manager.* A stranger who constructs a building on the land of another without the latter's consent is liable to be ejected. *In such a case the trespasser is not* entitled to claim compensation for the building erected even though an agent of the owner of the

exclude conveyance of land. *Per* CHAPMAN, *J.*—In India the power to dispose of the landed property of a company does not usually lie in the hands of the local Manager. *Per Atkinson, J.*—A person who deals with a known agent endowed with *limited authority and powers is bound to* ascertain the scope of the agent's authority and he neglects to do so at his peril. The description of a person, in a power-of attorney, as a general agent and manager cannot override the express limitation in the deed. STOKING *v* THE TATA IRON AND STEEL COMPANY (1917) . **2 Pat. L. J. 600**

ESTOPPEL—*contd.*

III ESTOPPEL BY JUDGMENT.

See CIVIL PROCEDURE CODE, 1882, ss. 13, 44 (*b*) . **I. L. R. 35 Bom. 297**

———— *Settlement—Suit by after-born son to set aside settlement—Difference between estoppel and* res judicata. Estoppel and *res judicata* are entirely different. *Res judicata*

I. L. R. 36 Bom. 214

———— *Res judicata and estoppel distinguished. Res judicata* ousts the jurisdiction of the Court while estoppel does no more than shut the mouth of a party. Estoppel never means anything more than that a person shall not be allowed to say one thing at one time

BHAISHANKER NANABHAI *v.* MORARJI KESHAVJI & Co. (1911) . . **I. L. R. 36 Bom. 283**

———— *Equitable estoppel*—Res judicata—*Indemnity, contract of—Breach—Decree against promisee is binding on promisor.* The second defendant undertook to pay interest on certain debt of the plaintiff, and in default, agreed to in-

iff and second defendant were parties, the court finding that second defendant's plea of payment of interest was false. In a suit by the plaintiff for recovery of damages against the second defendant, on account of the latter's default in payment of the stipulated interest, the second defendant again pleaded payment: *Held*, that whether the technical rule of *res judicata* was applicable or not, the second defendant was equitably estopped, by *reason of the finding in the previous suit* from raising the contention that he had really paid the interest due to the creditor. Where there is a contract to indemnify, a decree passed against the promisee cannot be impeached by the promisor

when the Court finds in a suit honestly defended by the promise, that there has been a violation of duty by the promisor, which has entitled a third party to the damage for which the indemnity has been given. *Parker* v. *Lewis, L. R. 8 Ch. A. 1035, 1058, Mercantile Investment and General Trust Company* v. *River Plate Trust Loan, and Agency Company, [1894] 1 Ch. 578,* and *Krishnan Nambiar* v. *Kannan, I. L. R. 21 Mad. 8, referred* to. NALLAPPA *v.* VRIDHACHALA (1914)

I. L. R. 37 Mad. 270

———— *Judgment affirmed on Appeal—Second Appeal not decided on merits—"Finally decided"—British Baluchistan Regulation IX of 1896, s. 10.* The appellant, in pursuance of a deed of dissolution of partnership, executed a bond for the payment of a sum of money to the respondent. ' t- -aside

ESTOPPEL—*concld.*

III. ESTOPPEL BY JUDGMENT—*contd.*

the bond on the ground of fraudulent misrepresentation as to the amount due. The trial judge and, on appeal, the District Judge held that the alleged fraud was not established, and dismissed the suit. Upon a further appeal to the Judicial Commissioner it was held, without entering into the merits, that the appellant could not avoid the bond as he did not claim to avoid the deed. In a subsequent suit by the respondent upon the bond the appellant raised as a defence the same case of fraud: *Held,* that the issue raised by the defence was not *res judicata,* since the matter had not been "finally decided" within the meaning of s. 10 of the British Baluchistan Regulation IX of 1896. ASHGAR ALI KHAN *v.* GANESH DASS (1917) . . . **L. R. 44 I. A. 213**

ETIQUETTE AFFECTING COUNSEL.

See BAR COUNCIL, RESOLUTION OF.
I. L. R. 40 Calc. 898

See BARRISTER **I. L. R. 44 Calc. 741**

ETMAM.

———————— Etmam *in temporarily settled area, if a tenure—Enhancement of rent—Bengal Tenancy Act (VIII of 1885), ss. 7, 9. 20, 37, 191 and 192—One suit for enhancement of rent of two etmams held by same tenant—Civil Procedure Code (Act V of 1908), s. 99.* The plaintiff landlord brought one suit for enhancement in respect of two etmans in a temporarily settled area twenty years after the last proceedings for increasing the rent. In the record-of-rights the defendants were recorded as settled raiyats: *Held,* that the plaintiffs and defendants being the landlords and tenants of both *etmams* and having the same interest in each the misjoinder in bringing one suit was merely technical and did not affect the merits of the case. A temporary settlement-holder is not, by virtue of ss. 191 and 192 of the Bengal Tenancy Act, precluded from exercising the ordinary powers of a landlord under s. 7 or s. 30 of the Act. *Etmams* are tenures and therefore s. 7 applied to the enhancement. The rent of a tenure is always liable to enhancement unless the landlord has precluded himself by contract or estopped by law and the mere fact that the parties have agreed that resort may be had to the *putni* regulation to recover arrears of rent cannot mean that the rent is permanently fixed. MAKBUL ALI CHOWDHURY *v.* JOGESH CHANDRA ROY (1919) . . **13 C. W. N. 945**

EUROPEAN BRITISH SUBJECT.

———— rights of—

See JURY, RIGHT OF TRIAL BY.
I. L. R. 37 Calc. 467

———————— *Summary trial outside British India by Justice of Peace—Jurisdiction—Criminal Procedure Code (Act V of 1898), s. 530.* The orders of the Governor-General in Council regulating the powers of the Justice of Peace beyond the limits of British India confer no power on a District Magistrate to try offenders summarily under s. 260 of the Code of Criminal Procedure (Act V of 1898). *Re* JEREMIAH (1915)
I. L. R. 39 Mad. 942

EVICTION.

See BOMBAY LAND REVENUE CODE, 1879 s. 68. . . **I. L. R. 45 Bom. 920**

EVIDENCE.

See ACKNOWLEDGMENT.
I. L. R. 39 Calc. 789

See ADMISSION AND CONFESSIONS TO POLICE OFFICERS.
I. L. R. 41 Calc. 601

See ADOPTION . **I. L. R. 32 All. 104**

See AGRA TENANCY ACT (II OF 1901)—
ss. 166, 201 . **I. L. R. 34 All. 250**
s. 201 . . **I. L. R. 33 All. 799**
s. 201 (3) . **I. L. R. 32 All. 427**
APPELLATE COURT.
I. L. R. 39 Bom. 386

See CASUAL DEATH BY RASH OR NEGLIGENT ACT . **I. L. R. 39 Calc. 855**

See CHARGE . **I. L. R. 47 Calc. 154**

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See CIVIL PROCEDURE CODE, 1908, ss. 100 O. XLV, R. 27.
I. L. R. 33 All. 379
XXVI, RS. 9, 16, 17, 18.
I. L. R. 39 All. 694
O. XLI, R. 27 **I. L. R. 38 Bom. 665**

See CONSTRUCTION OF DOCUMENT.
I. L. R. 37 Mad. 480

See CONTEMPT OF COURT.
I. L. R. 41 Calc. 173

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ss. 107 AND 117
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ss. 110 (*f*), 117
I. L. R. 40 All. 372
I. L. R. 41 All. 231
s. 268 AND 537. **I. L. R. 43 All. 125**
s. 512 . . **I. L. R. 38 All. 29**
I. L. R. 41 All. 60

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I. L. R. 33 All. 257
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I. L. R. 44 Bom. 217

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I. L. R. 42 Calc. 381

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See ENDORSEMENT OF DOCUMENT.
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See HINDU LAW—CUSTOM.
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See INSOLVENT I. L. R. 46 Calc. 996
I. L. R. 47 Calc. 254

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I. L. R. 40 Calc. 367

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See LEGAL PRACTITIONER ACT XVIII OF 1879, s. 36 . I. L. R. 40 All. 153

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See OATHS ACT (X OF 1873), ss. 5, 6 AND 13. . I. L. R. 38 All. 49

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I. L. R. 36 All. 464, 471
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See PROVINCIAL INSOLVENCY ACT (III OF 1907), s. 43 (2). I. L. R. 32 All. 547

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I. L. R. 41 Calc. 806

See SECURITY FOR KEEPING THE PEACE
I. L. R. 38 All. 468

See TEISHKHANA PAPER.
I. L. R. 39 Calc. 995

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I. L. R. 39 Calc. 348

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———— recording of—

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1 Pat. L. J. 455

———— sufficiency of, to prove necessity—

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———— unregistered deed *re* property—

See SPECIFIC RELIEF ACT 1877, s. 115.

———— where witness not sworn—

See OATHS ACT (III OF 1873), ss. 5, 13.
I. L. R. 38 Mad. 550

———— **Admissibility of evidence—Family settlement**—*Evidence of settlement consisting of a joint application by the parties for mutation in respect of the property in dispute.* The brother and widow of a deceased Hindu settled a dispute between them as to the ownership of the property of the deceased by means of a joint application in the Revenue Court asking that the property should be recorded half in the name of each. This was done, and subsequently each sold the share of which he or she was recorded as owner. Thereafter, the widow sued to recover the share which had gone to her husband's brother: *Held,* that it must be presumed from the application in the mutation proceedings the recording of names by the Revenue Court in accordance with that application and the subsequent sales on the strength of that record, that the parties entered into a family arrangement, and the application presented to the Revenue Court was, therefore, not compulsorily registrable and was admissible in evidence. KOKLA *v.* PIARI LAL (1913)
I. L. R. 35 All. 502

———— **Expert in handwriting,**—*Value to be attached to evidence of—Corroboration of such evidence.* An accused should not ordinarily be convicted of forgery upon the uncorroborated testimony of a handwriting expert. The value to be attached to the evidence of handwriting experts discussed. *In re* VENKATA ROW (1913)
I. L. R. 36 Mad. 159

———— **Private knowledge of facts by Judge,**—*How far may be relied on by him—Savaram lands—Meaning of Savaram—Madras Estates Land Act (I of 1908), s. 185, construction of.* Where the Judge used knowledge gained by him from his own experience as to scarcity of land for cultivation (although his knowledge was partly derived from facts relating generally to the lands in the zamindari of Nuzvid in which the lands in suit were situated): *Held,* that the fact of which he had such knowledge was merely a fact of economical history and that he had not acted illegally in relying upon it. *Per* SUNDARA AYYAR, *J.*—A Judge is not entitled to rely on specific facts not proved by the evidence in the case but known to him personally or otherwise but he may use his general knowledge and experience in determining the credibility of evidence adduced before him and applying it to the decision of the specific facts in dispute in the case. *Per* SADASIVA AYYAR, *J.*—I think the only practical rule which can be laid down in these cases is that if a Judge knows of his own knowledge as an individual observer of a past relevent concrete, private incident, and that fact cannot be subjected to ocular proof at the time of trial (such as a person's colour, resemblance of features, appearance, behaviour, chemical experiments on the present condition of the object), and if the truth of such incidents is contested between the parties, he should mention his private knowledge of such incidents to the parties and he should refuse to be the Judge in that case, unless both the parties after he so mentions to them his said personal knowledge of that particular incident, state that they have no objection to his continuing as Judge. In the present case, the learned Judge has not gone further than to use the general knowledge which he has acquired as a past revenue officer and as a revenue Court of experience in the course of the performance of his duties in zamindari tracts; and I hold that he was entitled to use such knowledge in coming to conclusion on the facts after the consideration of the evidence let in in this case." *Per* CURIAM: The word *savaram* as applied to lands does not necessarily convey the idea of full proprietary right in the zamindar. All that is clear is that *savaram* was compensation granted to a Zamindar or Revenue officer under the Mahomedan Government. *Per* CURIAM: Where *pattas* entered into in 1897 evidenced agreements to lease operating from 1st 1898: *Held,* that s. 185 of the (Madras) Estates Lands Act I of 1908 (does not preclude the Court from taking such *pattas*into consideration, it being the date of the contract that is material in deciding whether the evidence is admissible. *Per* SUNDARA AYYAR, *J.*: The Act does not lay down any rule as to all the kinds of evidence that may be produced to prove that the land in question is private land and it cannot be held that all evidence as to leases subsequent to 1st July, 1898, is shut out altogether. *Per* SADASIVA AYYAR, *J.*—Evidence as to leases granted after 1st July, 1898, is shut out by s. 185 if the leases are sought to be used for the purpose of proving the character of the tenure of the land. LAKSHMAYYA *v.* VARADARAJA APPAROW (1913) . . . I. L. R. 36 Mad. 168

———— **Documentary evidence**—*Reversal by appellate Court of decision as to genuineness of documents—Evidence taken on commission so that first Court had not the usual advantage of seeing and hearing witness—Suit by head of family and owner of impartible raj to recover immoveable property reverting to raj on failure of objects for which it was given as maintenance.* In this appeal from the decision of the High Court in *Pateshari Partab Narain Singh* v. *Rudra Narain, I. L. R. 26 All. 528,* their Lordships of the Judicial Committee agreed with the view of the High Court that the plaintiff (respondent) was entitled to succeed so far as his claim was based on the *sipurdnama,* which, if genuine, was decisive of the case; and without dissenting from their opinion on the point of law as to the competency of the Appeallate Court under the circumstances to add a party after the period of limitation for the suit had expired, affirm-

EVIDENCE—*contd.*

the *supurd-* *the appeal.* RAIN SINGH (1910) . . . . **I. L. R. 32 All. 241**

——— **Usufructuary mortgage—Burden of proof**—*Suit for possession of mortgaged property not brought for nearly twelve years—Presumption that no consideration passed.* Where the plaintiffs, who were usufructuary mortgagees, were

on plea raised by the defendants, that no consideration had passed, that the burden of proving that consideration had passed was rightly shifted to the plaintiffs. *Achobandil* v. *Mahabir, I. L. R. 8 All. 641,* followed *Mahabir Prasad* v. *Bishan Dayal. All. Weekly Notes (1904), 163,* distinguished. BIHARI v. RAM CHANDRA (1911)

I. L. R. 33 All. 483

——— **Prosecution of witness for perjury on deposition irregularly taken**—*Evidence, irregularity in taking, under s. 360, Criminal Procedure Code (Act V of 1898)—Effect of irregularity.* Where a deposition has been read to a witness over in Court and has been admitted by him to be correct in the presence of the Judge, the fact that another witness was being examined at the time is no defence to a prosecution of the deponent for giving false evidence in the deposition so read over. *Kamatchinathan Chetty* v. *Emperor I. L. R. 28 Mad. 308,* commented on. Though deposition so recorded might invalidate the conviction of the accused in the case in which the deposition was so recorded, the deponent having admitted its correctness may be properly convicted of perjury thereon. *Singiri Eradu* v. *Empress, Cr R. C. No. 453 of 1894* (*unreported*), (*II Weir's Cr Rul. 135*), distinguished. BOGRA v. EMPEROR

I. L. R. 34 Mad. 141

——— **Unstamped promissory note executed in Rampur in favour of the Nawab of Rampur**—*Suit on such note in British India—Lex loci contractus—Rampur Stamp Law, ss. 52, prov. (c), and 53.* Certain moneys having been advanced by the Nawab of Rampur, a promissory note was accepted as security in favour of "the Nawab of Rampur" and bearing no stamp. The Nawab, being examined on commission, stated:—"This debt is due to me personally, and, ordinarily speaking, a debt which is due to me is due to the State, and a debt which is due to the State is due to me: but the said amount I advanced from my own funds." According to the Stamp Law of Rampur a document executed in favour of the State did not require to be stamped: *Held,* that the *lex loci contractus* had to be applied and that the note in question not being drawn in favour of the Nawab in his private capacity did not require to be stamped. AMINA BEGAM v. THE NAWAB OF RAMPUR (1911)

I. L. R. 33 All. 571

be cited as a witness—Non-production of account books with ... *Unsatisfact* ... which the ... tion had ta... *plaintiff (respondent) to prove that he had been*

adopted, the Judicial Committee held that he had *not discharged the onus upon him* and reversed the decision of the High Court mainly on the ground that due weight did not appear to have been given to the conduct of the plaintiff, the improbability and inconsistency of the story told on his behalf, his absence from the witness box, and the non-production of all books and documents. Having

connected with this ceremony (of adoption) was entered covered the plaintiff's case with suspicion. No effort was shown to have been made by either side to procure their production; no search for them or loss of them was proved; no explanation why they were not forthcoming The species of advocacy tolerated by the Courts of Law in the United Provinces of India in which the unworthy *effort of the advocate on each side is to force his* opponent to produce his own client in order that he himself may have the opportunity of cross-examining that client, with the result that should the opponent refuse to be led into this trap, the parties, the principal witnesses, are never examined at all, condemned by the Judicial Committee as a vicious practice unworthy of a high toned or reputable system of advocacy, as embarrassing and perplexing judicial investigation, and, it was to be feared, too often enabling fraud, falsehood, or chicane to baffle justice. *Quære* Whether the existence of such a system formed a ground for not drawing the ordinary presumption to *the detriment of the* plaintiff from his failure to go into the witness box and support his case *Semble* It does not. LAL KUNWAR v CHIRANJI LAL (1909)

I. L. R. 32 All. 104

——— **Representative in interest**—*Evidence Act, s. 122.* Where there is no "representative in interest" who can consent under s 122 of the Evidence Act to the disclosure of communications made by a deceased husband to

"Representative in interest" for the purpose of giving such consent. NAWAB HOWLADAR v. EMPEROR . . . **I. L. R. 40 Calc. 891**

——— **Birth-day books, entries in**—*If admissible to prove age—Husband's evidence as to wife's age, admissibility and value of—Affidavit by husband, before question litigated, as to wife's age how far admissible.* Where the evidence showed a practice to make entries of dates of births in books kept for the purpose of obtaining the opinion of astrologers as to good or ill fortune: *Held,* that under the Straits Settlements Ordinance No. 3 of 1893, the provisions of which in this respect are

showed that he had sworn to the same date before the question arose was for that purpose admissible in evidence. CHUAH HOOI GNOH NEOH v. KHAW SIM BEE (1915) . . . **19 C. W. N. 787**

——— **Disbelief of greater part of the evidence of the prosecution witnesses—Convic-**

EVIDENCE—*contd.*

tion on the residue—Propriety of the conviction—Practice. When the prosecution witnesses are found to be untruthful as to the greater part of their evidence, it would be dangerous to convict the accused on the residue without corroboration. HARI KRISHNA *v.* EMPEROR (1914).

I. L. R. 42 Calc. 784

———— **Evidence taken by a Court without jurisdiction**—*Effect of consent to treat it as evidence, if relevant.* Consent or want of objection to the reception of evidence which is irrelevant cannot make the evidence relevant, but consent or want of objection to the wrong manner in which relevant evidence should be brought on record of the suit disentitles parties from objecting to such evidence in a Court of Appeal. *Miller* v. *Madho Dass, I. L. R. 19 All. 76, 92,* followed. The fact that it was evidence taken previously by a Court which was held to have had no jurisdiction to try the case and take the evidence and that it was consented to be treated as evidence does not affect the validity of the consent. *Quære:* Whether in a case falling under s. 33 of the Evidence Act, evidence recorded by a Court can be regarded as not given in a judicial proceeding on the mere ground that the decree of the Court was subsequently set aside for defect of jurisdiction. SRI RAJAH PRAKASARAYANIM GARU *v.* VENKATA RAO (1912) . . . **I. L. R. 38 Mad. 160**

———— **Mortgage**—*Recital of Receipt of consideration—Recital admissible as against representatives of original mortgagor. Held,* that the admission of the receipt of consideration contained in a mortgage deed is admissible in evidence against the representatives in interest of the original mortgagors. *Brajesware Peshakar* v. *Budhanuddi, I. L. R. 6 Calc. 268, Nawal Kunwar* v. *Bakhtawar Singh, 10 All. L. J. 390,* and *Abdul Majid* v. *Mahbub Ali, F. A. No. 129 of 1911,* followed. *Manohar Singh* v. *Sumirta Kuar, I. L. R. 17 All. 428,* not followed. *Bisheshwar Dayal* v. *Harbans Sahoy, 6 C. L. J. 659, Ghurphekni* v. *Permeshwar Dayal, 5 C. L. J. 653,* and *Rahim Jan Bibi* v. *Iman Jan, 14 C. L. J. 173,* doubted. BIHARI LAL *v.* MAKHDUM BAKSH (1913) . . . . **I. L. R. 35 All. 194**

———— **Handwriting, comparison of**—*Admissibility of intercepted letter written by the accused relating to the importation of contraband cocaine, the subject of the charge—Admissibility of intercepted letters addressed to the accused in order to prove identity with the sender of a telegram relevant to the charge—"Import into Bengal," meaning of—Seizure of cocaine in the Custom House before clearance—Evidence Act (I of 1872), s. 11—Bengal Excise Act (Ben. V of 1909), ss. 2 (12), 46 (a) and 61.* A letter written by an accused, when self-disserving, is *primâ facie* evidence against him if it relates distinctly to a relevant point. It is not necessary that it should be signed; it is enough if it is traced to the writer, and it is admissible though it may have been intercepted or surreptitiously detained and opened. *Rex* v. *Derrington, 2 C. & P. 418,* referred to. An unsigned letter, proved to have been written by the accused addressed to a firm in London, which had shipped certain contraband cocaine which the accused was charged with importing into Bengal, is admissible in evidence, though intercepted under the order of the Magistrate at the Post Office during the course of transit. A letter written by the exporter of certain contraband cocaine, the subject of the charge against the accused, containing a reference to a telegram signed in a different name but bearing the same business address as that of the accused, is relevant under s. 11 of the Evidence Act as showing that the accused was the sender of the telegram, though the letter was intercepted at the Post Office under an order of the Magistrate before delivery. *Queen* v. *Cooper, 1 Q. B. D. 19,* approved. Although an excisable article may be actually within the geographical limits of Bengal, it cannot be said to have been brought into Bengal, within the meaning of s. 2 (*12*) of the Bengal Excise Act if it is intercepted at the Custom House, and the offence in such a case is not one of importing but of attempting to import under s. 61 of the Act read with s. 46(*a*). BOOTH *v.* EMPEROR (1913)

I. L. R. 41 Calc. 545

———— **Date of Birth—Family Record**—*Admissibiliy—Illustrations to Statue—Straits Settlements Ordnance III, of 1893, and Indian Evidence Act (I of 1872), s. 32, sub-s. (5) and Illustration (l).* In an action in the Straits Settlements to recover the amount due upon certain mortgages the defendant pleaded that he was an infant when he executed them. As evidence in support of this plea there was tendered at the trial an entry recording the date of the defendant's birth made by the defendant's deceased father in a book in which he made similar entries with regard to his family: *Held,* that under the Straits Settlements Evidence Ordinance, 1893, s. 32, sub-s. (*5*), and having regard to illustration (*l*) to that section, the entry was admissible in evidence. Illustrations appended to sections of a Statute should be accepted, if that can be done, as being of relevance and value in construing the text; they should be rejected as repugnant to the section only as the last resort of construction. MAHOMED SYEDOL ARIFFIN *v.* YEOH OOI GARK.

L. R. 43 I. A. 256

———— **Secondary evidence**—*Certified copy of petition of compromise made in 1857—Record of proceedings destroyed in the Mutiny—Evidence to establish mortgage in suit for redemption of mortgage not made in writing—Stamp—Bengal Regulation X of 1829—Objection that certified copy is insuficiently stamped—Petition treated as document creating mortgage.* In a suit for the redemption of a usufructuary mortgage alleged to have been created in 1857, the document on which the plaintiffs relied to establish the mortgage was a certified copy of a petition of compromise filed in Court on the 1st of April, 1857. The record of the proceedings was admittedly destroyed in the Mutiny of that year. The document, which was admitted in evidence by the Subordinate Judge, recited the terms on which the dispute was settled, amongst them being the agreement relating to the mortgage and an endorsement on it, after reciting that "the pleaders for the parties filed the compromise in the presence of their respective clients, and verified and admitted all the conditions laid down therein" ordered that "the compromise be placed on the record, and the case be put up to-morrow for final disposal." Then followed the date and the signature of the Zillah Judge in English. The certified copy was on the 28th of April, 1857, issued to the pleader acting for the predecessors of the plaintiffs. It bore a stamp of one rupee. The defence was that the contract was not enforceable as the document was not properly stamped. The Subordinate Judge overruled the

EVIDENCE—*contd.*

objection and decreed the suit The District Judge held that the copy was required by article 20 of Regulation X of 1829, to bear a stamp of the same value as the original compromise; that the original bore a stamp of one rupee only, but require a stamp of ten rupees, and as it was

(affirming that decision), that the mortgage was made verbally and was valid according to the law then in force, and it was notified to the Court as part of the settlement. The present suit was not based on any agreement contained in the petition, but on a contract made outside and recited in it to enable the Court to make a decree in accordance with the settlement. If the Judge did so, the defendants' objections fell to the ground, and, *whether he did or not, the suit based* on the agreement made independently of and before the petition was filed in Court was clearly maintainable. If, however, the petition was treated as the document creating the mortgage it might rightly be presumed that the officer before whom it was presented satisfied himself that it was properly stamped. No inference *could be drawn from the fact that the copy bore*

I. L. R. 38 All. 494

———— **Conversation between defendant and plaintiff's pleader**—*When suit in contemplation, if admissible in evidence—Admission made by one defendant evidence against all others—Evidence Act (I of 1872), ss. 18, 23.* In a suit for rent, there was a talk of settlement between the plaintiff's pleader and one of the defendants when the suit was about to be instituted. *Held*, that the mere fact of the conversation taking place when the parties were contemplating a suit

Lawson, (1830) Moo. & M. 447n, Nicholson v. *Smith, 3 Starkie 128, Harding* v. *Jones, (1835) T. & G. 135,* and *Jorden* v. *Money, 5 H. L. C. 185,* relied on. *Mohabeer Singh* v. *Dhujjoo Singh, 20 W. R. 172,* discussed. When several persons

the other defendants, whether they be all jointly suing or sued, provided that the admission relates to the subject-matter in dispute and be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered. *Kowsulliah Sundari Dasi* v. *Mukta Sundari Dasi, I. L. R. 11 Calc. 588, Chalho Singh* v. *Jharo Singh, I. L. R. 39 Calc. 995,* and *Ahimsa Bibi* v. *Abdul Kader Saheb I. L. R. 25 Mad. 26,* referred to. *Kali Kishore Chowdhury* v. *Gopi Mohan Roy Chowdhury, 2 C. W. N. 166,* distinguished. MEAJAN MATBAR v. ALIMUDDI MIA (1916) . **I. L. R. 44 Calc. 130**

EVIDENCE—*contd.*

———— **Conveyance—Intention to Mortgage**—*Third-party owner—Notice—Evidence Act (I of 1872), s. 92.* As between the parties to an absolute conveyance, s. 92 of the Evidence Act *(subject to its provisos)* precludes the *giving of* oral evidence to prove that the transaction was

the transaction. *Semble*: that a claim by the

v. *Subbaraju, I. L. R. 25 Mad 7, Maung Bin* v. *Ma Hlaing, 3 L. B. R. 100,* and *Datloo valad Tataram* v. *Chandra Tataram, I. L. R. 30 Bom 119,* approved. *Baksu Lakshman* v. *Govinda Kanji, I. L R. 4 Bom. 594,* and other decisions, disapproved. MAUNG KYIN v. SHWE LA (1917)

L. R. 44 I. A. 236
I. L. R. 38 Calc. 892

———— **Mortgage-deed**—*Form of proof of—Evidence Act (I of 1892), ss. 68 to 71.* In a suit on a mortgage bond, the admission of execution by the sole mortgagor does not dispense with the necessity of complying with the provisions of s. 68 of the Evidence Act in order to prove the execution of the document as against other parties in the suit who do not admit such execution. Such a document must be proved as against them in accordance with the provisions of ss. 68, 69 and 71 of the Evidence Act. *Jogendra Nath Mukhopadhya* v. *Nitai Charan Bundopadhya, 7 C. W. N. 384,* distinguished. SATISH CHANDRA MITRA v. JOGENDRA NATH MAHALANABIS (1916) **I. L. R. 44 Calc. 345**

———— A party in possession of written evidence on a material issue is not justified in withholding it on the plea of onus of proof being on his opponent. T. S. MURUGESAM v. MANIKAVASAKA (1917) . **21 C. W. N. 761**

———— **Relevancy of judgment**—*Trial of accused for criminal breach of trust of certain amounts—Judgment in a civil case between the parties as to the amounts—Admissibility of the judgment into the criminal proceedings.* The applicant was prosecuted for criminal breach of trust with reference to certain items. There was a civil suit between the complainant and the applicant regarding items which included the items involved in the criminal case. The civil suit was decided in applicant's favour. He thereupon applied to admit the judgment in evidence in the criminal case, and on the strength of it prayed for an order of discharge. The Magistrate having refused to admit it in evidence the applicant applied to the High Court. *Held*, that the judgment of the Civil Court was admissible in evidence, inasmuch

I. L. R. 41 Bom. 1

———— **Unregistered deed**—*Admissibility of deed for collateral purposes—Joint owners—Adverse possession.* One of two brothers

EVIDENCE—*contd.*

joint owners of certain immovable property, executed a deed of relinquishment in favour of the other. The deed was never registered, but the brother in whose favour it was made remained in possession of the entire property. *Held*, that the deed of relinquishment was admissible in evidence to prove the nature of the occupant's possession, and that there was no legal impossibility about one co-owner claiming adverse possession as against the other. JHAMPLU *v.* KUTRAMANI (1917) . . **I. L. R. 39 All. 696**

———— *Evidence Act (I of 1872), s. 92—Evidence of acts and conduct of parties to deeds showing that they were mortgages when in form they were absolute transfers—Fraudulent dealing with property which the parties knew belonged to a third person not a party to deeds.* The language of s. 92 of the Evidence Act, 1872, with regard to a "contract, grant or disposition reduced to writing," in terms applies, and applies alone; "as between the parties to any such instrument, or their representatives in interest." Wherever, accordingly, evidence is tendered as to a transaction with a third party, it is not governed by the section or by the rule of evidence which it contains, and in such a case, therefore, the ordinary rules of equity and good conscience come into play unhampered by the statutory restrictions. The principle of equity, which are universal, forbid a person to deal with property which he knows he holds on security, and not in actual ownership. In this case both the grantor and grantee in transactions by deed regarding certain land were shown by the evidence to have dealt with it with the knowledge that it belonged to a third person who was not a "party to the deeds or a representative in interest of a party" to them. It was alleged that the deeds, though in form absolute transfers of the property, were intended to be only mortgages or transfers of mortgages. *Held*, that s. 92 of the Evidence Act was no bar to the admission of evidence to show what was the true nature of the transactions; it did not prevent fraudulent dealing with a third person's property. Evidence as to that third party's rights is admissible, and, if admissible, is most relevant. The series of cases cited in the judgment, of which *Baksu Lakshman* v. *Govinda Kanji, I. L. R. 4 Bom. 594*, is an example, in which it has been decided that, notwithstanding the terms of s. 92, evidence is admissible to show the acts and conduct of the parties to such deeds as inconsistent with the absolute transfer of the property, and only consistent with the true nature of the transaction having been one of mortgage or transfer of mortgage, ceased to have any binding authority after the decision by the Board in *Balkishen Das* v. *Legge, I. L. R. 22 All. 149; L. R. 27 I. A. 58*, in which it was held that oral evidence was not admissible for the purpose of ascertaining the intention of parties to written documents; and that the cases in the English Court of Chancery had no application to the law of India as laid down in the Acts of the Indian Legislature. *Achutaramaraju* v. *Subbaraju, I. L. R. 25 Mad. 7, Maung Bin* v. *Ma Hlaing, 3 L. B. Rul. 100*, and *Dattoo valad Totaram* v. *Ram Chandra Totaram, I. L. R. 30 Bom. 119*, referred to, as being cases in which the judgment of the Board in *Balkishen Das* v. *Legge, I. L. R. 22 All. 149, L. R. 27 I. A. 58*, had been rightly followed and applied. MAUNG KYIN *v.* MA SHWE LA (1917).
I. L. R. 45 Calc. 320

EVIDENCE—*contd.*

———— **Probability**—*considerations of, if and when may outweigh positive evidence, when some found untrustworthy—Admission in deed to be taken as* primâ facie *true.* Where some of the verbal evidence was untrustworthy whilst the documents recorded a state of affairs which was often hard to reconcile with probabilities. *Held*, that unless the facts evidenced by documentary and oral testimony were so much at variance with known conditions as to be incapable of reasonable explanation, it was to those facts, and those facts alone, that the Court must trust to reach a safe conclusion upon the matter in controversy. A statement in a document should *primâ facie* be accepted as true as against the executant unless it can be shown by independent evidence to be false. IRSHAD ALI *v.* KARIMAN (1917) . **22 C. W. N. 530**

———— **Statement in wajib-ul-arz**—*Suit to recover 'parjot.'* Plaintiff sued as owner of the *abadi* of a village to recover a certain number of maunds of cotton seed from the defendants who were banias having shops in the said *abadi*, and claim was based mainly upon an entry in a wajib-ul-arz framed some fifty years before suit, to the effect that tenants living in the village did not pay "*kiraya*"—(rent of a house) but '*parjot*' (ground-rent), which, for banias, was one maund of cotton seed a year for each shop. *Held*, that the entry in the wajib-ul-arz was reliable evidence of the liability of the defendants to pay '*parjot*' to the zemindar in the manner described, and that the use of the word indicated that the origin of the payment was an agreement between the inhabitants of the *abadi* and the zemindar rather than a custom. MUHAMMAD FAIYAZ ALI KHAN *v.* BIHARI (1917) . **I. L. R. 40 All. 56**

———— **Horoscope**—*Produced in proof of plaintiff's age—Document not entered in list as required by O. VII, r. 14, of the Civil Procedure Code, 1908—Refreshing memory of witness by document written by him at time of plaintiff's birth—Limitation Act, 1908, s. 7; Sch. I, Art. 126.* A question of whether or not a suit was barred by limitation under s. 7 and art. 126 of the Limitation Act, 1908, depended on the age of the plaintiff. One of the witnesses produced a horoscope which had not been entered in the list of documents as required by O. VII, r. 14, of the Code of Civil Procedure, 1908, and on an objection by the defendant, was rejected by the Trial Judge as inadmissible in evidence. *Held*, that it was wrongly rejected; the horoscope was not a document to be relied upon as a probative document in itself, but it was a record made by the witness at the time to which he was entitled to refer for the purpose of refreshing his memory and it was therefore admissible. BANWARI LAL *v.* MAHESH (1918) . . . . **L. R. 45 I. A. 284**
I. L. R. 41 All. 63

———— **Certified copies of chittas and map**—*Relating to partition under Reg. XIX of 1814, if admissible in evidence—Evidence Act (I of 1872), s. 35.* The plaintiffs' suit for ejectment related to a tank claimed as appertaining to a certain estate which, and three other revenue-paying estates, came in 1852 under the operation of Reg. IX of 1814 for partition of common lands. The lower Appellate Court relied on certified copies of certain *chittas* and a map kept in the Collectorate. The map was authenticated by a Deputy Collector but the *chittas* were

EVIDENCE—*contd.*

not signed: *Held*, that *primâ facie* the papers appeared to be record of the partition which was in fact made in a proceeding between the predecessors-in-interest of the parties. If so, the certified copies produced were good and admissible evidence, quite apart from anything in s. 35 of the Evidence Act. KHETRA NATH MANDAL *v.* MAHAMMAD ALLA RAKHA (1918) **23 C. W. N. 48**

———— Evidence of subsequent similar but unconnected transaction—*Evidence Act (I of 1872), ss. 9, 11, 14, 15, 167—Improper reception of evidence at the trial—Power of the High Court on review to examine residue of the evidence and to decide the case finally thereon—Power to order a new trial—Proper mode of dealing with the evidence on review of the case in trials by Jury—Court not to substitute its own finding—Evidence improperly admitted of a character to influence the Jury—Letters Patent, 1865, cl. 26—Procedure—Right of prisoner's counsel to begin on reference under cl. 25, Letters Patent—Advisability of separate trial when evidence clearly inadmissible on one of the charges, though admissible as to the rest, and likely to effect verdict on such charge.* Where *P* introduced himself as a Raja's or Zamindar's son to a prostitute who passed into his keeping, and he then introduced *G* as his *durwan*, and both afterwards visited her house till the night of the 9th December 1914, when she was found next morning to have been murdered and robbed, and the accused were tried on charges of murder, conspiracy to rob, theft, and abetment of each other in the commission of the theft and murder:—*Held*, by the majority of the Full Bench (CHAUDHURI, *J., dissenting*), that evidence that *P* had similarly introduced himself as a wealthy Babu, *successively, in 1915 and 1918, to three other* prostitutes, who each became his mistress, that he then introduced *G* as his *durwan*, that both visited the women and suddenly disappeared, and that their disappearance was followed by *discovery, by the women, in each case, of the loss* of their money or ornaments, was not admissible under s. 9, 14 or 15 of the Evidence Act. *Held*, by the majority (CHAUDHURI, *J., dissenting*), that s. 15 was not applicable, as there was no question of the acts of murder and theft being accidental or intentional or done with a particular knowledge or intent, but that they were plainly intentional. *Per* MOOKERJEE, *J.*, that s. 14 was also not applicable, as the evidence of the subsequent occurrences did not show the state of mind of the accused towards the murdered woman. *Per* MOOKERJEE, *J.*, The first *Explanation* and *Illus.* (*i*), (*j*) and (*o*) further clearly excluded such evidence. *Empress* v. *Vyapoory Moodelair, I. L. R. 6 Calc. 655, Baharuddin Mandal* v. *Emperor, 18 C. L. J. 578, Emperor* v. *Abdul Wahid Khan, I. L. R. 34 All. 93, Emperor* v. *Debendra Prasad, I. L. R. 36 Calc. 573, Amrita Lal Hazra* v. *Emperor, I. L. R. 42 Calc. 957*, relied on *Makin* v. *Att.-Gen.* [*1894*] *A. C. 57, Rex* v. *Ball*, [*1911*] *A. C. 47* [reversing *Rex* v. *Ball, 5 Cr. App. R. 238*], *Rex.* v. *Smith, 11 Cr. App. R. 229. Rex* v. *Bond* [*1906*] *2 K. B. 389, Rex* v. *Thompson.*[*1917*] *2 K. B. 630, Thompson* v. *Rex* [*1918*], *A. C. 221, Rex* v. *Rodley*, [*1913*] *3 K. B. 468, Rex* v. *Ellis, 5 Cr. App. R. 41, Rex* v. *Fisher*, [*1910*] *1 K. B. 149, Rex* v. *Mason, 111 L. T. 336, Rex* v. *Baird, 84 L. J. K. B. 1785*, and *Perkins* v. *Jeffer*, [*1915*] *2 K. B. 702*, referred to. *Held*, by the majority (CHAUDHURI, *J., dissenting*), that s. 9 did not apply for the purpose of proving identity, as the murder and theft took place in December 1914 and the subsequent incidents in 1915 and 1918. *Per* CURIAM. Evidence of the subsequent incidents was *not admissible under* s. 11 *Per* MOOKERJEE, *J.* S. 11 was not intended to have a meaning co-extensive with its very wide terms, as is possibly indicated by the fact that the *Illustrations* do not go beyond the cases familiar in the English Law of Evidence. *Reg.* [illegible] *1 Calc. 207, Imperatrix* v. *Pitambar Jina, I. L. R. 2 Bom. 61, Queen-Empress* v. *O'Hara, I. L. R. 17 Calc. 642, Emperor* v. *Narayan Raghunath Patki, I. L. R. 32 Bom. 111*, and *Emperor* v. *Fateh Chand Agarwalla, I. L. R. 44 Calc. 477*, followed. [illegible] ruling in *Subrahmania Ayar* v. *King-Emperor, I. L. R. 25 Mad. 61, has not overruled this view.* S. 167 of the Evidence Act applies to civil and criminal cases, and makes it incumbent on the Court to i[illegible] the evidenc[illegible] evidence to [illegible] v. *Navroji* [illegible] *Empress* v. [illegible] *Calc. 207,* [illegible] *2 Bom. 61* [illegible] ably influenced the minds of the jury, and whether it was reasonably certain that the jury *would*, not *might*, have acted on the unobjectionable evidence if the wrongly admitted evidence had not also been presented to them. Where the inadmissible evidence was of such character, and the [illegible] he majority [illegible] *Makin* v. [illegible] *rtrand, L. R.* [illegible] *pp. R. 236,* [illegible] *x* v. *Rodley,* [*1913*] *3 K. B. 468*, and *Rex* v. *Norton*, [*1910*] *2 K. B. 496*, referred to. At the hearing of a reference, under cl. 25 of the Letters Patent, the counsel for the prisoners begins and has a reply: *Reg.* v. *Inhabitants of Gate Fulford, 1 D. & B. 74. Per* SANDERSON, *C. J.* and MUKHERJEE, *J.* Where, on a trial for offences including murder and theft, certain evidence objected to was admittedly irrelevant on the charge of murder and the jury would have been influenced thereby in their verdict on such charge, the offence of murder should have been separately tried. *Per* MOOKERJEE, *J.* The question of the admissibility of evidence must be determined with reference to the provisions of the Indian Evidence Act, and not the English Law. *Lekraj Kuar* v. *Mahpal*

EVIDENCE—*concld.*

Singh, I. L. R. 5 Calc. 744, Empress v. *Ashootosh Chukerbutty, I. L. R. 4 Calc. 483, per* JACKSON, *J., Queen-Empress* v. *Abdullah, I. L. R. 7 All. 385, Muhammad Allahabad Khan* v. *Muhammad Ismail Khan, I. L. R. 10 All. 289, Collector of Gorakpur* v. *Palakhdhari Singh, I. L. R. 12 All. 1,* and *Imperatrix* v. *Pitambar Jina, I. L. R. 2 Bom. 61* referred to. EMPEROR *v.* PANCHU DAS (1920)

I. L. R. 47 Calc. 671

EVIDENCE ACT (I OF 1872).

———— s. 2—*Scope of act.* Section 7 of the Statute of frauds never applied to India and even if it had it was wholly repealed by the Evidence Act. SIR DINSHAW M. PETIT AND OTHERS *v.* SIR JAMSETJI JIJIBHOY AND OTHERS

I. L. R. 33 Bom. 509

———— **ss. 2, 5, 9—15, 167—**

See LETTERS PATENT, CL. 25.

24 C. W. N. 501

———— **s. 3—**

See SANCTION FOR PROSECUTION.

I. L. R. 45 Calc. 585

———— **admission of evidence—**

Admission of evidence for one purpose in a suit is evidence for all purposes (*Per* LORD MACNAGHTEN). BANK OF BOMBAY *v.* NAND LAL THACKARSEY DAS . . . **I. L. R. 37 Bom. 122**

———— **ss. 3, 10, 45, 101, 135—**

See PROBATE . **I. L. R. 39 Calc. 245**

———— **ss. 3, 74(2)—**

See CONTEMPT OF COURT.

I. L. R. 45 Calc. 169

———— **ss. 3, 114, ill. (g), 125—**

See LIMITATION. **I. L. R. 40 Calc. 898**

———— **s. 4—**

See AGRA TENANCY ACT (II OF 1901), s. 201 (3) . **I. L. R. 32 All. 427**
I. L. R. 33 All. 799

See LAND ACQUISITION.

I. L. R. 48 Calc. 916

———— **ss. 4 and 90**—*Ancient document—Practice as to mode of proof—Whether document presumed to be genuine by the First Court can be rejected in appeal—Practice—Appeal, from preliminary decree after passing of final decree.* According to the practice prevailing in this Presidency when *primâ facie* evidence of custody and of the date of a document purporting to be 30 years old is given the Court generally marks the document on the footing that there is sufficient evidence to justify its being marked as an exhibit at that stage. It is only subsequently that the opponent exercises his right of adducing evidence of circumstances which entitle him to say that the presumption under s. 90 of the Evidence Act should not be drawn with respect to the document. The Court generally arrives at its conclusion on the matter after the evidence on both sides has been given. An Appellate Court is entitled to reject a document presumed to be genuine by the Original Court under s. 90 of the Evidence Act, without calling for further proof. *Shafiq-un-nissa* v. *Shaban Ali Khan, I. L. R. 26 All. 581,* and *Srinath Patra* v. *Kuloda Prosad Banerjee, 2 C. L. J. 592,* referred to. It is competent to a party to prefer an appeal against the preliminary decree in a redemption suit, though

EVIDENCE ACT (I OF 1872)—*contd.*

———— **ss. 4 and 90**—*concld.*

before the appeal is presented the final decree has been passed. *Lakshmi* v. *Mani Devi, 21 Mad. L. J. 1063,* followed. *Janaki Nath Ray Chowdhury* v. *Promotha Nath Ray Chowdhury, 15 C. W. N. 830,* referred to. RAMUVIEN *v.* VEERAPPUDAYAN (1914) . . . **I. L. R. 37 Mad. 455**

———— **ss. 5, 32 and 167**—*Irrelevant evidence admitted without objection, effect of.* Mere omission to object to a document which is not in itself admissible as evidence does not constitute such document evidence so as to be available to either side at the trial. It is the duty of the court, apart from any objection by the parties or their pleaders, to exclude all irrelevant evidence. Where the lower court has based its decision partly on irrelevant evidence the High Court will not in second appeal decide whether the other evidence in the case is sufficient to support the findings arrived at, and s. 167 is not a bar to such a case being remanded. MUSSAMMAT SUMITRA KUER *v.* BAM KAIR CHOWBEY . . . **5 Pat. L. J. 410**

———— **ss. 9, 11**—*Omission of entry of payment in account book, if relevant.* The absence of an entry of payment in an account book is a relevant fact not under s. 34 but under ss. 9 and 11 of the Indian Evidence Act. GANGARAM AGARWALA *v.* LACHIRAM KISHEN DYAL (1914)

19 C. W. N. 611

———— **ss. 9, 11, 14, 15, 167—**

See EVIDENCE . **I. L. R. 47 Calc. 671**

———— **s. 10—**

See PROBATE. **I. L. R. 39 Calc. 295**

See SECURITY FOR GOOD BEHAVIOUR.

I. L. R. 46 Calc. 215

———— *Documents in possession of one conspirator if admissible to prove complicity of another—Independent proof of complicity if necessary.* What has to be established under s. 10 of the Evidence Act to make documents found in the possession of one of several persons accused of conspiracy admissible against the other accused is that there is reasonable ground to believe in the existence of a conspiracy among such persons. It is not necessary for this purpose to establish by independent evidence that they were conspirators. *Queen Caroline's Case, 2 B. & B. 302, R.* v. *Jacobs, 1 Cox, C. C. 173, R.* v. *Duffield, 5 Cox, C. C. 404, 434,* referred to. PULIN BEHARI DAS *v.* KING-EMPEROR (1911)

16 C. W. N. 1105

———— **ss. 10, 14, 15, 54, 135, 143, 154—**

See CHARGE . **I. L. R. 42 Calc. 957**

———— **ss. 10, 30—**

See CONSPIRACY TO WAGE WAR.

I. L. R. 38 Calc. 169

See HABEAS CORPUS.

I. L. R. 39 Calc. 164

———— **ss. 10, 30, 54—**

See WITNESS . **I. L. R. 46 Calc. 700**

———— **s. 11—**

See CUSTOM (RELIGIOUS INSTITUTION).

I. L. R. 1 Lah. 540

See EVIDENCE . **I. L. R. 41 Calc. 545**

See SECURITY FOR GOOD BEHAVIOUR.

I. L. R. 37 Calc. 91

EVIDENCE ACT (I OF 1872)—*contd.*

——— **s. 11**—*concld.*

——— *Scope of—Statement by wounded person on day of occurrence, if admissible—Trial by jury—Acquittal by High Court on the ground of misdirection.* The accused was charged with having caused grievous hurt to one of his wives and killed another. The wounded woman on the day of occurrence on her arrival in hospital made a statement to a Magistrate to the effect that it was the accused who had attacked herself and her co-wife. The statement was admitted and placed before the jury: *Held,* that the mere fact that the woman made a statement had no bearing on the main facts in issue and s. 11 of the Evidence Act does not justify the admission of the contents of the statement. KING-EMPEROR *v.* ABDUL SHEIKH (1919) . **23 C. W. N. 933**

——— **ss. 11, 14, 15**—*Evidence—Admissibility of evidence of similar but unconnected transactions in which the accused were concerned—Penal Code (Act XLV of 1860), s 420—Cheating. S, Y* and *W* were charged with having cheated *B* and *P* and thereby obtained from them various sums of money. The mode adopted by the accused was as follows: *S*, representing himself to be a broker, introduced *B* and *P*, who wanted to borrow money, to *Y* and *W*, as being the agents of a wealthy lady of the name of Abkari Begam, and a story was told them that Abkari

a ready money

very favourable

menced, and ex-

d, in the course

of which *B* and *P* were induced to part with various small sums of money for preliminary expenses. Ultimately the negotiations fell through, and it was discovered that they had been fraudulent from beginning to end. The accused's defence was, broadly, that, while admitting that *B* and *P* had paid them the sums of money in questions, the payments were made in circumstances totally different from those alleged by the prosecution. They denied that they had ever said that there was such a person as Akbari Begam, and, *a fortiori*, that they had ever represented themselves as her servants or agents. *Held,* that on the case for the prosecution evidence was admissible that the same three persons had on other occasions proposals made of much the same kind to other persons to whom they told a story similar in all essential particulars down to the name of the proposed lender of the money. *King-Emperor* v. *Abdul Wahid Khan, I. L. R. 34 All. 93,* and *Emperor* v. *Debendra Prosad, I. L. R. 36 Calc. 573,* referred to. EMPEROR *v.* YAKUB ALI (1916) **I. L. R. 39 All. 273**

——— **ss. 11, 13, 45**—

See CUSTOM. **I. L. R. 1 Lah. 540**

——— **ss. 11, 13, 40—45**—

See TENANCY ACT. **24 C. W. N. 378**

——— **ss. 11, 32**—*Evidence—Admissibility—Statements of deceased persons. Held,* that if the terms of a deposition made by a person since deceased do not fall within the provisions of s. 32 of the Indian Evidence Act, 1872, the provisions of s. 11 of the Act will not avail to make such deposition evidence. BELA RANI *v.* MAHABIR SINGH (1912) . . **I. L. R. 34 All. 341**

EVIDENCE ACT (I OF 1872)—*contd.*

——— **s. 13**—

1. ——— *Evidence—Admissibility of document affecting the right of a person, who is no party to it, against such person.* The plaintiff sued for a five annas share in the *maliki* right in a certain land. His case was that his mother's father owned a ten annas share, half of which he gave to the plaintiff and the other half to the plaintiff's mother. The contesting defendant who was the brother of the plaintiff's grandfather contended that he and his brother owned the ten annas in equal shares and the

acting through his father in favour of the contesting defendant in which it was recited that the gift of ten annas by the plaintiff's grandfather was a mistake and that he was entitled to deal, and intended to deal, with five annas only and the other a *patta* executed by the plaintiff's mother and father in which they stated that a five annas share in the property belonged to the contesting defendant. *Held,* that, both the documents

ALI *v* SYED REJAN ALI (1913) **19 C. W. N. 468**

2. ——— *Suit for rent by co-sharer landlord—Decree for rent obtained by another co-sharer, admissibility of, to prove holding and rent.* The plaintiff, a co-sharer landlord, sued the defendant for his share of rent in respect of a certain holding. He produced a decree for rent previously obtained by another co-sharer landlord against the defendant for his share of rent in respect of the same holding. *Held,* that whether the decree was by a predecessor of the plaintiff or by a stranger, it was admissible under s. 13 of the Evidence Act for the purpose of showing that the defendant held the holding at the particular rent. BYOMKESH CHAKRAVARTI *v.* JAGADISWAR RAI (1917) . **22 C. W. N. 304**

3. ——— *Judgment not inter partes admissibility of, for proving admission by defendant—Second appeal—Using document admissible for one purpose as evidence for another* The plaintiff sued for recovery of his share in the

relying on a certain passage therein as proving an admission by the defendant decided in favour of the plaintiff: *Held,* that the judgment was inadmissible in evidence for the purpose of proving the alleged admission and the error committed by the Subordinate Judge in using the judgment for a purpose for which it cannot be legitimately used vitiated his decree. That the proper mode of proving any admission made by the defendant in the previous suit was by producing a copy of the defendant's deposition or by putting in the witness-box some one who actually heard what the defendant said. DEBENDRA NATH HALDER *v.* BIRESHWAR HALDER (1914) **20 C. W. N. 648**

——— **ss. 13, 42, 43**—*Judgment not inter partes—Admissibility in evidence—Recitals in*

EVIDENCE ACT (I OF 1872)—*contd.*

———— ss. 13, 42, 43—*concld.*

judgment if admissible. It is well settled that although a judgment not *inter partes,* may be used in evidence in certain circumstances, as a fact in issue, or as a relevant fact, or possible as a transaction, the recitals in the judgment cannot be used as evidence in a litigation between the parties. KASHI NATH PAL *v.* JAGAT KISHORE ACHARYA CHOWDHURY (1915) **20 C. W. N. 643**

———— ss. 14, 15—

1. ———— *Relevancy of facts showing ill-will and facts forming part of similar occurrences—Indian Penal Code (Act XLV of 1860), s. 201—Making false claim in suit.* The appellant was convicted under s. 209, Indian Penal Code, of having made false claims in three suits brought against certain persons. Two other persons besides the appellant were similarly prosecuted and convicted for bringing other false suits against the same defendants. *Held,* that evidence relating to suits brought by the appellant other than those specified in the charges was properly admitted under ss. 14 and 15 of the Evidence Act for the purpose of showing the ill-will or enmity of the appellant towards the defendants in those suits as a body, but the evidence relating to suits brought by other persons, when no case of a conspiracy between them and the appellant was alleged or established, was inadmissible. RAGHUNATH LAL *v.* KING-EMPEROR (1918) . **22 C. W. N. 494**

2. ———— *Indian Penal Code s. 415—Cheating—Evidence to show instances of cheating other than those charged inadmissible.* A person employed as a clerk in charge of the renewal of licenses for hand-carts received Rs. 2 for each such renewal, whereas he ought to have taken Rs. 1-14. He was charged with cheating, and evidence was produced showing that he had taken 2 annas in excess from persons other than those named in the charge. *Held,* that such evidence was inadmissible either under s. 14 or under s. 15 of the Evidence Act. *Emperor* v. *Debendra Prosad, I. L. R. 36 Calc. 573,* distinguished. *Empress* v. *M. J. Vyapoory Moodeliar, I. L. R. 6 Calc. 655,* referred to. EMPEROR *v.* ABDUL WAHID KHAN (1911)

I. L. R. 34 All. 93

———— ss. 14 and 54—

See CRIMINAL PROCEDURE CODE. ss. 287 and 310 . . **5 Pat. L. J. 706**

———— s. 15—

See SEDITION . **I. L. R. 38 Calc. 253**

———— ss. 17 and 21—*Joint family—Partnership—Admission of partner Evidence—Evidence Act (I of 1872), ss. 17 and 21.* An arrangement was alleged to have been made with a Hindu joint family, part of whose property consisted of a joint family business, to take in as partner the person through whom the Plaintiff claimed to have a share in the family properties: *Held,* that no such arrangements had been proved. That a statement in a will which suggests an inference as to a fact in issue cannot be proved by or on behalf of the person who made it or his representative in interest. NALAM PATTABHIRAMA RAO *v.* MANDAPILLI NARAYANA MOORTHY (P. C.) **26 C. W. N. 275**

EVIDENCE ACT (I OF 1872—*contd.*

———— s. 18—*Admission by natural guardian of minor, if evidence against him in respect of interest not derived from guardian.* In a suit by Hindu reversioners for recovery of immoveable property left by their maternal grandfather and sold by their maternal grandmother for alleged necessity, the purchaser's representative adduced oral evidence to show that the widow had sold it for her husband's debts. This evidence was found by the trial Judge to be unreliable but the learned Judge, adverting to documentary evidence, chiefly relied on an affidavit which was filed in another suit and was signed by the reversioners' mothers and fathers and which contained a statement to the effect that certain other premises had been mortgaged by the widow (grandmother) for her husband's debt and that her daughters and sons-in-law had joined for protecting the reversioners' (the present plaintiffs') interest, and the Judge held that the affidavit was admissible, regarding "the parents as the guardians of the plaintiffs and as capable of making admissions against their interest on their behalf:" *Held* (on appeal), *per* JENKINS, *C. J.*, and WOODROFFE, *J.*, and affirmed by the Judicial Committee of the Privy Council, that there is nothing in the Indian Evidence Act to support the view of the learned Judge or make the affidavit relevant. That the present plaintiffs had in no sense derived their interest in the subject-matter of the suit from their parents, nor could their parents be regarded as having been expressly or impliedly authorised by them to make the admission. That when the suit was brought long after the alienation but within the period of limitation and the delay was explained as being due to the pendency of another suit and also to want of means: *Held,* that the delay did not operate to the prejudice of the plaintiffs' suit for declaration and possession. MANOKARANI DEBI *v.* HARIPADA MITTER (1914)

18 C. W. N. 718

———— ss. 18, 19—*Suit to declare property joint family property—Statement by an alleged co-sharer in a previous deposition that property not joint, if admissible against Plaintiff as admission—Community of interest, proof of.* Plaintiffs who were two out of five brothers sued to establish their right to a two-fifths share in properties which were sold in execution of a money decree against another brother *U* and purchased by the Defendant, on the allegation that the properties, when sold, were the joint family properties of the five brothers. The Defendant whose case was that the brothers were not joint at the date of the sale and that the properties were exclusively owned by *U* put in a deposition given by another brother *K* in the suit in which the money decree against *U* was passed in the course of which *K* stated that the family was not joint and the properties belonged exclusively to *U*: *Held,* that the deposition of *K* in the previous suit was not admissible as admission against the Plaintiffs. NAGENDRA NATH GHOSH *v.* LAWRENCE JUTE CO., LD.

25 C. W. N. 89

———— ss. 18, 23—

See EVIDENCE . **I. L. R. 44 Calc. 130**

———— *Conversation between one of several defendants and the plaintiff's pleader about compromise of suit, if admissible in evidence—Admission of one defendant when evidence against others.* The plaintiff sued the defendants for recovery of arrears of rent due on a lease

EVIDENCE ACT (I OF 1872)—*contd.*

———— **ss. 18, 23**—*concld.*

executed in favour of their father. The substantial defence was a plea of payment which was overruled by the Courts below. The material evidence in the case was that of the plaintiff's pleader with whom one of the defendants had *two interviews, once about a month* before the institution of the suit, when a form of settlement was suggested, namely, diminution of *interest*, and again on the day the suit was instituted, when the pleader was asked to make a compromise. *Held,* that as there was admittedly no express condition that the evidence of the interviews should not be given, and it could not be inferred from the circumstances that the parties had agreed that the evidence should not be given, the evidence could not be excluded under s. 23 of the Evidence Act. That the evidence of the plaintiff's pleader as to what had passed between him and the defendants who interviewed him for the settlement of the case, was admissible and could be used even against the defendants other than the defendant who made the admission, all of them being jointly liable to the plaintiff as the representatives in interest of their father *Per* SANDERSON, *C. J.*—That so far as the first interview was concerned the mere fact that it was contemplated between the parties that the suit was about to be instituted did not prevent the conversation as regards a settlement of the claim from being given in evidence. That the second conversation was a natural consequence of the first conversation and was not privileged. That the question whether the evidence of the interviews could be given against the defendants other than the defendants who made the admission depended upon s. 18 of the Indian Evidence Act, which enacted the principle that for making statements with reference to the joint concern or common subject of interest one partner or co-contractor is considered to be the agent of the other. *Per* MOOKERJEE, *J.*—In the absence of any express or strongly implied restriction as to confidence an offer of compromise is clearly admissible and may be material as some evidence of liability although it may not be proper to enquire into the exact terms offered. That under s. 18 of the Evidence Act an admission by one defendant may in certain circumstances be admissible in evidence as against another defendant. The principle is that when several persons are jointly interested in the subject-matter of the suit, an admission by any one of these persons is receivable not only against *himself but also against the other defendants* whether they be all jointly suing or sued, provided that the admission relates to the subject-matter in dispute and be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered. MEAJAN MATABOR *v.* ALIMUDDIN MEAN (1916) . . . . . **20 C. W. N. 1217**

———— **ss. 18, 32 (3)**—*Draft record-of-rights entry in, admissibility of—Recital in conveyance executed by some defendants, if admissible against defendants other than the executants—Reception of inadmissible evidence, if vitiates judgment arrived at independently thereof—Omission to object to irrelevant evidence, effect of—Court, if will entertain objection first taken in appeal as to improper admission of document not per se inadmissible—Ss. 155 (3), 157.* The plaintiffs sued for recovery

EVIDENCE ACT (I OF 1872)—*contd*

———— **ss. 18, 32(3)**—*concld.*

of possession of a tank on declaration of title alleging that it had been excavated by their ancestor long ago after whom it was known and it had been in their possession all along till dispossession by the defendants. The lower Appellate Court in decreeing the suit relied on (*1*) an entry in a draft record-of-rights (which was omitted in the *record finally published) that* the tank was known by the name of plaintiff's ancestor, (*2*) a recital in a conveyance of sale of an adjoining piece of land executed by some of the defendants (who at the time of the conveyance had acquired no interest in the land in suit) in favour of a *stranger to the effect that the land* was bounded by the tank known after the ancestor of the plaintiffs. The conveyance was duly proved and admitted in evidence without objection: *Held,* that the entry in the draft record-of-rights was not admissible in evidence but this did not vitiate the judgment of the lower Appellate Court which arrived at the conclusion on the merits independently of the evidence improperly admitted That the recital in the conveyance though admissible against the makers of the conveyance was not admissible as admissions against the other defendants under s 18 of the Indian Evidence Act nor was it admissible under s. 32 (*3*) of the Evidence Act, the conditions mentioned in the introductory words of the section not *having been fulfilled. That* principle which regulates the reception in evidence of an admission by one defendant against another is that when several persons are jointly interested in the subject-matter of the suit an admission of any one of these persons is receivable not only against himself but also against the other defendants whether they be all jointly suing or sued provided that the *admission relates* to the subject-matter in dispute and be made by the declarant in his character of a person jointly interested with the party against whom the evidence is tendered. The requirements of the identity in legal interest between the joint owners is of fundamental importance and the joint ownership must have existed at the time the *statement was made. That if the plaintiff* had cited the defendants who were the executants of the *kobala* as witnesses, the recital could have been received in evidence to impeach their credit under s. 155 (*3*) or to corroborate their testimony under s. 157 of the Evidence Act and was not *per se* inadmissible. That an erroneous omission to object to evidence which is irrelevant and *consequently* inadmissible under any circumstances does not make it admissible but the Court will not entertain for the first time in appeal an objection that a document which *per se* is not inadmissible in evidence has been improperly admitted in evidence. On this principle the High Court declined to set aside the judgment of the lower Appellate Court. AMBER ALI *v.* LUTFE ALI (1917) . **I. L. R. 45 Calc. 159**
21 C. W. N. 996

———— **s. 21**—

See s. 10 . **1 Pat. L. J. 168**
See s. 17 . **26 C. W. N. 275**
See ROAD-CESS RETURNS.
I. L. R. 39 Calc. 1005

———— **ss. 21 and 24**—

See CRIMINAL PROCEDURE CODE, s. 164.
I. L. R. 2 Lah. 325

EVIDENCE ACT (I OF 1872)—*contd.*

——— **ss. 21, 25, 29, 47, 67, 73—**

See JURY, RIGHT OF TRIAL BY.

I. L. R. 37 Calc. 467

——— **ss. 21 and 81**—*Evidence of publications of a newspaper by a particular person, merely by production of the paper—Sufficiency of Criminal Procedure Code (Act V of 1898), ss. 255, 256, 271, 272, 428—"Necessary" meaning of —Mistake of Court, as to primâ facie case—Retrial.* *Per* SUNDARA AYYAR and PHILLIPS, *JJ.*—Merely, exhibiting a copy of a private newspaper containing a libellous statement without any sort of proof such as the production of an authenticated copy of a declaration under s. 7 of Act XXV of 1867, is no proof of publication of the libel by the person by whom the paper purports to have been published. Evidence that a certain copy of the paper "*appears* to be printed and published by *A*" is no proof of publication, by him. If there be proof of publication of a newspaper of by *A* then s. 81, Evidence Act, presumes that what purpose to be a newspaper of a particular name is that paper and that every copy of its was issued by the publisher of that paper. *Gathercole* v. *Miall, 15 M. & W. 319, Rex* v. *Forsyth, Russ. & R. 274*, and *Watts* v. *Fraser, 7 Ad. & E. 223*, considered. A statement in a complaint that the accused published the libel is no evidence against the accused as it was not made in the presence of the accused. The fact that the accused never denied publication by him of the libel does not relieve the prosecution of the necessity of proving affirmatively that the accused published the libel, an essential fact necessary to establish the guilt of the accused. Additional evidence under s. 428, Criminal Procedure Code, can be ordered to be taken only if the Appellate Court thinks it necessary. *Quære*: Whether, if the admission by the accused of publication is contained in his written statement, that would relieve the prosecution from the defect in letting in evidence of publication. Difference between admissions in civil and criminal cases pointed out. *Quære*: Whether s. 81 of the Evidence Act is not confined to public documents alone. *Per* SUNDARA AYYAR, *J.* —Where the prosecution by its own negligence failed to produce evidence which it was its duty to do, additional evidence cannot be considered "*necessary*" by the Appellate Court within the meaning of s. 428. The language of that section seems to indicate cases where, there being already evidence on the record, the Court considered it to be unsatisfactory or where the evidence on record leaves the Court in such a state of doubt that it considers it necessary to enable it to decide the case to have further evidence. In such a case the accused should be ordered to be acquitted and not retried allowing further evidence to be taken. *Per* PHILLIPS, *J.*—Where on the Court itself taking a mistaken view that a *primâ facie* case of publication by the defendant had been made out (as was evident from its framing a charge), evidence to that effect was not let in by the complainant; it is a case where the Appellate Court ought to consider that additional evidence is *necessary* within the meaning of s. 428, Criminal Procedure Code, and a retrial would be the proper order to be made under the circumstances, if taking additional evidence would not meet the requirements of the case. "Necessity" under s. 428, Criminal Procedure Code, is a matter to be determined on the particular facts of each case. *Per* BENSON, *J.*—Where the prosecution wanted to let in evidence necessary to prove the offence, but the Magistrate intervened, stating that it was unnecessary in the circumstances of the case and so refused to take that evidence, the case is one in which retrial may properly be ordered or in which the Court may properly call for the additional evidence under s. 428, Criminal Procedure Code. JEREMIAH *v.* VAS (1813)

I. L. R. 36 Mad. 457

——— **ss. 21, 157**—*Criminal Procedure Code (Act V of 1898), ss. 162, 288—Evidence—Admissibility of evidence—Statements made by witness to Police and Panch—Statements made by the witness as accused before Committing Magistrate—Witness deposing to different story before Sessions Court—Corroboration of the deposition before the Committing Magistrate by statements made before the Police and the Panch—Investigating Police Officer—Deposition of, as to statements made by witnesses to him—Examination-in-chief—Practice and procedure.* During the trial of an accused person, the Sessions Judge admitted into evidence and used against the accused the following statements: (1) statements made by a witness to the Police implicating the accused, (2) the same witness's statement to the Panch, (3) his statement as an accused person made before a Magistrate, and (4) statements made by the co-accused to the Police. The witness, when he was examined before the Committing Magistrate, gave a consistent story; but he deposed to quite a different version when he was examined in the Sessions Court. The learned Judge disbelieved the changed story, and he used the witness's statements to the Police and his statements as an accused person and his statements to the Panch, by way of corroboration of what the witness had stated to the Committing Magistrate. The accused was convicted and sentenced. On appeal:—*Held,* (i) that it was an error to admit statements Nos. 1 and 2 for the purpose of corroborating statements No. 3, for only the statements of witnesses made to the trying Court can be corroborated in the manner contemplated by s. 157 of the Indian Evidence Act, 1872. Previous statements might be used to corroborate or contradict statements made at the trial; not to corroborate statements made prior to the trial. (ii) That statements No. 2 were altogether inadmissible as evidence of the accused's guilt, for they could at most be regarded as admissions by the co-accused which could possibly be used against himself, but could not be proved and used against the accused. The Investigating Police Officer ought not to be allowed to depose in examination-in-chief to what the witnesses stated to him. It opens up an undesirably wide field for cross-examination and leads to the attention of the Court being diverted and distracted from the true issues. Moreover, it is contrary to the plain intention of s. 162 of the Code of Criminal Procedure which is that such statements should be used, if at all, on behalf of and not against the person under trial. EMPEROR *v.* AKBAR BADOO (1910)

I. L. R. 34 Bom. 599

——— **s. 23—**

See s. 18 . . **20 C. W. N. 1217**

See EVIDENCE . **I. L. R. 44 Calc. 130**

See MALICIOUS PROSECUTION.

4 Pat. L. J. 676

EVIDENCE ACT (I OF 1872)—*contd.*

———— s. 24—

See CONFESSION **I. L. R. 37 Calc. 735**
23 C. W. N. 886

See PRACTICE . **I. L. R. 40 Bom. 220**

———— If in the circumstances of a case it appears to the Court that there is reason to believe that the confession was obtained by inducement the prosecution must shew that the confession was freely made. ASHUTOSH DUTT *v* THE KING-EMPEROR **26 C. W. N. 54**

———— *Confession—Inducement proceeding from a person in authority.* The accused in making a confession before a Magistrate admitted that he had been told to tell the truth by the Sahib who told him to tell the truth and he would be released: —*Held*, that the confession so made was bad under s. 24 of the Indian Evidence Act, 1872 EMPEROR *v.* DINANATH SUNDARJI
I. L. R. 45 Bom. 1086

———— ss. 24, 27, 30—

See MISDIRECTION.
I. L. R. 45 Calc. 557

———— ss. 24, 123, 124—*Privilege claimed by witness—Confession—Opium Act (I of 1878), s. 9—Illicit possession of opium.* The appellant was prosecuted by the Excise authorities and convicted of being in possession of opium without a license. It was stated that the appellant made a confession to the Superintendent of Excise At the trial the defence called the Inspector of the Customs Preventive Service and asked him to corroborate his statements from the posting register to show that the Preventive Officers were stationed at a particular place at the time of the appellant's arrest. The defence also examined the Superintendent of the Preventive Service and asked him whether an Excise Inspector made an admission to him in the presence of the Excise Superintendent. *Held*, that the question of privilege could not arise in respect of the posting register, the entry in question being merely a note of the times when particular Preventive Officers were ordered to be at their stations That the Customs Superintendent could not claim privilege as to the admission made to him by the Inspector although what took place between the two Superintendents might probably be privileged. That in the absence of any inducement, threat or promise the confession to the Superintendent of Excise was not shut out under s. 24 of the Evidence Act. RUKUMALI *v.* EMPEROR (1917) **22 C. W. N. 451**

———— s. 25—

See JURY . **I. L. R. 37 Calc. 467**

———— *Statement of approver, admissibility of.* Statements of approvers to a Police Inspector are inadmissible against accused. EMPEROR *v.* MILAKANTA . **L. R. 35 Mad. 247**

———— ss. 25, 27—*Police deposing to admission of guilt by accused, impropriety of.* Where the Police Sub-Inspector in his deposition before the Court stated that one of the accused admitted before him his guilt and that from the statement of that accused he (the Sub-Inspector) could *understand the exact nature of the offences committed by the accused*: *Held*, that the Sub-Inspector ought never to have been allowed to make such statement before the assessors whose

EVIDENCE ACT (I OF 1872)—*contd.*

———— ss. 25, 27—*concld.*

minds must have been considerably prejudiced thereby. PAIMULLAH *v.* KING-EMPEROR (1911).
16 C. W. N. 238

———— ss. 25, 30—

———— *Confessional statements to Excise Officers—Self-exculpatory statements, use of—Criminal Procedure Code (Act V of 1898), s. 342—Opium Act (I of 1878), s. 9, cls. (c), (d)—Illicit possession of opium.* The appellant with two other persons was prosecuted under the Opium Act. The co-accused made some statements to Excise Officers which the Magistrate used against the appellant. *Held*, that the statements could not be rejected under s 25 of the Evidence Act, for it could not be said that the Excise Officers were Police Officers. That in order to determine whether the statements were confessions the whole of the statements must be taken into consideration and the statements in question being self-exculpatory were inadmissible against the appellant. That the Magistrate should have examined the accused as provided in s. 342, Criminal Procedure Code. The High Court acquitted the accused on the ground that although the facts proved might give rise to suspicion against the appellant, he was entitled to the benefit of the doubt. AH FOONG CHINAMAN *v* KING-EMPEROR (1918)
22 C. W. N. 334

See EXCISE OFFICERS
I. L. R. 46 Calc. 411

———— ss. 25, 33—

See ADMISSIONS AND CONFESSIONS TO POLICE OFFICERS.
I. L. R. 41 Calc. 601

———— ss. 25, 114, Illustration (b), 133 and 157—*Accomplice, corroboration of—Material particulars, what are—Admissibility of previous statements of accomplice to Inspector of Police—S 157, "authority legally competent to investigate the fact," meaning of—Competency of officer of Criminal Investigation Department—Criminal Procedure Code (Act V of 1898), ss 162, 154, 155, 157 and 551—Act XIV of 1908—Letters Patent, cls. 25 and 26.* On a preliminary objection raised by the Crown with reference to the jurisdiction of the Court: *Held*, that the Letters Patent, s. 26, authorises the grant of a certificate by the Advocate-General in a case tried by a Special Bench appointed under the Indian Criminal Law Amendment Act (XIV of 1908). The following five points of law were raised in the certificate of the Advocate General in this Letters Patent Appeal, *viz.*—(i) Does the evidence of an accomplice require corroboration in material particulars before it can be acted upon; is it open to the Court to convict upon the uncorroborated testimony of an accomplice if the Court is satisfied that the evidence is true; and does not the Indian Evidence Act (I of 1872), s. 133, read with s. 114, illustration (*b*), merely intend to lay down that a conviction upon the uncorroborated testimony of an accomplice is not illegal where the presumption of untrustworthiness attaching to the evidence of an accomplice is rebutted by special circumstances? (ii) Can the previous statements of an accomplice legally amount to corroboration of the evidence *given by him at the trial? (iii) Is an Inspector* of the Criminal Investigation Department an authority legally competent to investigate the case within the meaning of s. 157, [illegible]

EVIDENCE ACT (I OF 1872)—*contd.*

——— **ss. 114, Illust. (b), 133 and 157**—*contd.*

Act (I of 1872) ? (iv) Is a statement of a confessional nature made by a witness to a police officer a confession of an accused person within the purview of s. 25, Indian Evidence Act ? (v) While statements made by a person to a police officer in the course of an investigation and taken down in writing may not (by reason of s. 162, Criminal Procedure Code) be proved by the production of the writing, may such statements be proved by oral evidence ? *On the first point, Held* (by BENSON, WALLIS and MILLER, *JJ.*) that the evidence of an accomplice need not be corroborated in material particulars before it can be acted upon and that it is open to the Court to convict upon the uncorroborated testimony of an accomplice if the Court is satisfied that the evidence is true. *On the second point, Held* (By BENSON, WALLIS and MILLER, *JJ.*) that the previous statements of an accomplice can legally amount to corroboration of the evidence given by him at the trial. *On the third point, Held* (by BENSON, WALLIS and MILLER, *JJ.*) that an Inspector of the Criminal Investigation Department is an authority legally competent to investigate the fact within the meaning of s. 157, Indian Evidence Act. *On the fourth point, Held* (by BENSON, WALLIS and SUNDARA AYYAR, *JJ.*) that a statement of a confessional nature made by a witness to a police officer is a confession of an accused person within the purview of s. 25, Indian Evidence Act. *On the fifth point, Held* (*per curiam totam*), that while statements made by a person to a police officer in the course of an investigation and taken down in writing may not (by reason of s. 162, Criminal Procedure Code) be proved by the production of the writing, they may be proved by oral evidence. Before the High Court has decided any point of law raised in the Advocate-General's certificate, the accused cannot be heard on any point not included in the certificate. MUTHUKUMARASWAMI PILLAI *v.* KING-EMPEROR (1912)

I. L. R. 35 Mad. 397

——— *Criminal Procedure Code, Act V of 1898, ss. 154, 155, 157, 162 and 551—Approvers' evidence, corroboration of—Admissibility of previous statements of, to Police Inspector—Value of such statements as corroboration—"Legally competent to investigate," meaning of—Competency of officer of Criminal Investigation Department.* Sir ARNOLD WHITE, *C.J.*, and AYLING, *J.*—It is not the law either in England or India that the evidence of an accomplice must be corroborated in material particulars before it can be acted upon. Where a Court is Judge of fact as well as of law the Court as a Judge of fact is not precluded from considering the question whether the unsupported evidence of an accomplice is true or not. A Court may be competent in declaring to draw the presumption of fact referred in the illustration (*b*) to s. 114, Indian Evidence Act (I of 1872). S. 133, Indian Evidence Act, is the substantive enactment declaring the law whereas s. 114 only lays down certain propositions intended to assist the Courts in drawing inferences of fact. Where the Court is acting in the capacity of both Judge and Jury, it must direct itself and the proper direction would be :—Consider the evidence of the approvers, always bear in mind that it is tainted evidence, scrutinize it with the utmost care, accept it with the greatest caution, consider it in the light of the circumstances in which it is given and in the light of all the other circumstances in the case of which evidence is legally admissible. Then, if you believe it, act on it even if there is not corroboration in the strict sense of the word. If you do not believe it, reject it. *In re Meunier, [1894] 2 Q. B. 415*, approved. *Reg.* v. *Ramasami Padayachi, I. L. R. 1 Mad. 394*, approved. What are the "material particulars" referred to in the Indian Evidence Act (I of 1872), illustration (*b*), must depend upon the nature of the charge and the facts of the particular case. Oral testimony of independent witnesses is not necessary. SANKARAN-NAIR, *J.* (*dissentiente*).—The Indian Evidence Act [ss. 133 and 114, illustration (*b*)] embodies the rules of English law that the presumption must first be drawn that the evidence of an accomplice is unreliable, and exceptional circumstances must be proved to justify its acceptance. The question is not whether a conviction based on the uncorroborated testimony of an accomplice is legal but whether there is a presumption that such testimony cannot be accepted without corroboration. A person should not be convicted except under "very special circumstances" upon the uncorroborated testimony of an accomplice. The "special circumstances" are that the grounds on which an accomplice's evidence has been held to be untrustworthy did not either exist in the case or did not exist in their full strength: that there are countervailing considerations of greater weight which diminish or entirely get rid of the weight due to such presumptions. In cases tried by a jury, a jury has to be advised by the Judge of what I have above referred to. The CHIEF JUSTICE and AYLING, *J.*—It cannot be laid down as a proposition of law that previous statements of an accomplice cannot be regarded as corroborative of evidence given by him at his trial. *Reg.* v. *Malapabi Kupana, 11 Bom. H. C. R., 196* dissented from. SANKARAN-NAIR, *J.* (*dissentiente*).—A previous statement by the accomplice himself or a statement by another accomplice is not the corroboration required under the rule as to material particulars. The CHIEF JUSTICE and AYLING, *J.*—The words "before any authority legally competent to investigate the fact" in s. 157, Indian Evidence Act, are quite general and should not be restricted to police officers and to "investigations" in the technical sense in which the word is used in the Code of Criminal Procedure. The words are competent to investigate not a *case* but "the fact." The words "legally competent" do not mean only competent under some express provision of law. An Inspector of the Criminal Investigation Department has power to investigate in cases to which s. 156, Criminal Procedure Code, applies. As such his "local area" is the Presidency of Madras. SANKARAN-NAIR, *J.* (*dissentiente*).—The police officers entitled to investigate an offence are the police officers referred to in the Code of Criminal Procedure, *i.e.*, a station-house officer (ss. 156, 157), an officer in charge of a police station (ss. 154, 155, cl. 1) and police officers superior in rank to an officer in charge of a police station (s. 551). An Inspector of the Criminal Investigation Department is not such an officer and his evidence is not admissible under s. 157, Indian Evidence Act, he not being "any authority legally competent to investigate the fact" under s. 157, Criminal Procedure Code. The CHIEF JUSTICE and AYLING, *J.*—A statement of a confessional nature made to a police

EVIDENCE ACT (I OF 1872)—*contd.*

———— ss. 114, Illust. (b), 133 and 157—*concld.*

officer by a witness is not a confession of an accused person within the purview of s. 25, Evidence Act. S. 25 lays down that such a statement cannot be used against the person making it while on his trial, SANKARAN-NAIR, *J.* (*dissentiente*) —The statements of approvers to the Police Inspector being really confessions are inadmissible in evidence against the accused under s 25, Indian Evidence Act. A confession is not the less a confession because it is sought to be used against other persons. *Per totum curiam.*—Under s. 162, Criminal Procedure Code, the written record of a statement made to a police officer in the course of an investigation cannot be used as evidence but the section does not exclude oral evidence of the statement whether the statement has been taken down in writing or not. KING-EMPEROR *v.* NILAKANTA (1912) . . . . I. L. R. 35 Mad. 247

———— s. 26—

1. ———————— *Statement to Excise Officer after arrest effected with help of police sergeants when such sergeants present in the house searched though not in the room where statement made, if a statement made in police custody, and if admissible—Protracted trial, evils of.* Where in

they were not present in the room in which the appellant made certain statements to the Excise officer: *Held*, that the appellant was to be regarded as having been in police custody for the purpose of s. 26 of the Evidence Act and the statements were inadmissible. Protracted trial in the Presidency Magistrate's Court animadverted on. IBRAHIM MUHAMAD *v.* KING-EMPEROR (1917) . . 21 C. W. N. 691

2. ———————— *Confession—Custody ... in dis... , is bad.*

... it up by the Magistrate in whose lock-up he was, in the custody of two policemen, to a hospital for treatment. The policemen made him over to the doctor and waited in the verandah to take him back. While with the doctor in his room, the accused made a confession of his guilt. At the trial, the confession was allowed to be proved. A question having arisen whether the confession was properly let in. *Held*, that the confession was excluded by s. 26 of the Indian Evidence Act (I ... in police ... remained ... standing outside on the verandah. *Queen-Empress* v. *Lakshmya bin Bhima, (1896) Ratanlal's Cri. Cas. 855*, followed. EMPEROR *v.* MALLANGOWDA (1917). I. L. R. 42 Bom. 1

———— s. 27—

See s. 25 . . . 16 C. W. N. 238

See MISDIRECTION

I. L. R. 45 Calc. 557

———— ss. 27, 25, 21—

————————*First information by accused admitting guilt—Portions of such information leading to discovery and containing narrative of events prior to occurrence, if admissible—"Discovery," if limited to discovery by police—Criminal Procedure Code (Act V of 1898), s. 164—Statement*

A first information of murder was lodged with the police by the accused himself and in he

he made a statement which was not a confession and which was not recorded by the Magistrate: *Held*, that the first information was not admissible in its entirety but so much of it as contained a narrative of events prior to the occurrence and the ... material ... Where ... persons affected thereby may demand that the statement should be admitted and considered in its entirety yet the principle that portions of a statement or confession may be admitted and others excluded

Kangal Mall, I. L. R. 41 Calc 601 (1915) and *Barindra Ghose* v *Emperor, I. L. R 37 Calc. 467*

to or by police officers and facts already known to persons other than police officers may be said to be discovered in consequence of information received within the meaning of s 27 of the Evidence Act. *Surendra Nath* v *Emperor, 19 Cr. L. J. 935* at p. 937 (1918) and *Adu Sikdah* v. *Queen-Empress, I. L. R. 11 Calc. 635 (1885)*, referred to. Under s. 164, Cr. P. C. no distinction can be drawn between a statement made by an accused person and a confession made by him and the statement made by the accused should have been recorded by the Deputy Magistrate as provided in s. 164 and the Deputy Magistrate's evidence regarding the unrecorded statement was inadmissible. *Queen-Empress* v. *Bhairab, 2 C. W.N. 702* at p. 715 *(1898)*, *Emperor* v. *Rajani, 8 C. W. N 22 (1900)* and *Amiruddin* v. *Emperor, I. R. R. 45 Calc. 557* at p. 564 (1917), referred to. To suggest that in capital cases stronger evidence or a higher degree of certainty is required than in other criminal cases is wrong. THE SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS *v.* LALIT MOHAN SINGH ROY . . 25 C. W. N. 788

———— s. 29—

See JURY . I. L. R. 37 Calc. 467

———— s. 30—

See s. 25 . . 22 C. W. N. 934

See CONFESSION . I. L. R. 38 Calc. 446

See CONSPIRACY TO WAGE WAR.

I. L. R. 38 Calc. 559

See CRIMINAL PROCEDURE CODE—

Ss. 110, 117 . I. L. R. 41 All. 231

Ss. 255, 342 . I. L. R. 38 Mad. 302

EVIDENCE ACT (I OF 1872)—*contd.*

———— s. 30—*contd.*

See HABEAS CORPUS I. L. R. 39 Calc. 164

See WITNESS . I. L. R. 46 Calc. 700

———— *Confession of co-accused not to be acted upon without corroboration—Misdirection to jury.* The confession of a co-accused is on an even lower footing than the evidence of an accomplice and a conviction based on such a confession alone is bad in law. S. 30 of the Evidence Act only provides that such a confession is to be an element in the consideration of all the facts of the case, but it does not do away with the necessity for other evidence. It is the duty of the Judge, when there is no other evidence than the confession of a co-accused to direct the jury accordingly and tell them to acquit the accused; and his omission to do so is a misdirection which will vitiate a conviction. GIDDIGADU *v.* EMPEROR (1909) . I. L. R. 33 Mad. 46

———— *Co-accused—Plea of guilty—Removal of co-accused from dock—Co-accused's confession—Admissibility as against the other prisoner.* Where one co-accused pleads guilty and is removed from the dock and the other accused alone is tried: *Held,* that the confession of the former cannot be taken into consideration as against the latter under s. 30 of the Indian Evidence Act, for there has been no joint trial. *Queen-Empress* v. *Pahuji, I. L. R. 19 Bom. 195,* followed. EMPEROR *v.* KERAMUT SIRDAR (1911).

I. L. R. 38 Calc. 405
16 C. W. N. 49

———— *Co-accused—Confession—Independent corroboration—Evidence—Practice.* Eleven accused persons were tried for the offence of dacoity. There was no direct evidence against any of them. Seven of these confessed, each one implicating himself and the rest. They were convicted on their own confessions. A question arose whether the remaining four accused, who had not confessed, could be convicted solely on the confessions of their co-accused when they were not corroborated by any independent evidence. HEATON, *J.,* was of opinion that s. 30 of the Evidence Act made the confessions, which were already evidence in the case, evidence against the person implicated as well as the other accused. SHAH, *J., held,* that s. 30 permitted the confession of a co-accused to be taken into consideration along with other evidence in the case; but if there was no evidence in the case outside those statements, no conviction based only upon the confessions of co-accused was good in law. Owing to this difference in opinion, the case was referred to MACLEOD, *J. Held,* that there was nothing in s. 30 of the Indian Evidence Act, 1872, which prevented the Court from convicting after taking the confession of a co-accused into consideration; but that the High Courts in India had laid down a rule of practice which had all the reverence of law, that a conviction founded solely on the confession of a co-accused could not be sustained. *Held,* further, that the confession of one co-accused could not be said to be corroborated by the confession of other co-accused. *Per* MACLEOD, *J.*—I do not think that "confession" in s. 30 can be restricted to an unretracted confession, as once a confession is proved it may be taken into consideration. EMPEROR *v.* GANGAPPA KARDEPPA (1913).

I. L. R. 38 Bom. 156

———— *Confession of co-accused in dacoity case, if admissible in subsequent bad livelihood case in which the maker of the confession was not an accused.* In a case under s. 110, Cr. P. C., against the Petitioner the confession made by a person who was the co-accused of Petitioner in a dacoity case but not in the present case was admitted in evidence: *Held,* that the confession was inadmissible. MAFIZUDDIN KHAN *v.* THE KING-EMPEROR . . . 25 C. W. N. 239

———— *Evidence—Confession—Admissibility of, in evidence against coaccused—Joint trial.* One out of several accused persons who were being tried jointly for an offence under s. 193 of the Indian Penal Code pleaded guilty and made a statement implicating himself and other accused. The Magistrate, however, did not convict him merely upon his plea of guilty, but upon the evidence and upon the statement made by him. The Magistrate also took the confession of this accused into consideration as against the others. *Held,* that the course taken by the Magistrate was not only admissible, but that in the circumstances of the case the Magistrate would not have exercised a sound discretion in convicting the confessing accused at once on the strength of his own statement alone. EMPEROR *v.* DIP NARAIN (1915) . I. L. R. 37 All. 247

———— ss. 30, 114, 133—*Confession by co-accused—Evidence against the accused—Amount of corroboration.* The accused was charged with the murder of his brother in concert with two associates with whom he was jointly tried for the offence. The principal evidence against the accused was the confessions of the two co-accused. Other facts established in the case were these. The accused had a wife and children, but no means to support them; he had to work as a coolie in the Forest Department. He was continually importuning the deceased who was rich but had no wife or children, for assistance which was continually refused, and although the two brothers lived in the same building they did not associate. About a fortnight after the disappearance of the deceased the accused made free with the grain which was collected in his brother's bin; and on several occasions gave rice from it to his two associates. Three months after the event, the accused told a shop-keeper that his brother had gone to Miraj for medical treatment. After the crops had been got in he began to ask the tenants of his brother to pay their rents to him. Shortly afterwards, the accused, when questioned by the Ranger of the forest, replied that his brother had gone to Miraj and that no letter had come. Later, the accused received a letter through post, purporting to come from his brother which directed the accused to collect the rents and pay the assessment. The muster-roll kept by the Forest Officer showed that the accused was absent from his work on the day of the offence and for some days after. The trial Judge acquitted the accused. On appeal by Government to the High Court of Bombay, HEATON, *J.* was of opinion that there was in the case, apart from the confessions, a body of evidence and circumstances

EVIDENCE ACT (I OF 1872)—*contd.*

———— ss. 30, 114, 133—*concld.*

and that taking he circumstances t. SHAH, *J.* was of opinion that, though the proved circumstances in the case were consistent with the guilt of the accused and though they might create a certain amount of suspicion against him, they did not prove anything as to his participation in the crime. Owing to this difference in opinion the case was heard by SCOTT, *C. J.* *Held*, by SCOTT, *C. J.* (agreeing with HEATON, *J.* and differeing from SHAH, *J.*) that there was, on the facts established, corroboration of the story of the confessing co-accused so far as it affected the accused. Dictum of GARTH, *C. J*, in *Empress* v. *Ashootosh*

I. L. R. 43 Bom. 739

1. ———— *Admission of evidence—Erroneous omission to object to the admission of evidence—Relevancy of evidence.* Plaintiff sued to recover possession of a house. The defendants contended that their deceased father had spent a certain amount of money for the completion of the house and for the purpose of proving this relied upon their father's will and a memo of expenses prepared by him. In the lower Courts no objection was taken to the admission of the will and the memo. as evidence. In second appeal, it was contended that the evidence was inadmissible. *Held*, upholding the contention, that neither the will nor the memo. was admissible in evidence under s. 32 of the Evidence Act, 1872; the erroneous omission before the lower Courts to object to the admission of evidence did not make that evidence relevant. *Miller* v. *Babu Madho Das (1896) L. R. 23 I. A. 106*, relied on. NARHARI HARI *v.* AMBABAI (1919) . I. L. R. 44 Bom. 192

———— s. 32—

See s. 5 . . . 5 Pat. L. J. 410

See s. 18 . I. L. R. 45 Calc. 159

See EVIDENCE . L. R. 43 I. A. 256

See CUTCHI MEMONS.
I. L. R. 41 Bom. 181

See HINDU LAW—ADOPTION.
I. L. R. 36 Mad. 69

See HINDU LAW (CUSTOM ADOPTION).
5 Pat. L. J. 164

See HINDU LAW (JOINT FAMILY)
5 Pat. L. J. 605
I. L. R. 40 All. 159

See HINDU LAW (MINOR).
I. L. R. 38 Mad. 166

See WILL . . I. L. R. 1 Calc. 173

———— sub-s. 2—*Held*, that entries in the diary of a deceased illiterate made by other people at his request were inadmissible under s. 32 (2) but might be used s. 157 or s. 159. MUSSAMAT NAINA KOER *v.* GOBARHAN SINGH
2 Pat. L. J. 42

———— sub-s. 5—*Evidence of relationship—Statement made in a plaint filed by a member of the family since deceased—Second appeal—Finding of fact.* In a suit to recover possession of property which [had belonged in her life-time to one Musammat Fiddo, one of the material issues was whether the plaintiffs were or were not the sons of one Munir Khan, paternal uncle of Musammat Fiddo. In support of their statement that they were the sons of Munir Khan the plaintiffs tendered in evidence the plaint in a suit filed some years *ante litem motam*, in which Musammat Fiddo as plaintiff had impleaded them as defendants, describing them as the sons of Munir Khan. *Held*, that this plaint was not only admissible evidence on the subject of the plaintiffs' relationship to Munir Khan, but was evidence to which considerable weight might be attached. The High Cou- not concerned upon which a of first appeal admissible evidence to support the finding of the court below, the High Court cannot interfere with it. *Coghlar* v. *Cumberland, L. R. 1 Ch. D. 704*, referred to. MAULADAD KHAN *v.* ABDUL SATTAR (1917) . . I. L. R. 39 All. 426

———— *Statement of relationship by deceased person, admissibility of.* The plaintiff brought a suit on two hand-notes executed by the defendant. The defence was that the

under Act VIII of 1890, which contained a petition by the defendant's aunt, since deceased, for her appointment as guardian of the defendant. This petition contained a statement by the aunt as to the date of the defendant's birth. The lower Appellate Court held that this statement was admissible in evidence. The High Court in appeal reversed the decision. *Held* (on review of judgment), that the statement was admissible in evidence under s. 32, cl. (5) of the Evidence Act. *Ram Chandra Dutt* v. *Jogeswar Narain Deo, I. L. R. 20 Calc. 758*, followed. RAM KISHORE SADKHAN *v.* MANINDRA MOHAN RAY (1915).
19 C. W. N. 646

———— sub-s. 6—*Evidence—Pedigree.* A document, ancient and genuine, purporting to be a family pedigree, was produced in evidence in a mutation case by one Jiraj. The record was brought before the civil Court in a suit in which the plaintiff's relationship to one Hulas, the last male owner of certain property, was in question. Jiraj stated that he had received the pedigree from his grandfather. It was not proved who had pre-

in evidence under s. 32, cl. (6), of the Evidence Act. JAHANGIR *v.* SHEORAJ SINGH (1915).
I. L. R. 37 All. 600

———— *Custom, statements of deceased persons as to existence of, if admissible, when made after controversy arisen.* Evidence, oral or documentary, as to statements of a deceased person as to the custom in a family, is not admissible, if it appears that such statements were made after a controversy as to the custom had arisen. EKRADESHWAR SINGH *v.* JANESWARI BAHUASIN (1914) . . . . 42 Cal.
W.

EVIDENCE ACT (I OF 1872)—*contd.*

——— **ss. 32, 90.**

——— A document 30 years old even though it does not purport to shew who signed it may be admissible as independent evidence if the provisions of s. 32 are complied with. CHARITAR RAI *v.* KALISAH BIHARI **3 Pat. L. J. 306**

——— **s. 33—**

See s. 25 . **I. L. R. 41 Calc. 601**

——— *'Opportunity to cross-examine' meaning of—Whether an accused in a Sessions enquiry had the opportunity to cross-examine a prosecution witness.* In an enquiry after Chapter XVIII of the Criminal Procedure Code (Act V of 1898), a witness was examined by the prosecution but he was not cross-examined by the accused; in the Sessions trial, the witness having died, his deposition was put in under s. 33 of the Indian Evidence Act: *Held*, that it is doubtful whether the evidence is admissible under s. 33 of the Indian Evidence Act; even if it is admissible, its evidentiary value is very small indeed. Having regard to the practice at Sessions enquiries not to cross-examine the prosecution witnesses unless, at the conclusion of the enquiry when the charge is drawn up, the accused thinks it worth while to defend himself in the first Court. It could hardly be said that the accused had the opportunity to cross-examine a witness examined by the prosecution, where the accused did not cross-examine any of the prosecution witnesses, and was not asked by the enquiring Magistrate to exercise this right of cross-examination. IBRAHIM *v.* THE KING-EMPEROR, (1912). **17 C. W. N. 230**

———*Evidence—Admissibility of statement made by witness since deceased.* A statement made by a witness in a civil suit concerning the authenticity of document before the court may be admissible in evidence on the prosecution of a party to the suit for an offence relating to the document, the witness having since died: but such a statement cannot be treated as evidence against another witness in the same civil suit accused of abetment of the offence charged against the party, and of perjury. EMPEROR *v.* KADHE MAL . . . . . **I. L. R. 42 All. 24**

——— *Mortgage-bond—Denial of execution, refusal of registration—Examination of attesting witnesses by the Registrar—Compulsory registration—Death of attesting witnesses—Suit on mortgage—Evidence recorded by Registrar if admissible under s. 33, Evidence Act—Special Registrar or Sub-Registrar at Headquarters, powers of.* A mortgage-bond was presented for registration by the mortgagee before the Special Registrar. The executant denied execution and the Special Registrar, acting for the Registrar, refused registration but after making an enquiry during which he examined the attesting witnesses registered the document. Subsequently, the mortgagee brought a suit on the mortgage, but during the interval the attesting witnesses, all but one, had died and the depositions recorded during the registration enquiry were tendered as evidence: *Held*, that the evidence given by the deceased attesting witnesses, who were duly cross-examined before the Special Registrar, was relevant and admissible in the present suit under s. 33 of the

EVIDENCE ACT (I OF 1872)—*contd.*

——— **s. 33**—*concld.*

Evidence Act. JEHETO SHEIKH *v.* JAIBANNESSA BIBEE (1913) . . . **18 C. W. N. 605**

——— *Admissibility of evidence recorded in a previous proceeding—Consent of parties.* Evidence recorded in a previous judicial proceeding between the same parties is made admissible in a subsequent proceeding by the consent of both parties. *Sri Rajah Prakasarayanim Garu* v. *Venkata Rao (1915) I. L. R. 38 Mad. 160* approved. *Ponnuswami Pillay* v. *Singaram Pillay (1918) I. L. R. 41 Mad. 731*, overruled. JAINAB BIBI SAHEBA *v.* HYDERALLY SAHIB (1920) . . . **I. L. R. 43 Mad. 609**

——— *Court's duty before admitting evidence under—Consent or want of objection on the part of the accused to the reception of inadmissible evidence—Duty of prosecution to prove the case—Evidence Act (I of 1872), s. 458—Hearsay evidence, inadmissibility of.* Before admitting under s. 33 of the Evidence Act, a deposition given on previous occasion a Judge has to satisfy himself that the presence of the witness cannot be obtained without an amount of delay or expense which he considers to be unreasonable. It is not enough to have the statement of the Public Prosecutor to that effect; and even consent or want of objection on the part of the accused's pleader to the reception of such evidence will not, in spite of s. 58 of the Evidence Act, entitle the Court to admit it under s. 33. Hearsay evidence as to the complicity of the accused in the crime charged and evidence as to the commission of other offences by the accused not relevant for the purpose of the trial are inadmissible. Where a Sessions Judge convicted the accused relying mainly upon such inadmissible evidence as above described and did not warn the jury against acting on the same, their Lordships set aside the conviction as illegal. *Per* SESHAGIRI AYYAR, *J.*—The Evidence Act is not exhaustive of the rules of Evidence. *Re* ANNAVI MUTHIRIYAN (1915) . **I. L. R. 39 Mad. 449**

——— **s. 34—**

See s. 32 . . **3 Pat. L. J. 306**

——— **s. 35—**

See s. 32 . . **2 Pat. L. J. 42**

See BENGAL TENANCY ACTS, 103 **2 Pat. L. J. 187**

See HINDU LAW—REVERSIONERS. **I. L. R. 40 Mad. 871**

See ITMAM . . **I. L. R. 47 Cal. 979**

——— s. 35—*Evidence—Public document—Report made by kotwal in 1840, on reference by the Political Agent.* *Held*, that on the question of the ownership of a certain temple said to be the property of the Ajaigarh State, the report of a kotwal who in 1840 had made an inquiry into the ownership of the temple at the instance of the Political Agent, was relevant evidence as being a public record of a public inquiry. BALDEO DAS *v.* GOBIND DAS (1914) . . . **I. L. R. 36 All. 161**

1. ——— *Register of births and deaths kept by village officials—Extract from the register, whether receivable in evidence and whether evidence of the date of death of a person.* A register of births and deaths kept by village officials under the orders of the Board of Revenue is a public

EVIDENCE ACT (I OF 1872)—*contd.*

——— **s. 35**—*concld.*

of his death. *Ratcliff* v. *Ratcliff and Anderson, 1 Sw. & Tr. 467*, and *In the Estate of Goodrich : Payne* v. *Bennt*, [*1904*] *P. D. 138*, referred to. RAMALINGA REDDI *v.* KOTAYYA (1917). **I. L. R. 41 Mad. 26**

2. ——— *Register of births and deaths kept at Police stations if a public document.* A Register of births and deaths kept at the police station is a public document within the meaning of s. 35 of the Evidence Act and a certified copy of an extract therefrom is admissible in evidence. TAMIJUDDIN SARKAR *v.* SHEIKH TAZU (1918) . . . . **22 C. W. N. 822**

3. ——— *Register of Minhaidari villages, admissibility of.* On the question of the admissibility in evidence of the contents of a register of Minhaidari villages, *Held*, that the register being clearly an official document, in the absence of anything to show that any particular part of it was in excess of the official duty by reason of which it came into existence, and that in consequence that part might not be admissible, was admissible in evidence under s 35 of the Indian Evidence Act. DIRGAJ DEO BAHADUR *v* BENI MAHTO (1917) . **22 C. W. N. 439**

4. ——— *Admissibility of report by Tahsildar to Collector.* A Tahsildar, in

Held, that the report was not admissible under the first part of s. 35 of the Evidence Act to prove that the charities referred to were not performed on the date of the report. Although in certain cases an isolated document may be considered a

is admissible evidence to prove such fact MALLIKARJUNA DUGGET *v.* THE SECRETARY OF STATE (1911) . . . . . **I. L. R. 35 Mad. 21**

5. ——— *Estate Partition Act (VIII of 1876)—V of 1897—Batwara khasra prepared under the Act of 1876, if a record within the meaning of s. 35.* A *khasra* prepared under Act VIII of 1876 in *batwara* proceedings, which were completed so far as the particular *khasra* was concerned, before Act V of 1897 was passed is not record within the meaning of s. 35 of the Evidence Act and cannot be relied on for the purpose of rebutting the presumption raised by an entry in the record-of-rights. *Perma Ray* v. *Kishen Ray, I. L. R. 25 Calc. 99*, followed. *Janki Deboy* v. *Kirtarath Roy, 13 C. W. N. 93*, distinguished. NANDA LAL PATHUK *v.* MOHUNT CHANURPAT DAS (1913) . . . **17 C. W. N. 779**

——— **ss. 35, 74, 114**—

See REGISTER OF DEATHS.
I. L. R. 46 Cal. 152

——— **ss. 35 and 82**—

See HINDU LAW—MINOR.
I. L. R. 38 Mad. 166

EVIDENCE ACT (I OF 1872)—*contd.*

——— **ss. 35 and 83**—*Chitta prepared by Government for resuming surplus lands acquired for roadway, if public document—Admissibility as private document.* Where it was argued that *chittas* prepared by Government for the purpose of resuming surplus lands acquired for the purpose of a roadway in the possession of persons without title were not admissible in evidence as public documents, *Held*, that the *chittas* were admissible

initiated, the reports of the Collector and the orders of the Board of Revenue furnished valuable evidence that Government recognised the right of one of the parties to hold the land described in the *chittas* as rent-free. *Ram Chandra Sao* v. *Bunseedhur Naik, I. L. R. 9 Calc 741*, referred to. Entries in a public register kept in the Survey Office for the public benefit and under the sanction of official duty are relevant under s. 35 of the Evidence Act, irrespective of whether the clerk who actually wrote the entries had any personal knowledge or whether the register was a copy of a previous register which had become untidy. GRAHAM *v.* PHANINDARA NATH MITRA (1915) **19 C. W. N. 1038**

——— **s. 36**—

1. ——— *That map—Entries in.* *Held* that an entry in the remark column of a Thukbast map, made during survey proceedings on an *exparte* statement by the Zamindar's Agent immediately contradicted by the defendant could not be accepted. JAGADENDRA NATH *v.* HEMANTA KUMARI DEBI. . **15 C. W. N. 887**

2. ——— *Thuk or survey maps—Value of.* There is no inflexible rule that facts on a survey map must be presumed to have been in existence at the time of the Permanent Settlement. Each case must be justified on its merits. PRAFULLA NATH TAGORE *v.* SECRETARY OF STATE FOR INDIA. . . **24 C. W. N. 639**

——— **ss. 38, 45**—*Foreign law—Nature of evidence required to establish a point of foreign law—Will—Holograph will executed in India by a person of Scotch domicile.* A holograph will executed in India by a person whose domicile is Scotch is a valid testamentary document. On such a document being propounded, the High Court declined to treat as evidence of the law applicable thereto a treatise on Scots Law, but accepted the opinion (attested before a notary public) of a Writer to the Signet of Edinburgh. *In the goods of* D. MCINTYRE (1918).
I. L. R. 41 All. 248

——— **ss. 40, 41, 42 and 44**—*Probate Act (V of 1881), s. 59—Will—Probate—Suit by the executor to recover possession and rent—Plea that the will was a fabrication and that probate had been obtained by fraud—Previous unsuccessful application by defendant to District Court to revoke probate*

EVIDENCE ACT (I OF 1872)—*contd.*

——— ss. 40, 41, 42 and 44—*concld.*

tor had bought him off under a mutual arrangement, but after the order for probate had been made, the executor failed to perform his part of the arrangement and had thus committed a fraud both on the Court and the applicant. The application for revocation was disposed of by the Court on the ground that the applicant, on his own showing, was a party to a fraud upon the Court, that he had not come with clean hands and was not, therefore, entitled to the relief sought. Thereafter the executor having brought a suit in the Court of the Subordinate Judge to recover rent and possession against a tenant of the testator as defendant 1 and against the aforesaid nephew as defendant 2, defendant 1 pleaded that the deceased (testator) had asked him to pay rent to defendant 2 and defendant 2 contended, as in the previous proceedings, that the deceased had made no will, that the will produced was a fabrication and that probate had been obtained by fraud. *Held,* that defendant 2 was barred by the decision of the District Court in the revocation proceeding from raising the same question in the Court of the Subordinate Judge. *Held,* further, that it was the District Court which was competent to decide the question of fraud and collusion vitiating the decree of that Court under which probate had been granted, and that as the Subordinate Judge who tried the suit had no jurisdiction in probate matters, the title of the plaintiff was conclusively proved on the production of probate and it was no valid defence for the defendants to allege that the will was a forgery and that probate had been obtained by fraud and deception. *Quære :* Whether a debtor of the state could raise such a defence if sued by the executor in a Court having jurisdiction to revoke the probate ? KISHORBHAI REVADAS *v.* RANCHODI DHULIA (1914) . . **I. L. R. 38 Bom. 427**

——— ss. 40 to 45—

See LUNACY ACT (1858). **24 C. W. N. 378**

See CIVIL PROCEDURE CODE, 1908, s. 11 **I. L. R. 44 Mad. 778**

——— s. 41—*Probate and Administration Act (V of 1881), s. 83—Civil Procedure Code (Act V of 1908), s. 11—Contentious proceeding for probate—Will not proved—Probate refused—Suit for recovery of property from defendants who held as executors—Judgment in the probate proceeding refusing probate, not judgment in rem—Res judicata.* In a contentious proceeding for probate, the will produced by the applicants was held not proved and the probate was refused. The applicants appealed to the High Court which dismissed the appeal. The widow of the deceased thereupon brought a suit for the recovery of the property of the deceased from the defendants who held it as executors under the will and the first Court allowed the claim. On appeal by the defendants, two questions having arisen, namely, (i) whether the judgment refusing probate was as much within the scope and intention of s. 41 of the Evidence Act (I of 1872) as a judgment granting probate, and (ii) whether the judgment in the probate proceeding operated as *res judicata. Held* by the Full Bench, that s. 41 of the Evidence Act (I of 1872) was not applicable to the judgment of the Appellate Court refusing probate. *Held,* further, that the judgment in the probate proceeding operated as *res judicata* between the parties under s. 83 of the Probate and Administration Act (V of 1881) and s. 11 of the Civil Procedure Code (Act V of 1908). KALYANCHAND LALCHAND *v.* SITABAI (1913) . **I. L. R. 38 Bom. 309**

EVIDENCE ACT (I OF 1872)—*concld.*

——— s. 41—*concld.*

——— s. 44—

See SANTAL PARGANAS SETTLEMENT REGULATION, 1872. **6 Pat. L. J. 373**

See CIVIL PROCEDURE ACT, 1908, s. 11. **I. L. R. 37 Bom. 563**

——— *Right of a stranger to a decree affecting his rights to show in a subsequent suit that the decree was invalid on the ground of fraud—Maintainability of such subsequent suit without previous suit to have decree set aside.* If by virtue of a previous High Court decree a person, who is no party to that decree, is deprived of his rights with respect to certain property, a suit by such a person with respect to the property is maintainable without his having first to bring another suit for getting the decree set aside on the ground of fraud; under s. 44 of the Evidence Act he can impeach it if it is sought to be used against him as evidence. ASWINI KUMAR SAMADDAR *v.* BONOMALY CHAKRAVARTI (1916). **21 C. W. N. 594**

——— *Grant by Probate Court if can be collaterally attacked in another proceeding as fraudulent. Semble :*—Having regard to the wide terms of s. 44 of the Evidence Act, it is not possible to say that it is not open to a Court other than the Court from which a grant has issued, in cases of fraud or collusion, to deal with the matter and decide whether the grant has been obtained by fraud or collusion. But the better course in such cases would be, when it is open to the party alleging fraud to apply to the Court from which the grant issued, to stay the suit to enable an application to be made to revoke the grant. RAKSHAB MONDAL *v.* SRIMATI TARANGINI DEVI . . . . **25 C. W. N. 207**

——— *Res judicata—Fixed rate tenancy—Partition—Power of joint-tenants to partition—Suit to recover joint possession.* A certain holding owned jointly by tenants at fixed rates was partitioned by an award. One party sued on the award to recover exclusive possession of certain plots and obtained a decree for possession and mesne profits, which was executed. Subsequently the other party sued to regain joint possession of these plots and pleaded that the former decree was by a Court not competent to pass it and therefore not binding on them. There was nothing to show whether the former suit was filed before or after the coming into force of the Agra Tenancy Act, 1901, or whether the landlord had or had not assented to the partition. *Held,* that the plaintiffs had failed to show that the former decree was passed by a Court which had not jurisdiction, and that the present suit was barred. *Achhey Lal* v. *Janki Prasad, I. L. R. 29 All. 66, explained.* RAGHUNATH KALWAR *v.* BALA DIN KALWAR (1910) . . **I. L. R. 33 All. 143**

See CIVIL PROCEDURE CODE (ACT V OF 1908), s. 11 **I. L. R. 37 Bom. 563**

——— *Compromise decree—Suit to set aside decree on the ground that the agreement was caused by undue influence—Jurisdiction.* A decree obtained by consent or on a

EVIDENCE ACT (I OF 1872)—*contd.*

——— s. 44—*concld.*

compromise can be attacked in a separate suit, not only upon the ground of fraud but upon any ground which would be a sufficient reason for invalidating the agreement upon which the decree was based. *The Huddersfield Banking Company, Limited* v. *Henry Lister and Son, Limited, L. R. 2 Ch. 273,* followed. *Musammat Gulab Kuar* v. *Badshah Bahadur, 13 C. W. N. 1197,* and *Sarbesh Chandra Basu* v. *Hari Dayal Singh, 14 C. W. N. 451,* referred to. SHAMI NATH CHAUDHRI *v.* RAMJAS (1911) . . I. L. R. 34 All. 143

See FRAUD . I. L. R. 41 Calc. 990

——— s. 45—

See s. 38 . I. L. R. 41 All. 248

See CUSTOM . I. L. R. 1 Lah. 540

See PROBATE. . I. L. R. 39 Calc. 295

See LUNACY ACT. . 24 C. W. N. 378

See SEDITION I. L. R. 39 Calc. 606

——— s. 47—

See JURY . I. L. R. 37 Calc. 467

——— s. 48—

See CUTCHI MEMONS. I. L. R. 41 Bom. 181

——— s. 52—

See SPECIFIC RELIEF ACT (I OF 1877) s. 39 . . I. L. R. 39 Bom. 149

——— s. 54—

See CHARGE . I. L. R. 42 Calc. 957

See CRIMINAL PROCEDURE CODE. ss. 387, 310 . . . 5 Pat. L. J. 706

See WITNESS. . I. L. R. 46 Calc. 700

——— ss. 54, 165—

See PRACTICE . I. L. R. 39 Bom. 326

——— ss. 55, 57, 78 (2).

See LIBEL . I. L. R. 37 Calc. 760

——— s. 57—

See CHURCH . I. L. R. 36 Mad. 418

——— s. 58—

1. ——— *Fact admitted need not be proved—Defendant's admission of signature to a bond—Proof of the bond—Inference from facts which are not evidence—Inference not according to law—Error of law—Interference by High Court on second appeal.* The plaintiff having sued on a mortgage, the sons, of the mortgagor, some of whom were minors, denied all knowledge of the mortgage. One of the sons (defendants) who had attained majority, when examined as a witness, admitted that the signature to the mortgage-deed was his father's. At an adjourned date of hearing, the plaintiff was absent on account of illness and his witnesses also were not present. The Court declined to grant any further adjournment, and dismissed the suit holding that the mortgage-deed was not proved. The Court also inferred from the mere fact that the plaintiff delayed bringing his suit until almost the last day allowed him by the law of limitation that he must have been receiving interest all that time at the rate stipulated for in the deed, and on that calculation it reached the conclusion that the debt had been fully satisfied. The plaintiff having appealed: *Held,* that as far as the defendant who had admitted the signature was concerned, his admission would, under s. 58 of the Indian Evidence Act, 1872, relieve the plaintiff of any further responsibility of proving the document. *Held,* further, that the inference in question was one not drawn from any evidence, and the drawing of it was an error of law, which could be rectified in second appeal. LAKHICHAND CHATRABHUJ *v.* LALCHAND GANPAT (1918).

I. L. R. 42 Bom. 352

2. ——— *Jurisdiction—Court—Consent of the parties as to jurisdiction—Suit of value beyond the jurisdiction of the Court—Trial of suit—Jurisdiction cannot be questioned in appeal.* The plaintiffs filed a suit for partition in the Court of the Subordinate Judge, First Class, valuing their claim at an amount which made the suit triable by that Court alone. The Judge, however, made over the trial of the suit to the Joint Subordinate Judge. In the latter Court, neither party raised any objection on the ground of jurisdiction; nor was any issue raised relating to it. The trial proceeded on merits; and a decree was passed in favour of plaintiffs. The defendant appealed to the lower appellate Court, where he, for the first time, raised the question of jurisdiction on the strength of the market value stated in the plaint. The objection was overruled. On appeal:—*Held,* that the market value stated in the plaint *primâ facie* determined the jurisdiction. *Held,* further, that as neither party raised any question as to want of jurisdiction in the first Court, and as they by their conduct and

down in s. 58 of the Indian Evidence Act came into operation and prevented the result of the statement of the market value in the plaint. As a rule, parties cannot by consent give jurisdiction where none exists. This rule applies only where the law confers no jurisdiction. It does not prevent parties from waiving inquiry by the Court as to facts necessary for the determination of the question as to jurisdiction, where that question depends on facts to be ascertained. JOSE ANTONIO BARETTO v. FRANCISCO ANTONIO RODRIQUES (1910).

I. L. R. 35 Bom. 24

——— ss. 58, 92, proviso 4—*Mortgage-bond, registered—Subsequent oral agreement by mortgagee to take less than due amount, whether modifies bond—Admission by mortgagee in pleadings in suit—Proof of agreement, whether necessary under Evidence Act and Civil Procedure Code.* A subsequent oral agreement to take less than is due under a registered mortgage-bond is an agreement modifying the terms of a written contract, and, if it has to be proved, oral evidence is inadmissible under s. 92, proviso 4 of the Indian Evidence Act. If such agreement has been admitted in the pleadings, no question of admissibility of evidence, oral or documentary, arises, as proof of the same is dispensed with in consequence of the admission under s. 58 of the Evidence Act and also under the provisions of the Civil Procedure Code. *Chenbasappa* v. *Lakshmanan Ramchandar, I. L. R. 18 Bom. 369,* distinguished. MALOAPPA v. MATUM NAGU CHETTY (1918) . . I. L. R. 42 Mad. 41

EVIDENCE ACT (I OF 1872)—*contd.*

——— **ss. 65, 66, 90**—*Secondary evidence of document—Original withheld by party who knew it would be required—Certified copy produced by plaintiff—Presumption as to ancient document applied in case of a certified copy.* In a suit for redemption of a usufructuary mortgage the plaintiffs tendered in evidence a certified copy of the mortgage bond, which was executed in the year 1876. There was no evidence that they had called upon the defendants mortgagees to produce the original document. *Held,* (i) that from the nature of the case the defendants must have known that they would be required to produce the original mortgage, which presumably was in their possession, and therefore the certified copy was admissible, and (ii) that the presumption allowed by s. 90 of the Indian Evidence Act, 1872, could be applied when a certified copy, being admissible, was produced in evidence, in the same way as it could be applied to an original document. *Ishri Prasad Singh* v. *Lalli Jas Kunwar, I. L. R. 22 All. 294,* followed. *Khetter Chunder Mookerjee* v. *Khetter Paul Sreeterutno, I. L. R. 5 Calc. 886,* and *Ponnambalath Parapravan* v. *Karoth Sankaran Nair, 12 Indian Cases, 453,* referred to. DWARKA SINGH *v.* RAMANAND UPADHIA (1919) . . **I. L. R. 41 All. 592**

——— **s. 66**—

See s. 74 . . **19 C. W. N. 1068**

——— **ss. 67 and 73**—

See JURY, RIGHT OF TRIAL BY.
I. L. R. 37 Calc. 467

——— **s. 68**—

See ATTESTING WITNESS.
I. L. R. 48 Calc. 61

See TRANSFER OF PROPERTY ACT, 1882, s. 59. . . **I. L. R. 44 Bom. 405**

1. ——— *Admissibility of document in evidence—Mortgage deed not proved, but terms thereof incorporated in a subsequent instrument properly executed and proved.* Where a document, itself legally inadmissible in evidence, was subsequently referred to and partly incorporated in a second document of similar import duly executed between the same parties and registered according to law, it was *held* that the earlier document might be referred to for the purpose of explaining and amplifying the terms of the second, and of arriving at a correct conclusion as to the true nature of the transaction into which the parties had entered. *Fishmongers' Company* v. *Dimsdale, 18 L. J., C. P. 65 ; 6 C. B. 899,* and *Mitchell* v. *Mathura Das, I. L. R. 8 All. 6,* referred to. MOTI CHAND *v.* LALTA PRASAD (1917).
I. L. R. 40 All. 256

2. ——— *Attesting witness, meaning of—Writer of a document, whether can be regarded as an attesting witness.* The writer of document who signed the same as a scribe, can be regarded as an attesting witness, if he saw the signing of the document by the executant. *Veerapudayan* v. *Muthukaruppan Thevan, 24 Mad. L. J. 534, Ayyaasami Iyengar* v. *Kylasam Pillai, 26 I. C. 409,* and *Ranu* v. *Laxman Rao, I. L. R. 33 Bom. 44,* referred to. *Badri Prasad* v. *Abdul Karim, I. L. R. 35 All. 254,* and *Ram Bahadur Singh* v. *Ajodhya Singh, 20 C. W. N. 699,* dissented from. PARAMASIVA UDAYAN *v.* KRISHNA PADAYACHI (1917) . . . **I. L. R. 41 Mad. 535**

EVIDENCE ACT (I OF 1872)—*contd.*

——— **s. 68**—*concld.*

3. ——— The section is imperative so if an attesting witness can be called he must be even though he prove hostile. TULA SINGH *v.* GOPAL SINGH. . **1 Pat. L. J. 369**

4. ——— A person whose name is on a deed merely as a scribe is not a witness within the Transfer of Property Act, 1882, s. 59 although he may have actually seen the document signed. RAMBULDER SINGH *v.* ADJUDHAY SINGH . . . . **1 Pat. L. J. 129**

5. ——— *Mortgage—Evidence of execution—Attesting witness—Scribe.* The scribe of a mortgage deed cannot be counted as an attesting witness merely because he has signed the deed, even though the deed may in fact, have been executed in his presence. To be an "attesting witness" within the meaning of s. 68 of the Indian Evidence Act, 1872, the witness must have seen the document executed and have signed it as a witness. *Ranu* v. *Laxmanrao, I. L. R. 33 Bom. 44, Burdett* v. *Spilsbury, & 10 C. & F. 340,* and *Shamu Patter* v. *Abdul Kadir Ravuthan, I. L. R. 35 Mad. 607,* followed. *Radha Kishen* v. *Fateh Ali Khan, I. L. R. 20 All. 532, Raj Narain Ghosh* v. *Abdur Rahim, 5 C. W. N. 554,* and *Muhammad Ali* v. *Jafar Khan, All. Weekly Notes, (1897) 146,* discussed. BADRI PRASAD *v.* ABDUL KARIM (1913)
I. L. R. 35 All. 254

——— **ss. 68, 70**—*Admission of execution by person claiming through executant.* Admission of execution of an attested document by the executant or by a person representing his interests is sufficient proof of its execution against the person making such admission. As against other parties the document must be proved in accordance with s. 68, Evidence Act. NIBARAN CHANDRA SEN *v.* RAM CHANDRA SEN (1917) . . **22 C. W. N. 444**

——— **ss. 68, 69**—

1. ——— *Evidence mortgage deed—Proof of mortgage-deed after death of executant and marginal witnesses. Held,* that the executant of and all three marginal witnesses to a mortgage-deed being dead, a mortgage-deed was sufficiently proved by evidence that the signature of the mortgagor was in his handwriting and that the signatures of two of the marginal witnesses were in their handwriting. By such evidence a presumption of due execution was raised which it lay on the defendants to rebut. *Wright* v. *Sanderson, L. R. 9 P. D. 149,* referred to. UTTAM SINGH *v.* HUKAM SINGH (1916)
I. L. R. 39 All. 112

2. ——— *Evidence—Mortgage—Proof of mortgage-deed.* A mortgage-deed on the face of it appeared to be attested by a large number of witnesses. In a suit upon the bond the mortgagee called one attesting witness who proved that he saw the mortgagor sign the mortgage and that he himself signed his name as an attesting witness. The other witnesses were not called, nor did the witness who was called say that any other attesting witness was present, nor was he asked the question by either side. *Held,* that, in the absence of any rebutting evidence, the mortgage-deed must be considered to be sufficiently proved. *Uttam Singh* v. *Hukam Singh, I. L. R. 39 All. 112,* referred to. SHIB DAYAL *v.* SHEO GHULAM (1916)
I. L. R. 39 All. 241

EVIDENCE ACT (I OF 1872)—*contd.*

———— ss. 68, 69—*concld.*

3. ———— *Transfer of Property Act (IV of 1882), s. 59—Proof of execution—Document proved have been executed in the presence of one attesting witness who was examined.* One of the attesting witnesses to a mortgage-deed was dead. The other attesting witness was called and proved that the mortgage-deed was signed by the mortgagor in his presence and that he signed the deed as an attesting witness. It was not expressly proved that there was another attesting witness present who saw the mortgagor sign, but it was not proved to be contrary that there was not another attesting witness. *Held,* that the mortgage was sufficiently proved according to the requirements of ss. 68 and 69 of the Indian Evidence Act. RAM DEI *v.* MUNNA LAL (1916) . . . I. L. R. 39 All. 109

———— *ss. 68 to 71*—

See EVIDENCE . I. L. R. 44 Calc. 345

———— ss. 69 and 70—

See MORTGAGE. . 4 Pat. L. J. 511

———— *Evidence—Mortgage—Proof of execution of mortgage—Mortgagors illiterate, and both they and the attesting witnesses dead before suit brought.* A mortgage-deed was on the face of it executed in 1889, by three illiterate mortgagors, who affixed their marks, and was attested by more than two witnesses. At the time of the institution of a suit for sale thereon, all the executants and the attesting witnesses were dead, and the evidence tendered in proof of the mortgage consisted of (i) the statement of a witness who professed to be acquainted with the handwriting of two of the attesting witnesses; (ii) a deed of usufructuary mortgage executed by one of exe-

which recognized by genuineness of the usufructuary mortgage
regard to
Act, 1872,
the mortgage in suit. GOBARDHAN DAS *v.* HARI LAL, (1913) . . . I. L. R. 35 All. 364

———— *ss. 68, 154—Attesting witness is in the position of witness called by Court.* SURENDRA KRISHNA MONDAL *v.* SM. RANEE DASSI

24 C. W. N. 860

———— s. 69—*Proof of document—Document required by law to be attested—Death of attesting witness—Hindu law—Joint Hindu family—Parties.* On execution of a deed of mortgage the names of two out of the four attesting witnesses were written by the scribe who had signed the document himself. *Held,* that it being necessary to prove the deed of mortgage after the death of all the attesting witnesses and the scribe, it was sufficient to prove the hand-writing of the scribe. *Radha Kishen* v. *Fateh Ali Ram, I. L. R. 20 All. 532,* referred to. Where all the adult members of a joint Hindu Family appear on the record as plaintiffs or defendants it is a legitimate presumption that they are acting as managers on behalf of themselves and of the minor members of the family who do not join in the suit. *Hori Lal* v. *Munman Kunwar, I. L. R. 34 All. 549,* and *Nathu Lal* v. *Lala, I. L. R. 34 All. 572,* referred to KRISHNA JIVA TEWARI *v.* BISHNATH KALWAR (1912)

I. L. R. 34 All. 615

EVIDENCE ACT (I OF 1872)—*contd.*

———— s. 69—*concld.*

———— ss. 69 to 72—

See EVIDENCE I. L. R. 44 Calc. 345

———— s. 70—

1. ———— *Registration Act (XVI of 1908), s. 60 (2)—Admission—Endorsement of registering officer not evidence of admission of execution of document,* The "admission" referred to in s. 70 of the Indian Evidence Act is an admission in the course of proceedings in which the attested document is produced, for example, made in the pleadings or by a party himself in his examination. The certificate of execution endorsed by the registering officer upon a document registered by him cannot be used as an "admission" of execution within the meaning of this section. RAJ MANGAL MISIR *v.* MATHURA DUBAIN (1915)

I. L. R. 38 All. 1

2. ———— *Suit on a mortgage-bond—Admission of mortgagee, if sufficient to make mortgage admissible against other parties not admitting execution, without proof by attesting witnesses—S. 70, effect of. Per* WOODROFF and D. CHATTERJEE, *JJ.* (Newbould *J.* dissenting). In a suit on a *mortgage bond the admission of execution* by the sole mortgagor does not under s. 70 of the Evidence Act dispense with the necessity of complying with the provisions of s. 68 of the Evidence Act in order to prove the execution of the document as against other parties in the suit who do not admit such execution. The document must be proved as against them in accordance with the *provisions of ss. 68, 69 and 70* of the Act. The effect of s. 70 is that the proof by calling attesting witnesses is dispensed with, when the party executant admits execution, only as against him. *Jogendra Nath Mukhopadhya* v. *Nitai Churn Bundopadhya, 7. C. W. N. 384,* commented on. SATISH CHANDRA MITRA *v.* JOGENDRA NATH MOHALANABIS (1916)

I. L. R. 44 Calc. 345
20 C. W. N. 1044

3. ———— A person who signs as a witness merely on admission of execution by the executant is not an attesting witness. MUSSAMMAT HIRA BIBI *v.* RAMDHAN LAL

6 Pat. L. J. 466

———— s. 73—*Handwriting, proof of—Document when admissible against accused.* A document to be admissible against an accused person should be proved (i) to be either a document in the handwriting of an accused person by comparison with an admitted or proved specimen of his handwriting, in the *light of the testimony of expert* witnesses, or (ii) to be in the possession of an accused person, or (iii) to be admissible as falling within the scope of s. 10, Evidence Act. *Barindra Kumar Ghose* v. *Emperor, 14 C. W. N. 1114: I. L. R. 37 Calc. 467,* followed. PULIN BEHARI DAS *v.* KING-EMPEROR (1911) 16 C. W. N. 1105

———— s. 74—

See CONTEMPT OF COURT.

I. L. R. 45 Calc. 169

———— *Notice under s. 107, Criminal Procedure Code, if a public document—Proof*

EVIDENCE ACT (I OF 1872)—*contd.*

——— **s. 74**—*concld.*

necessary for admission of such document in evidence. A notice under s. 107, Criminal Procedure Code, is a public document within the meaning of s. 74 of the Evidence Act, but it cannot come in without proof that the parties mentioned in it are the parties concerned in the question at issue about which it is produced as evidence. AMJAD *v.* LACHMI KANTA JHA (1914) . . . . . **18 C. W. N. 644**

——— **ss. 74, 66**—*Order of Probate Court granting letters of administration with copy of will annexed, if public document—Certified copy, if admissible—Admission as secondary evidence, though no steps taken to call for production of original.* The certified copy of an order of the Probate Court to the effect that letters of administration be granted to the person named with a copy of the will annexed of the deceased testator is admissible, the latter being a public document within the meaning of s. 74 of the Indian Evidence Act. Where it appeared that the original letters were in the possession of parties interested in opposing the plaintiff's claim but the plaintiff did not take steps to call upon them to produce them: *Held,* that there being no question of the genuineness of the document, these steps should have been waived by the Court and the document admitted in evidence under s. 66 of the Evidence Act. HABIRAM DAS *v.* HEM NATH SARMA (1915) **19 C. W. N. 1068**

——— **ss. 74 and 114**—

See REGISTER OF DEATHS. **I. L. R. 46 Calc. 152**

——— **s. 78 (2)**—

See LIBEL . **I. L. R. 37 Calc. 760**

——— **ss. 80, 91**—

See DEPOSITION **I. L. R. 45 Calc. 825**

——— **ss. 80 and 144**—

See CONFESSION . . **2 Pat. L. J. 80**

——— **ss. 80, 167**—

See DEPOSITION **I. L. R. 46 Calc. 895**

——— **s. 81**—

See s. 21 . **I. L. R. 36 Mad. 457**

——— **s. 82**—

See HINDU LAW (MINOR) **I. L. R. 38 Mad. 166**

——— **s. 83**—

See s. 35 . . **19 C. W. N. 1038**

——— *Evidence Act (I of 1872), ss. 3, 83—Map of khas mehal land prepared under direction of Government—Admissibility in boundary disputes—Witness, non-attendance of—Process to compel attendance refused without good ground—Second appeal.* In a dispute relating to the boundary of a holding between the plaintiff and the Municipal Corporation of Calcutta. *Held,* that a map prepared in 1872 under the direction of the Government acting not in its sovereign capacity but as the landlord of this and neighbouring holdings, was admissible in evidence, if not under s. 83, under s. 13 of the Evidence Act. UPENDRA NATH GHOSH *v.* THE CHAIRMAN OF THE CALCUTTA CORPORATION (1911) **16 C. W. N. 116**

EVIDENCE ACT (I OF 1872)—*contd.*

——— **s. 88**—

See CRIMINAL PROCEDURE CODE, 1908, ss. 196 AND 428. **I. L. R. 42 Mad. 885**

——— **s. 90**—

See s. 32 . . **3 Pat. L. J. 306**

See s. 4 . . **I. L. R. 37 Mad. 455**

See s. 65 . **I. L. R. 41 All. 592**

See BOMBAY LAND REVENUE CODE, 1879, ss. 3, 74. . **I. L. R. 45 Bom. 878**

——— S. 90 of the Indian Evidence Act does not prove the authority of the person who has made the grant, the genuineness whereof is presumed by the Court under the provisions of that section. KASHI NATH PAL *v.* JAGAT KISHORE ACHARYA CHOWDHURY (1915) **20 C. W. N. 643**

——— *Secondary evidence of document which may be given—Document, failure of witness to produce—Process fee for warrant, failure to deposit, if default excluding secondary evidence of document—Recital of boundaries in documents, if admissible as between persons not parties thereto—Document over thirty years old, opportunity if must be given to prove execution where presumption does not apply—Road-cess return, admissibility of—Omission in a document, if evidence.* Where the plaintiff issued summons upon a witness to produce a lease which was a title deed of the witness and which he was under no agreement with the plaintiff to produce, and on the failure of the witness to attend, the plaintiff to obtain an order for the issue of warrant against the witness but failed to put in the process-fee. *Held,* that, the failure of the plaintiff to get the warrant issue did not amount to default on his part, and that in the circumstances of the case he was entitled to use a certified copy of the document as evidence. A recital as to the boundary of a land in a lease is admissible in evidence against a person who was no party to that document. *Ningaya* v. *Bharmappa, I. L. R. 23 Bom. 63, Abdul Aziz Mollah* v. *Ebrahim Molla, I. L. R. 31 Calc. 965, Burha Mandar* v. *Megnath, 2 C. L. J. 4n.* followed. *Abdulla* v. *Kunja Behari, 14 C. L. J. 467, Brajeswari* v. *Bhudanuddi, I. L. R. 6 Calc. 268, Monohur Singh* v. *Sumitra Loer, I. L R. 17 All. 428,* referred, to Under s. 90 of the Evidence Act the Court is not bound to presume the genuineness of a document over thirty years old. It must first satisfy itself that the elements necessary to bring the document within the rule in that section exists and then exercise its discretion as to whether in the circumstances the presumption of genuineness should be applied to it. If the Court is not satisfied that the presumption should apply, it should call upon the party to produce evidence of its execution. Where, therefore, the Court below rejected such a document without calling upon the party to produce evidence of execution. *Held,* that the Court had not acted properly. The absence of the names of the predecessors of the plaintiff from the list of tenants in a road-cess return not filed by either party to the suit, was admissible in evidence against the plaintiff. IMRIT CHAMAR *v.* SIBDHARI PANDAY (1911) **17 C. W. N. 108**

——— **s. 91**—

See CONTRACT FOR SALE. **I. L. R. 45 Calc. 481**

EVIDENCE ACT (I OF 1872)—*concld.*

———— **s. 91**—*contd.*

See Criminal Procedure Code—

s. 103 . . **I. L. R. 34 Mad. 349**

s. 239 . . **I. L. R. 42 Mad. 561**

See Deposition.

I. L. R. 45 Calc. 825

See Dying declaration.

I. L. R. 36 Calc. 659

See Lease . **I. L. R. 46 Calc. 1079**

See Limitation Act, 1877, Sch. II, Arts. 132, 134 . **I. L. R. 35 Bom. 438**

See Partition . **15 C. W. N. 375**

See Transfer of Property Act, s. 107.

I. L. R. 36 Bom. 500

See Varthi amanam or letter.

I. L. R. 38 Mad. 660

———— **perjury, but statement not read out**—

See Penal Code, s 193.

I. L. R. 1 Lah. 361

———— **oral evidence of an agreement**—

See Registration.

I. L. R. 1 Lah. 436

1. ———— *Search-list does not*

stated therein and it does not therefore exclude oral evidence of such matter. G. O., No. 2883, Judicial, paragraph 5 (dated 17th December 1887), directs that no Magistrate may record any confession or statement under s. 167, Criminal Procedure Code, until he has first recorded in writing his

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I. L. R. 33 Mad. 413

2. ———— *Oral evidence admissible to prove what took place at time of search.* Where a search has been conducted under the Criminal Procedure Code, the search-list is not the only evidence admissible as to the matters dealt with therein. S. 91 of the Evidence Act does not exclude time of 2 *Weir* (*cutor* v. followed.

I. L. R. 33 Mad. 416

3. ———— *Hindu Law—Partition—Partition evidenced by a writing not registered—Oral evidence admissible to prove the fact of partition.* The fact of partition may be proved by oral evidence although the deed embodying the terms of partition cannot be proved for want of registration. Chhotalal Aditram v. Bai Mahakore (1917) . . **I. L. R. 41 Bom. 456**

4. ———— *Suit on promissory note—Note inadmissible in evidence—Plaintiff entitled to fall back on original cause of action.* If a creditor has a cause of action for the recovery of

EVIDENCE ACT (I OF 1872)—*contd.*

———— **s. 91**—*contd.*

money, for which his debtor has executed a promissory note, separate from and independent of the note, he *can recover upon such cause, in case the* note for any reason cannot be put in evidence. Nor is the creditor necessarily debarred from suing on the original cause of action by the fact that it *arose out of the same transaction in the course of* which the promissory note was executed. *Pursotam Narain* v. *Taley Singh, I. L. R. 26 All. 178,* overruled. *Sheikh Akbar* v. *Sheikh Khan, I. L. R. 8 Calc. 256, Krishnaji* v. *Rajmal, I. L. R. 24 Bom. 360, Virbhadrapa* v. *Bhimaji, I. L. R. 28 Bom. 432, Banarsi Prasad* v. *Fazal Ahmad, I. L. R. 28 All. 298,* and *Sri Nath Das* v. *Angad Singh, 7 All. L. J. 459,* referred to. Ram Sarup v. Jasodha Kunwar (1911) . . . **I. L. R. 34 All. 158**

5. ———— *Evidence, admissibility of—Confession made to enquiring magistrate but not recorded by him in writing—Criminal Procedure Code, ss. 364 and 533.* A confession of an accused person made to a Magistrate holding an inquiry is a matter required by law to be reduced to the form of a document within the meaning of s. 91 of the Indian Evidence Act, 1872, and that no such a con- nder s 364 , 533 of the cation to a case where no record whatever has been made of such a confession. Emperor v. Gulabu (1913)

I. L. R. 35 All. 260

6. ———— *Evidence—Confession—Admission of guilt during departmental inquiry—Oral evidence as to statement admissible.* The complainant in a petty criminal case before a bench of Honorary Magistrates, in the course of negotiations concerning a compromise, made a statement to the effect that he had paid a certain sum of money by way of an illegal gratification to the peshkar of the Court. The peshkar was at once

statement which was required by law to be in writing and could be proved by the evidence of either of the Magistrates who had heard it. Emperor v. Haidar Raza (1914)

I. L. R. 36 All. 232

7. ———— *Hundi—Renewal of hundis given as security for debt—Hundis sued on inadmissible for want of proper stamp—Right of creditor to fall back on previous hundis.* The defendants borrowed money from the plaintiffs and in return therefor drew four *hundis* in their favour.

particular *hundis* were insufficiently stamped and could not be admitted in evidence. *Held,* that the plaintiffs were entitled to fall back upon the last preceding set of *hundis,* and, as these were in the possession of the defendants, to give secondary evidence of their contents. Jagan Prasad v. Indar Mal (1911) . **I. L. R. 33 All. 259**

EVIDENCE ACT (I OF 1872)—*contd.*

———— **s. 91**—*concld.*

8. ———————— *suit for recovery of money advanced on a* hundi *which was signed shortly after the money was actually paid*—Hundi *insufficiently stamped and inadmissible in evidence—whether plaintiff has a cause of action independent of the* hundi. The defendant C. S. applied to the Amritsar National Insurance and Banking Company for a loan and in his application stated the security as " personal security on a *hundi* payable after 3 months." The Directors of the Company sanctioned the loan and the money was paid to C. S. less a certain amount deducted as interest in advance for 3 months and C. S. thumb-marked the Banker's voucher. The same day C. S. executed a *hundi* promising to repay the money to the Company after ninety days. The Company subsequently assigned their claim to the National Banking Company, Amritsar, and the latter at first sued on the *hundi*, but finding that it was insufficiently stamped, put in an amended plaint in which they claimed simply to recover the money advanced with interest. *Held*, that the loan having been granted on the security of a *hundi* (the execution of the *hundi* being for certain reasons postponed till a short time after the money had actually been paid to the defendant) the plaintiff had no cause of action independent of the *hundi*, and as the *hundi* was inadmissible in evidence and as s. 91 of the Evidence Act forbids secondary evidence the plaintiff's suit must fail. *Sheo Das* v. *Kanhaya Lal (61 P. R. 1888), Bakhshi Ram Labhaya* v. *Kaka Ram (42 P. R. 1895), and Ganga Ram* v. *Amir Chand (66 P. R. 1906) and C. A. 2865 of 1916*, unpublished, followed. *Baij Nath Das* v. *Salig Ram (16 Indian Cases 33)*, not followed. CHANDA SINGH *v.* AMRITSAR BANKING CO. . . **I. L. R. 2 Lah. 330**

———— **ss. 91, 92**—*Contract—Contract signed by a party personally—Oral evidence to show that the party signing contracted as agent—Admissibility of—Indian Contract Act (IX of 1872), ss.231, 233, effect of.* In a suit on a contract signed by the defendant personally, the defendant attempted to lead oral evidence to show that he was contracting as agent and that the name of his principal was disclosed at the time of the contract. On plaintiff objecting to this evidence being admitted, *Held*, that such evidence was not admissible for the purpose of exonerating a contracting party from liability, for that would be substituting a different agreement from that evidenced by the writing. *Higgins* v. *Senior (1841) 58 R. R. 884*, followed. *Venkatasubbiah Chetty* v. *Govindarajulu Naidu (1907) 31 Mad. 45 and Sadasuk Janki Das* v. *Sir Kishan Pershad (1918) 46 Calc. 663*, referred to. EBRAHIMBHOY PABANEY MILLS CO., LTD., *v.* HASSAN MAMOOJI (1921)

I. L. R. 45 Bom. 1242

———— **s. 92**—

See s. 58 . **I. L. R. 42 Mad. 41**

See CONTRACT ACT,

ss. 1 and 118. **I. L. R. 41 Bom. 518**

s. 65 . . . **15 C. W. N. 408**

See DOCTRINE OF SATISFACTION.

I. L. R. 37 Bom. 211

See DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879), ss. 2(2). 10A

I. L. R. 3 Bom. 18

EVIDENCE ACT (I OF 1872)—*contd.*

———— **s. 92**—*contd.*

See EVIDENCE . **I. L. R. 45 Calc. 320**
I. L. R. 38 Calc. 892

See EVIDENCE, ADMISSIBILITY OF.
L. R. 44 I. A. 236
I. L. R. 45 Calc. 320
I. L. R. 38 Calc. 892

See KHUD KASH JOTES.
I. L. R. 48 Calc. 259

See LANDLORD AND TENANT
I. L. R. 46 Calc. 1079

See LEASE . **I. L. R. 46 Calc. 1079**

See TRANSFER OF PROPERTY ACT (IV OF 1882), ss. 54, 118.
I. L. R. 37 Mad. 423

See RAYATI HOLDING.
I. L. R. 42 Calc. 546

See ORAL AGREEMENT.

See RECEIPT. . **I. L. R. 47 Calc. 129**

See RENT. . **I. L. R. 41 Calc. 347**

See RES JUDICATA **I. L. R. 1 Lah. 83**

———— **Price specified in the sale deed**—*Recital as to amount of price, essential term of contract of sale—Oral agreement as to higher price in discharge of a mortgage—Evidence inadmissible.* The amount of the price agreed to be paid is an essential term of a contract of sale; and consequently no evidence of an oral agreement at variance with the provisions of a registered sale-deed as to the amount of the price fixed for the sale is admissible under s. 92 of the Indian Evidence Act. *Cowasji Ruttonji Limboowalla* v. *Burjoji Rustomji Limboowalla, I. L. R. 12 Bom. 335*, followed. *Vasudeva* v. *Narasamma, I. L. R. 5 Mad. 6, Kumara* v. *Srinivasa, I. L. R. 11 Mad. 213, Hukumchand* v. *Hiralal, I. L. R. 3 Bom. 159*, and *Gopal Singh* v. *Laloo Lall, 10 C. L. J. 27*, explained. *Ram Baksh* v. *Durjan, I. L. R. 9 All. 392, Indarjit* v. *Lal Chand, I. L. R. 18 All. 168, Balkishen Das* v. *Legge, I. L. R. 22 All. 149, Selamba Goundan* v. *Palani Goundan, (1913) Mad. W. N. 650*, and *Probat Chandra Gangapadhya* v. *Chirag Ali, I. L. R. 33 Calc. 607*, referred to. ADITYAM IYER *v.* RAMA KRISHNA IYER (1913) . . . **I. L. R. 38 Mad. 514**

———— **Sale-deed or Mortgage**—*Written agreement—Contemporaneous oral agreement to treat it as mortgage—Absence of fraud, misrepresentation, etc.—Oral agreement cannot be pleaded.* Where parties enter into a sale-deed with a contemporaneous oral agreement to treat it as a mortgage, it is not open to either of them to plead the oral agreement in absence of fraud, misrepresentation or failure of consideration or the like reason rendering the sale void. SANGIRA MALAPPA *v.* KAMAPPA (1909) . **I. L. R. 34 Bom. 59**

———— **Sale-deed or Gift**—*Admissibility of evidence to show that a document purporting to be a sale-deed is in reality a deed of gift.* In the appeal their Lordships were of opinion that the decree of the High Court in *Faiz-un-nissa* v. *Hanif-un-nissa, I. L. R. 27 All. 612*, could not be supported and remitted the case to the High Court to be dealt with on the evidence. HANIF-UN-NISSA *v.* FAIZ-UN-NISSA (1911) . . **I. L. R. 33 All. 34**

EVIDENCE ACT (I OF 1872)—*contd.*

———— s. 92—*contd.*

———— prov. I—*Sale-deed—Contemporaneous agreement—Admissibility—Fraud.* A desired to set aside an ostensible sale-deed by proving that a representation, agreement or promise was made to him at the time of execution that the deed would not be enforced as a sale-deed. *Held*, that no evidence of such a representation, agreement or promise could be admitted for this purpose. *Datloo* v. *Ramchandra, I. L. R. 30 Bom. 119*, and *Keshavrao* v. *Raya, I. L. R. 8 Bom. L. R. 287*, followed. DAGDU VALAD SADU *v.* NANA VALAD SALU (1910) . I. L. R. 35 Bom. 93

———— Sale deed or Mortgage—*Dekkhan agriculturists' Relief Act (XVII of 1879), s. 10A—Redemption suit—Sale in reality a mortgage—Evidence of oral agreement varying the written document.* The plaintiff brought a redemption suit under the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879) alleging that the deed which he had executed to the defendant, though on its face a deed of sale, was in reality only a deed of mortgage, the defendant having promised at the time of the execution of the deed that he would allow redemption on payment of the money advanced. The defendant replied that the transaction was sale. The First Class Subordinate Judge of the Dharwar District to which s. 10A of the Dekkhan Agriculturists' Relief Act (XVII of 1879) was not extended found, on the evidence, that the deed passed by the plaintiff was not proved to be really a mortgage and dismissed the suit. The plaintiff appealed urging that the proper issue in the case was as to whether the sale-deed was not obtained or induced by the defendant by means of fraud or misrepresentation within the meaning of prov. I of s. 92 of the Evidence Act (I of 1872) and prayed for a

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separate oral agreement, but upon some fraud which would invite the application of prov. I of s. 92 of the Evidence Act (I of 1872). *Held*, further, that in the districts to which s. 10A of the Dekkhan Agriculturists' Relief Act (XVII of 1879) was not extended, it was not open to the Court to enter upon a defence which consisted of an allegation of an oral agreement varying the written contract. *Dagdu* v. *Nana, I. L. R. 35 Bom. 93*, and *Sangira Malappa* v. *Ramappa, I. L. R. 34 Bom. 59*, followed. *Balkishen Das* v. *W. F. Legge, I. L. R. 22 All. 149*, referred to. SOMANA BASAPPA *v.* GADIGEYA KORNAYA (1910) . . I. L. R. 35 Bom. 231

———— Fraud—*Evidence, admissibility of—Evidence of acts and conduct of parties to deeds showing that they were treated as being otherwise than they purport to be—Evidence showing actual*

instrument "as between the parties to such instrument or their representatives in interest:" but it does not prevent proof of a fraudulent dealing with a third person's property or proof of notice that the property purporting to be absolutely conveyed in fact belonged to a third person who was not a party to the conveyance. The respondents claimed to recover possession of certain parcels of land under deeds which purported to be absolute conveyances but which the appellants contended were meant to be, and had always in fact been, treated by all the parties concerned as mortgages

EVIDENCE ACT (I OF 1872)—*contd*

———— s. 92—*contd.*

only, and they tendered evidence of the acts and conduct of the parties to that effect. This evidence was excluded by both Courts below under s. 92 of the Evidence Act. Their Lordships of the Judicial Committee on appeal were, however, of opinion that on the evidence the case for the appellants disclosed a charge of fraud against the respondents antecedent to the deeds, inasmuch as they or the persons under whom they claimed took absolute conveyances of property from the appellants with

of the alleged fraudulent dealing. Their Lordships, therefore, without expressing any opinion on the construction or application of s. 92 of the Evidence Act in relation to the deeds came to the conclusion that the rejected evidence should be heard, subject to any objections which the respondents might be advised to take as the Court would then be in a position to deal hereafter (if necessary) with the admissibility of the evidence in relation not only to the deeds, but also in relation to the questions

validity might possibly depend. MAUNG KYIN *v.* MA SHWE LA (1911) . I. L. R. 38 Calc. 892

———— Consideration—*Sale of land, consideration for, not as stated in the deed—Oral promise, failure to perform.* Assuming that it may be shown by oral evidence that the real consideration for a deed of sale was not the consideration stated in the deed itself but a promise to maintain the plaintiff, in the absence of coercion, undue influence, fraud or misrepresentation of any kind at the time when the deed of sale was registered and possession taken thereunder, the deed will not be set aside. The special equitable doctrine whereby the American Courts have relieved in cases where an aged person has conveyed all his property in consideration of

I. L. R. 36 Mad. 8

———— prov. 1—*Evidence—Proof of failure of consideration—Promissory note given partly on account of a gambling debt.* The defendant who had been gambling with the plaintiffs and had lost, gave the plaintiffs two promissory notes, partly for his gambling losses and partly on other accounts, but it could not be ascertained

missing the whole suit. *Juggarnauth Sew Bux* v. *Ram Dyal, I. L. R. 9 Calc. 791*, distinguished. BALGOBIND *v.* BHAGGU MAL (1913).

I. L. R. 35 All. 558

———— Fraud—*Written document—Oral evidence to vary its terms—Plea of fraud—Section applies only to parties or their representatives.* In 1892, certain property was purported to be sold to *S* by its owners, the plaintiff and his cousin.

EVIDENCE ACT (I OF 1872)—*contd.*

———— s. 91—*concld.*

8. ———————— *suit for recovery of money advanced on a* hundi *which was signed shortly after the money was actually paid*—Hundi *insufficiently stamped and inadmissible in evidence—whether plaintiff has a cause of action independent of the* hundi. The defendant C. S. applied to the Amritsar National Insurance and Banking Company for a loan and in his application stated the security as "personal security on a *hundi* payable after 3 months." The Directors of the Company sanctioned the loan and the money was paid to C. S. less a certain amount deducted as interest in advance for 3 months and C. S. thumb-marked the Banker's voucher. The same day C. S. executed a *hundi* promising to repay the money to the Company after ninety days. The Company subsequently assigned their claim to the National Banking Company, Amritsar, and the latter at first sued on the *hundi*, but finding that it was insufficiently stamped, put in an amended plaint in which they claimed simply to recover the money advanced with interest. *Held*, that the loan having been granted on the security of a *hundi* (the execution of the *hundi* being for certain reasons postponed till a short time after the money had actually been paid to the defendant) the plaintiff had no cause of action independent of the *hundi*, and as the *hundi* was inadmissible in evidence and as s. 91 of the Evidence Act forbids secondary evidence the plaintiff's suit must fail. *Sheo Das* v. *Kanhaya Lal* (*61 P. R. 1888*), *Bakhshi Ram Labhaya* v. *Kaka Ram* (*42 P. R. 1895*), *and Ganga Ram* v. *Amir Chand* (*66 P. R. 1906*) *and C. A. 2865 of 1916*, unpublished, followed. *Baij Nath Das* v. *Salig Ram* (*16 Indian Cases 33*), not followed. CHANDA SINGH *v.* AMRITSAR BANKING CO. . . **I. L. R. 2 Lah. 330**

———— **ss. 91, 92**—*Contract—Contract signed by a party personally—Oral evidence to show that the party signing contracted as agent—Admissibility of—Indian Contract Act* (*IX of 1872*), *ss. 231, 233, effect of.* In a suit on a contract signed by the defendant personally, the defendant attempted to lead oral evidence to show that he was contracting as agent and that the name of his principal was disclosed at the time of the contract. On plaintiff objecting to this evidence being admitted, *Held*, that such evidence was not admissible for the purpose of exonerating a contracting party from liability, for that would be substituting a different agreement from that evidenced by the writing. *Higgins* v. *Senior* (*1841*) *58 R. R. 884*, followed. *Venkatasubbiah Chetty* v. *Govindarajulu Naidu* (*1907*) *31 Mad. 45 and Sadasuk Janki Das* v. *Sir Kishan Pershad* (*1918*) *46 Calc. 663*, referred to. EBRAHIMBHOY PABANEY MILLS CO., LTD., *v.* HASSAN MAMOOJI (1921)
I. L. R. 45 Bom. 1242

———— s. 92—

See s. 58 . **I. L. R. 42 Mad. 41**

See CONTRACT ACT,

ss. 1 and 118. **I. L. R. 41 Bom. 518**

s. 65 . . . **15 C. W. N. 408**

See DOCTRINE OF SATISFACTION.
I. L. R. 37 Bom. 211

See DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879), ss. 2(2). 10A
I. L. R. 3 Bom. 18

EVIDENCE ACT (I OF 1872)—*contd.*

———— s. 92—*contd.*

See EVIDENCE . **I. L. R. 45 Calc. 320**
I. L. R. 38 Calc. 892

See EVIDENCE, ADMISSIBILITY OF.
L. R. 44 I. A. 236
I. L. R. 45 Calc. 320
I. L. R. 38 Calc. 892

See KHUD KASH JOTES.
I. L. R. 48 Calc. 259

See LANDLORD AND TENANT
I. L. R. 46 Calc. 1079

See LEASE . **I. L. R. 46 Calc. 1079**

See TRANSFER OF PROPERTY ACT (IV OF 1882), ss. 54, 118.
I. L. R. 37 Mad. 423

See RAYATI HOLDING.
I. L. R. 42 Calc. 546

See ORAL AGREEMENT.

See RECEIPT. . **I. L. R. 47 Calc. 129**

See RENT. . **I. L. R. 41 Calc. 347**

See RES JUDICATA **I. L. R. 1 Lah. 83**

———— **Price specified in the sale deed**—*Recital as to amount of price, essential term of contract of sale—Oral agreement as to higher price in discharge of a mortgage—Evidence inadmissible.* The amount of the price agreed to be paid is an essential term of a contract of sale; and consequently no evidence of an oral agreement at variance with the provisions of a registered sale-deed as to the amount of the price fixed for the sale is admissible under s. 92 of the Indian Evidence Act. *Cowasji Ruttonji Limboowalla* v. *Burjeji Rustomji Limboowalla*, *I. L. R. 12 Bom. 335*, followed. *Vasudeva* v. *Narasamma*, *I. L. R. 5 Mad. 6*, *Kumara* v. *Srinivasa*, *I. L. R. 11 Mad. 213*, *Hukumchand* v. *Hiralal*, *I. L. R. 3 Bom. 159*, and *Gopal Singh* v. *Laloo Lall*, *10 C. L. J. 27*, explained. *Ram Baksh* v. *Durjan*, *I. L. R. 9 All. 392*, *Indarjit* v. *Lal Chand*, *I. 18 All. 168*, *Balkishen Das* v. *Legge*, *I. L. R. 22 All. 149*, *Selamba Goundan* v. *Palani Goundan*, (*1913*) *Mad. W. N. 650*, and *Probat Chandra Gangapadhya* v. *Chirag Ali*, *I. L. R. 33 Calc. 607*, referred to. ADITYAM IYER *v.* RAMA KRISHNA IYER (1913) . . . **I. L. R. 38 Mad. 514**

———— **Sale-deed or Mortgage**—*Written agreement—Contemporaneous oral agreement to treat it as mortgage—Absence of fraud, misrepresentation, etc.—Oral agreement cannot be pleaded.* Where parties enter into a sale-deed with a contemporaneous oral agreement to treat it as a mortgage, it is not open to either of them to plead the oral agreement in absence of fraud, misrepresentation or failure of consideration or the like reason rendering the sale void. SANGIRA MALAPPA *v.* RAMAPPA (1909) . **I. L. R. 34 Bom. 59**

———— **Sale-deed or Gift**—*Admissibility of evidence to show that a document purporting to be a sale-deed is in reality a deed of gift.* In the appeal their Lordships were of opinion that the decree of the High Court in *Faiz-un-nissa* v. *Hanif-un-nissa*, *I. L. R. 27 All. 612*, could not be supported and remitted the case to the High Court to be dealt with on the evidence. HANIF-UN-NISSA *v.* FAIZ-UN-NISSA (1911) . . **I. L. R. 33 All. 34**

EVIDENCE ACT (I OF 1872)—*contd.*

———— s. 92—*contd.*

———— prov. I—*Sale-deed—Contemporaneous agreement—Admissibility—Fraud.* A desired to set aside an ostensible sale-deed by proving that a representation, agreement or promise was made to him at the time of execution that the deed would not be enforced as a sale-deed. *Held,* that no evidence of such a representation, agreement or promise could be admitted for this purpose. *Dalloo* v. *Ramchandra, I. L. R. 30 Bom. 119,* and *Keshavrao* v. *Raya, I. L. R. 8 Bom. L. R. 287,* followed. DAGDU VALAD SADU *v.* NANA VALAD SALU (1910) . **I. L. R. 35 Bom. 93**

———— **Sale deed or Mortgage**—*Dekkhan agriculturists' Relief Act (XVII of 1879), s. 10A—Redemption suit—Sale in reality a mortgage—Evidence of oral agreement varying the written document.* The plain

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gage, the defendant having promised at the time of the execution of the deed that he would allow

plaintiff was not proved to be really a mortgage and dismissed the suit. The plaintiff appealed urging that the proper issue in the case was as to whether the sale-deed was not obtained or induced by the defendant by means of fraud or misrepresentation within the meaning of prov. I of s. 92 of the Evidence Act (I of 1872) and prayed for a

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separate oral agreement, but upon some fraud which would invite the application of prov. I of s. 92 of the Evidence Act (I of 1872). *Held,* further, that in the districts to which s. 10A of the Dekkhan Agriculturists' Relief Act (XVII of 1879) was not extended, it was not open to the Court to enter upon a defence which consisted of an allegation of

Balkishen Das v. *W. F. Legge, I. L. R. 22 All. 149,* referred to. SOMANA BASAPPA *v.* GADIGEYA KORNAYA (1910) . . **I. L. R. 35 Bom. 231**

———— **Fraud**—*Evidence, admissibility of—Evidence of acts and conduct of parties to deeds showing that they were treated as being otherwise than they purport to be—Evidence showing actual*

instrument "as between the parties to such instrument or their representatives in interest;" but it does not prevent proof of a fraudulent dealing with a third person's property or proof of notice

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claimed to recover possession of certain parcels of land under deeds which purported to be absolute conveyances but which the appellants contended were meant to be, and had always in fact been, treated by all the parties concerned as mortgages only, and they tendered evidence of the acts and conduct of the parties to that effect. This evidence was excluded by both Courts below under s. 92 of the Evidence Act. Their Lordships of the Judicial Committee on appeal were, however, of opinion that on the evidence the case for the appellants disclosed a charge of fraud against the respondents antecedent to the deeds, inasmuch as they or the persons under whom they claimed took absolute conveyances of property from the appellants with

that the rejected evidence should be heard, subject to any objections which the respondents might be advised to take as the Court would then be in a position to deal hereafter (if necessary) with the admissibility of the evidence in relation not only to the deeds, but also in relation to the questions

validity might possibly depend. MAUNG KYIN *v.* MA SHWE LA (1911) . **I. L. R. 38 Calc. 892**

———— **Consideration**—*Sale of land, consideration for, not as stated in the deed—Oral promise, failure to perform.* Assuming that it may be shown by oral evidence that the real consideration for a deed of sale was not the consideration stated in the deed itself but a promise to maintain the plaintiff, in the absence of coercion, undue influence, fraud or misrepresentation of any kind at the time when the deed of sale was registered and possession taken thereunder, the deed will not be set aside. The special equitable doctrine whereby the American Courts have relieved in cases where an aged person has conveyed all his property in consideration of an oral promise to be supported for the remainder of his life by the grantee, not applied SUBBAYYAH *v.* MONIEM SUBRAMANIA AYYAR (1913)
I. L. R. 36 Mad. 8

———— prov. I—*Evidence—Proof of failure of*

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partly for his gambling losses and partly on other accounts, but it could not be ascertained what proportion of the total sum secured was represented by the gambling debts. *Held,* on suit to recover on these notes, that it was open to the defendants to prove that the consideration was in

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missing the whole suit. *Juggarnauth Sew Bux* v. *Ram Dyal, I. L. R. 9 Calc. 791,* distinguished. BALGOBIND *v.* BHAGGU MAL (1913).
I. L. R. 35 All. 558

———— **Fraud**—*Written document—Oral evidence to vary its terms—Plea of fraud—Section applies only to parties or their representatives.* In 1892, certain property was purported to be sold to *S* by its owners, the plaintiff and his cousin.

EVIDENCE ACT (I OF 1872)—*contd.*

————s. 91—*concld.*

8. ———————— *suit for recovery of money advanced on a* hundi *which was signed shortly after the money was actually paid*—Hundi *insufficiently stamped and inadmissible in evidence—whether plaintiff has a cause of action independent of the* hundi. The defendant C. S. applied to the Amritsar National Insurance and Banking Company for a loan and in his application stated the security as "personal security on a *hundi* payable after 3 months." The Directors of the Company sanctioned the loan and the money was paid to C. S. less a certain amount deducted as interest in advance for 3 months and C. S. thumb-marked the Banker's voucher. The same day C. S. executed a *hundi* promising to repay the money to the Company after ninety days. The Company subsequently assigned their claim to the National Banking Company, Amritsar, and the latter at first sued on the *hundi*, but finding that it was insufficiently stamped, put in an amended plaint in which they claimed simply to recover the money advanced with interest. *Held,* that the loan having been granted on the security of a *hundi* (the execution of the *hundi* being for certain reasons postponed till a short time after the money had actually been paid to the defendant) the plaintiff had no cause of action independent of the *hundi,* and as the *hundi* was inadmissible in evidence and as s. 91 of the Evidence Act forbids secondary evidence the plaintiff's suit must fail. *Sheo Das* v. *Kanhaya Lal (61 P. R. 1888), Bakhshi Ram Labhaya* v. *Kaka Ram (42 P. R. 1895), and Ganga Ram* v. *Amir Chand (66 P. R. 1906) and C. A. 2865 of 1916,* unpublished, followed. *Baij Nath Das* v. *Salig Ram (16 Indian Cases 33),* not followed. CHANDA SINGH *v.* AMRITSAR BANKING CO. . . **I. L. R. 2 Lah. 330**

———— ss. 91, 92—*Contract—Contract signed by a party personally—Oral evidence to show that the party signing contracted as agent—Admissibility of—Indian Contract Act (IX of 1872), ss. 231, 233, effect of.* In a suit on a contract signed by the defendant personally, the defendant attempted to lead oral evidence to show that he was contracting as agent and that the name of his principal was disclosed at the time of the contract. On plaintiff objecting to this evidence being admitted, *Held,* that such evidence was not admissible for the purpose of exonerating a contracting party from liability, for that would be substituting a different agreement from that evidenced by the writing. *Higgins* v. *Senior (1841) 58 R. R. 884,* followed. *Venkatasubbiah Chetty* v. *Govindarajulu Naidu (1907) 31 Mad. 45 and Sadasuk Janki Das* v. *Sir Kishan Pershad (1918) 46 Calc. 663,* referred to. EBRAHIMBHOY PABANEY MILLS CO., LTD., *v.* HASSAN MAMOOJI (1921)
I. L. R. 45 Bom. 1242

———— s. 92—

See s. 58 . **I. L. R. 42 Mad. 41**

See CONTRACT ACT,

ss. 1 and 118. **I. L. R. 41 Bom. 518**

s. 65 . . . **15 C. W. N. 408**

See DOCTRINE OF SATISFACTION.
I. L. R. 37 Bom. 211

See DEKKHAN AGRICULTURISTS' RELIEF ACT (XVII OF 1879), ss. 2(2). 10A
I. L. R. 3 Bom. 18

EVIDENCE ACT (I OF 1872)—*contd.*

———— s. 92—*contd.*

See EVIDENCE . **I. L. R. 45 Calc. 320**
I. L. R. 38 Calc. 892

See EVIDENCE, ADMISSIBILITY OF.
L. R. 44 I. A. 236
I. L. R. 45 Calc. 320
I. L. R. 38 Calc. 892

See KHUD KASH JOTES.
I. L. R. 48 Calc. 259

See LANDLORD AND TENANT
I. L. R. 46 Calc. 1079

See LEASE . **I. L. R. 46 Calc. 1079**

See TRANSFER OF PROPERTY ACT (IV OF 1882), ss. 54, 118.
I. L. R. 37 Mad. 423

See RAYATI HOLDING.
I. L. R. 42 Calc. 546

See ORAL AGREEMENT.

See RECEIPT. . **I. L. R. 47 Calc. 129**

See RENT. . **I. L. R. 41 Calc. 347**

See RES JUDICATA **I. L. R. 1 Lah. 83**

———— Price specified in the sale deed—*Recital as to amount of price, essential term of contract of sale—Oral agreement as to higher price in discharge of a mortgage—Evidence inadmissible.* The amount of the price agreed to be paid is an essential term of a contract of sale; and consequently no evidence of an oral agreement at variance with the provisions of a registered sale-deed as to the amount of the price fixed for the sale is admissible under s. 92 of the Indian Evidence Act. *Cowasji Ruttonji Limboowalla* v. *Burjoji Rustomji Limboowalla, I. L. R. 12 Bom. 335,* followed. *Vasudeva* v. *Narasamma, I. L. R. 5 Mad. 6, Kumara* v. *Srinivasa, I. L. R. 11 Mad. 213, Hukumchand* v. *Hiralal, I. L. R. 3 Bom. 159,* and *Gopal Singh* v. *Laloo Lall, 10 C. L. J. 27,* explained. *Ram Baksh* v. *Durjan, I. L. R. 9 All. 392, Indarjit* v. *Lal Chand, I. L. R. 18 All. 168, Balkishen Das* v. *Legge, I. L. R. 22 All. 149, Selamba Goundan* v. *Palani Goundan, (1913) Mad. W. N. 650,* and *Probat Chandra Gangapadhya* v. *Chirag Ali, I. L. R. 33 Calc. 607,* referred to. ADITYAM IYER *v.* RAMA KRISHNA IYER (1913) . . . **I. L. R. 38 Mad. 514**

———— Sale-deed or Mortgage—*Written agreement—Contemporaneous oral agreement to treat it as mortgage—Absence of fraud, misrepresentation, etc.—Oral agreement cannot be pleaded.* Where parties enter into a sale-deed with a contemporaneous oral agreement to treat it as a mortgage, it is not open to either of them to plead the oral agreement in absence of fraud, misrepresentation or failure of consideration or the like reason rendering the sale void. SANGIRA MALAPPA *v.* KAMAPPA (1909) . **I. L. R. 34 Bom. 59**

———— Sale-deed or Gift—*Admissibility of evidence to show that a document purporting to be a sale-deed is in reality a deed of gift.* In the appeal their Lordships were of opinion that the decree of the High Court in *Faiz-un-nissa* v. *Hanif-un-nissa, I. L. R. 27 All. 612,* could not be supported and remitted the case to the High Court to be dealt with on the evidence. HANIF-UN-NISSA *v.* FAIZ-UN-NISSA (1911) . . **I. L. R. 33 All. 34**

EVIDENCE ACT (I OF 1872)—*contd.*

———s. 92—*contd.*

——— prov. I—*Sale-deed—Contemporaneous agreement—Admissibility—Fraud. A* desired to set aside an ostensible sale-deed by proving that a representation, agreement or promise was made to him at the time of execution that the deed would not be enforced as a sale-deed. *Held,* that no evidence of such a representation, agreement or promise could be admitted for this purpose.
Bom. 119, and
L. R. 287, followed. ... VALAD SALU (1910) . I. L. R. 35 Bom. 93

of oral agreement varying the written document. The *plaintiff brought a redemption suit under the provisions* of the Dekkhan Agriculturists' Relief Act (XVI ... which he had ... *its face* a deed of sale, was in reality ... of mortgage, the defendant having promised at the time of the execution of the deed that he would allow

... plaintiff was not proved to be really a mortgage and dismissed the suit. The plaintiff appealed urging that the proper issue in the case was as to whether the sale-deed was not obtained or induced by the defendant by means of fraud or misrepresentation within the meaning of prov. I of s. 92 of the Evidence Act (I of 1872) and prayed for a remand. *Held,* confirming the decree, that the plaintiff sought to make a new case in appeal in so far as he endeavoured to base his case, not upon a

... Agriculturists' Relief Act (XVII of 1879) was not extended, it was not open to the Court to enter upon a defence which consisted of an allegation of

... referred to. SOMANA BASAPPA *v.* GADIGEYA KORNAYA (1910) . . I. L. R. 35 Bom. 231

——— Fraud—*Evidence, admissibility of—Evidence of acts and conduct of parties to deeds showing that they were treated as being otherwise than they purport to be—Evidence showing actual conveyances to be only mortgages—Fraud with regard to property of third person not party to deed.* S. 92 of the Evidence Act (I of 1872) is applicable to an instrument "as between the parties to such instrument *or their representatives in interest;*" but it does not prevent proof of a fraudulent dealing with a third person's property or proof of notice that the property purporting to be absolutely conveyed *in fact* belonged to a *third person* who was not a party to the conveyance. The respondents claimed to recover possession of certain parcels of land under deeds which purported to be absolute conveyances but which the appellants contended were meant to be, and had always in fact been, treated by all the parties concerned as mortgages only, and they tendered evidence of the acts and conduct of the parties to that effect. This evidence was excluded by both Courts below under s. 92 of the Evidence Act. Their Lordships of the Judicial Committee on appeal were, however, of opinion that on the evidence the case for the appellants disclosed a charge of fraud against the respondents antecedent to the deeds, inasmuch as they or the persons under whom they claimed took absolute conveyances of property from the appellants with *notice that such property belonged in fact to a*

... therefore, without expressing any opinion on the construction or application of s. 92 of the Evidence Act in relation to the deeds came to the conclusion that the rejected evidence should be heard, subject to any objections which the respondents might be advised to take as the Court would then be in a position to deal hereafter (if necessary) with the *admissibility of the evidence in relation not only*

... the execution of those deeds, and upon which their validity might possibly depend. MAUNG KYIN *v.* MA SHWE LA (1911) . I. L. R. 38 Calc. 892

——— Consideration—*Sale of land, consideration for, not as stated in the deed—Oral promise, failure to perform* Assuming that it may be shown by oral evi... deed of sale ...

... thereunder, the deed will not be set aside. The special equitable doctrine whereby the American Courts have relieved in cases where an aged person has conveyed all his property in consideration of an oral promise to be supported for the remainder of his life by the grantee, not applied. SUBBAYYAH *v.* MONIEM SUBRAMANIA AYYAR (1913)
I. L. R. 36 Mad. 8

——— prov. I—*Evidence—Proof of failure of consideration—Promissory note given partly on account o...* The defendant who had ... had lost, ... partly for his gambling losses and partly on other accounts, but it could not be ascertained ... of the total sum secured was

... debts could not be separated from the rest, in dismissing the whole suit. *Juggarnauth Sew Bux* v. *Ram Dyal, I. L. R. 9 Calc. 791,* distinguished. BALGOBIND *v.* BHAGGU MAL (1913).
I. L. R. 35 All. 55

——— Fraud—*Written document—Oral evidence to vary its terms—Plea of fraud—Section applies only to parties or their representatives.* In 1892, certain property was purported to be sold to *S* by its owners, the plaintiff and his cousin

EVIDENCE ACT (I OF 1872)—*contd.*

———— s. 92—*contd.*

In 1898, *S* sold a moiety of the property to defendant No. 1, who was plaintiff's sister's son ; and he sold the other moiety to the same person in 1904. The plaintiff sued in 1913 for a declaration that the transaction of 1892 was a mortgage. The trial Court came to the conclusion that the original transaction with *S* was a mortgage and that in 1898 and 1904 the property was conveyed by *S* to defendant No. 1 with full knowledge of the fact that *S* was only a mortgagee and with the understanding that defendant No. 1 was to hold the property subject to the liability to reconvey the same to the plaintiff and his cousin on payment. The trial Court held the plaintiff entitled to redeem a moiety of the property. On appeal, the lower appellate Court came to the same conclusion on facts; but dismissed the plaintiff's claim on the ground that the evidence to show that the conveyance of 1898 was a mortgage was inadmissible. The plaintiff having appealed: *Held*, that so far as the transactions of 1898 and 1904 were concerned, s. 92 of the Indian Evidence Act (I of 1872) had no application, for the plaintiff was not a party to either of them. *Held*, by SHAH *J.*, that as regards the transaction of 1892, the oral evidence was admissible under prov. 1 to s. 92, the plaintiff's allegation in substance being one of fraud, namely, that though defendant No. 1 entered into these transactions with the full knowledge of the fact that *S* was really a mortgagee and not the owner of the property, he later turned round and said that he had no such knowledge. *Held*, by MARTEN *J.*, that assuming the transaction of 1892 must be taken to be a sale, there was nothing in s. 92 to prevent oral evidence of a subsequent agreement in 1898, to treat the 1892 deed as a mortgage, and to enter into the 1898 deed as a transfer of that mortgage. *Held*, therefore, that the plaintiff was entitled to recover the property comprised in the 1898 transaction on payment of the moneys there paid by defendant to *S* and subsequent interest. GANU *walad* RAMJI *v.* BHAU *walad* BAPUJI (1918)

I. L. R. 42 Bom. 512

———— Area—*Evidence to disprove area stated in lease of land within specified boundaries—Admissibility—Evidence of previous negotiations, if admissible.* Where the area of demised land, which was described in the lease as lying within certain specified boundaries, was stated therein as 400 bighas, extrinsic evidence was not admissible to show that there was not the stated area within the specified boundaries. Extrinsic evidence as to the negotiations which led up to the contract was inadmissible to vary the construction of the lease DURGA PROSAD SINGH *v.* RAJENDRA NARAIN BAGCHI (1913)

I. L. R. 41 Calc. 493
18 C. W. N. 66

———— Prov. (1)—*Evidence—Consideration—Admissibility of evidence to prove that the true consideration is other than that which appears from the deed embodying the transaction.* If one party to a deed alleges and proves that the whole of the consideration the receipt of which was acknowledged in the deed did not pass, the case falls within the first proviso to s. 92 of the Indian Evidence Act, 1872, and the other party is at liberty to prove what the real consideration was. Evidence can be given to prove the real

EVIDENCE ACT (I OF 1872)—*contd.*

———— s. 92—*contd.*

nature of the transaction. *Hanif-un-nissa* v. *Faiz-un-nissa, I. L. R. 33 All. 340*, followed. *Jumna Dass* v. *Srinath Roy, I. L. R. 17 Calc. 176* (note), *Shah Mukhun Lall* v. *Baboo Sree Kishen Sing, 12 Moo. I. A. 157, Lala Himmat Sahai Singh* v. *Llewhellen, I. L. R. 11 Calc. 486, Hukumchand* v. *Hiralal, I. L. R. 3 Bom. 159, Indarjit* v. *Lal Chand, I. L. R. 18 All. 168, Kailash Chandra Neogi* v. *Harish Chandra Biswas, 5 C. W. N. 158, Nathu Khan* v. *Sewak Koeri, 15 C. W. N. 408, Muhammad Yusuf* v. *Muhammad Musa, All. Weekly Notes, (1907) 181*, and *Adityam Iyer* v. *Ramakrishna Aiyar, 25 Mad. L. J., 602*, referred to. CHUNNI BIBI *v.* BASANTI BIBI (1914) . **I. L. R. 36 All. 537**

———— Prov. 4—*Contract of mortgage—Oral evidence led to prove discharge of mortgage debt by payment of a smaller sum of money than actually due—Inadmissibility of such evidence.* In a suit by a mortgagee to recover Rs. 2,000 as balance due on two registered mortgage deeds, the defendant-mortgagor pleaded that the mortgagee had received Rs. 800 in full satisfaction of the mortgage debt. The lower Courts allowed oral evidence to show that the mortgages in suit were discharged by the mortgagee by a payment of Rs. 800. On appeal to the High Court, *Held*, that oral evidence was inadmissible to prove discharge of the mortgage debt under s. 92, Proviso 4 of the Evidence Act, 1872. *Mallappa* v. *Matum Nagu Chetty (1918) 42 Mad. 41*, followed. JAGANNATH *v.* SHANKAR (1919)

I. L. R. 44 Bom. 55

———— provs. 1 and 3—*Sale-deed—Property, vesting of—Oral evidence contrary to its tenor, admissibility of—Document operative at once—Evidence as to vesting of property at a future time, inadmissible—Rule of English Law, different.* An executant of an instrument (which was not a sham transaction but intended to operate at once), cannot be permitted to set up or prove that the instrument, which according to its tenor vested the property in the grantee at once, was in reality intended to vest it only at a future time or after the death of the executant. S. 92, proviso 1, of the Indian Evidence Act, has no application to a case where the instrument represents what the parties intended to put down in writing, though it might not be in accordance with what they intended to do and with the legal effect that they secretly wanted to bring about but which for some reason they did not want to put in writing. The rule of English Courts of Equity permitting evidence to be given to show that a document was intended to operate in a manner different from the plaint and apparent meaning of its language cannot be followed in India, as it is contrary to the provisions of s. 92 of the Indian Evidence Act. *Balkishen Das* v. *Legge, I. L. R. 22 All. 149, Achutaramaraju* v. *Subbaraju, I. L. R. 25 Mad. 7, Dattoo* v. *Ramachandra, I. L. R. 30 Bom. 119*, and *Challa Venkatta Reddy* v. *Devabhaktuni Mruthunjayadu, (1912) Mad. W. N. 164*, followed. *Jibun Nissa* v. *Asgar Ali, I. L. R. 17 Calc. 937*, referred to. *Chaudhri Mehdi Hasan* v. *Muhammad Hassan, I. L. R. 28 All. 439, Ramalinga Mudali* v. *Ayyadorai Nainar, I. L. R. 28 Mad. 124*, and *Amirthathammal* v. *Periasami Pillai, I. L. R. 32 Mad. 325*, distinguished. MOTTAYAPPAN *v.* PALANI GOUNDAN (1913)

I. L. R. 38 Mad. 226

EVIDENCE ACT (I OF 1872)—*contd.*

———— **s. 92**—*contd.*

———— **Price**—*Essential term of contract.* The price agreed to be paid is an essential part of a sale contract consequently no evidence of an oral agreement at variance with the provisions of a sale-deed on this point is admissible. ADITYAM IYER *v.* RAMA KRISHNA IYER

I. L. R. 38 Mad. 514

———— **Prov. 2**—*Suit on promissory note—Plea of an oral agreement purporting to vary note—Admission in pleadings—Admission subject to condition—Absence of substantive proof of oral agreement—Onus of proof.* Although there are cases where it is allowable to urge an oral agreement which would have the effect of leaving matters otherwise than if they had depended on the written agreement alone, the oral agreement must be clearly proved, and the onus of doing so is on him who sets it up. In a suit on a promissory note, dated 23rd December 1907, executed by the defendant (appellant) and a firm of H. C. and

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a simple acknowledgment by H. C. being then substituted for the note. The plaintiff stated in his plaint that the defendant's liability was only to come to an end at the date named provided he

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pleadings would have brought the defendant's contention within proviso (2) of s. 92, as being an oral agreement as to which the promissory note was silent, and which was not inconsistent with its terms. In that view their Lordships were of opinion that it would not be satisfactory to decide against the defend

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the defendant's case was thereupon established. The agreement alleged by the defendant must be substantively proved, and that had not been done.

accepted at all. An admission, therefore, that the

ESSABHOY *v.*

I. L. R. 39 Bom. 399

———— **contemporaneous oral agreement**—*admissibility of.* In a suit by the payee of a *hundi* against the drawer and acceptor the plaintiff claimed interest at 12 *per cent. per annum* on the strength of an oral contemporaneous agreement. There was no stipulation regarding interest in the *hundi* itself. *Held,* that under the Evidence Act, 1872, s. 92, evidence of the oral contemporaneous agreement was excluded, and the plaintiff was entitled to interest only at the rate of 6 *per cent. per annum* as provided by the Negotiable Instruments Act, 1881, s. 80. *Banwari Lal* v. *Jagarnath Prasad* (1916)

1 Pat. L. J. 71

———— **Mistake**—*in a sale-deed to the defendant resisting suit for possession—Specific Relief Act (I of 1877), s. 31.—Plea of mistake without previous rectification of sale-deed, maintainability of.* The combined effect of s. 92, cl. (a) of the Evidence Act (I of 1872) and of s. 31 of the Specific Relief Act (I of 1877) is to entitle either party to a contract whether plaintiff or defendant to protect his right by proving a mistake in a

the party who is obliged to prove the mistake happens to be a defendant in the suit resisting a claim for possession of that property and that he has not previously obtained a rectification of his sale-deed are no bar to the advancement of the plea. *Mahendra Nath Mukkerjee* v *Jogendra Nath Roy Chaudry, 2 C. W. N. 260,* followed. *Mahadeva Ayyar* v. *Gopala Ayyar, I. L. R. 34 Mad. 51,* referred to. RANGASAMI *v.* SOURI (1915)

I. L. R. 39 Mad. 792

———— **Prov. 3**—*Promissory note—Contemporaneous oral agreement—Evidence cannot be allowed to prove the agreement.* In a suit on a promissory note payable on demand, no evidence

he had sold to a third party. Such an agreement cannot be brought within the terms of proviso 3 to s. 92 of the Indian Evidence Act, 1872. *Ramjibun Serowgy* v. *Oghore Nath Chatterjee (1897) 25 Calc. 401,* relied on. VISHNU RAMCHANDRA *v* GANESH KRISHNA **I. L. R. 45 Bom 1155**

———— **prov. 4**—*Registered kabuliyat—Acceptance by landlord for a long time of reduced rent, if precludes suit at kabuliyat rate—Admissibility of evidence of conduct to prove agreement to take rent at reduced rate or to prove that kabuliyat originally not intended to be acted upon.* The mere fact that the landlord accepted rent at a reduced rate from that stipulated for in the *kabuliyat* for some time does not bind the lessor to accept

Prosad Singh v. *Rajendra Narain Bagchi, I. L. R. 37 Calc. 293 : I. L. R. 41 Calc. 493 : s. c. 18 C. W. N. 66,* referred to. Under s. 92, prov. 4 of the Evidence Act any variation of rent reserved by a registered lease must be made by a registered instrument and oral evidence is inadmissible to

of the *kabuliyat*

than that stated in the *kabuliyat* is admissible to

EVIDENCE ACT (I OF 1872)—*contd.*

—————— s. 92—*contd.*

show that the intention of the parties was that the kabuliyat from the very first was not intended to be acted upon or that there had been a waiver of the strict terms of the lease. *Benimadhub Gorain* v. *Lalmoti Dasi, 6 C. W. N. 242,* followed. MANINDRA CHANDRA NANDI *v.* DURGA SUNDARI DASSYA (1915) . . **20 C. W. N. 680**

—————— **Mortgage with possession**—*De facto substitution of the other property for part of that included in the mortgage-deed—Suit for redemption—Evidence.* The plaintiff mortgaged to the defendants three specific items of property for a sum of Rs. 99. The mortgage was registered, and it was a possessory mortgage, but the defendants never in fact got possession of more than one of the items mentioned in the deed. They did, however, get possession as mortgagees of another piece of property not mentioned in the deed, apparently by virtue of a subsequent oral agreement with the plaintiff, and they held this piece of property in mortgagee possession for a number of years. *Held,* on suit by the plaintiff for redemption, that the plaintiff was entitled to lead evidence to prove two facts : (i) that the possession of the defendants over the plot not mentioned in the mortgage deed was that of mortgagees and had never been adverse to himself and (ii) that the right of mortgagee possession was terminated by the payment of Rs. 99 which had been duly tendered by him. BAID RAM *v.* TIKA RAM (1917).

I. L. R. 39 All. 300

—————— **Prov. 5**—Dowl kabuliyat, *construction of—Exclusion of evidence of customary incidents—Evidence Act (I of 1872), s. 92, Prov. 5—Non-agricultural tenancies created before the Transfer of Property Act. not heritable or Transferable—Death of tenant after Act IV of 1882 came into force—Heirs if may transfer tenancy—Tenancies if terminable without notice—Bengal Tenancy Act (VIII of 1885), s. 106, if bars civil suit to correct entry.* The mere fact that a document is called a *dowl kabuliyat* does not decide its nature. The document should be looked at as a whole and any evidence designed to show customary incidents of tenure as attaching to the *jotes* must be rejected if and so far as it conflicts with what is contained in the *dowls* themselves. Evidence of a custom of transferability is thus excluded by an express statement in the *dowls* that there is no right of sale. Gift or transfer without the landlord's consent. Where the only right secured in the *dowls* to the tenants was an option to take a renewal at the rate of rent prevalent in the perganah : *Held,* that the tenancies created by the *dowls* were neither heritable nor transferable and no evidence of custom was admissible on these heads. When the terms of the *dowl kabuliyats* expired the tenants holding over became yearly tenants on the terms of the *dowl kabuliyats* so far as applicable to a yearly tenancy and when on the death of the last survivor of them their heirs were recognised as tenants, they became yearly tenants upon the terms of the *dowl kabuliyat* so far as applicable to a yearly tenancy. The Transfer of Property Act having come into operation before the tenancy came into the possession of the tenants' heirs, they had a yearly tenancy in the land which was capable of transfer, and notice was necessary to terminate the tenancy, the tenancies not being agricultural within the meaning of s. 117 of the Transfer of Property Act and Chap. V of the Act consequently applying to them. S. 106 of the Bengal Tenancy Act does not provide the only method of obtaining the correction of the entry in a finally published record-of-rights, and a civil suit instituted with that object is maintainable. *Jogendra Nath Roy* v. *Krishna Pramada Dassi, I. L. R. 35 Calc. 1013 (1908)* not followed. MAHOMED AYEJUDDIN MEA *v.* PRODYOT KUMAR TAGORE

25 C. W. N. 13

—————— **Prov. 6**—*Deed of settlement, construction of—Subsequent conduct of parties to the instrument whether admissible in evidence—Execution proceedings—Res judicata—Notice of particular questions, necessity for—Application for execution—Order at one stage of the application, if res judicata at another stage.* Where, by a Deed of Settlement, almost the whole of the settlor's immoveable property was transferred to trustees together "with buildings and appurtenances thereto" and the question was raised as to whether certain specific properties were included in the deed : *Held,* that the ambiguity in the deed, being latent, in construing the deed the subsequent conduct of the parties thereto, can be legitimately looked into under s. 92, proviso 6 of the Evidence Act for the purpose of ascertaining to what persons or things the expressions used therein were intended to apply. *Tulshi Pershad Singh* v. *Ramnarain Singh, I. L. R. 12 Calc. 117, Venkataramanna* v. *Venkatapathi, 28 Mad. L. J. 510, Forves* v. *Watt, 2 Sc. & D. App. 214,* and *Van Diemen's Land Company* v. *Table Cape Marine Board, [1906] A. C. 92,* referred to. *Vissanji Sons & Co.* v. *Shapurji Burjorji, I. L. R. 36 Bom. 387, 395,* explained. A decree-holder applied for execution of his decree by attachment and sale of certain properties in the possession of the respondents, the sons of the deceased judgment-debtor. Notice went to the respondents to show cause why they should not be brought on the record as the legal representatives of the deceased judgment-debtor for purposes of execution ; they did not appear and an order was made *ex parte. Held,* that they were not estopped by this order from moving to set aside the attachment on the ground that the properties did not belong to the judgment-debtor. Observations as to the application of the principle of *res judicata* to orders in execution. SUBRAMANIA AYYAR *v.* RAJA RAJESWARA DORAI (1916) . **I. L. R. 40 Mad. 1016**

—————— *Sale-deed—Old document—Intention of parties—Extrinsic evidence, admissibility of—Such evidence can only be allowed if the terms of the document require explanation.* In 1865, a possessory mortgage deed was passed in favour of the father of defendant No. 1. In 1867, the mortgagor sold by a document purporting to be a sale-deed the equity of redemption to the plaintiff's assignor. The plaintiff having sued for redemption of the mortgage of 1865, an issue was raised whether the transaction of 1867 was a mortgage or sale. Both the lower Courts were of opinion that on the wording of the document itself viewed in the light of certain surrounding circumstances as to the value of the property, inadequacy of consideration, &c., under Proviso (6) of s. 92 of the Evidence Act, 1872, the parties intended that the transaction was a mortgage. On appeal to the High Court : *Held,* that the docu-

EVIDENCE ACT (I OF 1872)—*contd.*

——— s. 92—*concld.*

extrinsic evidence in construing the document. On general principles it would be extremely undesirable, after the document had stood more than fifty years to allow evidence to be led to show that the document is not what appears on the face of it. Where the document itself is a perfectly plain, straightforward document, no extrinsic evidence is required to show in what manner the language of the document is related to existing facts. There may be cases where such extrinsic evidence is required, and it will therefore be admitted. But it can only be in cases where the terms of the documents themse[illegible] trinsic evidenc[illegible] laid down by [illegible] 1872. *Dattoo* [illegible] relied on. *Jh*[illegible] *38 All. 570 ; I*[illegible] *45 Calc. 320 ;* [illegible] *22 All. 149*, referred to. GANPATRAO APPAJI *v.* BAPU *bin* TUKARAM (1919)

I. L. R. 44 Bom. 710

——— s. 93—

See s. 92 . **I. L. R. 40 Mad. 1016**

——— **Hand-note**—*Evidence Act (I of 1872), ss. 93, 94, 95, 96—Stipulation to pay interest—Interest whether monthly or annual, extrinsic evidence to prove.* A hand-note contained a stipulation to pay interest at 2½ per cent. but did not mention whether that interest was to be calculated annually or monthly or otherwise. *Held*, that evidence was properly admitted to show that the words meant that interest should be calculated monthly. *Mahomed Sumsooddeen* v. *Moonshee Abdool Huq*, (*1864*) *W. R. 379*, followed. MONMOTHA NATH CHAUDHURY *v.* NOBIN CHANDRA SANYAL (1910) . . **14 C. W. N. 1100**

——— *Agreement to sell land—Statement of area in the schedule, whether an assurance or description—Presumption—Rebuttal—Extrinsic evidence, admissibility of, to explain facts—Evidence Act (I of 1872), s. 93.* Negotiation for the sale of certain plots of land by the Plaintiffs to the Defendant having for a considerable time proceeded on the basis of area per square yard, Plaintiffs at a certain stage repudiated the suggestion of sale by area, Defendants at the same time insisting that the sale must be by area. After long discussion a conclusion was reached and an agreement executed. A memorandum at the top

retained in the schedule. In a suit for specific performance of the agreement, the Plaintiffs denied that they had agreed to guarantee any area whilst the Defendant affirmed that they did: *Held*, that extrinsic evidence to explain the facts was admissible in order to reconcile the statement in the body of the agreement on which the Plaintiffs rested their case with the recital in the schedule on which the Defendant relied as amounting to an assurance in respect of the area which was intended to be conveyed to him. That though the presumption is that in fixing the price, regard

EVIDENCE ACT (I OF 1872)—*contd.*

——— s. 93—*concld.*

was had on both sides to the quantity which both supposed the estate to consist of, yet there may be considerations which may rebut or weaken the presumption. *Hill* v. *Buckley, 17 Ves. 394 (1811)*, referred to. *Held*, on the evidence, that the allegati[illegible] statement of area [illegible] a oversight wa[illegible] area in the schedule was not by way of an assurance and amounted to no more than a misdescription. HUSSONANLLY SULLEMANJI *v.* TRIBHOWANDAS MANGALDAS NATHUBHAI (P. C.)

25 C. W. N. 385

——— **Imputation—ambiguity**—*If an imputation is ambiguous as to its meaning evidence is admissible to explain it.* KUPPUSWAMI *v.* DORAISWAMI . . . **I. L. R. 33 Mad. 67**

——— s. 94—*Mortgage—Construction of document—Misdescription of property mortgaged—Evidence admissible to show to what property the mortgage was intended to apply.* On the 27th of March, 1864, one H. B. mortgaged 91 biswas of the villages Anuda, Hasan Mahdud and Paniyala. On the 6th of February, 1873, the mortgagor executed a [illegible]

instead of Paniyala. *Held*, that s. 94 of the Indian Evidence Act, 1872, did not debar the mortgagees from giving evidence to show that the village of Paniyala was intended to be charged by the mortgage of the 6th of February, 1873 the language of the later mortgage could not be regarded as clear and unambiguous. MAHABIR PRASAD *v.* MASIATULLAH (1915) . . **I. L. R. 38 All. 103**

——— s. 95—

See CONTRACT ACT, s. 63.

I. L. R. 34 Mad. 156

——— ss. 95 and 96—

See s. 93 . . **14 C. W. N. 1100**

——— ss. 95 to 97—

See s. 92 . **I. L. R. 40 Mad. 1016**

——— s. 101—

See PROBATE . . **I. L. R. 39 Calc.**

——— s. 102—

See RENT SUIT.

I. L. R. 43 Calc. 554

——— s. 103—*Goods consigned by rail—Risk note—Liability of Railway Company for goods consigned on a risk note—Burden of proof.* The plaintiff consigned certain bales of piecegoods by the defendants' Railway under a risk note. By the terms of the risk note in consideration of a special reduced rate being charged the consignor agreed to hold the Railway Administration harmless for any loss except for loss of a complete consignment due to the wilful neglect of the Railway Administration or to theft by or wilful neglect of its servants: provided that wilful neglect was not to be held to include robbery from a running train or any other unforeseen event. The goods were properly carried in a closed waggon, but one of the bales was lost in transit. The plaintiff having sued the defendant Railway Company for

EVIDENCE ACT (I OF 1872)—*contd.*

——— s. 103—*contd.*

the value of the missing bale, the Subordinate Judge decreed the plaintiff's claim holding that the defendant Company failed to prove the theft from the running train though he found that there was no evidence to prove that there was any theft from the train. The defendant company having applied to the High Court under its revisional jurisdiction: *Held*, reversing the decree and dismissing the suit, that the burden lay on the plaintiff under s. 103 of the Indian Evidence Act to give proof of the fact that there was wilful neglect or theft by railway servants and, he not having done so, no question was reached of robbery from a running train. *East Indian Railway Company* v. *Nathmal Behari Lal, I. L. R. 39 All. 418*, approved. B., B. & C. I. RAILWAY COMPANY *v.* RANCHHODLAL CHHOTALAL & Co. (1919)
I. L. R. 43 Bom. 769

But *See* RAILWAY COMPANY.
I. L. R. 45 Bom. 1201

——— **s. 105—**

See PENAL CODE, s. 76.
I. L. R. 32 All. 451

——— *Penal Code (Act XLV of 1860), s. 97—Right of private defence—Pleadings—Alternative and apparently inconsistent pleas.* The right of an accused person to defend himself upon a criminal charge can only be limited by the provisions of the statute law. There is nothing in the law to prevent a man on his trial on a charge of culpable homicide from setting up an alternative defence on some such lines as these: "*First*, I was not present at the occurrence referred to by the prosecution witnesses, and they are giving false evidence against me; *secondly*, even if I fail to persuade the Court of this fact, I can show, from the statements of the prosecution witnesses themselves, that, if I had caused the death of any person in the manner and under the precise circumstances deposed to by their evidence, I should have been acting in the lawful exercise of a right of private defence. *Queen-Empress* v. *Prag Dat, I. L. R. 20 All. 459, Queen-Empress* v. *Timmal, I. L. R. 21 All. 122*, and *Emperor* v. *Gullu, All. Weekly Notes, 1904, p. 113*, referred to. EMPEROR *v.* YUSUF HUSAIN (1918) **I. L. R. 40 All. 284**

——— **s. 106—**

See MUNICIPALITY.
I. L. R. 41 Calc. 168

See RAILWAY COMPANY.
I. L. R. 47 Calc. 6

——— *Onus of Proof—Individual and Corporation.* In order to apply the section the knowledge must be in the nature of something peculiar and there is no difference in this respect between an individual and corporation. LACHHMINARAIN MARWARI *v.* RANCHI MUNICIPALITY . . . **1 Pat. L. J. 168**

——— **ss. 106 and 114, ill. (g)—**

See MADRAS REGULATION (XXV OF 1802), s. 4 **I. L. R. 38 Mad. 620**

——— **ss. 107, 108**—*Nature of presumption—Adverse possession, tacking of.* There is no presumption in law that a person was alive for seven years from the time when he was last heard of. Ss. 107 and 108 of the Evidence Act deal with the procedure to be followed when a question is raised

EVIDENCE ACT (I OF 1872)—*contd.*

——— **ss. 107, 108**—*concld.*

before a Court, as to whether a person is alive or dead, but do not lay down any presumption as to how long a man was alive or at what time he died. *Narki* v. *Lal Sahu, I. L. R. 37 Calc. 103*, and *Muhammad Sharif* v. *Bande Ali, I. L. R. 34 All. 36*, followed. Assuming that the Court could make a presumption that a person was alive for seven years after he was last heard of, it depends on the circumstances of each case, whether the Court would draw such a presumption or not. A person in possession without title cannot tack his possession to that of another, if he did not enter on possession as the heir of that other. VEERAMMA *v.* CHENNA REDDI (1914) **I. L. R. 37 Mad. 440**

——— **s. 108—**

See DEATH, PRESUMPTION OF.
I. L. R. 37 Calc. 103

See LIMITATION ACT (IX OF 1908), SCH. I, ARTS. 140, 141.
I. L. R. 40 Bom. 239

See MORTGAGE **I. L. R. 40 Calc. 342**

——— *Missing—Presumption as to death but not as to date of death—Muhammadean law.* The presumption of Muhammadan law that, when a person has disappeared and has not been heard of for a certain number of years, he is dead, and further that, as regards property coming to him by inheritance, he must be deemed to have died at the date of his disappearance, is a rule of evidence only and as such must be taken to have been superseded by the provisions of the Indian Evidence Act, 1872, which do not raise any presumption as to the date of the death of a person who has disappeared and has not been heard of for a certain number of years by those who would naturally hear of him. *Mazhar Ali* v. *Budh Singh, I. L. R. 7 All. 297*, followed. MAIRAJ FATIMA *v.* ABDUL WAHID **I. L. R. 43 All. 673**

——— *Evidence—Presumption of death—Burden of proof.* *Held*, that the presumption which it is permissible to make under s. 108 of the Indian Evidence Act, 1872, does not go further than the mere fact of death. If the period which has elapsed since the time that the person whose death is in question was last heard of is more than seven years, there is no presumption that such person died during the first period of seven years and not at any subsequent period. *Dharup Nath* v. *Gobind Saran, I. L. R. 8 All. 614*, discussed. *In re Phene's Trusts, L. R. 5 Ch. A. 139, Narayan Bhagvant* v. *Shriniwas, 8 Bom. L. R. 226, Fani Bhushan Banerji* v. *Surjya Kanta Roy Chowdhry, I. L. R. 35 Calc. 25*, and *Srinath* v. *Probodh Chunder Das, 11 C. L. J. 580*, referred to. MUHAMMAD SHARIF *v.* BANDE ALI (1911)
I. L. R. 34 All. 36

——— **s. 110—**

See CIVIL PROCEDURE, CODE, 1908, O. XLI, R. 23 . **2 Pat. L. J. 61**

——— *Unoccupied village site—Presumption of title vesting in Government—Onus of proof—Party in possession to prove better title—Adverse possession—Land Revenue Code (Bom. Act V of 1879), s. 37.* The land in dispute was a Gabhan or unoccupied village site. The plaintiff alleged that the land came to him at a partition of joint family property and he was in possession

EVIDENCE ACT (I OF 1872)—*contd.*

——— s. 110—*contd.*

of it for twenty years. In 1912 the Collector held that the site belonged to Government and ordered the plaintiff to pass a lease. The plaintiff, thereupon, sued for a declaration that the site was of his ownership and that the order passed by the Collector might be cancelled. It was contended that as the plaintiff was shown to have been in possession for a period of twenty years the onus of proving that the plaintiff was not the owner was thrown on the Government under s. 110 of the Evidence Act, 1872. *Held,* that under *old customary law and s. 37 of the Bombay Land* Revenue Code, the presumption arose that the title to the village site vested in the Government and in order to oust the Government the plaintiff had to prove either that he had got a title better than the title of the Secretary of State or that he had obtair .

sixty years. .
for India (1
Secretary of St
(1916) 39 Mad. 617, referred to. VASTA *v.* SECRETARY OF STATE FOR INDIA

I. L. R. 45 Bom. 789

——— s. 114—

See s. 25 I. L. R. 35 Mad. 247 and 397

See s. 30 . I. L. R. 43 Bom. 739

See s. 106 . 1 Pat. L. J. 168

See CONFESSION . 2 Pat. L. J. 80

See LIMITATION I. L. R. 40 Calc. 898.

See LIMITATION ACT, 1908, SCH. I, ARTS. 142 AND 144. . 2 Pat. L. J. 504

See MADRAS REGULATIONS (XXV OF 1802), s. 4 . I. L. R. 38 Mad. 620

See PRINCIPAL AND AGENT. I. L. R. 43 Calc. 527

See REGISTER OF DEATHS. I. L. R. 46 Calc. 152

See REGISTRATION ACT (III OF 1877) ss. 32, 60, 75 I. L. R. 34 All. 253

See RENT DECREE. I. L. R. 43 Calc. 170

See WARRANT ATTACHMENT. 3 Pat. L. J. 636

——— *Burden of proof——Suit on mortgage bond—Production by plaintiff of copy of bond on the ground of loss of the original—Defendants' admission of execution and production of original with payment of debt endorsed by agent*

EVIDENCE ACT (I OF 1872)—*contd.*

——— s. 114—*contd.*

evidence on both sides, set aside the presumption under s. 114 of the Evidence Act, and endeavoured to make out a case for the plaintiff based on a

favour of a "possibility" based on surmise Sus*picion, though a ground for scrutiny, could not be* made the foundation of a decision. MUHAMMAD MEHDI HASAN KHAN *v.* MANDIR DAS (1912)

I. L. R. 34 All. 511
17 C. W. N. 49

——— *Presumption arising under— Transfer of Property Act (IV of 1882), s. 106—Notice to quit—Service by post.* A notice to quit was given by registered post but the letter containing the notice was returned by the post

the presumption. GIRISH CHANDRA GHOSH *v.* KISHORE MOHAN DAS (1918) 23 C. W. N. 319

——— ss. 114, 133—

See ACCOMPLICE I. L. R. 38 Calc. 96

——— s. 115—

See ADVERSE POSSESSION. I. L. R. 40 Calc. 173

See BENAMI . I. L. R. 46 Calc. 586

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), s. 258 I. L. R. 34 Bom. 575

See EASEMENTS ACT, 1882, ss. 13 AND 47 I. L. R. 45 Bom. 80

See ESTOPPEL I. L. R. 36 Mad. 564
I. L. R. 39 Calc. 513

See LANDLORD AND TENANT (INTEREST) I. L. R. 46 Calc. 1070

See MINOR I. L. R. 1 Lah. 389

See TRANSFER OF PROPERTY ACT, 1882, s. 123 I. L. R. 45 Bom. 164

——— Adjustment outside the Court—*Civil Procedure Code (Act XIV of 1882), s. 258—Adjustment or payment of decree—Decree-holder acting upon the adjustment and receiving money—Application to execute the decree—Estoppel by conduct—Indian Evidence Act (I of 1872), s. 115.* A decree was adjusted outside the Court. No notice was given to the Court of the adjustment; and its

received for several years ...

EVIDENCE ACT (I OF 1872)—*contd.*

——— s. 115,—*contd.*

estopped by conduct under s. 115 of the Indian Evidence Act, 1872. *Held,* that the view of the Subordinate Judge gave the go-by to the plain language of the last paragraph of s. 258 of the Civil Procedure Code, 1882. *There is no room left by* the law for the operation of the law of estoppel in the matter of execution. The last paragraph of s. 258 enacts a special law for a special purpose whereas s. 115 of the Indian Evidence Act, 1872, relates to the general law of estoppel; and the principal is that a special law overrides for its purposes the general law. *Per* CHANDAVARKAR, *J.*—Fraudulent executions of decrees must be discouraged by the Courts whenever they come to their notice; and decree-holders, who enter freely into adjustments outside the Court and do not certify them as required by law, but fraudulently apply for execution, ignoring the adjustment, should be dealt with under the criminal law. *Per* HEATON, *J.*—The purpose of s. 258 of the Civil Procedure Code, 1882, is that the Court shall have complete knowledge of all that is done towards the satisfaction of its decree. TRIMBAK RAMKRISHNA *v.* HARI LAXMAN (1910) . . **I. L. R. 34 Bom. 575**

——— *Estoppel—Acquiescence—Both parties equally conversant with true state of facts—Vague allegations—Real controversy to be ascertained by the Judge.* Where parties make vague and loose allegations, it is essential to the correct determination of the suit that the real controversy should be ascertained by the Judge by questioning their legal advisers as to what is exactly their position in the matter. Where both parties to a suit are equally conversant with the true state of facts, it is absurd to refer to the doctrine of estoppel. In the year 1871 Government granted to the defendants' predecessor-in-title a certain plot of land situate at Dhandhuka. The grant expressly stated that a strip of land belonging to Government was the southern boundary of the plot so granted. This statement was repeated in the mortgage-deed executed by the defendants' predecessor-in-title to the defendants themselves in the year 1893. In the year 1895 the defendants purchased the said plot and encroached on the strip by extending their building on it. Thereupon the Secretary of State for India in Council brought a suit against them to recover possession of the strip after removing the defendants' encroachment. The suit was brought in the year 1908. The defendants' plea was that they were in possession and enjoyment for a long time and consequently there was acquiescence and estoppel on the part of the officers of Government and Dhandhuka Municipality and that they wished to lead evidence to prove their plea. *Held,* that the defendants' title-deeds having brought to their knowledge the title of the Government, the doctrines of estoppel and acquiescence were not applicable, and the suit was governed by sixty years' limitation, the Government being a party to it. RANCHODLAL VANDRAVANDAS *v.* THE SECRETARY OF STATE FOR INDIA (1910)

I. L. R. 35 Bom. 182

——— *Estoppel—Minor if may be estopped from repudiating contract induced by representation that he was sui juris—Misrepresentation, not fraudulent—Contract Act (IX of 1872), s. 10.* The law of estoppel must be read subject to other laws such as a Indian Contract Act, and a minor cannot be made liable upon a contract by means of an estoppel under s. 115 of the Indian Evidence Act. *Dhurmadas* v. *Brohmo Dutt, I. L. R. 25 Calc. 616 :* s. c. *2 C. W. N. 330,* followed. *Surendra Nath Roy* v. *Krishna Sakhi Dasi, 15 C. W. N. 239,* where there was fraudulent misrepresentation, distinguished. GOLAM ABDIN SARKAR *v.* HEM CHANDRA MAJUMDAR (1915).

20 C. W. N. 418

——— *Estoppel—Minor included in "person"—Minor passing himself off as a major is bound by his contract—Sale of house.* The plaintiff purchased a house from defendant No. 2 who was not clearly a minor in appearance and who represented to the plaintiff and caused her to believe that he was a major. In a suit by the plaintiff, to recover possession of the house, defendant No. 2 pleaded his minority. *Held,* negativing the plea, that defendant No. 2 being "a person" within the contemplation of s. 115 of the Indian Evidence Act, 1872, and having by direct declaration intentionally caused the plaintiff to believe that he was a major, was precluded absolutely from denying the truth of that assertion. *Ganesh Lala v. Bapu I. L. R. 21 Bom. 198,* followed. DADASAHEB DASRATHRAO *v.* BAI NAHANI (1917).

I. L. R. 41 Bom. 480

——— *Estoppel—Owner causing person without legal title to have her name registered as proprietor in Revenue Register—Conveyance sued on challenged as invalid on account of vendor's minority—Failure to prove minority—Onus—Co-defendants, res judicata as between.* Property belonging to *B*'s estate, then under management under the provisions of the Chota Nagpur Encumbered Estates Act, having been put up to sale by the manager, was bought by *K* who either was a *benamidar* for *B* or whose title was extinguished by reason of his not taking a conveyance of it. *B* then caused *K*'s son to execute a conveyance of the property to *B*'s natural daughter *R* and later on actively assisted her in a proceeding for mutation of names in the Revenue Register for which *R* applied. Her name was registered and she thus became bound for all the State liabilities which attach to registered holders of immoveable property. On *B*'s death, his widow *C* sued for a declaration that the property was hers, making *R* and *J*, *B*'s son and heir, defendants. That suit was dismissed, the Court holding as between *R* and *J* that the property was *R*'s. The plaintiff claiming under a conveyance executed in his favour by *R* sued for recovery of the property from *J* who *inter alia* pleaded that *R* was an infant at the date of the conveyance which in consequence was invalid. *Held,* that the onus to prove minority being on defendant, defect in his proof could not be cured by a mere criticism of the plaintiff's evidence, and the defendant having failed to bring reliable evidence to prove his assertion, the conveyance must stand. That the decision in *C*'s suit as between *R* and *B* who were co-defendants was not *res judicata* in the present suit. That *B* was estopped from questioning *R*'s title to the property. JAGANNATH PRASHAD SINGH *v.* SYED ABDULLAH (1918) . . . . **I. L. R. 45 Calc. 909**
22 C. W. N. 891

——— ss. 115, 116—

See ADMINISTRATOR PENDENTE LITE.
I. L. R. 41 Calc. 771

See WAKF . **I. L. R. 37 Bom. 447**

EVIDENCE ACT (I OF 1872)—*contd.*

———— ss. 115, 116, 117—*Lessee if may deny lessor's title after expiry of term—Possession given by lessor and retained after expiry of term—Estoppel, rules of—Evidence Act, if exhaustive as to estoppel.* A lessee, so long as he retains the possession he obtained from the lessor, cannot, even after his term has expired, set up in the lessor's suit for ejectment the defence that the lessor had no title at the time the lease was granted. This rule has not been affected by s. 116 of the Indian Evidence Act. Ss. 115 to 117 of the Evidence Act are not exhaustive as to the rules of estoppel in force in British India. BHAIGANTA BEWAH *v.* HIMMAT BADYAKAR (1916) . . **20 C. W. N. 1335**

———— *Estoppel*—There can be no estoppel if the party to whom the representation was made did not believe it to be true, for in such a case the resulting conduct is in no sense the effect of the preceding declaration. S. 115 does not apply in such a case. Under Hindu Law a bequest of income without disposing of the

the absence of words of limitation JAGARNATH PRASAD *v.* JAIKISHUN PRASAD . **1 Pat. L. J. 16**

———— s. 116—

See BENAMI TRANSACTION.

I. L. R. 37 All. 557

See LANDLORD AND TENANT

I. L. R. 36 Mad. 53

———— *Landlord and tenant—Denial of landlord's title—Estoppel.* When once a person is the tenant of another person he cannot be allowed to deny that the person whose tenant he was, was the owner when the tenancy was created. He can, no doubt, admit that his landlord was the owner at the commencement of the tenancy and allege and prove by evidence that the landlord's estate has subsequently come to an end; but he cannot deny that at the commencement of the tenancy the person with whom he entered into the contract was the owner of the property, and this disability, is not removed, by the declaration of the tenancy *Bilas Kunwar v. Desraj Ranjit Singh, I. L. R. 37 All. 557,* followed. GANPAT RAI *v.* MULTAN (1916)

I. L. R. 38 All. 223

———— *Estoppel—Landlord and tenant—Tenant not let into possession by the landlord —Whether estopped from denying the landlord's title to the property. Held* by the Full Bench (SESHAGIRI AYYAR and PHILLIPS, *JJ.*, ABDUR RAHIM, Offg. *C. J.*, dissenting), that a tenant who has executed a lease but has not been let into possession by the lessor is estopped from denying his lessor's title in the absence of proof that he executed the lease in ignorance of the defect in his lessor's title or that his execution of the lease was procured by fraud, misrepresentation or coercion. *Per* ABDUR RAHIM, Offg *C. J.*—A tenant who was let

show that the title is in some third person or in himself. But the execution of a lease or payment

EVIDENCE ACT (I OF 1872)—*contd.*

———— s. 116—*contd.*

favour unless the fact is sufficiently explained. In most cases of this nature the presumption in favour of the plaintiff can only be displaced by the defendant showing that the attornment was made by him in ignorance of the plaintiff's title or was induced by fraud, misrepresentation or coercion. VENKATA CHETTY *v.* AIYANNA GOUNDAN (1916)

I. L. R. 40 Mad. 561

———— s. 117—

See ss. 115, 116 . **20 C. W. N. 1335**

See TRADE-MARK.

I. L. R. 42 Calc. 262
I. L. R. 40 Calc. 814

———— s. 118—

See APPEAL. . **I. L. R. 41 Calc. 406**

See OATH ACT (X OF 1873), ss. 5, 6, 13.

I. L. R. 38 All. 49
6 Pat. L. J. 148

———— ss. 118, 132—

See WITNESS . **I. L. R. 45 Calc. 720**

———— s. 122—

See EVIDENCE . **I. L. R. 40 Calc. 891**

———— *Evidence Act (I of 1872), s. 122—"Representative in interest"—Disclosure by wife of communications made by deceased husband during marriage.* Where there is no "representative in interest" who can consent under s 122 of the Evidence Act, to the disclosure of communications made by a deceased husband to his wife during marriage, the wife should not be permitted, even if willing to disclose such communications. The widow of a deceased husband is not his "representative in interest" for the purpose of giving such consent. NAWAB HOWLADAR *v.* EMPEROR (1913) . **I. L. R. 40 Calc. 891**

———— ss. 123, 124, 125—*Privilege—Departmental enquiry into conduct of Police officers, statements made by witnesses at—Trial of Police Officers on charge of taking illegal gratification—Court's duty to send for the statements and allow accused to cross-examine thereon.* Statements made by witnesses in the course of departmental enquiry into the conduct of Police Officer who were subsequently

of the Evidence Act on the statements made by them at the departmental enquiry. *Empress v. Ramadhan Maharun, 2 Bom. L. R. 329,* HARBANS SAHAI *v.* EMPEROR (1912) . **16 C. W. N. 431**

———— ss. 123, 124, 163—

See EASEMENTS ACT (V OF 1882), s. 15.

I. L. R. 39 Mad. 304

———— s. 125—

See LIMITATION **I. L. R. 40 Calc. 898**

evidence. Plaintiff sought to prove that defendant who had recovered a decree for possession of property against certain third parties was plaintiff's *benamdar* and for that purpose examined defendant's pleader in that suit, who deposed that defendant had informed him that he was plaintiff's

EVIDENCE ACT (I OF 1872)—*contd.*

—————— **s. 126**—*contd.*

benamdar. Held, that the statement of the pleader, having been made without his client's consent, was inadmissible in evidence under s. 126, Evidence Act. The pleader acted improperly in disclosing without his client's consent communications made to him in confidence as pleader. BAKAULLA MOLLAH *v.* DEBIRUDDI MOLLAH (1912)

16 C. W. N. 742

—————— *Privilege of witness—Vakil and client—Information gained by vakil in case of former employment, though not by direct oral or written communication.* S. 126 of the Indian Evidence Act, 1872, applies as much to what a witness has learned by observation, as *e.g.*, by watching a manufacturing process being carried on, as to what is communicated to him by word of mouth or writing. In the course of his employment to defend certain manufacturers of a substance called *banslochan* against a charge of creating a nuisance in the process of manufacture, the process in question was shown to the vakil engaged by the manufacturers. *Held,* that such vakil could not afterwards, being subpoenaed as a witness for the applicant in an application for revocation of patent against the same manufacturers, be compelled to disclose what he had learned of the process in the course of his former employment. GOPI LAL *v.* LAKHPAT RAI (1918)

I. L. R. 41 All. 125

—————— **s. 132**—

See FALSE EVIDENCE.

I. L. R. 37 Calc. 878

See THUMB-IMPRESSION.

I. L. R. 39 Calc. 348

See WITNESS . **I. L. R. 45 Calc. 720**

1. —————— *Penal Code (Act XLV of 1860) s. 499—Witness—How far a statement made by a witness in giving evidence is privileged.* A person who whilst giving evidence as a witness in Court has made a statement which *primâ facie* amounts to defamation under s. 499 of the Indian Penal Code may plead one or other of the exceptions to that section, or he may claim the protection of the proviso to s. 132 of the Indian Evidence Act, 1872; but in the latter case he must show that he was *compelled* to make the statement alleged to be defamatory in the sense that he had asked to be excused from answering the question which led up to it and the Court had obliged him to answering it. *Queen* v. *Gopal Dass, I. L. R. 3 Mad. 271, Queen-Empress* v. *Moss, I. L. R. 16 All. 88,* and *Emperor* v. *Ganga Prasad, I. L. R. 29 All. 685,* referred to. KALLU *v.* SITAL (1918) . **I. L. R. 40 All. 271**

—————— *Defamation—Prosecution of witness in respect of statement made in answer to a question put by the court. Held,* that a witness in a civil suit cannot be prosecuted for defamation in respect of an answer made by him to a question asked by the court. *Queen-Empress* v. *Moss, I. L. R., 16 All. 88,* and *Kallu* v. *Sital, I. L. R., 40 All. 271,* referred to. EMPEROR *v.* GANGA SAHAI . . . . . **I. L. R. 42 All. 257**

2. —————— *Witness—Defamation—Statement made on oath by a witness in a criminal case in answer to a question—Witness "compelled" to answer even if he has not objected.* Although a voluntary statement made by a witness may stand on a different footing, an answer given by a witness in a criminal case on oath to a question put to him either by the court or by counsel on either side, especially when the question is on a point which is relevant to the case, is within the protection afforded by s. 132 of the Indian Evidence Act, 1872, whether or not the witness has objected to the question asked him. *Queen* v. *Gopal Das, I. L. R., 3 Mad. 271, Queen-Empress* v. *Moss, I. L. R., 16 All. 88, Kallu* v. *Sital, I. L. R., 40 All. 271,* and *Ganga Sahai* v. *Emperor, I. L. R., 42 All. 257,* not followed. EMPEROR *v.* CHATUR SINGH . . . . **I. L. R. 43 All. 92**

—————— **s. 133**—

See s. 25 **I. L. R. 35 Mad. 247 and 397**

See ACCOMPLICE. **I. L. R. 38 Calc. 96**

—————— **s. 135**—

See CHARGE . **I. L. R. 43 Calc. 957**

—————— *Per Curiam*—While Counsel has discretion, the Court has also power under s. 135 of the Evidence Act to direct the order in which witnesses cited by a party shall be examined. *In the goods of* GOPESSUR DUTT (1911).

16 C. W. N. 265

—————— **s. 137**—

See CRIMINAL PROCEDURE CODE, s. 342.

6 Pat. L. J. 644

—————— **ss. 143, 154**—

See CHARGE **I. L. R. 42 Calc. 957**

See CROSS-EXAMINATION.

I. L. R. 42 Calc. 957

—————— **ss. 144**—

See CONFESSION. . **2 Pat. L. J. 80**

—————— **s. 145**—

See HINDU LAW—ADOPTION.

I. L. R. 39 Bom. 441

See HINDU LAW—MINOR.

I. L. R. 38 Mad. 166

—————— **ss. 145, 33**—*Depositions of witnesses in a criminal trial, use of, in supporting or contradicting them in a subsequent civil suit—Irregularity in procedure.* In the absence of proof of circumstances specified in s. 33 of the Evidence Act the importing in bulk in a civil suit of depositions of witnesses recorded in a criminal trial was a serious irregularity. The depositions could not in such circumstances be used even to support the evidence the witnesses gave in the civil suit. Where they were used to contradict the witnesses, but without giving them opportunity to tender their explanation or to clear up the particular points of ambiguity or dispute. *Held,* that the procedure was contrary to general principles and to the specific provisions of s. 145 of the Evidence Act. *Valubai* v. *Govind Kashinath, I. L. R. 24 Bom. 218, 221,* approved. BAL GANGADHAR TILAK *v.* SHRINIWAS PANDIT (1915) . . . . **19 C. W. N. 729**

—————— **s. 153, 154**—

See WILL **I. L. R. 47 Calc. 1043**

EVIDENCE ACT (I OF 1872)—*contd.*

———— s. 154—

See s. 143 . I. L. R. 42 Calc. 957

———— ss. 155 and 157—

See POLICE DIARIES 3 Pat. L. J. 568

———— s. 157—

See s. 21 I. L. R. 34 Bom. 599

See s. 25 I. L. R. 35 Mad. 247 and 397

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), s. 162.
I. L. R. 39 Bom. 58

See ss. 32, 35, 157, 159
2 Pat. L. J. 42

———— s. 159—

———— *Held*, that under the provisions of ss. 159 and 160 of the *Evidence Act*, an officer, while giving his evidence, was entitled to refresh his memory from the entries in the register written by his clerk and which he himself signed daily. ABDUL SALIM v 'KING-EMPEROR'
26 C. W. N. 660

———— s. 163—

See EASEMENT ACT (V OF 1882), s. 15
I. L. R. 39 Mad. 304

———— s. 165—

See s 132 . I. L. R. 42 All. 257

See PRACTICE . I. L. R. 39 Bom. 326

———— *Suit under Registration Act (XVI of 1908), s. 77—Suit to enforce registration of a will—Evidence taken before Sub-Registrar, filed in Court by the consent of parties—Evidence, not found to be relevant under s. 33 of the Act or otherwise—Judgment and decree, based on such evidence, whether valid.* A suit, instituted under s. 77 of the Registration Act to enforce registration of a will, was decided by the Court on evidence taken before the

not find that the evidence was relevant under s. 33 or any other section of the Evidence Act but admitted the same *solely* on the ground of the consent of the parties. On objection being taken ...ent. *Held*, ... 165 of the ...cts declared to be relevant by the Act and duly proved, that the consent of parties could not take the place of a declaration of the Evidence Act, and that conse-

...SWAMI PILLAY v. SINGARAM PILLAY (1918)
I. L. R. 41 Mad. 731

———— s. 167—

See DEPOSITION.
I. L. R. 46 Calc. 895

See EVIDENCE ACT, ss. 5, 32, 167.
5 Pat. L. J. 411

———— *Trial by Jury—Misdirection, improper admission of evidence whether amounts to—Counter-information—Criminal Procedure Code (Act V of 1898), s. 423—Powers of the High Court, in a jury trial.* Where in his charge

EVIDENCE ACT (I OF 1872)—*concld.*

———— s. 167—*contd.*

to the jury, the Sessions Judge referred to a certain counter-information lodged by one of the accused as if it contained an admission by all the accused of their presence at the scene of occurrence. *Held*, that the counter-information was wrongly admitted as evidence against the accused other than the accused who lodged it. That the observation of the Sessions Judge on the counter-information amounted to a misdirection only in so far as a wrong admission of evidence implies a misdirection; and that notwithstanding such a misdirection the High Court can deal with the case in accordance with the provisions of s. 167, Indian Evidence Act.

be retired by the Sessions Judge and a Jury. SHEIKH HAZIR v. EMPEROR (1910)
14 C. W. N. 493

———— *Application in second appeal, when finding of fact arrived at, in part, on inadmissible evidence.* Where in a suit on a bond, plaintiff sought to save the bar of limitation by

was "discrepant" and "not satisfactory" and went on to hold that there was sufficient proof of the certificate,— and in this view dismissed the suit. *Held*, that the certificate being inadmissible in evidence and it being impossible for the High Court to say how far the lower Appellate Court was influenced in its decision by it there ought to be a retrial. GOMEZ v. IDOO MIAN (1914)
19 C. W. N. 1148

EVIDENCE FOR THE DEFENCE.

See PRACTICE I. L. R. 40 Calc. 376

EVIDENCE OF ASSOCIATION.

———— admissibility of—

See SECURITY FOR GOOD BEHAVIOUR.
I. L. R. 37 Calc. 91

EVIDENCE OF BAD CHARACTER.

See LIBEL . I. L. R, 37 Calc. 760

EVIDENCE OF IDENTITY.

See CONSPIRACY I. L. R. 41 Calc. 754

EVIDENCE OF JURORS.

See JURY, TRIAL BY.
I. L. R. 40 Calc. 693

EVIDENCE OF REPUTATION.

See BURMESE LAW—MARRIAGE.
I. L. R. 39 Calc. 492

See CRIMINAL PROCEDURE CODE, s. 110.
25 C. W. N. 334

EVIDENCE ON OATH.

See "JUDICIAL PROCEEDI...
I. L.

EVIDENCE ON COMMISSION.

See WILL . **I. L. R. 47 Calc. 1043**

EVIDENTIARY VALUE.

See CONFESSION **I. L. R. 40 Calc. 873**

EXAMINATION.

See INSOLVENCY **I. L. R. 44 Calc. 374**

EXAMINATION OF WITNESS.

See INSOLVENCY **I. L. R. 38 Calc. 542**

———— de novo—

See MAGISTRATE, TRANSFER OF.
I. L. R. 37 Calc. 812

EXAMINATION ON COMMISSION.

1. ———— *Purdanashin lady—Exemption—Code of Civil Procedure (Act V of 1908), ss. 132, 133—Costs,* S. 132 of the Code of Civil Procedure covers the case of a woman, who, although she may have abandoned the protection of the *purda*, should not be compelled to give evidence in Court, having regard to the class and community to which she belongs. SOLOMON *v* JYOTSNA GHOSAL (1917) **I. L. R. 45 Calc. 492**

2. ———— *Purdanashin lady—Practice—Right of purdanashin lady to be examined on commission—Civil Procedure Code (Act V of 1908), s 132, cl. (1).* The petitioner, a *purdanashin* lady, applied under s. 132, cl. (*1*) of the Civil Procedure Code, to be examined on commission. The opposite party objected on the ground that she had on a former occasion appeared before a Criminal Court to institute a complaint. *Held,* that she was entitled to be examined on commission and ought not to be compelled to appear in public. *Chamatkar Mohiney Dabee* v. *Mohesh Chunder Bose, I. L. R. 26 Calc. 651, n., Mohesh Chunder Addy* v. *Manick Lall Addy, I. L. R. 26 Calc. 650,* followed. *In re Hurro Soondrey Chowdhrain, I. L. R. 4 Calc. 20, In re Din Tarni Debi, I. L. R. 15 Calc. 775, Abhayeswari Debi* v. *Kishori Mohan Banerjee, I. L. R. 42 Calc. 19; 18 C. W. N. 1020, Hem Coomaree Dassee* v. *Queen Empress, I. L. R. 24 Calc. 551, In re Faridunnissa, I. L. R. 5 All. 92. In re Basant Bibi, I. L. R. 12 All. 69,* discussed. BALAKESHWARI DEBI *v.* JNANANANDA BANERJEE (1917) . . . **I. L. R. 45 Calc. 697**

———— *Purdanashin lady—Civil Procedure Code (Act V of 1908), ss. 132, 133, O. XXVI, r. 1—Right of choice as to place of examination.* The defendant contended that his witness who is a *Purdanashin* lady is entitled to be examined on commission at a place of her own choice or where she happened to be at the time of the issue of the commission. *Held,* that she had no such right. KHITIPATI ROY *v.* DHARANI MOHAN MOOKERJEE (1920) **I. L. R. 48 Calc. 448**

EXCAVATION OF TANK.

See PROHIBITORY ORDER.
I. L. R. 38 Calc. 376

EXCEPTED RISKS.

See COMMON CARRIER, LIABILITIES OF.
I. L. R. 38 Calc. 28

EXCESS-PROFITS DUTY.

———— *Club—"Business"—Charities—Excess Profits Duty Act (X of 1919),*

EXCESS PROFITS DUTY—*contd.*

s. 2. The income of a Turf Club consisted of moneys paid by the public as (*i*) entrance fees to the stand, paddocks and enclosures, (*ii*) entrance fees paid by owners of race-horses. (*iii*) bookmakers' license fees, and (*iv*) percentage on the totalisators, besides moneys paid by its ordinary members:—*Held,* that the club carried on 'business' within the meaning of s. 2 of the Excess Profits Duty Act (X of 1919) in respect of the above heads and was liable to pay such duty. *Carlisle and Silloth Golf Club* v. *Smith, [1913] 3 K. B. 75,* relied on. CALCUTTA TURF CLUB *v.* SECRETARY OF STATE FOR INDIA (1921)
I. L. R. 48 Calc. 844

EXCESS PROFITS DUTY ACT (X OF 1919).

———— s. 2—

See EXCESS PROFITS DUTY
I. L. R. 48 Calc. 844

———— It is not necessary that the duty should be assessed within the year for which the duty is payable. CHIEF COMMISSIONER FOR INCOME TAX *v.* RAMANATHAN CHETTIAR
I. L. R. 44 Mad. 768

———— **ss. 4, 5 (b), 6 (1) (b)**—*Indian Income Tax Act (VII of 1918), s. 2 (1)—Capital employed in the business, meaning of—money invested in shares in public companies and Government securities—moneys lent and advanced.* Moneys invested in the shares of public companies and in Government securities having been treated by the firm as part of the capital of the firm were "capital employed in the business of the firm," and consequently, as such must be included in the capital computation both for the accounting period and "the standard years" under the Excess Profits Duty Act, 1919. Moneys lent to business concerns and individuals were also capital employed in the business and as such to be similarly computed. MESSRS. MARTIN & Co., *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL . . . **25 C. W. N. 875**

———— **ss. 3, 15, Sch. I**—"*Offices or employments*" *meaning of—"Excepted business"—Agents of a mill company remunerated by commission—Indian Income Tax Act (VII of 1918), s. 51—Reference on application of assessee—Finance (No. 2) Act, 1915 (5 and 6 Geo. 5, 89), c. 39—Specific Relief Act (I of 1877), s. 45—High Court's power of Interference.* The petitioners, who acted as agents of a mill company and were remunerated by a commission, claimed to be exempted from the excess profits duty under clause 2 of Schedule I of the Excess Profits Duty Act, 1919. The Collector and the Chief Revenue Authority in appeal decided that the petitioners were not exempt from such duty inasmuch as they constituted a separate firm whose business was different from that of the mill company and was not an "office or employment" which would be exempted under the Act. The petitioners requested the Chief Revenue Authority to refer the question of exemption to the High Court under s. 51 of the Income-Tax Act, 1918; but the latter declined to do so and the petitioners applied to the High Court under s. 45 of the Specific Relief Act:—*Held,* that the proviso to Schedule I must be read as governing generally the three kinds of businesses enumerated under headings (1), (2) and (3) of the Schedule; or, in other words, as including the businesses mentioned therein as within the terms of s. 3 of

EXCESS PROFITS DUTY ACT (X OF 1919) —*contd.*

———— *ss. 3, 15, Sch. I—contd.*

the Act. *Held*, further on the facts, that the petitioners were not to be considered as carrying on a business excepted under the above Schedule. *Held*, also, that it was not incumbent on the Chief Revenue-Authority to make a reference to the High Court whenever an application for a reference was made to him, and that in the present case he exercised a proper discretion in coming to the conclusion that a reference was unnecessary. IN THE MATTER OF DORAISWAMI IYER & CO.

I. L. R. 45 Bom. 1064

———— **s. 6(1) (a) and (b) and Schedule II, cl. 1, Proviso**—*Cash and investments—Accumulated profits not to be considered as capital unless employed in business—' Employed in the business,' meaning of—Income Tax Act (VII of 1918), s. 51—High Court's power of interference—Specific Relief Act (I of 1877), s. 45.* Under the proviso to clause (1) to Schedule II of the Excess Profits Duty Act, 1919, accumulated profits of a company cannot be treated as capital unless they are employed in the business. Whether or not they are employed in the business is a question of fact which the Chief Revenue-Authority is entitled to decide on the materials before it the words ' employed in the business' in the proviso, *primâ facie*, bear their natural meaning of '*actually* employed in the business' and cannot be construed as if the words were ' employed or *intended to be employed* in the business.' *Per* MACLEOD, *C. J.*—It would be open to the Court to consider the grounds on which the Chief Revenue-Authority (acting under s. 51 of the Indian Income Tax Act, 1918) was satisfied that a reference was unnecessary. For

authority rather than by the Chief Revenue-Authority, I doubt whether that Authority would be justified in saying that it was satisfied that a reference was unnecessary. IN THE MATTER OF THE EXCESS PROFITS DUTY ACT (1920)

I. L. R. 45 Bom. 881

EXCHANGE.

See ENCUMBRANCE.

I. L. R. 46 Calc. 891

See TRANSFER OF PROPERTY ACT (IV OF 1882), SS. 118, 119, 120, 54 AND 55, CL. 6 (*b*) . **I. L. R. 38 Mad. 519**

ss. 54, 118 **I. L. R. 40 All. 187**

———— **rate of**—

See FOREIGN CURRENCY.

I. L. R. 48 Calc. 836

EXCISABLE ARTICLE.

See BENGAL EXCISE ACTS.

See BOMBAY ABKARI ACT.

See MADRAS ABKARI ACT.

See UNITED PROVINCES EXCISE ACT (IV OF 1910), S. 60.

I. L. R. 35 All. 575

———— *Bonâ fide medicinal preparation containing alcohol—Unlicensed manufacture and sale of such—Excise Act (Beng. V of 1909), ss. 2 (7), (14), and 46 (a), as amended by Beng.*

EXCISABLE ARTICLE—*contd.*

Bengal Excise Act (V of 1909), s. 2 (7), (14), as amended by Beng. Act VII of 1914. *Gonesh Chunder Sikdar* v. *Queen Empress, I. L. R. 24 Calc. 157, Mati Lal Chandra,* v. *Emperor, I. L. R. 39 Calc. 1053, Satish Chandra Roy* v. *King-Emperor, 17 C. W. N. 939,* declared obsolete. GANESH CHANDRA SIKDAR v. EMPEROR (1917)

I. L. R. 45 Calc. 82

———— *"Spirituous and fermented liquors"—Drugs containing spirituous liquor—Manufacture, sale or possession—Transport, import or export—Bengal Excise Act (V of 1909), ss. 46, 52, 55 and 57—Board Notifications—License—Misconduc*

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of drugs selling intoxicating liquors or otherwise dealing with them, and not to penalise the use of beneficent drugs. To be an excisable article, liquor must be intoxicating liquor. The term "*spirituous liquor*" is not intended to include a medicinal preparation merely because it is a liquid substance containing alcohol in its composition. S. 55 of the Bengal Excise Act (V of 1909) refers to manufacture, sale or possession of excisable articles. It does not apply to import, transport or export. S. 56 makes the holder of a license, permit, or pass liable for the misconduct of his servant or agent in matters of import, transport or export. *Gonesh Chunder Sikdar* v. *Queen-Empress, I. L. R. 24 Calc. 157,* approved. MATI LAL CHANDRA v. EMPEROR (1912)

I. L. R. 39 Calc. 1053

EXCISE.

———— *"Denatured spirit" meaning of—Dilution of denatured spirit with water rendering it fit for human consumption—"Excisable article" and "liquor," whether diluted denatured spirit is—"Manufacture," meaning of—Mere dilution of denatured spirit not a "process"—Bengal Excise Act (Beng. V of 1909), ss. 2 (6), (7) (14), (15) 46, 48, 75, 81, 84—Application of the Criminal Procedure Code to trials for excise offences—Misjoinder of charges—Criminal Procedure Code (Act V of 1898), s. 233.* The words "effectually and permanently rendered unfit" in s. 2 (6), read with s. 48, of the Bengal

process

treatme

the bulk of the liquid, renders the spirit fit for human consumption. Where the liquid was so manipulated as to lose its characteristics of a denatured spirit, and the accused had succeeded in the attempt to render the spirit fit for human consumption, the conviction under s. 48 was *held* bad in the above meaning. *Semble* If the words imply only a process which would be permanently effective in the absence of some chemical treatment or process of filtration, the conviction under s. 48 was still bad for want of evidence that the spirit was in fact ever so denatured by the accused. The words "unfit for human consumption" may be taken to mean "liable to be injurious to health." The term "manufacture" in s. 2 (11) of the Act does not include the act of mere dilution of denatured spirit with water, but a continuous and regular action or a succession of actions taking place, o carried on in a definite manner and leading to th

EXCISE—*contd.*

accomplishment of some result. *Quære:* Whether denatured spirit diluted with water is an "excisable article" or "liquor," within s. 2 (7) and (*14*) of the Act. Ss. 75 and 81 of the Act apply to proceedings before a Collector, and s. 84 shows that the Criminal Procedure Code is applicable to trials before a Magistrate under the Act subject to specified restrictions. An appeal, therefore, lies under s. 410 of the Code, from a conviction and sentence by a Presidency Magistrate, passed under the Act. The acts of manufacturing the excisable article brought into Court, bottling, and possessing the same, and of selling from time to time various other and similar articles not before the Court, and of attempting to render denatured spirit fit for human consumption, do not constitute the same transaction, and a trial in respect of all such acts is bad for misjoinder, under s. 233 of the Code. S. 233 applies to trials of summons cases. *King Emperor* v. *San Dun, 3 L. B. R. 52,* approved. UPENDRA NATH BISWAS *v.* EMPEROR (1913)

I. L. R. 41 Calc. 694

EXCISE ACT (X OF 1871).

See ACT OF STATE.

I. L. R. 39 Calc. 615

EXCISE ACT (E. B. AND ASSAM I OF 1910).

———— **ss. 36, 53, 72**—*Medicated article containing Bhang "Kameshwar Modak" Manufacture and sale by medical practitioner for medicinal purposes if protected—S. 72, effect and scope of—Notification by Local Government—Rules by Board of Revenue.* The petitioner, who was a Kabiraj, was charged under s. 53 of the Eastern Bengal and Assam Excise Act with the manufacture and sale of an exciseable article, namely, a mixture called "Kameshwar Modak" which contained *bhang* and which admittedly was a medical article prepared by the petitioner for medical purposes: *Held,* that, in regard to the manufacture and sale of the article in question, the petitioner was protected by s. 72 of the Act, the language of which is wide enough to take any case to which it applies without restriction out of the Act. SATISH CHANDRA ROY *v.* THE KING-EMPEROR (1913)

17 C. W. N. 939

EXCISE LICENCE.

See UNITED PROVINCES EXCISE ACT (IV OF 1910), s. 64 (c)

I. L. R. 40 All. 563

EXCISE OFFICERS.

See PENAL CODE, s. 332.

I. L. R. 37 All. 353

———— *Excise officers, whether police officers—Retracted confessions, admissibility of—Confession, whether exculpatory statements amount to—Evidence Act (I of 1872), ss. 25, 30—Duty of Presidency Magistrate to examine the accused when written statement filed—Duty of such Magistrate to make a full and proper record of material facts—Criminal Procedure Code (Act V of 1898), ss. 342, 362—Benefit of the doubt when facts are consistent with innocence.* Excise officers are not police officers within s. 25 of the Evidence Act. A confession made out of Court but retracted

EXCISE OFFICERS—*contd.*

during the trial is, nevertheless, admissible under s. 30 of the Evidence Act. The word "makes" in s. 30 only means that a confession may be taken into consideration against the co-accused as well as against the maker. To determine whether a statement is a confession it is essential to consider the nature of the offence charged or likely to be charged and to read the statement as a whole. A statement consistent with an attempt on the part of the maker to exculpate himself from the charge made or likely to be made against him is not a confession, and is inadmissible under s. 30 of the Evidence Act against the co-accused. The putting in of a written statement by the accused does not absolve the Court from the duty of carrying out the provisions of s. 342 of the Criminal Procedure Code. It is the duty of a Presidency Magistrate, under s. 362 of the Code, to make a full and proper record of all the material facts, whether appearing in the examination-in-chief or cross-examination, especially when the witness is the only independent prosecution witness (all the other witnesses being excise officers engaged in the arrest) and there is an appeal, so as to enable the Appellate Court to deal with the case. Where the Magistrate recorded only a few sentences of the cross-examination, which took place on two days, the High Court looked into and compared the notes of the evidence made at the trial by a local pleader with the Magistrates' record of the same to satisfy itself as to the incompleteness of the record. Although the facts may give rise to grave suspicion, on a charge under s. 9 (c) (*d*) of the Opium Act, yet if the view that the accused was not in possession of the opium and took no part in its transport, but had only to pay the fare, is consistent with the evidence, after elimination of the inadmissible parts of it, the accused ought to have the benefit of the doubt. AH FOONG *v.* EMPEROR (1918)

I. L. R. 46 Calc. 411

EXCLUSION OF FEMALES.

See HINDU LAW—INHERITANCE.

I. L. R. 42 Calc. 1179
I. L. R. 45 Calc. 17

EXCLUSIVE POSSESSION.

———— **claim of**—

See DISPUTE CONCERNING LAND.

I. L. R. 38 Calc. 889

EXCOMMUNICATION.

———— **from caste**—

See TORT . **I. L. R. 39 Mad. 433**

EXCULPATORY STATEMENTS.

See ADMISSIONS AND CONFESSIONS TO POLICE OFFICERS

I. L. R. 41 Calc. 601

EXECUTANT.

———— **personal liability of**—

See NEGOTIABLE INSTRUMENTS ACT (XVI OF 1881), s. 28.

I. L. R. 38 Mad. 482

EXECUTING COURT.

——— *competency of, to enquire into title of transferee*—

See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXI, R. 2 (3).
I. L. R. 40 Mad. 296

——— jurisdiction of—

See EXECUTION OF DECREE.
I. L. R. 37 *Calc.* 574

EXECUTION.

See CIVIL PROCEDURE CODE, 1882—

ss. 287, 293 I. L. R. 36 Bom. 329

ss. 324A, 272, 285.
I. L. R. 36 Bom. 519

s. 325A . I. L. R. 36 Bom. 510

See CIVIL PROCEDURE CODE, 1908—

s. 47 . I. L. R. 45 Bom. 241 and 812

s. 48 . I. L R. 36 Bom. 368

s. 60 (*c*) . I. L. R. 41 Bom. 475

S. 115, O. XXI, R. 89.
I. L. R. 43 Bom. 735
I. L. R. 45 Bom. 943

S. 144 . I. L. R. 41 Bom. 625

Ss 2 (*11*), 5. 3
I. L. R. 42 Bom. 504

Ss. 11, 47 . I. L. R. 42 Bom. 246

O. XXI. RR. 73, 83.
I, L. R. 41 Mad. 616

O. XXXIV, R. 14.
I. L. R. 43 Bom. 631

SCH. III, s. 7 (*1*) (*b*); ss. 69, 70.
I. L. R. 37 Bom. 32

See CONTRACT ACT (IX OF 1872), s. 70.
I. L. R. 42 Bom. 556

See CRIMINAL PROCEDURE CODE, s. 145.
14 *C. W. N.* 78

See DECREE . I. L. R. 43 Bom. 412
I. L. R. 36 Bom. 42
I. L. R. 40 Bom. 504
I. L. R. 44 Bom. 227

See DECREE, EXECUTION OF.

See DEKKHAN AGRICULTURAL RELIEF ACT (XXV OF 1879), s. 48.
I. L. R. 42 Bom. 367

See EXECUTION OF DECREE.

See EXECUTION OF DOCUMENT.

See EXECUTION, STAY OF.

See EXECUTION SALE.

See FOREIGN DECREE.
I. L. R. 40 Bom. 551

See IDOL . I. L. R. 36 Bom. 135

See INJUNCTION I. L. R. 46 *Calc.* 103

See LIMITATION ACT (XV OF 1877)—

ARTS. 178, 179 I. L. R. 36 Mad. 553

ART. 179, CL. (4)
I. L. R. 34 Bom. 68

See LIMITATION ACT (IX OF 1908) SCH. I—

ARTS. 181, 182.
I. L. R. 42 Bom. 309

EXECUTION—*contd.*

ART 182, CLS. (5) AND (6)
I. L. R. 42 Bom. 420

See MORTGAGE I. L. R. 37 Calc. 897
I. L. R. 41 Mad. 513

See TRANSFER OF PROPERTY ACT, s. 85.
I. L. R. 34 Bom. 354

See WILL . I. L. R. 47 Calc. 1043

——— application for—

See CIVIL PROCEDURE CODE 1908, s 144.
I. L. R. 45 Bom. 1137

See EVIDENCE ACT (I OF 1872), s. 92, PRO. 6 AND SS, 93 AND 95 TO 97.
I. L. R. 40 Mad. 1016

——— application for, defective—

See LIMITATION ACT (IX OF 1908), SCH. I, ART. 182, CL. (*5*).
I. L. R. 40 Mad. 949

——— attachment by petitioner before judgment — sale — Opponent withdrawing the proceed of sale in execution of his decree—

See CIVIL PROCEDURE CODE (ACT V OF 1908), s. 115.
I. L. R. 45 Bom. 360

——— claimant to Property sold in possession paying into Court—

See CIVIL PROCEDURE CODE, 1908, O XXI, R 89 . *I. L. R. 45 Bom. 1094*

——— claim to property—Burden of proof—

See ATTACHMENT.
I. L. R. 45 Bom. 1020

——— death of judgment debtor—effect of—
I. L. R. 45 Bom. 1186

——— decree for partition of property in *possession of judgment debtor*—

See ADVERSE POSSESSION.
I. L. R. 45 Bom. 943

——— decree-holder attaching mortgage decree of his judgment debtor—

See CIVIL PROCEDURE CODE 1908, O XXI, R 53 I. L. R. 45 Bom. 343

——— *execution proceedings in Court of* a Native State—

See LIMITATION ACT (IX OF 1908), ART. 182, EXPL. II.
I. L. R. 45 Bom. 453

——— executing Court—Inherent powers of—

See CIVIL PROCEDURE CODE, 1908, s 115
I. L. R. 45 Bom. 940

——— for sale of mortgaged property—

See CIVIL PROCEDURE CODE (ACT V OF 1908), ss. 47, 73, 104.
I. L. R. 39 Mad. 570

——— of ex parte decree—

See CIVIL PROCEDURE CODE (ACT V OF 1908), ss. 47, 144, 151.
I. L. R. 43 Bom. 235

——— of decree passed under old code—

See CIVIL PROCEDURE CODE 1908, s 480.
I L. R. 45 Bom. 755

EXECUTION—*contd.*

——— of Order in Council—

See CIVIL PROCEDURE CODE, 1908, O. XLV, R. 15 . **1 Pat. L. J. 385**

——— purchaser in, rights of—

See TRANSFER OF PROPERTY ACT (IV OF 1882), s. 67. **I. L. R. 40 Mad. 77**

——— stay of—

See SEARCH WARRANT **I. L. R. 47 Calc. 164**

See EXECUTION, STAY OF **I. L. R. 38 Mad. 766**

See CIVIL PROCEDURE CODE, 1908, O. XLI, R. 5 . . **I. L. R. 2 Lah. 61**

——— transmission of decrees to Courts of Native States—

See EXECUTION **I. L. R. 40 Mad. 1069**

——— in statement award decree—

See CIVIL PROCEDURE CODE, 1908, s. 47. **I. L. R. 45 Bom. 812**

——— transfer to and sale by Collector—

See HIGH COURT CIRCULAR (BOM.) **I. L. R. 45 Bom. 1132**

——— whether court can restore an application for dismissed for default—

See CIVIL PROCEDURE CODE. **I. L. R. 2 Lah. 63**

——— **Decree for rent**—*Suit for redemption—Taking of accounts under the Dekkhan Agriculturists' Relief Act (XVII of 1879)—Result of account showing that mortgaged over-paid himself from rents and profits—Mortgagees' right to execute decree for rent.* In virtue of a decree for four years' rent, passed at a time when the provisions of the Dekkhan Agriculturists' Relief Act did not apply, the plaintiff (mortgagee) became entitled to recover a certain sum from the defendant (mortgagor). After the introduction of the Dekkhan Agriculturists' Relief Act, the latter sued the former for redemption of the mortgage of the land in respect of which the rent-note sued on had been passed; on taking accounts in the way directed by the Act, it was found that the plaintiff as mortgagee had overpaid himself from the rents and profits of the land. The plaintiff thereafter applied to execute his decree for rent. Both the lower Courts dismissed the application on the ground that the plaintiff had already recovered more than was due to him as mortgagee from the rents and profits of the land. On appeal: *Held*, that the rent decree must be executed as it stood, having regard to the fact that the provisions of the Dekkhan Agriculturists' Relief Act did not apply when it was passed, and that the accounts which were taken for the purposes of the subsequent decree, were taken for a special purpose—that is, for enabling the defendant to redeem on favourable terms, and did not entitle him to recover anything, from the plaintiff by way of set-off. MUGAPPA *v.* MAHAMAD SAHEB (1909) . . . **I. L. R. 34 Bom. 260**

——— **Limitation—Step in aid**—*Accompanying serving peon and identifying the judgment-debtor, if a step in aid of execution—Limitation Act (IX of 1908), Art. 182, cls. (5) and (6)—Court deciding ex parte and without notice to judgment-debtor—Application within time—Decision if binds judgment-debtor—Ex parte decree.* One of the decree-holders accompanying the serving peon and identifying the judgment-debtor upon whom notice of the application for execution had been taken out for service, does not by itself constitute a step taken by the decree-holders in aid of execution within cls. (5) and (6) of Art. 182 of the Limitation Act. Where an application for execution which was reported by the office of the executing Court to be time-barred was, without notice to the judgment-debtor, held by the Court to be within time, and registered and later on dismissed for default: *Held*, that the decision that the application was not time-barred was not binding on the judgment-debtor. An *ex parte* decree is a good decree, but if it is made in the absence of, and without notice to, the other party, it does not bind him, and does not prevent him from showing what the true facts of the case were JUGOL KISHORE *v.* CHINTAMONEY (1914) **18 C. W. N. 1288.**

——— *Prayer herein for attachment—Attachment ordered—Failure to pay batta—Presumed oral application at the hearing of the petition to issue warrant of attachment—Whether such application is step in aid of execution—Part-payment entered in the petition—Civil Procedure Code (Act V of 1908), O. XXI, r. 2, cl. 1, whether certificate of payment proved—Limitation Act (IX of 1908), s. 20, saving of limitation.* Where an assignee of a decree filed a petition for execution on the 13th July 1911 and an order of attachment was made on the day of hearing, the 12th August 1911, and the petition was subsequently dismissed on the 26th August 1911 on his failure to pay batta within the time allowed, and a fresh application was filed on the 10th August 1914. *Held*, that, though in the above circumstances, the Court might presume that the decree-holder made an oral application of the day of hearing to proceed with the execution such application was not a step in aid of execution and that the second application filed more than three years after the date of the first was barred by limitation. *Held*, also, that the part-payment of a decree amount entered in an execution petition, presented within three years from the date of such alleged payment amounts, if the fact of payment is proved, to a certificate of payment under O. XXI, r. 2 of the Code of Civil Procedure, and will operate to save limitation under s. 20 of the Limitation Act. *Rajam Aiyar v. Ananthanatnam Aiyar, 29 Mad. L. J. 669*, and *Lakhi Narain v. Felamani Dasi, 20 C. L. J. 131*, referred to. MASILAMANI MUDALIAR *v.* SETHUSWAMI AYYAR (1917) . **I. L. R. 41 Mad. 251**

——— *Application to transmit a decree of a British Court to a Travancore Court, whether an execution application or a step in aid of execution—Issue of notice on such application, whether affords a fresh starting point, under Act 182, cl. (6)—Limitation Act (IX of 1908), Art. 182, cl. 5—Power of British Courts to send their decrees for execution to Courts of Travancore State—Civil Procedure Code (Act V of 1908), s. 45; effect of.* *Held* by the Full Bench: (i) that in the absence of any provision to that effect in the Civil Procedure Code, Courts in British India have no power to send their decrees for execution to the Courts in Travancore but may and should send to these Courts the documents they require to enable them to execute these decrees under the powers conferred upon them by the legislative authority in Travancore; (ii) that the execution contemplated by the Civil Procedure Code and Art. 182 of the Limitation Act being execution by

EXECUTION—*contd.*

British Courts in India on application made to such

a Travancore Court does not give a fresh starting point under Art. 182 (6), as no such notice is required by the Civil Procedure Code to be issued as a preliminary for execution by the Travancore Court. PIERCE LESLIE & CO., LTD., COCHIN *v.* PERUMAL (1917) . I. L. R. 40 Mad. 1069

——— **Civil Procedure Code**—*Act V of 1908, s. 141, O. II, r. 2 Non-applicability of, to execution applications—consolidating statute, construction of.* The dismissal of a suit on the ground that no suit would lie to recover mesne profits subsequent to the date of a previous decree which awarded subsequent mesne profits is no bar to a claim thereto in execution of that decree The fact that a decree-holder made a previous application for execution to recover mesne profits only for three years subsequent to the plaint and not for a further period also is not a bar under O. II, r 2, Civil Procedure Code, or s. 141, Civil Procedure Code, as now enacted, to another execution application for recovery of mesne profits for the further period. *Thakur Prasad* v. *Fakir-ullah, I. L R 17 All. 106, s.c. 22 I. A. 44,* followed. *Safdar Ali* v. *Kishen Lal, 12 C L. J. 6,* not followed. There is nothing in the Code of Civil Procedure to prevent a decree-holder fron

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effect cannot be cut down by a comparison with *the language of earlier statutes.* S. 141, Civil Procedure Code, is intended to apply to proceedings in Civil Courts such as probate, etc. BALASUBRAHMANYA CHETTI *v.* SWARNAMMAL (1913)

I. L. R. 38 Mad. 199

——— **Transfer to Collector**—*Mortgage by judgment-debtor—Invalidity—Civil Procedure Code (Act XIV of 1882), s. 325A.* When the execution of a decree ordering the sale of immovable property has been transferred to the Collector under s. 320 of the Code of Civil Procedure, 1882, the effect of s. 325A is that a mortgage of the property, or any part of it, made by the judgment-debtor while the Collector can exercise the powers given to him by ss. 322 to 325 is absolutely void, and not merely void as against the Collector and those claiming under him. *Magniram Vithuram* v.

L. R. 45 I. A. 219

——— **Civil Procedure Code (Act V of 1908), s. 49 and O. XXI, r. 2**—*Satisfaction of decree, not certified—Second execution of decree by assignee of decree-holder—Suit by judgment-debtor for damages against decree-holder and assignee, maintainability of.* Even a decree which has once

of the decree-holder, has a cause of action for damages only as against the decree-holder but none against the assignee even though the assignee got the assignment with knowledge of satisfaction.

EXECUTION—*contd.*

Viraraghava Reddi v. *Subbakka, I. L. R. 5 Mad. 397,* referred to. *Manmohan Karmokar* v. *Dwarka Nath Karmokar, 12 C. L. J. 312,* and *Goono Monee Dossia* v *Pran Kishore Dossee, 13 W. R. 69,* distinguished. KRISHNA AIYAR *v.* SAVURIMUTHU PILLAI (1918)

I. L. R. 42 Mad. 338

——— **Attachment and sale of lands**—*Transfer of territorial jurisdiction of Court—Order of Court which did not pass the decree but to which execution was transferred—Attachment and sale of lands by Court after deprivation of territorial jurisdiction, validity of —Estoppel against judgment-debtor, how far binding upon auction purchaser.* A Court to which execution of a decree is transferred has no jurisdiction to order either the attachement or sale of immoveables in execution, if at the time of the order such Court had no territorial jurisdiction over the immoveables. Though a judgment-debtor, who does not object to a confirmation of a sale by such Court, may be estopped from raising the question that the sale was a nullity, such estoppel does not operate against the subsequent purchaser of the same property in a sale held by Court having jurisdiction in execution of another decree against the same judgment-debtor. *Mahomed Mazuffer Hossein* v. *Kishori Mohun Roy (1895). I. L. R., 22 Calc. 909,* explained. *Prayag Roy* v. *Sidhu Prasad Tewari (1908), I. L. R. 35 Calc. 877,* and *Parsidh Narain Singh* v. *Janaki Singh (1907), 7 C. L. J., 644,* dissented from. VEERAPPA CHETTY *v.* RAMASAMI CHETTY (1920)

I. L. R. 43 Mad. 135

——— **Pre-decree arrangement that decree should be inexecutable in part,** *whether recognizable in execution proceedings.* An arrange-

the arrangement is good *Chidambaram Chettiyar* v. *Krishna Vathiyar (1917), I. L. R 40 Mad. 233 (F.B.).* ARUMUGAM PILLAI *v.* KRISHNASWAMI NAYUDU (1920) . . I. L. R. 43 Mad. 725

——— *Civil Procedure Code (V. of 1908), O. XXI, rr. 15, 16 and O. XXII, r. 10 (1)—Transfer of part of decree—Right of transferee to execute or to join in execution—Prohibition of execution by transferee, void under s. 28 —Contract Act (IX of 1872)—Appeal against orders purporting to be passed under O. XXII, r 10, Civil Procedure Code.* S. 146, Civil Procedure Code, recognizes the validity of a transfer of a part of a decree and execution thereof by the transferee. O. XXI, r. 16, is no bar to the application of the section. Such transferee is like a joint decreeholder and can, under O. XXI, r. 15, protect his rights either by executing the decree himself or by joining or intervening in the execution by his transferor. An agreement by the transferee of part of a decree that the transferor shall conduct execution proceedings and may compromise the same as he thinks fit, only con-

transferee

agreement

not in any

way enforce his rights under the transfer, *e.g.*, execute or intervene in execution is void under s. 28 of the Contract Act. An order purporting to be passed under O. XXII, r. 10, by a Court of first instance is appealable though on the facts the

EXECUTION—*contd.*

———— **of Order in Council—**

See Civil Procedure Code, 1908, O. XLV, r. 15 . **1 Pat. L. J. 335**

———— **purchaser in, rights of—**

See Transfer of Property Act (IV of 1882), s. 67. **I. L. R. 40 Mad. 77**

———— **stay of—**

See Search warrant **I. L. R. 47 Calc. 164**

See Execution, stay of **I. L. R. 38 Mad. 766**

See Civil Procedure Code, 1908, O. XLI, r. 5 . . **I. L. R. 2 Lah. 61**

———— **transmission of decrees to Courts of Native States—**

See Execution **I. L. R. 40 Mad. 1069**

———— **in statement award decree—**

See Civil Procedure Code, 1908, s. 47. **I. L. R. 45 Bom. 812**

———— **transfer to and sale by Collector—**

See High Court Circular (Bom.) **I. L. R. 45 Bom. 1132**

———— **whether court can restore an application for dismissed for default—**

See Civil Procedure Code. **I. L. R. 2 Lah. 63**

———— **Decree for rent**—*Suit for redemption—Taking of accounts under the Dekkhan Agriculturists' Relief Act (XVII of 1879)—Result of account showing that mortgaged over-paid himself from rents and profits—Mortgagees' right to execute decree for rent.* In virtue of a decree for four years' rent, passed at a time when the provisions of the Dekkhan Agriculturists' Relief Act did not apply, the plaintiff (mortgagee) became entitled to recover a certain sum from the defendant (mortgagor). After the introduction of the Dekkhan Agriculturists' Relief Act, the latter sued the former for redemption of the mortgage of the land in respect of which the rent-note sued on had been passed; on taking accounts in the way directed by the Act, it was found that the plaintiff as mortgagee had overpaid himself from the rents and profits of the land. The plaintiff thereafter applied to execute his decree for rent. Both the lower Courts dismissed the application on the ground that the plaintiff had already recovered more than was due to him as mortgagee from the rents and profits of the land. On appeal: *Held*, that the rent decree must be executed as it stood, having regard to the fact that the provisions of the Dekkhan Agriculturists' Relief Act did not apply when it was passed, and that the accounts which were taken for the purposes of the subsequent decree, were taken for a special purpose—that is, for enabling the defendant to redeem on favourable terms, and did not entitle him to recover anything, from the plaintiff by way of set-off. Mugappa *v.* Mahamad Saheb (1909) . . . **I. L. R. 34 Bom. 260**

———— **Limitation—Step in aid**—*Accompanying serving peon and identifying the judgment-debtor, if a step in aid of execution—Limitation Act (IX of 1908), Art. 182, cls. (5) and (6)—Court deciding ex parte and without notice to judgment-debtor—Application within time—Decision if binds judgment-debtor—Ex parte decree.* One of the decree-holders accompanying the serving peon and identifying the judgment-debtor upon whom notice of the application for execution had been taken out for service, does not by itself constitute a step taken by the decree-holders in aid of execution within cls. (5) and (6) of Art. 182 of the Limitation Act. Where an application for execution which was reported by the office of the executing Court to be time-barred was, without notice to the judgment-debtor, held by the Court to be within time, and registered and later on dismissed for default: *Held*, that the decision that the application was not time-barred was not binding on the judgment-debtor. An *ex parte* decree is a good decree, but if it is made in the absence of, and without notice to, the other party, it does not bind him, and does not prevent him from showing what the true facts of the case were Jugol Kishore *v.* Chintamoney (1914) **18 C. W. N. 1288.**

———— *Prayer herein for attachment—Attachment ordered—Failure to pay batta—Presumed oral application at the hearing of the petition to issue warrant of attachment—Whether such application is step in aid of execution—Part-payment entered in the petition—Civil Procedure Code (Act V of 1908), O. XXI, r. 2, cl. 1, whether certificate of payment proved—Limitation Act (IX of 1908), s. 20, saving of limitation.* Where an assignee of a decree filed a petition for execution on the 13th July 1911 and an order of attachment was made on the day of hearing, the 12th August 1911, and the petition was subsequently dismissed on the 26th August 1911 on his failure to pay batta within the time allowed, and a fresh application was filed on the 10th August 1914. *Held*, that, though in the above circumstances, the Court might presume that the decree-holder made an oral application of the day of hearing to proceed with the execution such application was not a step in aid of execution and that the second application filed more than three years after the date of the first was barred by limitation. *Held*, also, that the part-payment of a decree amount entered in an execution petition, presented within three years from the date of such alleged payment amounts, if the fact of payment is proved, to a certificate of payment under O. XXI, r. 2 of the Code of Civil Procedure, and will operate to save limitation under s. 20 of the Limitation Act. *Rajam Aiyar* v. *Anantharatnam Aiyar, 29 Mad. L. J. 669*, and *Lakhi Narain* v. *Felamani Dasi, 20 C. L. J. 131*, referred to. Masilamani Mudaliar *v.* Sethuswami Ayyar (1917) . **I. L. R. 41 Mad. 251**

———— *Application to transmit a decree of a British Court to a Travancore Court, whether an execution application or a step in aid of execution—Issue of notice on such application, whether affords a fresh starting point, under Act 182, cl. (6)—Limitation Act (IX of 1908), Art. 182, cl. 5—Power of British Courts to send their decrees for execution to Courts of Travancore State—Civil Procedure Code (Act V of 1908), s. 45; effect of.* *Held* by the Full Bench: (i) that in the absence of any provision to that effect in the Civil Procedure Code, Courts in British India have no power to send their decrees for execution to the Courts in Travancore but may and should send to these Courts the documents they require to enable them to execute these decrees under the powers conferred upon them by the legislative authority in Travancore; (ii) that the execution contemplated by the Civil Procedure Code and Art. 182 of the Limitation Act being execution by

EXECUTION—*contd.*

British Courts in India on application made to such Courts, an application to a British Court in India to send a decree of such Court for execution to a Court of Travancore is neither an execution application nor a step in aid of execution within Art. 182,

a Travancore Court does not give a fresh starting point under Art. 182 (6), as no such notice is required by the Civil Procedure Code to be issued as a preliminary for execution by the Travancore Court. PIERCE LESLIE & CO., LTD., COCHIN *v.* PERUMAL (1917) **I. L. R. 40 Mad. 1069**

——————**Civil Procedure Code**—*Act V of 1908, s. 141, O. II, r. 2 Non-applicability of,*

sequent to the date of a previous decree which awarded subsequent mesne profits is no bar to a claim thereto in execution of that decree. The fact that a decree-holder made a previous application for execution to recover mesne profits only for three years subsequent to the plaint and not for a further period also is not a bar under O II, r 2, Civil Procedure Code, or s. 141, Civil Procedure Code, as now enacted, to another execution application for recovery of mesne profits for the further period. *Thakur Prasad* v. *Fakir-ullah, I. L R. 17 All. 106, s c. 22 I.*
Lal, 12 C.
in the Code

effect cannot be cut down by a comparison with the language of earlier statutes. S. 141, Civil Procedure Code, is intended to apply to proceedings in Civil Courts such as probate, etc. BALASUBRAHMANYA CHETTI *v.* SWARNAMMAL (1913) **I. L. R. 38 Mad. 199**

——————**Transfer to Collector**—*Mortgage by judgment-debtor—Invalidity—Civil Procedure Code (Act XIV of 1882), s. 325A.* When the execution of a decree ordering the sale of immovable property has been transferred to the Collector under s. 320 of the Code of Civil Procedure, 1882, the effect of s. 325A is that a mortgage of the property, or any part of it, made by the judgment-debtor while the Collector can exercise the powers given to him by ss. 322 to 325 is absolutely void, and not merely void as against the Collector and those claiming under him. *Maguiram Vithuram* v. *Bakubai, I. L. R. 36 Bom. 510,* disapproved. *Salu Bai* v. *Bajat Khan, 13 Nagpur L. R. 130,* approved. GAURISHANKAR BALMUKUND *v.* CHINNUMAYA (1918) **L. R. 45 I. A. 219**

——————**Civil Procedure Code (Act V of 1908), s. 49 and O. XXI. r. 2**—*Satisfaction of decree, not certified—Second execution of decree by assignee of decree-holder—Suit by judgment-debtor for damages against decree-holder and assignee, maintainability of.* Even a decree which has once been satisfied can be executed so long as the satisfaction is not reported to and certified by the Court.

ages only as against the decree-holder but none against the assignee even though the assignee got the assignment with knowledge of satisfaction.

EXECUTION—*contd.*

Viraraghava Reddi v. *Subbakka, I. L. R. 5 Mad. 397,* referred to. *Manmohan Karmokar* v. *Dwarka Nath Karmokar, 12 C. L. J. 312,* and *Goono Monee Dossia* v. *Pran Kishore Dossee, 13 W. R. 69,* distinguished. KRISHNA AIYAR *v.* SAVURIMUTHU PILLAI (1918) **I. L. R. 42 Mad. 338**

——————**Attachment and sale of lands**—*Transfer of territorial jurisdiction of Court—Order of Court which did not pass the decree but to which execution was transferred—Attachment and sale of lands by Court after deprivation of territorial jurisdiction, validity of —Estoppel against judgment-debtor, how far binding upon auction purchaser.* A Court to which execution of a decree is transferred has no jurisdiction to order either the attachement or sale of immoveables in execution, if at the time of the order such Court had no territorial jurisdiction over the immoveables. Though a judgment-debtor, who does not object to a confirmation of a sale by such Court, may be estopped from raising the question that the sale was a nullity, such estoppel does not operate against the subsequent purchaser of the same property in a sale held by Court having jurisdiction in execution of another decree against the same judgment-debtor. *Mahomed Mazuffer Hossein* v. *Kishori Mohun Roy (1895), I. L. R., 22 Calc. 909,* explained. *Prayag Roy* v. *Sidhu Prasad Tewari (1908), I. L. R 35 Calc. 877,* and *Parsidh Narain Singh* v. *Janaki Singh (1907), 7 C. L. J., 644,* dissented from. VEERAPPA CHETTY *v.* RAMASAMI CHETTY (1920) **I. L. R. 43 Mad. 135**

——————**Pre-decree arrangement that decree should be inexecutable in part,** *whether*

v. *Krishna Vathiyar (1917), I. L R. 40 Mad. 233 (F.B.).* ARUMUGAM PILLAI *v.* KRISHNASWAMI NAYUDU (1920) . . **I. L. R. 43 Mad. 725**

——————*Civil Procedure Code (V. of 1908), O. XXI, rr. 15, 16 and O. XXII, r. 10 (1)—Transfer of part of decree—Right of transferee to execute or to join in execution—Prohibition of execution by transferee, void under s. 28—Contract Act (IX of 1872)—Appeal against orders purporting to be passed under O. XXII, r. 10, Civil Procedure Code.* S. 146, Civil Procedure Code, recognizes the validity of a transfer of a part of a decree and execution thereof by the transferee. O. XXI, r. 16, is no bar to the application of the section. Such transferee is like a joint decreeholder and can, under O. XXI, r. 15, protect his rights either by executing the decree himself or by joining or intervening in the execution by his transferor. An agreement by the transferee of part of a decree that the transferor shall conduct execution proceedings and may compromise the same as he thinks fit, only con-
transferee
agreement
not in any
way enforce his rights under the transfer, *e.g.,* execute or intervene in execution is void under s. 28 of the Contract Act. An order purporting to be passed under O. XXII, r. 10, by a Court of first instance is appealable though on the facts the

EXECUTION—*concld.*

order should not have been passed under the rule. MUTHIAH CHETTIAR *v.* GOVINDDOSS KRISHNADOSS (1921) **I. L. R. 44 Mad. 919**

——————**stayed by High Court upon Appeal to England**—*furnishing security within a fixed date to the satisfaction of the Subordinate Judge, in default execution to be proceeded with—Security furnished but Commissioner's investigation of security not completed within that date—Subordinate Judge whether has jurisdiction to give time to Commissioner and stay sale any further—Specification of time for tendering security.* The High Court ordered that execution of a decree be stayed pending the disposal of appeal therefrom to His Majesty in Council upon the Appellant to England giving security to the satisfaction of the Subordinate Judge for a certain sum by the 20th September 1919, and that in default of the said security being given by the 20th September, the application for stay of execution was to stand dismissed and the sale to be proceeded with. In pursuance of the said order security was offered on the 16th September and the matter was referred to Commissioners for investigation of its sufficiency. The Subordinate Judge on 20th September upon an application by the Appellants to England gave the Commissioners time up to the 10th November for submitting their report after the completion of the enquiry and on the 22nd September postponed the sale till the 1st December. The Respondents to England moved the High Court against the orders of the Subordinate Judge, dated the 20th and the 22nd September as having been made without jurisdiction. *Held,* that in the special circumstances of the case, the High Court should refuse to interfere under s. 115 of the Civil Procedure Code. That the Commissioners having later on found the security to be sufficient and objections having been or being about to be made by the Respondents to the Commissioner's report, the Respondents would not be prejudiced if on the hearing of the observations, it turned out that the security was sufficient; on the other hand if the security was held to be insufficient, execution should not be stayed and the sale should take place. It will be advisable in the future for the Court to specify definitely the time within which the security, which it is desired to offer, must be tendered and to give such further directions as may be necessary to ensure the intention of the Court being carried out. KEDAR NATH SANYAL *v.* MATILAL DAS . **24 C. W. N. 265**

EXECUTION APPLICATION.

See CIVIL PROCEDURE CODE (ACT V OF 1908)—

ss. 38, 39, 41 AND 50, O. XXI, RR. 16, 26. . **I. L. R. 37 Mad. 23**

ss. 144 AND 11, EXP. IV AND 47, O. II R. 2 . **I. L. R. 40 Mad. 780**

See EXECUTION **I. L. R. 38 Mad. 199**

See LIMITATION ACT (IX OF 1908), ART. 182 . . **I. L. R. 39 Mad. 923**

—————— **by one only of the decree-holders**—

See CIVIL PROCEDURE CODE (ACT XIV OF 1882), s. 231 **I. L. R. 36 Mad. 357**

EXECUTION OF DECREE.

See AGRA TENANCY ACT (II OF 1901), s. 20, CL. (2)
I. L. R. 37 All. 278
I. L. R. 43 All. 547

See APPEAL . **I. L. R. 38 Calc. 717**

See ARMY ACT (44 AND 45, VICT. c. 58), ss. 145, 190. **I. L. R. 43 Bom. 368**

See ASSIGNEE. **I. L. R. 38 Mad. 36**

See ATTACHMENT.
I. L. R. 42 All. 39

See BENGAL TENANCY ACT, 1885, ss. 69 AND 70. . . **2 Pat. L. J. 24**

See CIVIL COURT ACT, s. 32.
. **I. L. R. 38 Bom. 662**

See CIVIL PROCEDURE CODE, 1882.
I. L. R. 37 All. 542

s. 230 **I. L. R. 34 All. 397, 636**
I. L. R. 32 All. 136

s. 234 . **I. L. R. 32 All. 404**

s. 235 . **I. L. R. 33 All. 517**

ss. 235, 320 **I. L. R. 34 Bom. 142**

s. 244 . **I. L. R. 32 All. 321**

ss. 244, 283 **I. L. R. 32 All. 129**

s. 258 . **I. L. R. 34 Bom. 575**

ss. 268, 278, 283
I. L. R. 38 Bom. 631

ss. 268, 274. **I. L. R. 35 Bom. 288**

ss. 276, 295, 320, 325A.
I. L. R. 35 Bom. 516

ss. 278, 279, 280, 281.
I. L. R. 34 All. 365

ss. 282, 287 **I. L. R. 35 Bom. 275**

s. 287 (*c*). **I. L. R. 35 All. 257**

s. 308 . . **I. L. R. 32 All. 380**

s. 315 . **I. L. R. 35 All. 419**
I. L. R. 40 All. 411

s. 316 . . **I. L. R. 33 All. 63**

s. 317 . **I. L. R. 35 Bom. 342**

s. 341 AND 349
I. L. R. 33 All. 279

ss. 373 AND 375 .
I. L. R. 36 All. 172

See CIVIL PROCEDURE CODE 1908.

ss. 56 to 74—

s. 104, O. XXI
I. L. R. 40 All. 122

O. XXI,
SCH. III.

O. XXIII, R. 3.
I. L. R. 38 Mad. 959

O. XXIV, RR. 1, 2 AND 3.
I. L. R. 40 All. 125

R. 14. . **I. L. R. 35 Bom. 248**

O. XXXIV,

R. 8 . **I. L. R. 35 All. 116**

R. 14 . **I. L. R. 38 All. 327**
I. L. R. 35 All. 518
I. L. R. 39 All. 36
I. L. R. 41 All. 399
I. L. R. 42 All. 566

EXECUTION OF DECREE—*contd.*

——— **s. 102**—*contd.*

See TRANSFER OF PROPERTY ACT (IV OF 1882)—

s. 52 . . **I. L. R. 37 Bom. 621**

s. 89 . **I. L. R. 37 All. 414**

s. 99 . **I. L. R. 37 All. 165**

——— **application for**—

See LIMITATION ACT, 1877, SCH. II, ART. 179 . . **14 C. W. N. 481**

See EXECUTION PROCEEDINGS. **I. L. R. 37 All. 518**

See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXI, R. 2 (*3*). **I. L. R. 40 Mad. 296**

——— **Baroda-Court decree**—

See DECREE . **I. L. R. 39 Bom. 34**

——— **by assignee**—

See CIVIL PROCEDURE CODE, O XXI, R 16 . **I. L. R. 2 Lah. 230**

——— **deed of conveyance, obtained in**—

See CIVIL PROCEDURE CODE (ACT V OF 1908), O. II, R. 2. **I. L. R. 38 Mad. 698**

——— **jurisdiction**—

See CIVIL PROCEDURE CODE (ACT V OF 1908), SS. 37, 38 AND 150. **I. L. R. 37 Mad. 462**

——— **mortgagor in possession under rent note**—

See CIVIL PROCEDURE CODE 1908, S. 47. **I. L. R. 45 Bom. 174**

——— **payable by instalments**—

See LIMITATION ACT, 1908, ART. 181. **I. L. R. 2 Lah. 155**

——— **power of court to which decree is transfered for execution to determine certain matters**—

See CIVIL PROCEDURE CODE, 1908, S. 42. **I. L. R. 43 All. 394**

1. ——— Parties—*Civil Procedure Code, 1882, ss. 244, 252, 647—Decree—Execution—Death of judgment-debtor—Legal representatives of the judgment-debtor brought on record—Dispute as to property—Legal representatives should put forward their claim under s. 244—They cannot raise the defence in a separate suit for possession by auction-purchaser—Auction-purchaser not a stranger.* C sued *M* on a money-bond. *M* having died during the pendency of the suit, his widow *R* and his brother *N* were brought by *C* on the record as his representatives. A decree was passed awarding the claim out of the property of the deceased. After the passing of the decree but before it could be executed both *R* and *N* died. *C* then brought on the record the defendants as the legal representatives of *M*. The latter denied that they were *M*'s legal representatives or that they had any property of *M*'s which could be liable for the decree. The Court overruled the objections, and in execution of the decree attached and sold the property in dispute. The plaintiff purchased the property at the sale: and filed this suit to recover possession thereof from the defendants. The lower Court disallowed the plaintiff's claim on the ground that the property having been joint property of *M* and defendants' survived to the latter at *M*'s death; and that the plaintiff obtained no title at the Court-sale which he could legally assert as against the defendants. In the lower Appellate Court the plaintiff contended unsuccessfully that the defendants were debarred by the provisions of s. 244 of the Code of Civil Procedure, 1882, from asserting their title. *Held,* that as the property was sold by the Court at *C*'s instance as that of *M*, the question so far was one relating to the execution of the decree arising between the decree-holder and the defendants as judgment-debtors under s. 252 of the Civil Procedure Code of 1882. It was, therefore, a question in relation to them falling within s. 244 of the Code by reason of the explanation to s. 647 that applications for the execution of the decree were proceedings in suits. The defendants were consequently bound to object to the attachment and sale under that section, so far as the decree-holder's action was concerned. It was contended that whatever might have been the result if the decree-holder had been a party to the suit, the present dispute was between the auction-purchaser, who was a stranger to the previous suit and the execution proceedings therein, and the defendants, and that s. 244 did not apply. *Held,* that though an auction-purchaser at a Court-sale in execution of a decree was not a party to the suit in which the decree was passed and though he was not a representative of either the decree-holder or the judgment-debtor for the purposes of s. 244, yet if the question raised by the judgment-debtor as to the legality of the Court-sale was virtually one between the parties to the suit, that is, between the decree-holder and the judgment-debtor, and if in the decision and result of that question the auction-purchaser was interested, the judgment-debtor ought not to be allowed to attack the sale in a suit. The test in all such cases is whether the ground upon which the Court-sale is attacked as conferring no title upon the auction-purchaser affects the parties to the suit and could have as between them been raised, and determined under s. 244 and whether the auction-purchaser, though not a party to that suit, is a party interested in the result. GOKUL SING BHIKARAM *v.* KISANSINGH (1910)

I. L. R. 34 Bom. 546

1(a). ——— **Property under wrongful attachment stolen by bailiff**—*Attachment—Liability of attaching decree-holder—Small Cause Court—Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 35 (j)—Jurisdiction.* Where crops of a third party had been wrongfully attached by a decree-holder as those of his judgment-debtor, and, while so attached, were stolen by the *shahana* (or bailiff) in whose custody they were, it was *held,* that the decree-holder was responsible to the owner for their value; also, that a suit by the owner against the decree-holder to recover the value of the crops and damages was not a suit cognizable by a Court of Small Causes. *Goma Mahad Patil* v. *Gokaldas Khimji, I. L. R. 3 Bom. 74,* followed. *Musammat Subjan Bibi* v. *Shaikh Sariatulla, 3 B. L. R. A. J. 413,* not followed. *Kissori Mohun Roy* v. *Harsukh Das, I. L. R. 7 Calc. 436,* referred to. BISHAMBAR NATH *v.* GADDAR (1910) **I. L. R. 33 All. 306**

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property, and purchased it, the purchase-money being equal to the amount of his share of the decree. *Held*, in a suit by the co-decree-holders to recover their shares of the property so purchased, that they were entitled to recover, the equity being on the side of the plaintiffs KESRI *v.* GANGA SAHAI (1911) . . . I. L. R. 33 All. 563

2.———— Transfer of execution proceedings—*Jurisdiction of executing Court—Presidency Small Cause Courts Act (XV of 1882), s. 31, cl. (b)—Civil Procedure Code (Act V of 1908), s. 24.* The meaning of s 31, cl. (*b*) of the Presidency Small Cause Courts Act, is that the Civil Court to which a decree may be transferred for execution is the Civil Court competent to deal with it under the provisions of Act XIV of 1882, and so also the Court which, under the provisions of the present Code, is competent to deal with it. Proceedings which are without jurisdiction are not proceedings that can be transferred under the provisions of the old Code, and are equally incapable of transfer under the new Code. SHAMSUNDAR SAHA *v* ANATH BANDHU SAHA (1910) . . I. L. R. 37 Calc. 574

2(a).———— Inherent power—*Civil Procedure Code (Act V of 1908), s. 152, O. XIX, rr. 97-98—Resistance by stranger not in possession—Inherent power of court to investigate and put decree-holder in possession.* The Court's inherent power to pass such orders as may be necessary for the ends of justice may in a proper case be exercised against a stranger to the suit. *Surendra Nath* v. *The Chief Justice and the Judges of the High Court of Bengal, L. R. 10 I. A 171,* relied on Where execution is

the matter, and take measures to put him in possession, although rr. 97 to 99 of O. XXI do not cover such a case. RADHIKA MOHAN SAHA *v.* GYAN CHANDRA SAHA (1910) 14 C. W. N. 836

2(b).————Benamidars—*Execution, if may be directed against a person not a party to the decree—Benami.* A person who is neither a party to the decree nor a representative of the judgment-debtors cannot be made liable for the decretal amount on the ground that the judgment-debtors were *benamidars* for him. JADU NATH BOSE *v.* SRIMATI PREMMONI DASI (1910) 14 C. W. N. 774

3.———— Rent-decree—*Limitation—Chota-Nagpur Encumbered Estates Act (Beng. VI of 1876), ss. 3, 12—Chota-Nagpur Encumbered Estates Amendment Act (Beng. III of 1909), s. 4.* The words "Civil Courts" in s. 3 of Act VI of 1876, as amended by s. 4 of Act III B.C. of 1909, are comprehensive enough to include the Revenue Courts deciding rent-suits and executing rent-decrees. *Nilmoni Singh Deo* v. *Taranath Mukerjee, I. L. R. 9 Calc. 295; L. R. 9 I. A. 171,* followed. PRATAP UDAINATH SHAH DEO. *v.* MADAN MOHAN NATH SABI (1910) I. L. R. 38 Calc. 288

4.———— Fraud—*Sale—Application to set it aside—Fraud should be definitely established—Irregularity, how far it affects auction-purchaser—Second application for setting aside sale, if it lies.* The word "fraud" is very loosely used in the class of cases instituted for setting aside sales, any irregularity being taken to be *fraud,* with all the consequences that such a finding involves. A finding of fraud, however, should be reserved for that which is dishonest and morally wrong; and it is not sufficient to come to a vague general finding of fraud; actual fraud must be established. A Court should have much hesitation in visiting an innocent auction-purchaser at one of its sales with the consequences of an irregularity or defect of procedure, which was not discovered by the Court or its officers, at the time of sale, and was *not apparent on the face* of the record. Where an application to have a sale set aside was dismissed for default and the application for restoration was rejected, it is doubtful whether the applicant can successfully prefer a second application for the same purpose. *Lalla Bunseedhur* v. *Koonwar Bindeseree Dutt Singh, 10 Moo I A. 454,* and *Mallarjun* v. *Narhari, I L. R. 25 Bom 337, L. R. 27 I. A. 216,* referred to *Khiarajmal* v. *Daim, I. L. R. 32 Calc. 296,* distinguished. PARESH NATH MALLICK *v.* HARI CHARAN DEY (1911) I. L. R. 38 Calc. 622

5.———— Successive applications to execute decree—*Decree—Execution—First darkhast made during the pendency of the previous darkhast—Decision on the first darkhast does not operate as res judicata if a new darkhast filed within time of the disposal of the previous darkhast.* A decree obtained in 1893 was, after three intermediate applications to execute it, sought to be executed in 1903 This application was ordered by the Subordinate Judge to be proceeded with: and his order was confirmed on appeal by the

by the Subordinate Judge as barred by limitation. This order was not appealed against. The present *darkhast*, filed in 1907, was held to be

not be affected by the order of the Subordinate Judge passed in the *darkhast* of 1904, because the latter was the order of a lower Court and it was passed in a *darkhast* which could not have legal validity so long as the *darkhast* of 1903 was kept alive by proper proceedings. BALKRISHNA WAMNAJI *v.* SHIVA CHIMA (1911) I. L. R. 35 Bom. 245

6.———— Stay of execution—*Civil Procedure Code (Act V of 1908, s. 115, O. XLI, r. 5—Whether a security bond given by the Secretary of State for India in Council, but which was not sanctioned with the concurrence of a majority of votes at a meeting, is sufficient—Government of India Act, 1858 (21 and 22 Vict., c. 106), ss. 39, 40, 41, 42*

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perty, power to restore to possession the party whom it has ejected. SATYA SHANKAR GHOSHAL *v.* MAHARAJ NARAIN SHEOPURI (1912)

I. L. R. 35 All. 119

12. ———— Limitation—*Suit for sale on a mortgage—Decree payable by instalments—Civil Procedure Code, 1882, s. 258—Civil Procedure Code (1908), O. XXI, r. 2; O. XXXIV, r. 5—Limitation Act (IX of 1908), Sch. I, Art. 181.* On a compromise in a suit for sale on a mortgage, a decree followed providing that the sum found due on the mortgage (Rs. 1,374), with interest at a certain rate, should be paid by instalments of Rs. 100 a year, along with the interest then due. Payments were to be made by the end of Jeth in each year beginning with the Jeth 1957 Fasli (June 1900), and it was provided that, if default were made for three years in succession in the payments and interest, the decree-holder would be at liberty to recover at once the whole amount payable under the decree, that is, to apply for an order absolute for sale and execute the same. No payment was made in 1900 or 1901, but in June 1902, just before the end of Jeth 1959 Fasli, the judgment-debtor paid up all that was due on account of the first three years. He made no payment in 1903, but in June, 1909, he paid up all that was due up to the end of Jeth 1960 Fasli (June, 1903). No payment was made in 1905, but in June, 1903, he paid the instalment and interest which he ought to have paid in Jeth 1961 Fasli (June, 1904). This payment was covered by the proviso to s. 20 (*1*) of the Limitation Act. The only other payment made was a small sum on account of interest in July, 1903. The decree-holder applied for an order absolute for sale on the 3rd of August, 1909. *Held,* that the first three consecutive defaults were in 1905, 1906 and 1907, and that the decree-holders' application was in time applying Art. 181 of the first Schedule to the Indian Limitation Act, 1908. The following cases were referred to:—*Oudh Behari Lal* v. *Nageshar Lal, I. L. R. 13 All. 278, Kishan Singh* v. *Aman Singh, I. L. R. 17 All. 42, Roshan Singh* v. *Mata Din, I. L. R. 23 All. 36, Chunni Lal* v. *Hurnan Das, I. L. R. 20 All. 302, Shankar Prasad* v. *Jalpa Prasad, I. L. R. 16 All. 371, Ajudhia* v. *Kunjal, I. L. R. 30 All. 123, Mon Mohan Roy* v. *Durga Churn Gooee, I. L. R. 15 Calc. 502,* and *Kashiram* v. *Pandu, I. L. R. 27 Bom. 1.* BADRI NARAIN *v.* KUNJ BIHARI LAL (1913) **I. L. R. 35 All. 178**

13. ———— Shebait—*Claim preferred by successor in office of judgment-debtor (adverse to his own interests) as the legal representative—Order made, whether under scope of Civil Procedure Code (Act V ... O. XXI, rr. 58, 60—Appeal ... Code (A ... O. XLI ...*

for money agains ... and proceeded to sell properties of which *Y* or his successor in office had alleged that he was in possession, not as shebait of the deity, but in his own right: *Held,* that the case did not fall within the scope of s. 47 of the Civil Procedure Code of 1908 as *Y* in his character of shebait, the only character in which he was a party to the suit, could not rightly be deemed the same person in his character as a private individual. *Kartick Chandra Ghose* v. *Ashutosh Dhara, I. L. R. 39 Calc. 298,* followed. That the order of the original Court must be ... r. 60 of O. XXI, ... tion between t ... the personal character of the same individual: and that, in consequence, the appeal to the Subordinate Judge was incompetent. *Punchanun* v. *Rabia Bibi, I. L. R. 17 Calc. 711,* distinguished and explained. *Per* MOOKERJEE J. When *X* in execution of a decree for money against *Y* seeks to proceed against *Z* as the legal representative of *Y* who is liable only to the extent of the assets of *Y* in his hands, and a question arises whether a particular property does or does not constitute such assets, it must be determined by the execution Court under s. 47 of the Code. *Per* BEACHCROFT J. If the claim of the objector is really in his own interests as representative of the judgment-debtor, the case will come under s. 244 (of the Code of 1882); if the claim is adverse to his interest as representative, it will not. UPENDRA NATH KALAMURI *v.* KUSUM KUMARI DASI (1914) . . **I. L. R. 42 Calc. 440**

...

share in a house. Pending the attachment the judgment-debtor sued for partition of the house and obtained a decree for separate possession of her share conditional on payment of Rs. 237 into Court. The decree-holder then brought to sale the share allotted to his judgment-debtor, and, having paid into Court the Rs. 237 which the judgment-debtor had omitted to pay, asked for delivery of possession of the specific share purchased. *Held,* that, whether or not the decree-holder might ultimately be entitled to the full benefit of the decree for partition in favour of his judgment-debtor on payment of the sum of Rs. 237, all he acquired by his purchase was a right to be put into possession of the undivided share to which his judgment-debtor was entitled. RAM DULARI *v.* BALAK RANI (1914)

I. L. R. 37 All. 120

15. ———— *Construction of decree—Decree for maintenance based on an arbitration award.* A decree was passed by the High Court in a second appeal from the decree of a Court of Revenue in terms of an arbitration award to the following effect. Possession of the land claimed was to be given to the plaintiffs, who were to pay to the defendant half-yearly a maintenance allowance, partly in grain and partly ... It was provided further that if the ...

... and could be executed by a Court of Revenue, but that the defendant should bring a regular suit in a Civil Court to enforce her right to maintenance. ANUPA KUNWAR *v.* ACHHAIBAR SINGH (1914) . . . **I. L. R. 37 All. 97**

16. ———— *Limitation—Limitation Act (IX of 1908), Art. 182, Sch. I—Application in accordance with law—Civil Procedure Code (1908), O. XXI, r. 12.* The failure of a decree-holder to annex to an application for

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and 55—Government of India Act, 1859 (22 and 23 Vict., c. 41), s. 1. A decree for recovery of possession of immoveable property having been passed against a minor under the Court of Wards, and the Collector, an appeal was preferred against it to the High Court; subsequently the appellants applied for stay of execution of the decree, and as security they offered a guarantee to be executed by the Government of Bengal on behalf of the Secretary of State for India in Council; but it was not shown that the security had been sanctioned by the Secretary of State for India in Council with the concurrence of a majority of votes at a meeting, as provided by s. 40 of the Government of India Act, 1858. *Held,* that the execution of the decree could not be stayed inasmuch as the security offered was not sufficient. SRINIBASH PRASAD SINGH *v.* KESHO PRASAD SINGH (1911)

I. L. R. 38 Calc. 754
15 C. W. N. 475

7.———— Attachment—Sale proclamation —Notice—*Execution of decree—Civil Procedure Code (Act V of 908), O. XXI, rr. 57, 66—"Default," meaning of.* On 20th February, 1909, an execution case, which could not proceed owing to the failure of the decree-holder to serve notice on the judgment-debtor as required by O. XXI, r. 66, of the Civil Procedure Code, 1908, was dismissed, the order concluding with these words:—"The execution case is accordingly dismissed, the properties will remain under attachment. Decree-holder will bear his own costs." On 25th March, 1909, the decree-holder without issuing a fresh attachment again applied for sale of the property, and duly served the required notice. The judgment-debtor objected on the ground that there was no subsisting attachment. *Held,* that this application must also be dismissed. *Held, per* CHITTY, *J.*, that the words of O. XXI, r. 57, are imperative and the attachment on the property ceased by operation of law on the 20th February 1909, and that the word "default" in that rule cannot be given a restricted meaning so as to confine it to default in appearance, in the payment of process fees, or in production of documents, but must have its ordinary meaning, namely, failure to do what one is legally bound to do. *Held, per* COXE, *J.*, that under the Civil Procedure Code, 1882, the striking off of execution proceedings was capable of different interpretation in different circumstances, but O. XXI, r. 57, was enacted to put a stop to the confusion. The application for execution having been dismissed the result specified in O. XXI, r. 57, must necessarily follow. *Puddomonee Dossee* v. *Roy Muthooranath Chowdhry, 20 W. R. 133, Biswa Sonan Chunder Gossyamy* v. *Binanda Chunder Dibingar Adhikar Gossyamy, I. L. R. 10 Calc. 416, Mohunt Bhagwan Ramanuj Das* v. *Khetter Moni Dassi, 1 C. W. N. 617,* referred to. NAMUNA BIBI *v.* ROSHA MIAH (1911)

I. L. R. 38 Calc. 482
15 C. W. N. 428

8.———— Notice of execution—*Sale—Civil Procedure Code (Act V of 1908), s. 47, O. XXI, rr. 22 and 90—Omission to serve notice, effect of—Whether subsequent sale void—Question relating to execution of decree—Second appeal.* Omission to serve a notice under the provisions of O. XXI, r. 22 of the Civil Procedure Code is not by itself sufficient to render a sale, which has been subsequently held, void. *Sahdeo Pandey* v. *Ghasiram Gyawal, I. L. R. 21 Calc. 19,* not followed. Though an application to set aside a sale on the ground that no notice had been served as required by O. XXI, r. 22 of the Civil Procedure Code, is one which cannot be made under the provisions of O. XXI, r. 90 of the Code, but must be one made under the provisions of s. 47 of the Code; still in order to justify a Court in setting aside a sale on the ground of the omission to serve a notice under O. XXI, r. 22, it must be proved that the omission to serve such notice has resulted in substantial injury to the owner of the property sold. *Lakshmi Charan Sen* v. *Sris Chandra Roy, 13 C. L. J. 162,* referred to. A second appeal lies from an order passed on appeal on an application to set aside a sale on the ground, that no notice had been served as required by O. XXI, r. 22 of the Code. KUMED BEWA *v.* PRASANNA KUMAR ROY (1912) . I. L. R. 40 Calc. 45

9.———— Rent decree—*Sale—Encumbrances by way of maintenance grant—Portion of tenure in charge of the Encumbered Estates Act—Authorities exempted from sale by Commissioner—Effect of the order of exemption—Chota Nagpur Landlord and Tenant Procedure Act (Beng. I of 1879), s. 123—Chota Nagpur Tenancy Act (Beng. VI of 1908), s. 208—General Clauses Act (Beng. I of 1899), s. 8, cl. (c)—Rent Recovery Act (Beng. VIII of 1865), ss. 4, 5 and 16.* When an application in execution of a rent decree was made for the sale of all the villages comprised in a tenure, but the Commissioner, for reasons sufficient in his opinion, directed the exemption of some of the villages from the sale: *Held,* that, the decree holder was not deprived of his right to execute his decree, which must be executed as a decree for rent against the unexempted portion of the tenure under the Bengal Rent Recovery Act of 1865. The effect of a sale of the unexempted portion would be to pass the property to the purchaser free of all encumbrances. *Dwarkanath Chuckerbutty* v. *Dhun Monee Chowdhrain, 15 W. R. 524, Sham Chand Mitter* v. *Juggut Chandra Sircar, 22 W. R. 511,* referred to. MADANMOHAN NATH SAHI DEO *v.* PROTAP UDAI NATH SAHI DEO (1912) . . I. L. R. 40 Calc. 623

10.———— Mortgage-decree—*passed befor the Code of 1908—Application for execution m after the Code of 1908 came into force, if gov by the new Code—Civil Procedure Code (of 1908), ss. 1 (2), 48, 154—General Cla (X of 1897), s. 6.* S. 48 of the new Co Procedure (Act V of 1908) governs cation for the execution of a m obtained even before that Code c S. 154 of the new Code clearl retrospective effect of the Cod and with rights acquired u S. 1, cl. (2) of the new Code aft tunity to all persons having righ Code to enforce them before the n into operation. *Kaunsilla* v. *Ishri Sin 32 All. 499,* not followed. BISSESWAR *v.* JASODA LALL CHOWDHRY (1913)

I. L. R. 40 Calc.

11.———— Stay of execution—*of dec under appeal—Jurisdiction—Procedure.* The Court which passed a decree has no power to stay execution thereof whilst the decree is under appeal; neither has a Court which has executed its own decree awarding possession of immoveable pro-

EXECUTION OF DECREE—*contd.*

perty, power to restore to possession the party whom it has ejected. SATYA SHANKAR GHOSHAL *v.* MAHARAJ NARAIN SHEOPURI (1912)

I. L. R. 35 All. 119

12. ——— Limitation—*Suit for sale on a mortgage—Decree payable by instalments—Civil Procedure Code, 1882, s. 258—Civil Procedure Code (1908), O. XXI, r. 2; O. XXXIV, r. 5—Limitation Act (IX of 1908), Sch. I, Art. 181.* On a compromise in a suit for sale on a mortgage, a decree followed providing that the sum found due on the mortgage (Rs. 1,374), with interest at a certain rate, should be paid by instalments of Rs. 100 a year, along with the interest then due. Payments were to be made by the end of Jeth in each year beginning with the Jeth 1957 Fasli (June 1900), and it was provided that, if default were made for three years in succession in the payments and interest, the decree-holder would be at liberty to recover at once the whole amount payable under the decree, that is, to apply for an order absolute for sale and execute the same. No payment was made in 1900 or 1901, but in June 1902, just before the end of Jeth 1959 Fasli, the judgment-debtor paid up all that was due on account of the first three years. He made no payment in 1903, but in June, 1909, he paid up all that was due up to the end of Jeth 1960 Fasli (June, 1903). No payment was made in 1905, but in June, 1906, he paid the instalment and interest which he ought to have paid in Jeth 1961 Fasli (June, 1904). This payment was covered by the proviso to s. 20 (*1*) of the Limitation Act. The only other payment made was a small sum on account of interest in July, 1909. The decree-holder applied for an order absolute for sale on the 3rd of August, 1909. *Held*, that the first three consecutive defaults were in 1905, 1906 and 1907, and that the decree-holders' application was in time applying Art. 181 of the first Schedule to the Indian Limitation Act, 1908. The following cases were referred to:—*Oudh Behari Lal* v. *Nageshar Lal, I. L. R. 13 All. 278, Kishan Singh* v. *Aman Singh, I. L. R. 17 All. 42, Roshan Singh* v. *Mata Din, I. L. R. 23 All. 36, Chunni Lal* v. *Hurnan Das, I. L. R. 20 All. 302, Shankar Prasad* v. *Jalpa Prasad, I. L. R. 16 All. 371, Ajudhia* v. *Kunjal, I. L. R. 30 All. 123, Mon Mohan Roy* v. *Durga Churn Gooee, I. L. R. 15 Calc. 502,* and *Kashiram* v. *Pandu, I. L. R 27 Bom. 1.* BADRI NARAIN *v.* KUNJ BIHARI LAL (1913) I. L. R. 35 All. 178

13. ——— Shebait—*Claim preferred by successor in office of judgment-debtor (adverse to his own interests) as the legal representative—Order made, whether under scope of Civil Procedure Code (Act V of 1908), s. 47, or O. XXI, rr. 58, 60—Appeal therefrom, competency of—Civil Procedure Code (Act V of 1908), s. 2, sub-s. (2), ss. 96, 104; O. XLIII, r. 1.* Where *X* in execution of a decree for money against *Y* as shebait of a deity attached and proceeded to sell properties of which *Y* or his successor in office had alleged that he was in possession, not as shebait of the deity, but in his own right: *Held*, that the case did not fall within the scope of s. 47 of the Civil Procedure Code of 1908 as *Y* in his character of shebait, the only character in which he was a party to the suit, could not rightly be deemed the same person in his character as a private individual. *Kartick Chandra Ghose* v. *Ashutosh Dhara, I. L. R. 39 Calc. 298,* followed. That the order of the original Court must be taken to have been made under r. 60 of O. XXI, which recognised a broad distinction between the representative character and the personal character of the same individual: and that, in consequence, the appeal to the Subordinate Judge was incompetent. *Punchanun* v *Rabia Bibi, I. L. R. 17 Calc. 711,* distinguished and explained. *Per* MOOKERJEE *J.* When *X* in execution of a decree for money against *Y* seeks to proceed against *Z* as the legal representative of *Y* who is liable only to the extent of the assets of *Y* in his hands, and a question arises whether a particular property does or does not constitute such assets, it must be determined by the execution Court under s. 47 of the Code. *Per* BEACHCROFT *J.* If the claim of the objector is really in his own interests as representative of the judgment-debtor, the case will come under s. 244 (of the Code of 1882); if the claim is adverse to his interest as representative, it will not. UPENDRA NATH KALAMURI *v.* KUSUM KUMARI DASI (1914) . . I. L. R. 42 Calc. 440

14. ——— Attachment of undivided share in house—*Conditional decree for partition pending attachment—Purchase of judgment-debtor's share by decree-holder not entitled to benefit of decree for partition.* A decree-holder attached in execution of his decree his judgment-debtor's undivided share in a house. Pending the attachment the judgment-debtor sued for partition of the house and obtained a decree for separate possession of her share conditional on payment of Rs. 237 into Court. The decree-holder then brought to sale the share allotted to his judgment-debtor, and, having paid into Court the Rs. 237 which the judgment-debtor had omitted to pay, asked for delivery of possession of the specific share purchased. *Held*, that, whether or not the decree-holder might ultimately be entitled to the full benefit of *the* decree for partition in favour of his judgment-debtor on payment of the sum of Rs. 237, all he acquired by his purchase was a right to be put into possession of the undivided share to which his judgment-debtor was entitled. RAM DULARI *v.* BALAK RANI (1914)

I. L. R. 37 All. 120

15. ——— *Construction of decree—Decree for mainteanace based on an arbitration award.* A decree was passed by the High Court in a second appeal from the decree of a Court of Revenue in terms of an arbitration award to the following effect. Possession of the land claimed was to be given to the plaintiffs, who were to pay to the defendant half-yearly a maintenance allowance, partly in grain and partly in cash. It was provided further that if the maintenance allowance was not paid, the defendant should enforce payment by taking proceedings in a competent Court. *Held*, on a construction of the decree, that it was not merely declaratory of the defendant's right to receive maintenance, and could be executed by a Court of Revenue, but that the defendant should bring a regular suit in a Civil Court to enforce her right to maintenance. ANUPA KUNWAR *v.* ACHHAIBAR SINGH (1914) . . . I. L. R. 37 All. 97

16. ——— *Limitation—Limitation Act (IX of 1908), Art. 182, Sch. I—Civil Procedure Code (1908), O. XXI, r. 12. Application in accordance with law.* The failure of a decree-holder to annex to an application for

EXECUTION OF DECREE—*contd.*

application. *Held,* that the application was governed by s. 48 of the Code and was time-barred and present application was not in continuation of that 28th July 1911. MAHANTH KRISHNA DAYAL *v.* MUSSASAMAT SAKINA BIBI

1 Pat. L. J. 214

32. ———— **Limitation Decree temporarily satisfied**—*effect on limitation.* An *ex parte* decree was obtained against two persons, the appellant and one *S.* The decree was executed against *S* by the sale of whose moveables the whole decree was satisfied. On a suit by *S* the decree as against him was set aside and the money realised from him was ordered to be refunded. The decree-holder then applied for execution against the Appellant: *Held,* that the order directing refund by the decree-holder to *S* in effect reopened the execution proceedings and the application for execution against the appellant must be treated as a continuation of the original application for execution which was brought within time. KERAMAT ALI *v.* NAGENDRA KISHORE RAY (1916)

21 C. W. N. 571

33. ———— **Decree conditional on money being paid into Court** "*within thirty days of the decree becoming final*"—*Interpretation of condition.* Where a decree was passed in favour of a plaintiff, conditional on his depositing a sum of money into Court "within thirty days of the decree becoming final," it was *held* that this did not signify merely the bare period of limitation for an appeal but included also the time necessary for obtaining the requisite copies. BHAGELU SALU *v.* RAM AUTAR SHAKUL (1916)

I. L. R. 39 All. 193

34. ———— **Execution of decree by instalments**—*Limitation—Petition of compromise —Decree—"Application in accordance with law" —Civil Procedure Code (Act V of 1908), O. XXI, r. 17—Limitation Act (IX of 1908), Art. 82, cls. (5) and (7)—Instalment decree—Default.* Where in a suit against five persons for recovery of monies due on a handnote separate compromise petitions for instalment decrees were filed on the 1st July 1911 in which there was a provision that default being made in the payment of one *kist,* the whole amount would become due, and subsequently on the 10th July 1911, one instalment decree was passed against all the five defendants in which separate amounts were decreed against each defendant to be paid as per instalments provided therein, but in which the condition as to the whole amount being due in default of the payment of one *kist* was not stated; and an application for execution of the whole decree having been made on the 10th July 1914 against all the five defendants it was dismissed on the 20th February 1915 on the ground that the prayer for execution was not in accordance with the terms of the decree; and subsequently the present application for execution of the decree for the *kist* from January 1911 to September 1915 was made on the 10th November 1915 against defendant No. 2 alone and it was dismissed by the lower Court on the ground that the decree was barred by limitation: *Held,* that in order to properly understand what the decree was, the Court was entitled to look at and consider the terms of the compromise and was not bound to take the decree by itself; that the application for execution dated the 10th July 1914 having been rejected under O. XXI, r. 17, sub-r. (*1*) as not being an application in accordance with law, did not save limitation; that the whole decree became due on the default of the payment of one *kist,* and the decree-holder had no option to recover the decretal amount in accordance with the *kists* and his present application for execution of the decree dated the 10th November 1915 was barred by limitation. JAYANUDDIN KHAN *v.* JAMIRUDDIN SARKAR (1917) . . **21 C. W. N. 835**

35. ———— **Objection to execution of decree** —*Dismissed for default—Fresh objection, if lies before order of dismissal is set aside—Civil Procedure Code (Act V of 1908), r. 9, O. IX, applicability of—Inherent power of Court to review order of dismissal.* Where an objection to the execution of a decree is dismissed for default the order of dismissal is binding until it is set aside and the judgment-debtor cannot ignore it and file a fresh objection. R. 9, O. IX, does not apply to such a case but the Court has inherent power on a proper application being made to review the order and to enquire whether the objector had or had not a reasonable case for not appearing on the date appointed for the hearing of his petition. BHARAT CHANDRA NATH *v.* IASIN SARKAR (1917)

21 C. W. N. 769

36. ———— **Practice**—*Rival decree-holders—Assets in the hands of Registrar—Attachment of fund with Accountant-General—Anticipatory attachment—Priority—Rateable distribution—Civil Procedure Code (Act V of 1908), s. 73; O. XXI, r. 52.* A question of rateable distribution under s. 73 of the Code of Civil Procedure of 1908 arises amongst creditors where the application for execution has been made before the receipt of assets. O. XXI, r. 52, does not allow of an anticipatory attachment of money expected to reach the hands of a public officer and is restricted only to money actually in his hands. Where a fund in Court has been attached by several creditors of the judgment-debtor, none of the attaching creditors is entitled to preferential treatment by reason of the priority of his attachment; as the attachments create no charge or lieu upon the fund, so long as the fund is in the custody of the Court is bound to apply the rules of justice, equity and good conscience in the determination of the relative rights of the creditors who wish to proceed against the fund in *custodia legis* for the satisfaction of their dues. In such circumstances, the fund, if sufficient to meet in full the claims of the creditors, should be rateably distributed amongst them. THAKURDAS MOTILAL *v.* JOSEPH ISKENDER (1917)

I. L. R. 44 Calc. 1072

37. ———— **Limitation**—*Decree giving mesne profits to be ascertained in the execution department—Terminus a quo.* The decree in a suit for redemption of a usufructuary mortgage provided that certain mesne profits were payable to the mortgagor, the mortgage having been more than satisfied by the profits of the property. The amount of mesne profits was to be ascertained in the execution of department. *Held,* that as regards execution of the decree in respect of such mesne profits time did not begin to run against the mortgagor until the profits had in fact been ascertained. *Muhammad Umarjan Khan* v. *Zinat Begam, I. L. R. 25 All. 385,* followed. NARSINGH DAS *v.* DEBI PRASAD (1918)

I. L. R. 40 All. 211

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38.
Civil I
rr. 14,
properties cannot be sold in execution—Decree-holder's remedy. Where a decree is a decree against the judgment-debtor personally with a declaration in the decree that the decree-holders are entitled to a lien over the properties—a mortgage decree having been expressly refused by the decreeing Court—the decree is merely a money-decree with a declaration of lien over the properties. Rr. 14 and 15 of O. XXXIV stand in the way of properties being sold in execution of such a decree. The decree holder's only course is to institute a suit for sale in enforcement of the mortgage. *Mungul Pershad Dichit* v. *Grija Kant Lahiri, I. L. R. 8 Calc. 51,* distinguished. GOBINDA CHANDRA PAL *v.* KAILAS CHANDRA PAL (1917)
I. L. R. 45 Calc. 530

39.———— **Transfer** —*Civil Procedure Code (Act XIV of 1882), ss. 232, 248—Application for transmission of decree, whether application for execution—Order under s. 284, without notice, whether without jurisdiction.* An order for execution made under s. 248 of the Civil Procedure Code of 1882 (O. XXI, r. 22 of the Civil Procedure Code of 1908 without notice is without jurisdiction and is a nullity. Notice given to the representative of the judgment-debtor of the application for transmission of the decree cannot be treated as notice given upon a previous application for execution within the meaning of s. 248 of the Code of 1882. *K* obtained a decree on 19th June 1896 against *D* in the High Court. On 18th May 1907 an application was made by the son of *K* (*K* dying in the meantime) for transmission of the decree to the District Court of Murshidabad for the purpose of having the decree executed. On 23rd August 1907 order for transmission was made by the High Court in the presence of the judgment-debtor. The decree was not transmitted. On 4th September 1907 an application was made by the son of *K* for the attachment and sale of certain pemises in Calcutta, without notice to the representatives of *D* (*D* having died in the meantime). On 17th September 1907 an attachment was made of the property in Calcutta and on 29th July 1908 an order for sale was made. Both the orders were made without notice. On the 29th August 1916 the respondent who is the assignee of the decree made an application for leave that he might be allowed to proceed with the sale of the attached property in terms o the order of the 29th August 1908. *Held,* that inasmuch as the application for attachment, dated 4th September 1907, was made without notice, the attachment of the 17th September 1907 and the order for sale of the 29th of July 1908 were made without jurisdiction and consequently no legal proceedings can be taken on the basis thereof. *Held,* further, that the order for ansmission, dated 23rd August 1907, was not an order passed on a previous application for execution. MAHARAJ BAHADUR SINGH *v.* INDAR CHAND BOTHRA (1917) . . . **22 C. W. N. 390**

40. ———— **Composite decree**—*Consisting of separate decrees—Execution of one of such decrees, if saves the others from bar of limitation—Limitation Act (IX of 1908), Art. 182, expl. 1.* The defendants held three separate tenancies under the plaintiffs who instituted one suit against him for arrears of rent in respect of the three tenancies. At the instance of the plaintiffs a decree was made specifying the sum due in respect of each of the tenancies with an order for the realisation of the sums in arrear from the respective tenancies. Within three years, the plaintiffs applied for execution of the decree only in respect of the sum decreed with regard to the third tenancy. Thereafter more than three years from the date of the decree they applied for execution in respect of the entire amount of the three tenancies. *Held,* that the position was precisely the same as if the plaintiffs had brought three distinct suits for rent against the defendants, one in respect of each tenancy, and by taking out execution in respect of one decree they were not protected from the bar of limitation in respect of the other decrees and the second application for execution was barred by limitation with regard to the sums claimed for the first and second tenancies, but in respect of the sum due from the third tenancy the application was in time as made within three years from the date of the first appication. That there might be nominally one decree passed in a a suit which is essentially of a composite character and contains a number of separate decrees in respect of which the law of limitation will be separately enforced. This principle which underlies the decision of the Full Bench in *Wise* v. *Raj Narain Chakrabarty, 19 W. R. 30,* met with legislative approval and is embodied in explanation (1) to Art. 182 of the Limitation Act, 1908, which is in terms identical with explanation (1) to Art. 179 of the Act of 1877. DHIRENDRA NATH SARKAR *v.* NISCHINTAPUR COMPANY (1916)
22 C. W. N. 192

41. ———— **Provident fund**——*Jurisdiction —Small Cause Court—Civil Procedure Code (Act V of 1908), s. 115.* By the provisions in the Provident Fund Act (IX of 1897), money in such fund is protected from attachment by creditors, even after the death of the subscriber. Any error in law which amounts to a usurpation of authority in the act done by the Court comes within the scope of s 115 of the Code of Civil Procedure (Act V of 1908). *Veerchand* v. *B. B. & C. I Ry. Co., I. L. R. 29 Bom. 259, Seth Manna Lal* v. *Gainsford, I. L. R. 35 Calc. 641, Badami Kuar* v. *Dinu Rai, I. L. R. 8 All. 111, Dhan Singh* v. *Basant Singh, I. L. R. 8 All. 519, Sew Bux* v. *Shib Chunder, I. L. R. 13 Calc. 225, Sheoraj Nandan* v. *Gopal Suran, I. L. R. 18 Calc. 290, Shew Prosad* v. *Ram Chunder, I. L. R. 41 Calc. 323, Balakrishna* v. *Vasudeva, I. L. R. 40 Mad. 793,* referred to. HINDLEY *v.* JOYNARAIN MARWARI (1918) . . **I. L. R. 46 Calc. 962**

42. ———— **Bengal Tenancy**—ACT (*VIII of 1885*), *s. 66, sub s. (2)—"Date of the decree," meaning of—Whether decree of the Appellate Court or the Court of first instance.* S. 66 provides for ejectment of a tenant not being a permanent tenure-holder (and certain other classes of tenants) for arrears of rent and sub-s. (2) of the section provides that in a suit for ejectment for an arrear of rent a decree passed in favour of the plaintiff shall specify the amount of the arrear and of the interest (if any) due thereon and the decree shall not be executed if that amount and the costs of the suit are paid into Court within 15 days from the *date of the decree,* or, when the Court is closed on the 15th day, on the day when the Court reopens. So long as an appeal is not disposed of "date of the decree" in sub s. (2) of

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s. 66 of the Act means the decree of the Court of first instance inasmuch as the decree of the Court of first instance is then the only decree capable of execution. ABDUL RASHID MANDAL *v.* SHAHARALI MOLLA (1919)

I. L. R. 46 Calc. 1032

43. ———— **Property of a third** *party as that of the judgment-debtor—Property attached damaged as a consequence of the resistance of the decree-holder to its release—Liability of decree-holder.* A creditor of *A*, who had been adjudged an insolvent, caused certain goods belonging to *B* to be attached, by the Receiver in insolvency alleging them to be the property of his debtor. *B* raised objections to the attachment, but the creditor contrived to keep the property, which consisted mainly of woollen goods, in the hands of the Receiver for a considerable period. The goods remained packed up throughout the rainy season and suffered considerable injury owing to the ravages of insects. *B*, the owner of the goods, sued the creditor for compensation. *Held*, that the damage to *B*'s property was the natural and probable consequence of the action taken and persisted in by the decree holder, and that he was liable in damages to *B*. *Sharp* v. *Powell, L. R. 7 C. P. 253, 258* and *Kissorimohun Roy* v. *Harsukh Das, I. L. R. 17 Calc. 436, 443* referred to. ABDUL RAHIM *v.* SITAL PRASAD (1919)

I. L. R. 41 All. 658

44. ———— **Mesne profits**—*Decree fixing the mesne profits at a specified sum—Judgment-debtor not entitled to deductions on account of payments made, by him.* Where a decree for mesne profits itself names a definite sum at which such profits have neen assessed, it is not open to the judgment-debtor in answer to an application for execution to claim to set off any payments, such as taxes or ground-rent, made by him, as payments which should have been made by the decree-holder; but the decree must be executed as it stands. *Kachar Ala Chela* v. *Sha Oghadbhai Thakarshi, I. L. R. 17 Bom. 35*, distinguished. KRISHNA PAL SINGH *v.* DESRAJ RANJIT SINGH (1919) . . . **I. L. R. 41 All. 517**

45. ———— **Compromise decree**—*right of parties.*—It is open to the execution Court to consider what the rights of the parties equitable or otherwise are which follow from the contract embodied in a compromise decree. SURENDRO NATH BANERJEE *v.* SECRETARY OF STATE FOR INDIA . . . . . **24 C. W. N. 545**

46. ———— **Limitation**—'*Step-in-aid,' what is.* An application by the decree-holder to have the form of the sale proclamation corrected and a date fixed for the settlement of the terms of the proclamation under rule 66 of O. XXI, with a request that notice should issue for a specified date is a 'step-in-aid' of execution, for the purpose of limitation even if it is not in writing. SURAJMAL *v.* SARJOOG PRASAD SINGH

2 Pat. L. J. 5

47. ———— *Decree passed by competent court—officer not invested with jurisdiction to try the suit, appointed to the court—application for execution.* A decree was passed by the 1st Munsiff of Gaya who was invested with jurisdiction to try suits up to Rs. 2,000, on February 25th, 1911. An application for execution of the decree was made on June 28th, 1913, to his successor who was not invested with jurisdiction to try cases over Rs. 1,000. A second application for execution was made to the court on June 9th, 1915. *Held*, that the first application was made to the proper court and therefore, the second application was not barred by limitation. ISWARI PRASAD SINGH *v.* FARKAT HUSAIN

2 Pat. L. J. 113

48. ———— **Decree against one of two defendants**—*execution against one judgment-debtor—appeal by plaintiff—decree passed against both defendants by appellate court—whether second judgment-debtor entitled to credit for half the amount realised in the execution proceedings against first judgment-debtor appeal by second judgment-debtor—cross-objection by decree-holder against first judgment-debtor, validity of.* In a suit against *H* and *S* a decree was passed against *H* and the suit was dismissed as against *B*. On appeal a decree was passed against *H* and *B* jointly for the principal sum together with interest thereon up to the institution of the suit. Under the appellate court's decree *H* alone was made liable for interest from the date of suit till realization. While the appeal was pending execution was taken out and a certain sum was realised by sale of *H's* property. The decree-holder then applied for execution against both *H* and *B*. *Held*, that *B* was not entitled to be given credit for half of the amount realised in the execution proceedings against *H*. *Held, further*, that in an appeal by *B* against the order allowing the execution to proceed against both himself and *H*, the decree-holder was not entitled to file a cross-objection directed against *H* who was not a party to the appeal. BARSHI BINDESWARI PRASAD *v.* DHENINDER DAS

2 Pat. L. J. 162

49. ———— **Death of party**—*Question whether a person is or is not a representative of a party, duty of executing court to decide.* One of the defendants in a suit which was dismissed by the court of first instance died during the pendency of an appeal which resulted in a reversal of the decree of the original court. Plaintiff applied to the first court for execution of the decree obtained in the appellate court and prayed that the widow of the deceased defendant should be substituted in place of her husband. The widow objected on the ground that her husband had died before the passing of the decree, that no heir was substituted before that decree was made and that, therefore, execution could not proceed against her. The executing court held that the objector should have applied to the appellate court for an amendment of the decree, and dismissed the objection. *Held*, that the executing court should have decided the objection under s. 47 of the Code of Civil Procedure, 1908. MUSSAMAT MUNA KOER *v.* DURGA PRASAD . **2 Pat. L. J. 192**

50. ———— **Surety**—*Stay of execution upon judgment-debtor furnishing surety—liability of property pledged by surety.* A judgment-creditor who has exhausted his remedies against the judgment-debtor is entitled to take out execution against the property pledged by a surety as security for the judgment-debtor upon the latter obtaining a stay of execution. An order directing the surety to pay is not a decree except for the purposes of appeal. GANGA DEO NARAIN SINGH *v.* JOTI LAL SAHU . . . . **2 Pat. L. J. 197**

51. ———— **Appeal from Decree for possession of land**—*Security bond—Liability of sureties,*

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bond—Applica- Procedure Code dure Code (1908), ss. 47, 144. The widow of the taluqdar of Mahewa brought a suit in a Subordinate Judge's Court on the 6th of August, 1902, obtained a decree for possession of it, and on her applying for execution of the decree the Subordinate Judge made, on the 21st of August, 1902, an order under s. 545 of the Code of Civil Procedure, (1882), giving her possession on her providing security to restore the mesne profits to the extent of one lakh of rupees in case his decree should be reversed by the Court of the Judicial Commissioner to which the defendant had appealed. The security was in the form of a hypothecation bond executed by the predecessors in title of the present appellants, secured on certain villages of their estate. The bond recited the order and stated it was given "so that any order that might be passed by the Appellate Court be made binding on the sureties for the above sum." No obligee was named in the bond The defendant failed in his appeal to the Judicial Commissioner, but on his father's death an appeal to the Privy Council by his son the decre reversed, to the taluqa of Mahewa, and the widow's suit

of mesne profits due to the respondent. On an application under ss. 47 and 144 of the Code of Civil Procedure of 1908 to which the appellants were made parties. *Held,* that on the true construction of the hypothecation bond it was an instrument of charge, and not a bond imposing any personal liability on the appellants. *Held,* also, that the restitution of ultimate decis did not cease the Court of the appeal f... *further,* that the Court had jurisdiction over the sureties in the present proceedings, and to make an order as to their liability. RAJ RAGHUBAR SINGH *v.* JAI INDRA BAHADUR SINGH **I. L. R. 42 All. 158**

52. ——— Failure of custodian—*Appointed by court to restore property to judgment-debtor when so ordered—Remedy of judgment-debtor.* Where a person placed in charge of property of a judgment-debtor by order of the court fails to restore the same to the judgment-debtor when directed to do so, the judgment-debtor's remedy is not to invoke by application executive or disciplinary action on the part of the court, but to sue the receiver for the restoration of the property or damages. KALLU KHAN *v.* ABDULLAH KHAN . . . **I. L. R. 42 All. 394**

53. ——— Limitation—*Application for execution in continuation of previous application —indentical property concerned.* A decree was passed on the 28th June, 1905, and an application for execution made in August, 1906, was dismissed in February, 1907. A second application was made in July, 1909, and the judgment-debtor's property was sold on December 4th, 1909. The sale was set aside on February 12th, 1910. On December 10th, 1912, a third application was made asking the court to sell the identical property sold on December 4th, 1909. *Held* that under the circumstances the third application for execution should be regarded as having been made in continuation of the second application. MUSSAMAT KANIZ ZOHRA *v.* BOONDI SAHU **2 Pat. L. J. 115**

54. ——— Jurisdiction— *Civil Procedure Code (Act V of 1908), s. 150—Decree by Subordinate Judge for nearly Rs. 2,000—Application for execution of decree before Munsif invested with power up to Rs. 2,000—Maintainability.* In a mortgage suit for over Rs. 1,000, after a preliminary decree was obtained in the Court of the 2nd Munsif, who was empowered to try suits up to Rs. 2,000, the Munsif was transferred and the final decree in the case was passed by the Subordinate Judge. Application for the execution of the decree was then made before a successor of the Munsif, similarly empowered:—*Held,* that, under the provisions of s. 150 of the Civil Procedure Code, the Munsif had jurisdiction to entertain the application. AMINUDDIN MULLICK *v.* ATARMANI DASI (1920) . **I. L. R. 47 Calc. 1100**

55. ——— Practice— *Rateable distribution—Money paid to Sheriff in execution of a decree—High Court (Original Side) Rules, Chap. XVII, r 24—Civil Procedure Code (Act V of 1908), s. 73 O. XXI, r. 55.* On an application by a judgment-creditor for execution of a decree, money was paid by the judgment-debtor to the Sheriff, who paid it into Court. Two other creditors, who had previously applied for execution, had part of their claim and the costs of execution respectively unpaid and asked for rateable distribution of the assets —*Held,* that the money so lying in Court was assets available for rateable distribution. *Held,* further, that the right to rateable distribution is limited to ... *36 Bom. 156,* dissented from. *Harai Saha* v. *Fai lur Rahaman, I. L. R. 40 Calc. 619,* referred to. NOOR MAHOMED DAWOOD *v.* BILASIRAM THAKURSIDASS (1919) . **I. L. R. 47 Calc. 515**

56. ——— Warrant of arrests—*Outsid the territorial limits of court's jurisdiction.* The fact that the judgment-debtor does not reside within the territorial jurisdiction of the court is not a sufficient reason for refusing to issue a warrant for his arrest, although such a warrant can be executed only within the court's territorial jurisdiction, but a time must be fixed for its return. KRISHNA PRASAD *v.* BIDYA NANDA . **3 Pat. L. J. 95**

57. ——— Limitation—*revival of former application for execution—Code of Civil Procedure (Act V of 1908), s. 48—Limitation Act (IX of 1908), Sch. I, article 181.* S. 48 of the Code of Civil Procedure, 1908, has no application to the case of a revival of an antecedent application for execution which has been in suspense by reason some bar or which has been stayed pending the determination of subsequent litigation. The period of limitation in such a case is that provided by Art. 181 of the Limitation Act, 1908, namely, three years from the date of the removal of the bar. SAKINA BIBI *v.* GANESH PRASAD BHAGAT **3 Pat. L. J. 103**

58. ——— Security of cost pendings appeal—*subsequent application for execution of original*

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decree—personal liability of judgment-debtor. Where on the defendant furnishing security execution of a decree is stayed pending the disposal of an appeal, the decree-holders are entitled, after the disposal of the appeal, to proceed against the person of the judgment-debtor, and are not bound to proceed against the property covered by the security bond. The fact that security is given does not take away a decree-holder's rights. RAJBANS SAHAI *v.* SURJU LALL **3 Pat. L. J. 176**

59. ———————— **Limitation**— *Date from which runs—Limitation Act (XI of 1908), sch. I, art. 182 (6).* "The date of the issue of notice" in article 182 (6) of Sch. I to the Limitation Act, 1908, means the date on which the notice actually issued from the office of the Court, that is to say, the date on which it is signed by the *Sherishtadar* in the name of the Court. SHAIKH KHODA BUKHSH *v.* BAHADUR ALI . . **3 Pat. L. J. 285**

60. ———————— **Estoppel**—*Judgment-debtor's admission and subsequent repudiation of liability.* Where a person against whom execution is taken out admits his liability he cannot subsequently repudiate it. It is not necessary, according to the law as at present accepted, that there should be any fraudulent intention established in connection with the misrepresentation which is the subject of estoppel. *Gunga Sahai* v. *Hira Singh, I. L. R. 2 All.*, not followed. BALBIR PRASAD *v.* JUGALKISHORE . . **3 Pat. L. J. 454**

61. ————————**Where wrongly executed**—*Power of High Court to interfere where its decree is being wrongly executed—Code of Civil Procedure (Act V of 1908), s. 151.* Where it is brought to the notice of the High Court that its decree is being executed in a manner manifestly at variance with the purport and intention of that decree then the High Court under its inherent powers of supervision which are expressly saved by s. 151 of the Code of Civil Procedure, 1908, may take such action for the ends of justice as may be necessary to enforce the proper execution of the decree. KULADA PRASAD TEWARI *v.* SADHU CHARAN TEWARI .
3 Pat. L. J. 435

62. ———————— **Limitation**—*Proceedings for delivery of possession—Appeal—Review—Code of Civil Procedure (Act V of 1908), s. 47* and *O. XLVII.* Proceedings for delivery of possession are not proceedings in connection with the execution of a decree and, therefore, no appeal lies from an order passed in review cancelling a former order for delivery of possession, on the ground that the application for delivery of possession was barred by limitation. A Court has power to review its own order erroneously made delivering possession. DHANINDAR DAS *v.* BAKHSHI HARIHAR PRASAD SINGH . . . . **3 Pat. L. J. 57**

63. ———————————— *Step-in-aid.* An application for execution of a decree against a minor represented by his mother without any application to the Court for an order appointing the mother as guardian *ad litem* is a step-in-aid of execution. A decree does not become time-barred by reason of a trivial defect in the form in which a former application for execution was made. KESHWA SURENDRA SAHI *v.* MUSAMMAT MULUKRANI KUER . . **4 Pat. L. J. 35**

64. ————————**Dismissal of application**—*Decree holder's remedy for—Code of Civil Procedure (Act V of 1908) Os. IX* and *XLVII* and *s. 151.* O. IX of the Code of Civil Procedure, 1908, does not apply to execution proceedings. The remedy of a decree-holder, whose application for execution is dismissed, lies in a fresh application within the period of limitation, or by resort to the provision of O. XLVII for review. BABUI RITU KUER *v.* ALAKHDEO NARAIN SINGH
4 Pat. L. J. 330

65. ———————— **Transfer of decree for execution**—*Procedure.* A Subordinate Judge has no jurisdiction to execute a decree sent direct to him for execution by the trial Court. The decree should be sent in the first instance to the District Judge. Where a decree has not been sent first to the District Judge it is open to the parties at any stage to question the jurisdiction of the Subordinate Judge even though no objection to the execution was taken in his Court. KUNJA BEHARI SINGH *v.* TARAPADA MITRA
4 Pat. L. J. 49

66. ———————— **Mortgage suit**—*Judgment-debtor dead at time of passing of decree—Representatives not brought on the record—jurisdiction of executing court to question validity of decree—Code of Civil Procedure (Act V of 1908), O. XXII, Rs. 4, 6 and 9.* When, at the time of the passing of a final decree in a mortgage suit, one of the judgment-debtors was dead and his representatives have not been brought on to the record it is open to such representatives to object to execution of the decree on the ground that the decree is a nullity. A void decree ought to be disregarded without any formal proceedings to set it aside. *Per* COUTTS *J.*—O. XXII, r. 6, refers to cases in which judgment is reserved and a party dies before it is delivered. JUNGLI LALL *v.* LADDU RAM MARWARI
4 Pat. L. J. 240

67. ———————— **Joint decree**—*Application by the decree-holder, validity of—Duty of Court to protest interests of decree-holders who are not parties—Whether application may be amended—Code of Civil Procedure (Act V of 1908), O. XXI, rr. 15 and 17.* A decree in favour of two persons jointly cannot be executed by one of such persons in respect of what that person considers his share of the decree, nor can the whole decree be executed by one of the decree-holders alone unless he applies for execution on behalf of all the decree-holders or for the benefit of them all. An application for execution of a decree by one of several joint decree-holders who has not complied with the provisions of O. XXI, r. 15, cannot be amended. A. J. MEIK *v.* THE MIDNAPORE ZEMINDARY COMPANY, LTD. . . . **4 Pat. L. J. 575**

68.———————— **Mistake in recital**—*Whether binding on executing court—Rent decree.* In a suit for rent for three years the plaintiff claimed rent for 12 *bighas* odd for two years and for 6 *bighas* odd for the third year, it being admitted in the plaint that the holding had been reduced by a recognized transfer. An *ex parte* decree was passed which merely recited that the claim was in respect to an area of 12 *bighas* odd and did not mention that the claim for the third year was in respect to a reduced area. The operative part of the decree directed the defendant to pay to the plaintiff the rent claimed in the plaint. The executing court, to whose attention the principles of s. 99 proceed against the lands allotted to his vendor Ss. 23, 24, 26 and 77 show that a Civil Court has jurisdiction to decide a question of title or

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extent of interest not only between a proprietor and a stranger but also between the proprietors themselves, after a partition has been completed. BAHURIA JANAKDULARI KUER *v.* BINDESHWARI GIR . . . . . 5 Pat. L. J. 456

68(a). ———— Non-service of notice—*Concurrent findings by two Courts in India—Non-interference by Judicial Committee—Adjudication of judgment-debtor as Insolvent—Subsequent proceedings in execution against sons and heirs only of judgment-debtor.* In execution of a decree passed in 1896 the decree-holder in December 1915 applied for the attachment of a certain property of the judgment-debtor and obtained the order of attachment on the 21st January 1916. In March 1916 the judgment-debtor applied to have the order of attachment set aside on the ground that no notice of execution had been served on him and the decree was barred by limitation. The decree-holder's contention was that the judgment had been revived by a writ of attachment issued on the 3rd February 1904 and within 12 years from that date, *viz.*, on the 12th January 1916, the notice of execution taken out in December 1915 had been served. This application of the judgment-debtor was in the first instance, dismissed but on appeal a remand was ordered on 23rd November 1916. On the same day the judgment-debtor was declared an insolvent by the Privy Council. The judgment-debtor died on 25th April 1918 and on 5th August 1918 the decree-holder took out a summons against the present Appellants, the sons and heirs of the judgment-debtor, to show cause why the original decree should not be executed against them and having

ting *C* an insolvent was afterwards annulled or came to a termination in any way before the death of *C* the appeal should be dismissed with a declaration that if the insolvency had not terminated on or before the date when the order on remand was made the said order would owing to the absence of a representative of the insolvency court be in operation. SRIPAT SINGH DUGAR *v.* RAI HARIRAM - 26 C. W. N. 739

69. ———— Limitation—*Date from which runs—Code of Civil Procedure (Act V of 1908), O. XX, r. 7.* The procedure of the Patna High Court allowing the period of limitation for the execution of a decree of an appellate court to be calculated from the date on which the decree is signed does not govern an application for the execution of a decree of a court of first instance. Such an application is therefore barred unless made within three years from the date on which judgment is pronounced. HIRA LAL SAHU *v.* JAMUNA PRASAD SINGH 5 Pat. L. J. 490

70. ———————— *Limitation—Civil Procedure Code (1882), ss. 318 and 319—Civil Procedure Code (1908), o. XXI, rr. 95 and 96—Formal possession not available to save limitation where actual possession could have been and ought to have been given.* If, upon an execution sale, possesion has been delivered to the auction purchaser in accordance with the provisions of the law, that is, in accordance with s. 318 or 319 of the Code of Civil Procedure of 1882 as the case may be, having

purchaser gets a fresh start ...

of limitation. But where such possession has not been delivered, the mere fact of formal delivery of possession is not available to him for saving the operation of limitation. JANG BAHADUR SINGH *v.* HANWANT SINGH I. L. R. 43 All. 520

71. ———————— *Held* that a civil court can in execution of a decree order a temporary alienation of the land of a judgment-debtor who a member of an agricultural tirbe and s. 6 of the Punjab Alienation of Land Act prohibits only a sale and not a temporary alienation of such land. SARDARNI DATAR KAUR *v.* RAM RATTAN I. L. R. 1 Lah. 192

72. ———————— *Held*, that O. IX of the Civil Procedure Code does not apply to Execution Proceedings. BABUI RITU KUER *v* ALAHDEO NARAIN SINGH 4 Pat. L. J. 330

73. ———————— *Jurisdiction—Appellate decree—Objection raised in execution that appeal had abated and the decree was void—No objection taken in the appeal itself. Held*, that it was compe-

of the appeal within the prescribed period of limitation, although no plea to this effect had been taken at the hearing of the appeal. BINDHYACHAL SINGH *v.* NAWALRAJ KUNWARI I. L. R. 43 All. 328

when the judgment-

first application for execution of a decree on the ground of illegalities in relation to the execution proceedings, *e g.*, non-service of notice on the transferrer under O. XXI, r. 16, of the Code of Civil Procedure, 1908, he cannot take such objection when a subsequent application for execution is made. BRAJLAL MARWARI *v.* E. M. ATKINSON 5 Pat. L. J. 639

75 ———— Interest payable until realization—*Whether* ad valorem *court-fee is payable on interest accrued due subsequent to decree—Appeal from order reducing total claim, court-fee payable on.* In an appeal from an order regarding the amount of interest recoverable under a decree an *ad valorem* court fee is payable on the difference between the amount awarded by the first court up to the date of the claim and the amount claimed in the appellate court up to the same date. TARAPADA MITRA *v.* RANI JAGADAMBA KUMARI 5 Pat. L. J. 23

EXECUTION OF DOCUMENT.

——— evidence as to—

See PROBATE . I. L. R. 39 Calc. 245

EXECUTION OF MORTGAGE.

See PARDANASHIN LADY.
I. L. R. 45 Calc. 743

EXECUTION OF ORDER IN COUNCIL.

See LETTERS PATENT . 2 Pat. L. J. 684

EXECUTION OF WILL.

See PROBATE I. L. R. 39 Calc. 245

See WILL . I. L. R. 38 Calc. 355

EXECUTION PETITION.

———*Attachment ordered—Failure to pay batta—Presumed oral application at the hearing of the petition to issue warrant of attachment whether such application is step in aid of execution—Part-payment entered in the petition—Civil Procedure Code (Act V of 1908)), O. XXI, r. 2, cl. 1, whether certificate of payment proved—Limitation Act (IX of 1908), s. 20, saving of limitation.* When an assignee of a decree filed a petition for execution on the 13th July 1911 and an order of attachment was made on the day of hearing, the 12th August 1911, and the petition was subsequently dismissed on tho 26th August 1911 on his failure to pay batta within the time allowed and a fresh application was filed on the 10th August 1914. *Held,* that though in the above circumstances, the court might presume that the decree-holder made an oral application on the day of hearing to proceed with the execution such application was not a step in aid of execution, and that the second application filed more than 3 years after the date of the first was barred by limitation. *Held,* also, that the part-payment of a decree amount entered in an execution petition, presented within three years from the date of such alleged payment amounts, if the fact of payment is proved to a certificate of payment under O. XXI, r. 2 of the Code of Civil Procedure and will operate to save limitation under s. 20 of the Limitation Act. *Rajan Aiyar* v. *Anantharatnam Aiyar (1915), 29 M. L. J. 669,* and *Lakhi Narain* v. *Felamani Dasi (1914), 20 C. L. J. 131,* referred to. MASELAMANI MUDALIAR *v.* SETHUSWAMI AYYAR

I. L. R. 41 Mad. 251

EXECUTION PROCEEDINGS.

See ATTACHMENT.
I. L. R. 38 Calc. 448

See CIVIL PROCEDURE CODE (1908), ss. 37, 38 AND 150.
I. L. R. 37 Mad. 462

O. XXII, R. 10.
I. L. R. 37 All. 226

See "COURT," I. L. R. 37 Calc. 642

See JURISDICTION.
I. L. R. 45 Calc. 926

See MESNE PROFITS.
I. L. R. 40 Calc. 56

See SALE IN EXECUTION OF DECREE.
I. L. R. 41 Calc. 590

See RES JUDICATA.
I. L. R. 39 Calc. 848
I. L. R. 37 Mad. 314

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——— transfer of—

See CIVIL PROCEDURE CODE (ACT V OF 1908), s. 70; O. XXI, R. 72.
I. L. R. 42 Bom. 621

——— **Limitation**—*Application for execution was struck off and file sent to record room—Second application for revival of the first.* An application for execution was made on the 1st of December, 1908, for sale of certain property. The case was sent to the Collector for execution. The Collector discovered that part of the property sought to be sold belonged to persons other than the judgment-debtor and he sent the case back to the Subordinate Judge for orders. The Subordinate Judge called upon the pleader for the decree-holders to make a statement. No statement having been made the application was struck off and the file was sent to the record-room. The present application for execution was made on the 20th of December, 1913. *Held,* that it was an application to revive the execution proceedings which had been suspended and not dismissed, and that it was therefore not barred by limitation. YAKUB ALI *v.* DURGA PRASAD (1915)
I. L. R. 37 All. 518

——— **Res judicata**—*Decision at one stage of execution proceedings when bar to re-opening of the question—The principle of such bar.* The decisions of the Judicial Committee in *Munga Pershad Dichit* v. *Girija Kant, I. L. R. 8 Calc. 51; Ram Kirpal* v. *Rupkuari, I. L. R. 6 All. 269; Baniram* v. *Nanhumal, I. L. R. 7 All. 102,* lay down that a decision at any stage of execution proceedings should not be questioned at any later stage not because it is *res judicata* but on general principles of law to secure finality in litigation. *Srihari* v. *Murari, I. L. R. 13 Calc. 257; Bhagwan* v. *Dhondi, I. L. R. 22 Bom. 83; Khosal* v. *Ukiladdi, 14 C. W. N. 114,* referred to. The essence of the matter is that the judgment-debtor though called on to dispute any proposition either failed in his contention or at any rate allowed the judgment to go by default. *Sheikh Budan* v. *Ram Chandra, I. L. R. 11 Bom. 537,* referred to. Where therefore certain properties had been sold without notice to the judgment-debtor, and an *ex parte* order for possession made on an application which was itself time-barred, and the judgment-debtor had no knowledge of these matters till possession was actually delivered to the decree-holder when he took exception to the entire proceeding not on the ground that the last application was time-barred but that the original sale was fraudulent, and the sale was thereupon set aside: *Held,* that the *ex parte* order for possession on the previous time-barred application does not operate as a bar to the judgment-debtor being heard upon any subsequent application on the question as to whether it was time-barred. MAZAEM HOSSEIN MUNDUL *v.* SARAT KUMARI DEBI (1909)
14 C. W. N. 433

——— **Enforceability in, of ante-decree agreement**—*As to manner of execution of the decree—Civil Procedure Code (Act V of 1908), O. XXI, r. 2, no bar by—Rule of stare decisis, applicability of, to matters of procedure. Held* by the Full Bench (PHILLIPS, *J.,* dissenting), that an agreement between the plaintiff and the defendant made prior to the passing of a decree in the suit, to the effect that the defendant should not press his defence but allow a decree to be passed

EXECUTION PROCEEDINGS—*contd.*

for the full amount of the suit, that the defendant should make an arrangement for the satisfaction of the decree within a certain time after the decree and that the plaintiff should not execute or transfer the decree before that time is one that can be pleaded in proceedings taken in execution of the decree. *Per* ABDUR RAHIM, officiating *C. J.*, and SESHAGIRI AYYAR, *J.*—The uniform practice of this Court has been to allow such defence to be raised in execution instead of allowing it to be made the subject of future litigation. *Per*, PHILLIPS, *J.*—Such a plea ought not to be allowed in execution proceedings as the executing Court cannot go behind the decree but must execute the decree as it stands and as the allowance of such pleas will lead to an abuse of process of Court enabling parties to obtain collusive decrees. The rule of *stare decisis* is not applicable in such cases, for no rights are taken away but only the method of enforcing them is changed *Held*, further by the Full Bench that such an agreement is not

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VATHIYAR (1916) . **I. L. R. 40 Mad. 233**

——— Civil Procedure Code, 1882, s. 13—**Res judicata**—*Proceedings in execution—Decision that execution time-barred, not appealed against—Question of limitation if may be again contested—Fresh proceedings on notice to judgment-debtors struck off for default—Want of adjudication, effect of.* The decisions of the Judicial Committee in *Mungal Pershad Dichit* v. *Girija Kant Lahiri, L R. 8 I. A. 123 : s. c. I. L. R. 8 Calc. 51, Ram Kirpal* v. *Rup Kuari, I. R. 11 I. A. 37 : s. c. I L. R. 6 All. 269*, and *Baniram* v. *Nanhu Mal, L. R. 11 I. A. 181 : s. c. I L. R. 7 All. 102*, affirm [illegible] f execu- [illegible] a later [illegible] is *res judicata* under s. 13, Civil Procedure Code, but upon general principles of law, for if it were not binding there would be no end to litigation. The previous decision of the Judicial Committee in *Delhi and London Bank Ld.* v. *Orchard, I. L. R. 3 Calc. 47 : s. c. L. R. 4 I. A. 127*, does not lay down any general principle of law inconsistent with the principle laid down in the later cases. *Dhonkal Singh* v. *Phakkar Singh, I. L. R. 15 All. 84*, approved. *Hurro Soondary Dussee* v. *Jugobundhoo Dutt, I. L. R. 6 Calc. 203*, not followed. Where the question whether execution of a decree is barred by limitation is not decided because the parties do not appear, there is no bar to the adjudication of the objection when actually raised at a later stage of the proceedings. *Bhola Nath* v. *Prafulla Nath, I. L. R. 28 Calc. 122 ; Hira Lal* v. *Dwija Charan, 10 C. W. N. 209 : s. c. 3 C. L. J. 240*, followed. *Dhonkal Singh* v. *Phakkar Singh, I. L. R. 15 All. 84, Tileshar Rai* v. *Parbati, I. L. R. 15 All. 198*, referred to. KHOSAL CHANDRA ROY CHOWDHURY *v.* UKHILADI (1909)

14 C. W. N. 114

——— Civil Procedure Code, 1908) s. 141 and O. IX, r. 13—O. IX, r. 13, of the Civil Procedure Code, 1908, is not applicable to a proceeding under rr. 100 and 101 of O. XXI of that Code. *Thakur Prasad* v. *Fakirullah, I. L. R. 17 All. 105*, referred to. HARI CHARAN GHOSE *v.* MANMATHA NATH SEN (1913)
I. L. R. 41 Calc 1

EXECUTION PROCEEDINGS—*contd.*

——— Execution proceedings arrested by injunction of Court—*Case dismissed, attachment subsisting—Subsequent application, if continuation of former application—Prayer for execution by attachment and sale of land—Subsequent application for attachment and sale of movables, if abandonment of relief claimed in first application—Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 6—Limitation.* The appellant obtained an *ex parte* decree for rent against the defendant on the 16th July 1903. After an unsuccessful application by the judgment-debtor under s. 108, Civil Procedure Code, to have the *ex parte* decree set aside, the decree-holder applied on the 13th February 1907 for attachment and sale of specified lands. The judgment-debtor applied on the 6th May 1907 for time to satisfy the decree. The judgment-debtor instituted a suit to have the decree set aside on the ground of fraud and obtained on the 27th June 1907 an i

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attachment subsisting; the injunction was subsequently dissolved on 8th May 1908. On 18th October 1909, the decree-holder made a second application for execution by attachment and sale of moveables. To this the judgment-debtor objected on the 16th December that the execution was barred by limitation The objection was over-ruled on 9th June 1910 and the decree-holder was called upon to take further steps but as the writ of attachment was returned unserved on the 18th June 1910, the case was dismissed for default and want of prosecution On 4th July 1910, a third application was made for execution by

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the 4th July 1910 was not barred by limitation under Art. 6, Sch. III of the Bengal Tenancy Act, as the second application of 18th October 1909 could not rightly be treated as an abandonment of the relief claimed in the first application but was an application for additional relief, and the third application of the 4th July 1910 was in substance an application in continuation of the first application, the proceedings wherein were discontinued by reason of the injunction obtained by the judgment-debtor. SARANDHARI LAL *v.* BIKRAM SINGH (1913) . . **18 C. W. N. 539**

——— Decree for rent—*Assignment of decree—Limitation Act (XV of 1877) s. 22—Civil Procedure Code (Act XIV of 1882) s. 372—Bengal Tenancy Act VIII of 1885), s. 148, cl. (h)—Civil Procedure Code (Act V of 1908), O. XXII, r. 12.* Upon the death of the appellant during the pendency of an appeal from an order in an execution proceeding it is open to the legal representative to apply for leave to prosecute the appeal. An assignee of a decree may apply to the execution Court for leave to carry on the execution proceeding which has been commenced by the original decree holder. S. 22 of the Limitation Act applies only to suits and does not govern execution proceedings. S. 372, Civil Procedure Code (Act XIV of 1882), has not application to proceedings in execution. *J* was the zemindar; *N* the *putnidar* under him; *K* was the *dur-putnidar* and he obtained a decree for rent against the respondent and applied for execution thereof on the 23th June 1903; meanwhile the *putni*

EXECUTION PROCEEDINGS—*concld.*

was sold in execution of a decree for rent and the zemindar having purchased it on the 15th August 1906 served a notice upon the *dur-putnidar* under s. 167 of the Bengal Tenancy Act and annulled his encumbrance; the *dur-putnidar* conveyed to *J*, the zemindar, amongst other properties, all decrees for rent and authorised *J*, the purchaser, to carry on all execution proceedings. *J* having applied for leave to proceed with the execution it was objected that in view of cl. (*h*) of s. 148 of the Bengal Tenancy Act *J* was not entitled to execute the decree. *Held*, that s. 143, cl. (*h*) of the Bengal Tenancy Act did not debar the superior landlord (*i.e.*, *J*) from executing the decree for rent in the same manner as the *dur-putnidar K* might have done. The Court is bound to allow execution at the instance of the recorded decree-holder unless intimation has been given in the regular way prescribed by law for the admission of another person who obtains leave to carry on execution as an assignee. MANMOTHA NATH MITTER *v.* RAKHAL CHANDRA TEWARY (1909) . . . . **14 C. W. N. 752**

EXECUTION PURCHASER.

See PARTIES . **I. L. R. 39 Calc. 881**

EXECUTION SALE.

See CIVIL PROCEDURE CODE (ACT V OF 1908)—

ss. 47 AND 50 . **I. L. R. 38 Mad. 1076**

ss. 47 AND 115. **I. L. R. 42 Mad. 776**

O. XLI, RR. 23 AND 25 **4 Pat. L. J. 645**

See COURT SALE.

See EXECUTION OF DECREE.

See INSOLVENCY **I. L. R. 42 Calc. 72**

See LIMITATION ACT (IX OF 1908), s. 22. **I. L. R. 38 Mad. 837**

See PARTIES . **I. L. R. 39 Calc. 881**

See SALE.

See SALE IN EXECUTION.

See UNDER-TENURE. **I. L. R. 37 Calc. 823**

——— **confirmation of**—

See MORTGAGE (SALE 22). **I. L. R. 41 Mad. 403**

1. ——— *Execution Sale proceeding—Order directing writ of attachment to issue, effect of—Objection that execution was then time-barred, if may be taken in subsequent proceedings—Necessity of proving non-service of notice—Onus—Entry in order-sheet that notice was served, value of.* An order made at one stage of execution proceedings cannot be questioned at a later stage unless the parties sought to be bound by such order had no notice of the proceedings. An order directing a writ of attachment to issue is in substance a determination that the decree was on the date of the order alive and capable of execution. An entry in the order-sheet that notice has been served does not constitute conclusive evidence of the *factum* of service, but there is no presumption that the entries are false and a judgment-debtor who alleges that the notice stated in the order-sheet in a previous execution proceedings to have been served on

EXECUTION SALE—*contd.*

him was in fact not served must start his case. Other cases where the burden has been placed on parties relying on due service to prove such service distinguished. BINDU BASHINI DASHYA *v.* KESHAB LAL BOSE (1916) . **21 C. W. N. 945**

——— **confirmation of**—*contd.*

2. ——— *Application to set aside execution sale—Destruction of record by fire—Presumption that official act was regularly performed—Rebuttal—Copies of proclamations alleged to have been served on the locality found on appeal by High Court to be obviously concocted—Failure of purchaser's pleader to support their genuineness and consequent admission that sale was illegal—Reversal of Trial Court's finding by High Court—Statement in judgment as to pleader's admission, if may be challenged.* The record of the service of sale proclamations having been destroyed by fire an application to set aside the sale was disposed of on other evidence. The burden of disproving the *primâ facie* presumption that official acts were rightly carried out lying on the applicants, the evidence necessarily of a negative character was held by the trial Court which saw the witnesses as untrustworthy. The purchaser on the other hand having adduced positive evidence of service, the trial Court found that the sale had been properly held and dismissed the application. On appeal, the High Court scrutinised certain copies of sale proclamations which were produced in the trial Court to prove service, and which it was alleged, had been fixed on the various properties sold but which had no sign whatever of exposure to sun or rain, and the matter being put by the Court to the pleader for the purchaser, he was unable to answer these criticisms and admitted that he could not oppose the application to set aside the sale. The High Court thereupon held that the whole story of the service of sale proclamations was false and decreed the appeal. *Held* by the Judicial Committee, that though the actual documents exhibited related to some of the properties only, the fact that these were concocted destroyed the whole fabric of the story put forward on behalf of the purchaser, and it was only right that he should be associated with the scheme of deceit which it was designed to carry out and that such association should be regarded as an important element in determining whether his defence was honest and just. That the suggestion that the Judges of the High Court might have misunderstood the conduct of the pleader could not be entertaining in the absence of anything showing that the pleader called the attention of the Court to the fact that the statement in the judgment regarding his conduct was wrong while the matter was still fresh in the minds of the Judges and an affidavit filed before the Judicial Committee long afterwards by a person who said he was present at the trial and that the pleader made no admission as stated and that the pleader was unable to recall at its date whether in fact he made the admission or not was wholly insufficient to prove that the statement in the judgment was erroneous. MADHU SUDAN CHOWDHRI *v.* CHANDRABATI (1917) **21 C. W. N. 897**

3. ——— *Proceeding, order in execution sale not reviewed or appealed against—Fresh application to set aside order, if lies, when order erroneous but within jurisdiction—Civil Pro-*

EXECUTION SALE—*contd.*

cedure Code Act (V of 1908), ss. 128, 157—Rules delegating judicial functions to ministerial officer, ultra vires under old Code, if validated by amended Code, without fresh promulgation An order which is passed without jurisdiction is a nullity, which may be disregarded and need not be set aside. But an erroneous order made by a Court having jurisdiction can only be set aside by review or appeal. An order having been made in execution proceedings, an application does not lie to set aside the order on the ground that at the time the order was made the execution was barred. Such an order can only be set aside by review or appeal. *Quære* · Whether the Civil Procedure Code of 1908 by s. 128 (1) which allows delegation of judicial duties validates rules which were in existence previous to the Code of 1908 when such delegation was *ultra vires* CHUTTERPUT SINGH v. SADASOOK KOTARY (1917) . **21 C. W. N. 1052**

4. ———————— *Execution sale set aside for irregularities of decree-holder—Right of purchaser to return of poundage fees and to interest on purchase money—Right of suit—Civil Procedure Code (Act V of 1908), O. XXI, r. 93, no* [illegible]

[illegible]

to him and interest on the purchase money paid by him. *Held* (overruling the objection that remedy for the return of the poundage fees lay only in execution), that a suit was maintainable for the recovery of the same. *Powell v. Powell 19 Eq. 422*, followed. The poundage fee is really part of the purchase money paid. *Held*, also, that the purchaser was entitled to interest on the purchase money paid by him. *Raghubir Dayal v. The Bank of Upper India, Limited, I. L R 5 All. 364*, followed. PARVATHI AMMAL v. GOVINDASAMI PILLAI (1915) . **I. L. R. 39 Mad. 893**

5. ———————— *Purchase in Court sale of specific properties when judgment-debtor an undivided member—Subsequent decree for partition—Allotment to judgment-debtor of some items purchased and other properties—Right of execution purchaser for compensation by way of substitution.* A purchaser bought in Court auction specific items of properties said to belong to a member of a joint Hindu family. Subsequently there was a partition decree and only some of these items fell to the share of the judgment-debtor *Held*, that the purchaser was entitled to only such of the items as are common to the sale-certificate and the share of the judgment-debtor under the decree, and that he could not compel the judgment-debtor to give him other properties in substitution for the remaining properties comprised in the sale certificate. SABAPATHI PILLAI v. THANDAVAROYA ODAYAR. (1920)

I. L. R. 43 Mad. 30

6. ———————— *Decree-holder purchaser —Decree subsequently reversed —Restitution—Civil Procedure Code (Act V of 1908), s. 144—Tenant settled on land by purchaser if protected.*] Where the decree-holder is the purchaser at a sale in execution of a decree which is subsequently set under s. 144, C. P. C. notwithstanding that the under s. 144, C. P. C. notwithstanding that the decree-holder has subsequently to his purchase settled the land with a tenant. SAGORE MANDAL v. MAFIJUDDIN SIRDAR . **24 C. W. N. 50**

EXECUTION SALE—*concld.*

[illegible]

even if on terms of a contract made before. *Venkatappa v. Jalayya 1919, L. R. R. 42 Mad. 615*, approved. RAMATHAI VADIVELU MUDALLIAR v. PERIA MANICKA MUDALLIAR

L. R. 47 I. A. 108

8. ———————— *Purchase by mortgage decree-holder subject to specified incumbrance—Purchaser if may claim priority over incumbrance by subrogation—Estoppel.* In a mortgage suit certain defendants who were joined in the suit as puisne mortgagees claimed priority in respect of a portion of their dues by way of subrogation having paid off a prior mortgagee but it was proved that in a previous suit to enforce their mortgage in which they did not make the present plaintiff a party they had put up the property to sale in execution of their decree and that upon the judgment debtor's objection that property

[illegible]

DHURY v. PROSUNNO KUMAR DAS

24 C. W. N. 269

9. ———————— *Of occupancy holding for arrears of rent—Executrix, default by, in payment of rent—Sale of occupancy holding in execution of decree for arrears of rent obtained against executrix, effect of—Omission to describe executrix expressly as such, if vitiates sale.* The executrix in possession of the estate made default in payment of rent of an occupancy holding which was sold in execution of the decree for arrears of rent obtained against the executrix as such and purchased by the Plaintiff. It appeared that in the sale the executrix was not expressly described as such. The Plaintiff's suit for recovery of possession on declaration of title was dismissed by the lower Courts on the ground that as the executrix had no personal interest in the property nothing passed by the sale: *Held*, that the sale was operative and the Plaintiff acquired a good title thereby. That it is incumbent upon the Court to look to the substance of the proceedings and not to confine its attention to the mere form. *Bijraj Nopani v. Pura Sundary Dassee, L. R. 41 I. A. 189 · s. c. I. L. R. 42 Calc. 56 : 18 C. W. N. 1313 (1914)*, applied. MAHENDRA NATH MANDAL v. SHEIKH SAMSUDDIN

25 C W. N. 273

EXECUTION, STAY OF.

———————— *Order of, by Appellate Court—No communication to lower Court, effect of—When order takes effect.* An order of an Appellate Court staying further proceedings in the lower Court, such as holding a sale, etc., takes effect from the time it is pronounced and not from the time it is officially communicated to the lower Court and a sale held contrary to such an order whether with or without knowledge of it is

EXECUTION, STAY OF—*contd.*

liable to be set aside as having been held without jurisdiction. *Per* SPENCER, *J.*—The lower Court should have postponed the sale when having itself had no official information of the order of the Appellate Court it was moved by the party on the ground of such an order. *Per* SADASIVA AYYAR, *J.*—The sale under such circumstances is so gravely irregular that it must be set aside even without proof of injury. *Muthukumarasami Rowther Minda Nayinar* v. *Kuppusami Aiyangar, I. L. R. 33 Mad. 74,* dissented from by SADASIVA AYYAR, *J.*, and distinguished by SPENCER, *J. Hem Chandra Kar* v. *Mathura Santhal, 16 C. W. N. 1031,* and *Sati Nath Sikdar* v. *Ratanmani Nasker, 15 C. L. J. 335,* followed. RAMANATHAN *v* ARUNACHELLAM (1913) . **I. L. R. 38 Mad. 766**

EXECUTIVE AND JUDICIAL FUNCTIONS.

See FORFEITURE **I. L. R. 41 Calc. 466**

EXECUTIVE ORDER.

———— **of District Judge not open to revision by High Court—**

See CRIMINAL PROCEDURE CODE, 1898, s. 197 . **I. L. R. 2 Lah. 305**

EXECUTOR.

See CIVIL PROCEDURE CODE, 1908, O. XXXIII . **I. L. R. 36 Bom. 279**

See HINDU LAW—WILL. **I. L. R. 39 Mad. 365**

See LIMITATION **L. R. 43 I. A. 113**

See LIMITATION ACT, 1877, SCH. II, ART. 123 . . **I. L. R. 36 Bom. 111**

See LIMITATION ACT (IX OF 1908), SCH. I, ART. 95 . **I. L. R. 37 Bom. 158**

See PROBATE . **I. L. R. 40 Bom. 666**

See WILL . **I. L. R. 34 Bom. 209**
I. L. R. 36 All. 217
I. L. R. 40 Bom. 1

———— **assent of—**

See SUCCESSION ACT (X OF 1865), s. 187. **I. L. R. 38 Mad. 474**

———— **conveyance by—**

See VENDOR AND PURCHASER. **I. L. R. 37 Calc. 362**
I. L. R. 42 Calc. 56

———— **Death of—**

See PROBATE . **I. L. R. 43 Calc. 625**

———— **liability of—**

See JURISDICTION OF HIGH COURT. **I. L. R. 34 Mad. 258**

See INCOME TAX. **I. L. R. 42 Calc. 151**

———— **not brought on the record—**

See LIMITATION ACT (IX OF 1908), SCH. I, ARTS. 164 AND 181. **I. L. R. 38 Mad. 442**

———— **title of, to sue without probate—**

See LIMITATION ACT (IX OF 1908), s. 17. **I. L. R. 37 Mad. 175**

———— **Probate**—*Probate and Administration Act (V of 1881), ss. 3, 5, 12—Executor who has obtained order for grant but not taken out probate*

EXECUTOR—*contd.*

if may represent estate in suit—Intermeddling with estate—Lunatic, not found—Representation—Civil Procedure Code (Act XIV of 1882), s. 463. An executor who obtained an order for the grant to him of probate but took no further steps to complete the grant and who in no way intermeddled with the estate cannot properly represent the estate in a suit brought against it. A decree purporting to have been passed against such an executor does not bind the estate. LAKHYA DASYA *v.* UMAKANTA CHAKERBUTTY (1909) **14 C. W. N. 256**

———— *Appointed* shebaits, *suit for accounts and delivery of* debutter *estate by administratrix* de-bonis-non—*Probate and Administration Act (V of 1881), executors also appointed* shebaits—*Suit for accounts, by administratrix* de-bonis-non *against heirs of* shebaits, *if lies—Heirs if liable to render accounts of the executorship of their predecessors. S* by his Will appointed *A* and *B* as his executors as well as *shebaits* of an idol in whose favour the Will created a trust in respect of the whole of his properties. *S* left a widow and a daughter. The daughter obtained letters of administration *de-bonis-non* of the estate of *S* and in this capacity brought the suit against the heirs of *A* for delivery to her of the *debutter* estate and for accounts: *Held,* that the suit was misconceived. As soon as debts, legacies and the funeral expenses were paid the executors would hold the property upon the trusts of the Will and there would be no property administered by the executors which would pass to any administratrix *de-bonis-non* appointed by the probate Court. If the property became trust property it was not for the administrator to ask for accounts of these properties which were in trust and the administratrix *de-bonis-non* could not maintain a suit of this nature. *Held,* further, that the Defendants were under no oligation to render accounts of the executorship of *A* and *B* with whom they had no concern. GOUR CHANDRA DAS *v.* SREEMATI MONMOHINI DASI **25 C. W. N. 332**

———— **De son tort.**—*Widow in possession of husband's undivided property not liable as executor de son tort, when such property has devolved on co-parceners—Decree, suit on—No suit maintainable on decree, when the passing of the decree gives no cause of action independent of the original cause of action—Res judicata—Subsequent suit on same cause of action barred though different reliefs claimed—Suit against partners, parties to.* On the death of an undivided co-parcener, the estate vests in the survivors and there is no estate belonging to a deceased person. The widow of the deceased, by the fact of being in possession of a portion of the joint family property, does not become liable as an executor *de son tort,* as she has not intermeddled with any estate belonging to a deceased person. A suit is not maintainable on a decree, when the mere passing of the decree does not give rise to a cause of action distinct from the original obligation. The passing of a decree against an undivided co-parcener, does not give rise to such a cause of action against other co-parceners, except his sons, whatever be the nature of the original debt on which the decree was passed. A decision in a prior suit bars a subsequent suit on the same cause of action, though the reliefs claimed in the two suits may

EXECUTOR—*contd.*

be different. To a suit for winding up a partnership, all partners having distinct interests must be parties; and where such a suit, brought against all the partners, is not maintainable against some, the suit must be dismissed. RAMASAMI AIYAR *v.* VEERAPPA CHETTY (1910)

I. L. R. 33 Mad. 423

———— **Sale by**—*Powers of an executor, happening to be guardian, effect of—Limitation Act (XV of 1877), Arts. 44 and 91—What must be proved before setting aside a sale by an executor—Onus—Executor under Probate and Administration Act (V of 1881)—Sale without Probate or Letters of Administration, validity of.* In the absence of proof that a sale by an executor was not a proper act of administration and was not required for the purpose of discharging debts of the deceased, and that the vendee was a *mala fide* purchaser having knowledge that the sale was not in due course of administration, the onus of proving all which lies on the party attacking the sale, the sale is valid and binding on all. The validity of a sale by one clothed with the powers of an executor must be tested with reference to the powers and duties of an executor; and it cannot be regarded or attacked as a sale by a guardian even if the executor actually happen to occupy the position of a guardian with reference to the plaintiff, a legatee under the will. Hence Art. 44 of the Limitation Act (Act XV of 1877) is inapplicable to such a sale. Nor is Art. 91 appli-

which was made neither by him nor by any one through whom he claims the property as heir, the validity of the sale depending on considerations aforesaid, with reference to the powers of an executor. An executor's title is derived from the will, and an executor under the probate and Administration Act (V of 1881), unlike an executor under the Indian Succession Act or the Hindu Wills Act, can clothe his vendee with full title, even without obtaining any Probate or Letters of Administration. *Sheik Moosa* v. *Sheik Essa, I. L. R. 8 Bom. 241,* and *Mathuradas Lowji* v. *Goculdas Madhowji, I. L. R. 10 Bom. 468,* followed. *Sarat Chandra Banerjee* v. *Bhupendranath Basu, I. L. R. 25 Calc. 103,* considered and explained. Ss. 2, 4 and 45 and the preamble and heading of Chap. II of Act V of 1881 considered. GANAPATHI AIYAR *v.* SIVAMALAI GOUNDAN (1913)

I. L. R. 36 Mad. 575

———— **Powers and duties of executor**—*Personal liability—Right to indemnity—Interest of minor in conflict with that of executors—Necessity of minor being represented—Insufficiently stamped hundis—Plaintiff's remedy.* Before the Hindu Wills Act (XXI of 1870), the position of an

a statutory position. An executor under the statute is the legal representative of a deceased person for all purposes and all the property of the deceased person vests in him as such. He is accordingly, in many respects, in a different position from a Hindu widow succeeding to her husband's estate a guardian of a minor, or a *shebait* of an idol. The estate of the testator is absolutely vested in the executor for the purpose of administration and he can deal with it, as he

EXECUTOR—*concld.*

pleases, subject to his responsibility as executor for the due administration of the estate. The executor who borrows money in the course of the administration for the purposes of the estate, is personally responsible for the repayment of such debts, though he is entitled to be indemnified out of the estate for such borrowing if he shows that it was reasonably and properly made. *Labouchere* v. *Tupper, 11 Moo. P. C. 198, Farhall* v. *Farhall, I. L. R. 7 Ch. 123, Ramanath Paul,* v. *Kanai Lal Dey, 7 C. W. N. 104, Debendra Nath Biswas* v. *Hem Chandra Roy, I. L. R. 31 Calc. 253, Satya*

Chowdhry, I.

an executor

—whether he does so for the purpose of winding it up or of making it over as a going concern to the person or persons entitled to inherit it, there does not appear to be any difference between his duties in so doing and his duties in dealing with any other part of the testator's estate. The responsibility rests entirely upon him subject only to his ultimate rights to be indemnified out of the estate. Where hundis in a suit are insufficiently stamped, it is open to the plaintiff to give the go-by to the hundis, which are inadmissible in evidence, and sue for the consideration. *Golap Chand Marwaree* v. *Thakurani Mohokoom Kooaree, I. L. R. 3 Calc. 314, Pramatha Nath Sandal* v. *Dwarka Nath Dey, I. L. R. 23 Calc. 851,* referred to. Ordinarily the executors represent the estate but not in a case where their personal interests as executors are diametrically opposed to those of the minor. When such is the position of affairs, the minor's interests must be safeguarded and the minor properly represented at the trial. SUDHIR CHANDRA DAS *v.* GOBINDA CHANDRA ROY (1917) **I. L. R. 45 Calc. 538**

EXECUTORSHIP.

———— **renunciation of**—

See HINDU LAW—WILL.

I. L. R. 39 Mad. 365

EXECUTRIX.

See EXECUTOR.

———— **death of**—

See PROBATE **I. L. R. 43 Calc. 625**

———— **Decree for rent against**—

See EXECUTION SALE.

25 C. W. N. 279

EXECUTORY CONTRACTS.

———— **English rule, applicability of**—

See CONTRACT ACT (IX OF 1872), s. 73.

I. L. R. 40 Mad. 338

EXORBITANT INTEREST.

See CONTRACT ACT, s. 74.

I. L. R. 36 Mad. 229

EX-PARTE CASE.

See SALE FOR ARREARS OF REVENUE.

I. L. R. 44 Calc. 573

———— **reinstatement of**—

See MORTGAGE (USUFRUCTUARY)

I. L. R. 44 Calc. 388

EX-PARTE DECREE.

See CIVIL PROCEDURE CODE, 1908, ss. 47, 144 AND 151.
I. L. R. 43 Bom. 235

O. V, RR. 1 AND 2.
I. L. R. 35 All. 163

O. IX, R. 13. **I. L. R. 37 All. 208**
I. L. R. 39 All. 13, 143
I. L. R. 43 Mad. 94
I. L. R. 44 Mad. 731

See DECREE, *ex parte.*

See FOREIGN DECREE.
I. L. R. 40 Bom. 551

See FRAUD . **I. L. R. 38 Calc. 936**

See GUARDIAN AD LITEM.
I. L. R. 38 All. 315

See LIMITATION ACT (IX OF 1908), SCH. I, ART. 164 AND 181.
I. L. R. 38 Mad. 442

See PROVINCIAL SMALL CAUSE COURT'S ACT (IX OF 1887), s. 17.
I. L. R. 38 All. 425
I. L. R. 43 All. 438

See RENT DECREE.
I. L. R. 43 Calc. 170

See RES JUDICATA.
I. L. R. 37 All. 484

See RIGHT OF SUIT.
I. L. R. 37 Calc. 197

See SUBSTITUTED SERVICE.
I. L. R. 38 Calc. 394

See SUMMONS, SERVICE OF.
I. L. R. 43 Calc. 447
I. L. R. 42 Calc. 67

——— **imposition of terms for rehearing of—**

See CIVIL PROCEDURE CODE, 1908. OIX R. 13 **5 Pat. L. J. 420**

——— **suite to set aside.—**

See RES JUDICATA . **5 Pat. L. J. 259**

——— **for feiture—**

See CRIMINAL PROCEDURE CODE 1898. ss. 524, 517 **5 Pat. L. J. 321**

——— **against one defendant—**

See CIVIL PROCEDURE CODE 1908, O. IX, R. 13 . **I. L. R. 44 Mad. 781**

——— *Collusion—Land purchased in execution—Suit for possession—Utilisation of Courts for creation of fictitious titles, whether permissible—Benamidar's right to sue.* Where *A* sued his widowed sister *B* collusively for money alleged to have been advanced to her husband, and obtained an *ex parte* decree, and in execution thereof purchased *B's* property also collusively at a sale held by the Court, and thereafter instituted a suit for recovery of possession on establishment of title: *Held,* that Courts of Justice should not be permitted to be utilised for the purpose of creating fictitious titles, which must inevitably tend to weaken the sanctity which justly attaches to judicial transactions. It was open to a party to impeach the reality of a transaction between two private individuals and equally open to him to impeach the reality of a judicial proceeding. *Held,* also, that in suits for land an action could not be maintained by a *benamidar.*

EX-PARTE DECREE—*contd.*

Bandon v. *Becher, 3 Cl. & Fin. 479, Atrabannessa Bibi* v. *Safatullah Mia, 22 C. L. J. 259,* followed. *Rambehari Sarkar* v. *Surendra Nath Ghose, 19 C. L. J. 34, Hari Gobind Adhikari* v. *Akhoy Kumar Mozumdar, I. L. R. 16 Calc. 364, Mohendra Nath Mookerjee,* v. *Kali Proshad Johuri, I. L. R. 30 Calc. 265,* referred to. *Ram Bhurosee Singh* v. *Bissesser Narain Mahata, 18 W. R. 454,* dissented from. SURENDRA NATH GHOSE *v.* KALI GOPAL MOZUMDAR (1917) . **I. L. R. 45 Calc. 920**

——— A person who obtains an *ex parte* judgment is responsible for any slip in the order founded on the judgment. CHAMPAT SINGH *v.* JANGU SINGH (1912)
16 C. W. N. 793

——— *Application for setting aside ex parte decree—Limitation—Limitation Act (XV of 1877), Sch. II, Art. 164—Limitation Act (IX of 1908), Sch. I, Art. 164—General Clauses Act (X of 1897), s. 6.* Where the right of the judgment debtor to make an applicaton for setting aside an *ex parte* decree was lost under the provisions of Art. 164, Sch. II of the Limitation Act of 1877, long before Act IX of 1908 was passed, the provisions of the new Limitation Act of 1908 cannot revive the right to apply for setting aside the decree. NEPAL CHANDRA ROY CHOWDHURY *v.* NIRODA SUNDARI GHOSE (1912)
I. L. R. 39 Calc. 506

——— *Appearance, what constitutes—Civil Procedure Code (Act V of 1908), O. IX, rr. 6, 13; O. XVII, rr. 2, 3—Part-heard suit—Adjourned hearing—Absence of defendant—Practice.* The provisions of O. IX by themselves do not apply to a case in which the defendant has already appeared in answer to the summons but has failed to appear at an adjourned hearing of the suit. For such a case the procedure is laid down in O. XVII which deals with adjournments. The distinction between rr. 2 and 3 of O. XVII is that while the former rule applies to hearings adjourned at the instance of the Court, the latter applies to hearings adjourned at the instance of a party to whom time has been allowed to do some act to further the progress of the suit but who has defaulted. There is yet another distinction between the two rules. Where there are no materials on the record, the proper procedure to follow would be that laid down in r. 2 but if there are materials on the record the Court ought to proceed under r. 3. To apply the procedure, therefore, laid down in r. 3 to a case there must be the presence of both the elements; *viz.,* (i) the adjournment must have been at the instance of a party; and (ii) there must be materials on the record for the Court to proceed to decide the suit. The presence of one without the other does not justify the application of r. 3. *Kader Khan* v. *Juggeswar Prasad Singh, I. L. R. 35 Calc. 1023, Mariannissa* v. *Ramkalpa Gorain, I. L. R. 34 Calc. 235,* and *Jonardan Dubey* v. *Ramdhone Singh, I. L. R. 23 Calc. 738,* referred to. ENATULLA BASUNIA *v.* JIBAN MOHAN ROY (1914)
I. L. R. 41 Calc. 956

——— *Perjured evidence, whether a ground for setting aside—Fraud—Plaintiff knowing evidence to be perjured—Court imposed upon.* If the case, which was placed before the Court, was a false one the Court has jurisdiction in a subsequent suit to set aside the

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decree which was obtained in the previous suit by fraud practised on the Court. *Abouloff* v. *Oppenheimer, 10 Q. B. D. 295, Vadala* v. *Lawes, 25 Q. B. D. 310, Lakhmi Charan* v. *Nur Ali, I. L. R. 38 Calc. 936 : s. c. 16 C. W. N. 1010,* followed. *Mosuful Huq* v. *Surendra Nath, 16 C. W. N. 1002, Baker* v. *Wordsworth, 67 L. J. R. Q. B. D. 301,* distinguished. KEDAR NATH DAS v. HEMANTA KUMARI DEBI (1913) **18 C. W. N. 447**

——— *Civil Procedure Code (Act V of 1908), s. 144—Principle if applicable to restore a sale under an ex-parte decree set aside—Subsequent contested decree if revives old decree—Civil Procedure Code (Act XIV of 1882), s. 108.* Where an *ex-parte* decree and sale under it were

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aside the sale. When a decree has once been set aside under s. 108, Civil Procedure Code (Act XIV of 1882), it cannot by any subsequent proceeding be taken to be revived. If a decree is passed against judgment-debtors on re-hearing, it is a new decree and does not revive the former decree. RAGHU NANDAN SINGH v. JAGDIS SINGH (1909) . . . . **14 C. W. N. 182**

——— *Decree setting aside ex-parte decree, effect of—Court if bound to revive and proceed with trial of suit.* Where an *ex-parte* decree is set aside by a Court of competent jurisdiction the effect is that the decree whereby the suit was terminated stands cancelled and the suit remains on the file of the Court as an undisposed of suit. In these circumstances it is incumbent upon the Court to proceed with the trial of the suit and if the plaintiff does not wish to proceed with the trial of the suit the Court must dismiss it, but if the plaintiff desires to proceed with it, it must be tried in accordance with law. The fact that the suit terminated in an *ex-parte* decree and not a consent decree makes no difference in point of principle. DHARANIDHAR ADITYA v. HEMANGA CHANDRA JAINA (1917) **21 C. W. N. 1087**

——— *Decree without evidence—Practice and Procedure—Unliquidated damages—Undefended suit—Defendant appearing at the trial—Leave to defend refused—Non-denial of claim, effect of—Verification of plaint—Civil Procedure Code (Act V of 1908), O. VIII, rr. 3, 5 ; O. IX, r. 6 ; O. XVIII, r. 2 ; O. XIXand O. XXXVII.* The plaintiffs entered into a contract with the defendants for the sale of certain goods and upon the defendants failing to deliver the same within the time specified in the contract, they brought a suit for breach of contract and claimed as damages the difference between the contract price of the goods and the market price thereof. The defendant did not enter appearance nor did they file a written statement, and the suit was in due course transferred to the list of undefended cases. On the date of hearing of the case, the defendants applied for leave to defend the suit on the ground that their attorneys had misunderstood their instructions to them to appear and defend the suit. The Court, however, refused the application and, without hearing any evidence whatsoever other than reading the affidavit of service of summons, decreed the plaintiff's suit *ex parte*. *Held,* that it would be undesirable if a suit such as this were adjudicated upon without any evidence, in the real sense of the word, given by the plaintiffs where the claim was for unliquidated damages, and that the learned Judge, had no jurisdiction to make the decree, which in fact he did. *Held,* also, that O. VIII, r. 5 of the Code did not apply to a case where the defendant had not put in written statement. *Held,* also, that the verification of the plaint was not evidence on which a suit could be decreed whether the adversary did or did not appear. *Basdeo* v. *John Smidt, I. L. R. 22 All. 55,* referred to. *Held,* further, that there was no legal evidence on the record on which the decree made in favour of the plaintiffs might be supported, and that the plaintiffs were not entitled to succeed on the basis of an implied admission of their claim by the defendants. *Per* SANDERSON *C. J.* The fundamental principle is that the plaintiff, when he comes to Court, must prove his case and must prove it to the satisfaction of the Court. *Per* WOODROFFE *J.* No decree can be legally given in any case without evidence except in cases of the suits governed by the provisions of O. XXXVII of the suits governed by the provisions of O. XXXVII of Civil Procedure Code. In this Court it has always been the practice in undefended cases to take evidence as defined in the Evidence Act, namely, oral statement of witnesses and documents proved before the Court. The *cursus curiæ* may be looked at when interpreting the terms of the Civil Procedure Code. *Galstaun* v. *Hutchison, I. L. R. 39 Calc. 79,* referred to. *Per* MOOKERJEE *J.* Great caution should be exercised when suits are heard *ex parte*. This observation is of universal application. But it applies with special force to cases where unliquidated damages are claimed on the allegation that there has been a breach of contract. *Amrinath Jha* v. *Dhunpat Singh, 8 B. L. R. 44* referred to. ROSS & CO., v. C. R. SCRIVEN (1916) . **I. L. R. 43 Calc. 1001**

——— *Primary Court jurisdiction of, to set aside an ex-parte decree when the appeal against its decree is dismissed—Civil Procedure Code (Act V of 1908) O. IX, r. 13—Jurisdiction.* An application to set aside an *ex-parte* decree made in the primary Court, did lie to that Court, even though there was an appeal against it by the contesting defendants to which the petitioners were not parties and which was dismissed by the Appellate Court. *U. Hedlot Khasia* v. *Ka Ram Khasiani, 13 Ind. Cas. 377, Braja Lall Singh* v. *Choudhury Mahadeo, 17 C. W. N. 133, Kumud Nath Ray Choudhury* v. *Jotendra Nath Choudhury, I. L. R. 38 Calc. 394,* followed. ABDUL GHAD v. AMDALI GAZI (1920) **I. L. R. 48 Calc. 153**

——— *Setting aside, application for—Deposit of money into Court—Time for depositing, granted—Extension of time till a certain date—Deposit not made on that date—Dismissal of application on that date; legality of jurisdiction of Court—Time granted by Court for performance of any act till a certain date, meaning of.* When time is granted by Court for the performance of any act till a certain date, it includes that date. Where, on an application by a defendant to set aside an *ex-parte* decree in a Small Cause Suit, the Court granted time to the applicant till a certin date to deposit the decree

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amount, but dismissed the same as no deposit was made before the application was taken up for orders on that date: *Held*, that the Court had no jurisdiction to pass the order dismissing the application. *Dawkins* v. *Wagner, 3 Dowl, 535, Knox* v. *Simmonds, 3 Bro. C. C, 358* and *Isaacs* v. *Royal Insurance Co., L. R. 5 Ex. 296,* followed. PERUMAL NADAN *v.* SIVANAMJI NADACHI (1915) . . . **I. L. R. 39 Mad. 583**

———— *Primary Court, jurisdiction of, to set aside an ex parte decree when the appeal against its decree is dismissed—Civil Procedure Code (Act V of 1908) O. IX, r. 13—Jurisdiction.* An application to set aside an *ex parte* decree made in the primary Court, did lie to that Court, even though there was an appeal against it by the contesting defendants to which the petitioners were not parties and which was dismissed by the Appellate Court. *U. Hedlot Khasia* v. *Ka Ram Khasiani, 13 Ind. Cas. 377, Braja Lall Singh* v. *Chowdhury Mahadeo, 17 C. W. N. 133, Kumud Nath Roy Chowdhury* v. *Jotendra Nath Chowdhury, I. L. R. 38 Calc. 394,* followed. ABDUL OHAD *v.* AMDALI GAZI (1920) **I. L. R. 48 Calc. 153**

EX-PARTE ORDER.

See LIMITATION. **L. R. 44 I. A. 218**

EXPECTANCIES.

———— *Contracts for sale of validity of—Transfer of Property Act (IV of 1882) s. 6—Indian Contract Act (IX of 1872), 23—Estate falling into possession—Specific performance suit for—Maintainability of suit—Rule of English Law—Rule in India before Transfer of Property Act—Doctrine of feeding the estoppel, meaning of.* Contracts for sale of expectancies are void in India under the provisions of s. 6 of the Transfer of Property Act and s. 23 of the Indian Contract Act, and a suit for the specific performance of such a contract, instituted after the expectancy fell into possession is not maintainable. The statute law of India forbids *transfer* of expectancies, and it would be futile to forbid such transfers, if contracts to transfer them are to be enforced as soon as the estate falls into possession. In England and in India before the Transfer of Property Act a mere chance of succeeding to an estate was a bare possibility incapable of assignment, but in England it is settled law that in the case of such expectancies, equity will enforce a contract to convey the estate when it fell in, and a similar rule has been applied in India in cases which were not governed by the Transfer of Property Act. Courts are bound to give effect to the plain provisions of the statute law, instead of following a course of English decisions which are based on a course of long established practice rather than on principle. 'Equitable doctrine of feeding the estoppel' explained. *Raja Sahib Prahlad Sen* v. *Baboo Sundur Singh, 2 B. L. R. 111, 117, Oodey Koowar* v. *Mussumat Ladoo, 13 Moo, I. A. 585, Ram Nirunjan Singh* v. *Prayag Singh, I. L. R. 8 Calc. 138, Gitabai* v. *Balaji Keshav, I. L. R. 17 Bom. 222, Sumsuddin* v. *Abdul Hussin, I. L. R. 31 Bom. 165, Dhoorjeti Subayya* v. *Dhoorjeti Venkayya, I.L. R. 30 Mad. 201,* and *Sham Sundar Lal* v. *Acchau Kunwar, I. L. R. 21 All. 71,* referred to. SRI JAGANNADA RAJU *v.* SRI RAJA PRASADA ROW (1915) . . **I. L. R. 39 Mad. 554**

EXPERT EVIDENCE.

See PROBATE . **I. L. R. 39 Calc. 245**

———— **in proof of custom—**

See CUTCHI MEMONS. **I. L. R. 41 Bom. 181**

———— **in handwriting—**

See EVIDENCE . **I. L. R. 36 Mad. 159**

See WILL . . **15 C. W. N. 729**

See HANDWRITING, **I. L. R. 39 Calc. 603**

———— The limits within which the opinion of experts is admissible considered and the difference between mere advice on evidence and opinion indicated by Woodroffe, J. *In the goods of* GOPESSUR DUTT *v.* SARAT KUMARI DASI (1911) . **16 C. W. N. 265**

EXPIRY OF SANCTION.

See SANCTION FOR PROSECUTION. **I. L. R. 48 Calc. 867**

EXPLOSIVE SUBSTANCE.

———— The term "explosive substance" as used in s. 4 (*b*) of Act VI of 1908 includes *any part* of an apparatus, machine, or implement intended to be used or adapted for causing or aiding in causing any explosive substance, and "by means thereof" does not mean by means thereof *alone*. *R.* v. *Charles, 17 Cox 499,* referred to. AMRITA LAL HAZRA *v.* EMPEROR (1915) . . . **I. L. R. 42 Calc. 957**

EXPLOSIVES ACT IV OF 1884.

See MAGISTRATE. **I. L. R. 39 Calc. 119**

EXPLOSIVE SUBSTANCES ACT (VI OF 1908)

———— **ss. 4 (b), 7—**

See CHARGE . **I. L. R. 42 Calc. 957**

See MAGISTRATE **I. L. R. 39 Calc. 119**

———— **s. 5**—*Bomb found in joint family residence, who may be held responsible for—Possession, whose.* It is not the law that every person in a joint Hindu family should, merely, on the ground that a bomb is found in the joint family residence, be liable to be imprisoned and tried for an offence under the Explosive Substances Act (s. 5). If the article is found in a portion of the house of which one member of the family has the exclusive use, such member must *primâ facie* be held responsible for anything that is found there. But if the article is found in a portion of the house of which all the members of the family have use, then *primâ facie* the *karta* of the family is responsible. But in either case it is only a presumption which may be rebutted and if the Police act on the information, which they believe, showing that the article found in a house is in the exclusive possession of one member of the family and the article is found in a portion of the joint family residence of which all the members of the family have the use, then the head of the family is not liable to arrest merely on the ground that the article is found in a portion of the house to which all the family can resort. *Queen-Empress* v. *Sangam Lal, I. L. R. 15 All. 129,* relied on. PEARY MOHAN DAS *v.* D. WESTON (1911) . . . . **16 C. W. N. 145**

ON APPEAL. *See* LIMITATION. **I. L. R. 40 Calc. 898**

EXPLOSION.

See Gas Company . **14 C. W. N. 158**

EXPORT.

See Exciseable Articles.
I. L. R. 39 Calc. 1053

See Trading with the Enemy.
I. L. R. 42 Calc. 1094

EX-PROPRIETARY HOLDING.

———— *Holding sold in execution of money decree—Formal possession obtained—Subsequent suit for recovery of actual possession—Execution of decree.* In execution of a simple money decree certain plots of land, which formed part of the ex-proprietary holding of the judgment-debtor were sold by auction, and were purchased by the decree-holder. The decree-holder obtained formal possession of the plots purchased but not actual possession. Within twelve years after the date of the order giving formal possession the decree-holder filed the present suit to obtain actual possession of the plot purchased by him. *Held,* that, inasmuch as the land in suit was part of an ex-proprietary holding, the plaintiff's suit must be dismissed. Chunni Lal *v.* Biri Singh (1918) . **I. L. R. 41 All. 346**

EX-PROPRIETARY RIGHTS.

See Agra Tenancy Act (II of 1901), ss. 10, 20 and 83
I. L. R. 33 All. 695
I. L. R. 40 All. 449

See North West Provinces Rent Act (XII of 1881) . **I. L. R. 39 All. 645**

———— agreement to surrender—

See Agra Tenancy Act (II of 1901), ss. 10 and 83.
I. L. R. 39 All. 173

EX-PROPRIETARY TENANT.

See Adverse Possession.
I. L. R. 37 All. 22

See Agra Tenancy Act (II of 1901).
I. L. R. 33 All. 507
I. L. R. 36 All. 155

ss. 28, 29, 30 and 34.
I. L. R. 35 All. 123

See Grove Land.
I. L. R. 42 All. 483

See United Provinces Land Revenue Act (III of 1901), s. 36.
I. L. R. 39 All. 318

———— *Sale by one of several co-owners holding sir land of his undivided zamindari share—Vendor ex-proprietary tenant of all the co-owners and not merely of his vendee.* Where the owner of an undivided share in a *patti* sells his zamindari rights and becomes an ex-proprietary tenant of the *sir* land held by him he becomes the tenant as regards such land, not merely of his vendees but of all the co-sharers in the *patti.* Debi Prasad *v.* Bhagwan Din (1912)
I. L. R. 35 All. 27

———— *Mortgage of sir land followed by a perpetual lease of the same—Sale of mortgaged property in execution of decree—Rights of auction-purchaser as against perpetual lessee.*

EX-PROPRIETARY TENANT—*contd.*

Certain *sir* land was mortgaged by the owner who thereafter, pending a suit for sale on the mortgage, granted a perpetual lease of the mortgaged property. The mortgaged property was sold in execution of a decree for sale on the mortgage, and the auction purchaser sued to eject the perpetual lessee. *Held,* that the auction-purchaser was not entitled to a decree for physical possession as against the lessee, though, if the lease was fraudulent, she was entitled to the rent which the ex-proprietary tenants ought to pay for the land in suit. Ghura *v.* Shitab Kunwar (1914)
I. L. R. 36 All. 248

EXPULSION OF MEMBER.

See Stock Exchange
I. L. R. 47 Calc. 623

EXTENSION OF TIME.

See Decree . **I. L. R. 44 Calc. 954**
I. L. R. 40 All. 579

EX-TERRITORIAL JURISDICTION OF BRITISH COURT.

———— *Foreign Jurisdiction Act, 1890, and China and Corea Order-in-Council, 1894—Arts. III, V, cls, (1), (3), (4), XXXV (2), Order-in Council—Ex-territorial jurisdiction over foreigners—"British protected person," jurisdiction over—Jurisdiction of Supreme Court of China and Corea to try Afghan soldier enlisted in Indian Army for murder committed at Canton—Consent of Ameer to exercise of jurisdiction, if to be implied from public rec.* [illegible] *rmy—Proof of* [illegible] *'n China by ora.* [illegible] *rules of evidence how far binding on Supreme Court at Hong Kong—Statement by accused in answer to question by commanding officer when in custody, if admissible—Substance and not mere formalities of law, to be complied with—Misdirection to jury on matter of comparatively small importance, if a ground for reversal—Privy Council when will interfere with order in criminal case—Violation of natural justice.* The specified conditions under which only, according to cl. (*3*) to Art. V of the China and Corea Order-in-Council, 1904, the Supreme Court of China and Corea has civil and criminal jurisdiction over a "foreigner" as such have no application to "British protected persons" who even when in fact natural born foreigners are "*British subjects*" *as* defined by Art. III and so subject to the jurisdiction of that Court under cl. (*1*) to Art. V. The accused, a natural born subject of the Ameer of Afghanistan, was duly enlisted and enrolled in a British Indian regiment, took the oath of allegiance to His Majesty and made a solemn declaration undertaking, among other things, to go wherever ordered by land or sea, and whilst serving with the detachment of that regiment which was encamped on Shameen Island *at* Canton *as a guard of the* Concession, was alleged to have murdered a Subadar of that regiment. The Acting Consul at Canton, who also served as Judge under Art. XIX of the Order-in-Council, gave evidence (which was uncontradicted) "that the place of murder was within his jurisdiction and that the jurisdiction exercised at Canton or Shameen, was the same ex-territorial jurisdiction as was exercised throughout China by the Supreme Court, that

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Indian soldiers enjoy His Majesty's protection in Shameen, Canton, and the Court exercises jurisdiction over them, and that consular protection extends to trying persons and protecting them if they are improperly arrested." *Held*, that s. 4 (*1*) of the Foreign Jurisdiction Act, 1890, did not make this evidence inadmissible to prove that by "usage, sufferance or other lawful means" His Majesty has jurisdiction at Canton. That the accused being, during his service in the Indian Army, subject to military law was entitled to His Majesty's protection and was a "British protected person" within Art. III. When the Crown lawfully enlists in its forces aliens along with British subjects and requires of them the same service, loyalty and allegiance as on the duties of British enlisted subjects, it extends to them the same protection in a foreign country where all are serving together in the armed forces of His Majesty. Protection enjoyed by virtue of the Foreign Jurisdiction Act, 1890, "or otherwise," as mentioned in Art. III, includes that derived from other Statutes, Imperial or Indian, applicable to the person in question *Quære:* Whether the Court could take judicial notice of the political change in China in considering the question of jurisdiction. *Quære:* Whether it may not be reasonably inferred from the practice (which is a matter of public knowledge) of enlisting native Afghans in the Indian Army whereby they are *de facto* brought under the authority of His Majesty, that the Ameer does in fact consent to such enlistment with its consequences, so as to bring such enlisted Afghans within the terms of cl. (*4*) Art. V. *i.e.*, "foreigners with respect to whom any State, King, Chief or Government whose subjects they are, consents to the exercise of power or authority by His Majesty." The officer commanding the detachment, who spoke to the accused shortly after the occurrence deposed to having asked the accused why he had done such a senseless act—not thereby meaning to convey a threat or inducement—and to the accused having replied that he was being abused by the deceased three or four days and that without a doubt he had killed him. The Judicial Committee found that the words of the officer though formally a question, were really an exclamation of dismay: *Held*, that the prosecution having by the evidence of this officer proved to the satisfaction of the trial Judge that the statement of the accused was voluntary in the sense that it had not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority, its admission in evidence was not in breach of the long established rule of English criminal law which makes statements obtained from the accused by pressure of authority and fear of consequences inadmissible in evidence and which casts on the prosecution the onus of proving that the statement relied on was voluntary. On the question whether the statement should not have been excluded from evidence on the ground of its having been made by a person in custody in answer to a question put by a person having authority over him and having custody of him through his subordinates : *Held*, on a review of English authorities, that the English law on the point was still unsettled, some Judges being of opinion that such a statement is admissible in evidence without exception, whilst others treat its exclusion from evidence as a matter for the Judge's discretion depending largely on his view of the impropriety of the questioner's conduct and the general circumstances of the case. That the trial Judge in admitting this evidence decided in accordance with what at any rate was a "probable opinion" of the present law if it was not actually the better opinion, and his so doing was not a violation of "the principles of natural justice," calling for His Majesty's interference. That even if the evidence was admissible in the exercise of the trial Judge's discretion, that discretion in the present case was not shown to have been exercised improperly. With reference to Act XXXV (*2*) of the China and Corea Order-in-Council which provides that, subject to the provisions of that Order, criminal jurisdiction under the Order shall, as far as circumstances admit, be exercised on the principle of and in conformity with English law for the time being: *Held*, that in the absence of any provision in the Order on the point modifying or excluding the principles and practice of English law, the question of the admissibility of the statement of the accused might justly be treated as if English criminal law and practice applied to the criminal jurisdiction of the Supreme Court at Hong-Kong, subject, however, to the following reservations:—(i) That such law and practice are not to be considered as in all respects and particulars binding on that Court; (ii) that regard must be had to the necessary distinction that must be drawn between the criminal procedure of a European country whose jurisprudence has a defined history extending over many centuries and that applicable to a British possession in the Far East, where a mixed and fluctuating population is subject to the administration of law by European Judges whose duty it is to have regard alike to the principle of British justice and to the necessities of local order; (iii) that the words "so far as circumstances admit," may well (*a*) refer to absence of facilities at Hong-Kong for formal proof of Statutes passed and administrative orders made in various parts of His Majesty's dominions, and (*b*) be intended to cover some necessary departures from the formalities only as distinguished from the essentials of English justice, when, as in the present case, a force detailed for the protection of European residents beyond His Majesty's dominions in the midst of a population often turbulent, and at the particular time disturbed was itself disturbed by such a crime as the murder of a Subadar by a native private in the ranks. That in view of the position which the Privy Council held in regard to criminal proceedings, the Judicial Committee did not in this case decide what the rule of English law should be with regard to the admissibility in evidence of statements made by an accused person in answer to a question put by a person in authority in whose custody he is; that should be left to a Court which exercises the revising functions of a general Court of criminal appeal. *Clifford* v. *The King-Emperor, L. R. 40 I. A. 241*, referred to. The Privy Council cannot in a criminal matter allow an appeal on grounds that would not have sufficed for granting leave to appeal. Misdirection as such or irregularity as such will not suffice. There must be something which in the particular case deprives the accused of the substance of fair trial and the protection of the law, or which, in general, tends to divert the due and orderly

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administration of law into a new course, which may be drawn into an evil precedent in future. *Ex parte Macrea, [1893] A. C. 346, R. v. Bertrand 16 L. J. N. S. 752,* followed. *Riel v. The Queen, 10 A. C. at p. 675, In re Dillet, 12 A. C. 459,* referred to. The jurisdiction of the Privy Council in appeals in criminal matters involves a general consideration of the evidence and of the circumstances of the case in order to place the irregularities complained of, if substantiated, in their proper relation to the whole matter. *Held,* upon a review of the evidence, that the preponderance of unquestioned over the questioned evidence (the accused's statement to the com-

Therefore, the fact that the Judge left the objectionable evidence for the consideration of the jury without any warning to disregard it, did not justify the conclusion that there was any miscarriage of justice, substantial, grave or otherwise. *Semble:* Where it is highly improbable that evidence improperly admitted can have had any influence on the verdict of the jury, the Appellate Court will be justified in refusing to interfere. *Makin v. A.-G. for New South Wales, [1894] A. C. 57,* considered. IBRAHIM *v.* THE KING (1914) . . . . . **18 C. W. N. 705**

EXTRADITION.

———— *High Court, jurisdiction of—Extradition Proceedings, jurisdiction of High Court in—Code of Criminal Procedure (Act V of 1898), s. 491—Indian Extradition Act (XV of 1903), s. 3, sub-s. (3), (4), (6), (7) and (8) and s. 4, sub-s. (1) —Habeas Corpus.* If the provisions of the Legislature have not been carried out, the High Court can interfere, notwithstanding *that the warrant* has been given in extradition proceedings. *Rudolf Stallmann v. Emperor, I. L. R. 38 Calc. 547,* distinguished. S. 3, sub-s. (6) of the Indian Extradition Act, 1903, is not a substitute for, and does not interfere with, proceedings taken under s. 491 of the Code of Criminal Procedure, 1908, the provisions of which are as much binding as those of the Extradition Act. The Government of India may issue its order to *any* Magistrate, and such Magistrate may issue a warrant, provided he is one who has jurisdiction to enquire into the crime of the nature of that for which extradition is sought. Therefore, an enquiry into the case of a fugitive criminal under arrest in Calcutta can be made by the Magistrate of Alipore, if duly authorised. An order issued under s. 3, sub-s. (*1*) of the Indian Extradition Act, 1903, by the Government of *Bengal* upon a requisition made to the Government of *India* is invalid, and cannot be "ratified" by a subsequent order of the Government of *India*. Where, however, the latter order directs the Magistrate in pursuance of the former order "and of the statutory provisions in that behalf to enquire into the said case," the Government gives valid effect to its intention, and the Magistrate has jurisdiction to enquire. Under s. 528 of the Code of Criminal Procedure, 1898, the District Magistrate can transfer to his own file, from that of the Deputy Magistrate, an application by the fugitive criminal for return of his property. The Magistrate making the enquiry under s. 3 of the Indian Extradition Act, 1903, can initiate fresh proceedings notwithstanding proceedings taken under a previous order. When the Magistrate sends up his report to the Government of India under s. 3, sub-s. (*6*) of the Indian Extradition Act, 1903, he becomes *functus officio*, and renders himself incapable, therefore, of recording evidence that may be subsequently produced. The Legislature intended that the fugitive criminal should be given an opportunity of defence. If such opportunity is not given, it goes to the jurisdiction of the Magistrate. The enquiry, therefore, is not according to law, and the issue of the warrant *is itself invalid. Per* MOOKERJEE, *J.*—The burden lies very heavily upon those who assert that a right of so much importance to the criminal as *Habeas Corpus*, given by the Common Law, has been taken away by implication. S. 491 of the Code of Criminal Procedure, 1898, *is applicable to cases under* the Indian Extradition Act. *Rudolf Stallmann v. Emperor, I. L. R. 38 Calc. 547,* distinguished. The jurisdiction of the High Court has not been taken away merely because the Government of India has already issued a warrant for surrender *under s. 3, sub-s. (8) of the Indian Extradition* Act, 1903. Depositions which have not been taken in the presence of the accused may be admitted by the Magistrate: *In re Counhaye, L. R. 8 Q. B. 410.* Where there is no evidence before the Magistrate, the Court will interfere. *R. v. Maurer, 10 Q. B. D. 513, approved of.* The Court will not consider questions regarding evidence, unless the objection is such that if effect were given to it, there would be no evidence left upon which the order for extradition could be supported. Under s. 4, sub-s. (*1*), the Magistrate *may issue a warrant when the person to be* arrested is within his jurisdiction. S 4 merely provides a preliminary procedure. Under it an arrest may be effected before the receipt of the requisition *mentioned in s. 3, otherwise* the criminal might escape. The two sections do not overlap. *Under s. 3, sub-s. (1) of the Indian* Extradition Act, 1903, the only Government competent to issue the order for enquiry is the Government to whom the foreign state has made a requisition. This function must be performed strictly, and cannot be delegated. Where the *provisions of the Statute have not been followed,* the report of the Magistrate cannot afford a foundation for the order of the Government of India under s. 3 of the Indian Extradition Act, 1903. *In the matter of* RUDOLF STALLMANN (1911) . . . **I. L. R. 39 Calc. 164**
15 C. W. N. 1053

———— *Extradition Act (XV of 1903), ss. 3, 3 (1), 3 (4), 3 (8), 3 (10), 4 (1), 4 (2)—Jurisdiction of High Court—Transfer—Criminal Procedure Code (Act V of 1898), s. 526—Habeas Corpus—Bail.* Although the warrant of arrest under which the accused was arrested in extradition proceedings referred to the offence of "escaping from lawful custody," inasmuch warr . . . theft, whic . . . iat the extr . . . ject of an . . . stances of tl... . . . ustody for a period exceeding two months had not been committed to prison under s. 3 (*4*) of the Extradition Act, and consequently s. 3 (*10*) was inappli-

EXTRADITION—*contd.*

cable to entitle him to be discharged by the High Court. Apart from considerations as to the jurisdiction of the High Court, the application for transfer, for a writ of *Habeas Corpus* and for bail, refused on the merits. *Rudolf Stallmann* v. *Emperor, I. L. R. 38 Calc. 547,* referred to. *Per* WOODROFFE, *J. Semble:* that inasmuch as it has been held that the High Court has no general superintendence over such extradition proceedings, it would have no jurisdiction to grant bail. A. C. TOPS *v.* EMPEROR (1918)

I. L. R. 46 Calc. 31

———— **Effect of illegal arrest on trial of accused**—*Criminal Procedure Code (Act V of 1898), s. 188.* Where a man is in the country and is charged before a Magistrate with an offence under the Penal Code, it will not avail him to say that he was brought there illegally from a foreign country. The principle upon which English cases to this effect are based underlies also s. 188 of the Criminal Procedure Code (Act V of 1898). EMPEROR *v.* VINAYAK DAMODAR SAVARKAR (1910)

I. L. R. 35 Bom. 225

———— **Jurisdiction of High Court to revise proceedings of Magistrates under the Extradition Act.**—*High Courts Act, 1861 (24 and 25 Vict., c. 104), s. 15—Extradition Act (XV of 1903), ss. 3 and 4.* The High Court has no jurisdiction under s. 15 of the Charter Act, to revise the proceedings of a Magistrate acting under ss. 3 and 4 of the Extradition Act. *In re Mohunt Deva Dass, I. L. R. 38 Calc. 550 (note),* referred to. STALLMANN, RUDOLF *v.* EMPEROR (1911) . . . **I. L. R. 38 Calc. 547**

15 C. W. N. 736

———— *Proceedings before the Magistrate without jurisdiction—Power of High Court to interfere with order directing delivery of fugitive offender—Extradition Act (XV of 1903), ss. 10, 15,* S. 15 of the Extradition Act ousts the jurisdiction of the High Court to inquire into the propriety of a warrant issued under Chap. III. Where, however, the order of the Magistrate is sought to be justified under an authority supposed to be derived from the law, but is in fact without jurisdiction, such order is revisable by the Court at the instance of the party whose liberty is affected by it. *Emperor* v. *Huseinally Niazally, 7 Bom. L. R. 463, In the matter of Ahadyer, Punj. Rec. 45,* followed. *Attorney-General for Hong-Kong* v. *Kwok-a-Sing, L. R. 5, P. C. 179,* referred to. The High Court set aside the order of the Magistrate directing the delivery of a fugitive offender to the Nepal authorities where he had issued the warrant, at least in the case of one accused, on mere information, without any evidence, where he had failed to report the issue of the warrants to the Political Agent in Nepal, had made an inquiry into the case without a warrant issued by the Political Agent, and had ordered the surrender on a procedure not known to the Extradition Act. GULLI SAHU *v.* EMPEROR (1913) . **I. L. R. 41 Calc. 400**

———— *Requisition by Administrator of French Chandernagore for surrender of a British Indian subject for theft committed there—"Foreign State," meaning of—French Chandernagore not a "Foreign State"—Extradition Treaty with France of 14th August 1876, Art. 16—Extradition Treaty with same of 7th March 1815, Art. 9—Procedure on requisition for surrender—Extradition Act (XV of 1903), s. 2 (c), Chapter II, ss. 7, 8, 8A, 9 and 18.* By Art. 16 of the Extradition Treaty with France of 1876 the East Indian Possessions of the two countries are excluded therefrom, and are not a "Foreign State" within s. 2 (c) and Chap. II of the Indian Extradition Act (XV of 1903) and the provision of the chapter are not, therefore, applicable to such Possessions. Ss. 7, 8 and 8A of the Act do not apply to the French Possessions in India. Art. 9 of the Extradition Treaty with France, of 7th March 1815, contemplates the summary surrender of a fugitive criminal, and, read with s. 18 of the Act, excludes the operation of s. 9 of the latter. A British Indian subject may, on requisition by the Administrator of French Chandnagore, be surrendered for theft committed therein without any preliminary enquiry, under s. 9 of the Act, by a Magistrate in British India. The subject has no right at Common Law to have such preliminary enquiry made before his surrender when there is a treaty excluding such enquiry and is followed by a statute recognising the treaty. RAHAMAT ALI *v.* EMPEROR (1919)

I. L. R. 47 Calc. 37

———— *"Foreign State"—Chandernagore—Treaties between Great Britain and France, 7th March 1815, Art. IX, and 14th August 1876, Art. XVI—Orders in Council, 16th May 1878, and 7th March 1904—Extradition Act, 1870 (33 and 34 Vic. c. 52), ss. 2, 18, 25—Indian Extradition Act (XV of 1903), s. 2 (c), Chap. II, and s. 18.* Chandernagore is a "Foreign State" as defined by s. 2 (c) of the Indian Extradition Act, and the provisions of Chapter II thereof must be followed before a fugitive offender can be surrendered to the French authorities. The concluding portion of Art. XVI of the Extradition Treaty with France of 1876 does not exclude its East Indian Possessions, but is a saving clause intended to preserve intact the special arrangement established by Art. IX of the Treaty of 1815. The Order in Council of 16th May 1878 applied the English Extradition Acts, 1870, 1873 to the case of France and, therefore, by reason of s. 25 of the Extradition Act, 1870, to the East Indian Possessions of France as part thereof. The words "*shall be delivered*" in Art IX, aforesaid, do not provide for any procedure within the meaning of s. 18 of the Indian Extradition Act. *Rahamat Ali* v. *Emperor, I. L. R. 47 Calc. 37,* not followed. A Judge exercising the Original (Criminal) Jurisdiction of the Court in one matter is not bound by a decision of an Appellate Bench in another matter. *Abhai Charan Ghose* v. *Dasmani Dasi, 6 B. L. R. 623,* followed. CELESTE CULLINGTON, *In re,* (1920)

I. L. R. 48 Calc. 328

EXTRADITION ACT (XV OF 1903).

See EXTRADITION.

See HABEAS CORPUS.

I. L. R. 46 Calc. 52

———— **s. 2**—

See EXTRADITION.

I. L. R. 39 Calc. 146, 547
I. L. R. 47 Calc. 37

———— **s. 2(c) Chap. II, and s. 18**—

See EXTRADITION.

I. L. R. 48 Calc. 328

EXTRADITION ACT (XV OF 1903)—*contd.*

———— ss. 3, 4—

See EXTRADITION

I. L. R. 38 Calc. 547
I. L. R. 39 Calc. 164
I. L. R. 46 Calc. 31

See HABEAS CORPUS

I. L. R. 39 Calc. 164
I. L. R. 46 Calc. 52

———— ss. 7, 15—

See EXTRADITION WARRANT.

I. L. R. 42 Calc. 793

———— ss. 7 10, 15—

See EXTRADITION

I. L. R. 41 Calc. 400

———— ss. 7, 8 and 8A—*Extradition Treaty with the Hyderabad State—" Cheating " not mentioned in the treaty though mentioned in the Act—Extradition for cheating by British Government—Warrant from the Political Agent—Bail not allowed in the warrant—British Magistrate has no power to grant bail—Criminal Procedure Code (Act V of 1898), s. 496.* The offence of cheating is an extradition offence, so far as British India is concerned, under the Indian Extradition Act (XV of 1903), notwithstanding its omission from Art. 4 of the Extradition Treaty between the British Indian Government and the Hyderabad State. The Magistrate in British India to whom a warrant has been addressed under s. 7 of the Indian Extradition Act, 1903, has no power to admit an arrested person to bail apart from the provisions of s. 8 and 8A of the Act. MURLIDHAR BHAGWANDAS, *In re* (1918) . . I. L. R. 43 Bom. 310

———— ss. 7, 8, 9 and 18—

See EXTRADITION.

I. L. R. 47 Calc. 13

———— ss. 7 and 15—

See REVISION.

I. L. R. 42 Calc. 793

EXTRADITION ACT (XXI OF 1879).

———— s. 14—*Extradition Act (XXI of 1879), s. 14, enquiry under—High Court's power to transfer enquiry to another Magistrate or to control the procedure therein.* The High Court had no power to order the transfer of an enquiry under s. 14 of the Extradition Act, XXI of 1879, from the Court of

ment to appoint another Magistrate to enable it to transfer the enquiry to that Magistrate if appointed. The High Court refused to direct by what procedure the Magistrate should be guided in the further conduct of the enquiry, as it did not possess any power to control or interfere in the conduct of an enquiry held under s. 14 of the Act. MOHUNT DEVA DASS, *In re* (1898) . . . . . 15 C. W. N. 736

EXTRADITION ACT (33 AND 34 VICT. C. 52)

———— how far applicable to India—

See CRIMINAL PROCEDURE CODE, 1898, s. 491 . . 15 C. W. N. 1053

EXTRADITION TREATY.

———— with the Hyderabad State—

See EXTRADITION ACT (XV OF 1903), ss. 7, 8 AND 8A.

I. L. R. 43 Bom. 310

EXTRADITION WARRANT.

———— by Resident in Nepal—

See REVISION I. L. R. 42 Calc. 793

EXTRAORDINARY ORIGINAL CIVIL JURISDICTION.

See PRACTICE I. L. R. 37 Calc. 853

EXTRINSIC EVIDENCE.

———— admissibility of—

See HINDU LAW—ADOPTION.

I. L. R. 38 Mad. 1105

EX-TRUSTEE.

———— suit by an, for reimbursement—

See LIMITATION ACT (XV OF 1877), SCH. II, ART. 120 . *I. L. R. 38 Mad. 260*

EYE-WITNESSES.

See PUBLIC PROSECUTOR.

I. L. R. 42 Calc. 423.

F

FABRICATING FALSE DOCUMENT.

———— *Kabala containing a false recital of marriage—Intent to use same in a judicial proceedings—Fraudulently executing a document—" Fraudulently," meaning of—Deprivation of property—Deception and injury to different persons—Penal Code (Act XLV of 1860), ss. 193 and 423.* When an accused person had unsuccessfully sought to obtain a woman in marriage and thereafter made and registered a *kobala* in her favour falsely reciting that he had married her, . plot of land in o acted in fur- r person; that, as this could under the circumstances be done only by judicial proceedings, his intention was to use the document with its false statements in a judicial proceeding, and thereby to mislead the Court, and that he was therefore, guilty of an offence under s. 193 of the Penal Code. *Held,* also, that he had a further intention to cause injury to her and her husband, and to support his own false claim to that status, and that he was guilty also under s. 423 of the same Code. The word "fraudulently" in s. 423 does not connote deprivation of property. It is not essential under the section that the person deceived or to be deceived should be the same as the person injured or intended to be injured. LEGAL REMEMBRANCER *v.* AHI LAL MANDAL (1921) . . I. L. R. 48 Calc. 911

———— *Kabuliat containing false recitals and purporting to be accepted by the landlords—Admissibility in evidence of kabuliat—Kabuliat, whether a document purporting to transfer or subject to any charge property or interest therein —Penal Code (Act XLV of 1860), ss. 192, 193, 423—Evidence Act (I of 1872), s. 13.* Although a kabuliat, when accepted, operates as a lease

FABRICATING FALSE DOCUMENT—*contd.*

for some purposes, it is not a document which purports to transfer or subject to any charge any property or any interest therein within the meaning of s. 423 of the Penal Code. *Raimani Dassi* v. *Mathura Mohan Dey, I. L. R. 39 Calc. 1016,* referred to. *Quære:* Whether ss. 192, 193 of the Code apply only where the fabricated evidence is legally admissible in the proceedings mentioned therein. *Empress* v. *Gauri Shankar, I. L. R. 6 All. 42, Emperor* v. *Chandra Kumar Missir, 2 C. L. J. 46, and Barada Kanta Sarkar* v *Emperor, 16 Cr. L. J. 620,* referred to. Where kabuliat, containing false recitals as to the true co-owners of certain disputed land and as to the possession of the executants, purported to have been accepted by all the alleged owners including the complainant and his brothers:—*Held,* that the statements in the document would be admissible in evidence against the latter, and that the kabuliat might also be admissible under s. 13 of the Evidence Act. As the questions of law arising in the case were not free from doubt, it was not one in which the Court would interfere with an order of acquittal on revision. MAHAMMAD KAZEM ALI *v.* JORADDI NASKAR (1919)
I. L. R. 46 Calc. 986

FACT.

——— findings of—

See SECOND APPEAL. **I. L. R. 38 Calc. 278**

See SPECIAL APPEAL. **I. L. R. 46 Calc. 189**

——— question of—

See WILL . . **I. L. R. 38 Calc. 355**

See APPEAL . **I. L. R. 43 Calc. 833**

——— *Fact, determination of question of—Creditability of witnesses—Trial Judge, opinion of, value of—Strong case established by plaintiff's evidence—Necessity of rebuttal by personal testimony of defendants—Failure of defendants to depose—Material witness not cited by plaintiff, because witness expected to be summoned by defendants—Costs—Successful appellant ordered to pay costs of unsuccessful—Set off against costs decreed.* The appellant sued to recover jewellery of the value of Rs. 20,000 which she alleged she had deposited with the respondents who were husband and wife for safe custody and produced receipts, purporting to be signed on their behalf by their son, which the respondents alleged were forgeries. The respondents denied the deposit and alleged that the only jewels they had received from the appellant had been deposited with them by way of security for two loans for Rs. 2,500 and Rs. 1,000 and they produced promissory notes for the amounts, purporting to be signed by the appellant which the appellant alleged were forgeries. The story told by the appellant was corroborated by witnesses of whose respectability and credit the Trial Judge had exceptional advantages of forming an opinion, and he held that the evidence established the appellant's case. *Held,* by the Judicial Committee, differing from the High Court, that the evidence adduced by the appellant if believed established a strong case which it was incumbent on the respondents to meet by personal denials. All they did however was to put against it the denial of the signature to the receipts by their son and evidence, not very satisfactory, on a collateral matter, *viz.,* the

FACT—*contd.*

execution of the promissory notes by the appellant. The judgment of the High Court was reversed and that of the Trial Judge restored. A material witness by whose hands, the appellant alleged, the jewellery had been sent to the respondents for deposit, and who was a relative of the respondents and had been a servant of the appellant but had previously to the suit left her service, was summoned by the respondents whose conduct showed that they were going to make her their witness. *Held,* that it was not unnatural that the appellant should, as she did, leave it to the respondents to call her. DURGA KUNWAR *v.* MATHURA KUNWAR (1911) . **15 C. W. N. 717**

FACTORY.

See BOMBAY CITY MUNICIPAL ACT, s. 390. **I. L. R. 34 Bom. 344**

FACTORIES ACT (XII OF 1911).

——— **Whether Magistrate can try a case when he has ordered enquiry—**

See CRIMINAL PROCEDURE CODE, s. 536. **I. L. R. 1 Lah. 35**

——— **ss. 29 (1) and 41 (*a*)**—*Manager of a textile factory—Employment of labour after prohibited hours—Liability of the manager to be punished separately for each workman so employed.* The accused, who was the manager of a textile mill, employed 18 workmen to work at his mill after 7 P.M. in violation of the provisions of s. 29 (*1*) of the Indian Factories Act, 1911. Eighteen prosecutions were started against the accused; and the accused was convicted and sentenced separately in each case. On appeal the Sessions Judge was of opinion that the employment of labour was a single offence under s. 41 (*a*) read with s. 29 (*1*) of the Indian Factories Act, 1911; he, therefore, confirmed the conviction and sentence passed on the accused only in one case and acquitted him in the remaining cases. The Government of Bombay having appealed against the orders of acquittal: *Held,* setting aside the orders of acquittal, that the accused was liable to be convicted and sentenced separately in each of the eighteen cases, for, s. 41 (*a*) of the Indian Factories Act, 1911, indicated that what was prohibited was the employment of any person or allowing any person to work contrary to the provisions of the Act. EMPEROR *v.* JOHNSON (1914) . . . . **I. L. R 44 Bom. 88**

——— The liability of the manager and owner is joint and several. EMPEROR *v.* VRIJVAL LABHADAS ILKINSONDAS **I. L. R. 45 Bom. 220**

FACTUM VALET.

See ADOPTION . **15 C. W. N. 524**

See HINDU LAW—MARRIAGE. **I. L. R. 35 All. 265**

——— **failure of justice—**

See SANCTION FOR PROSECUTION. ***I. L. R. 48 Calc. 867***

FAIR COMMENT.

See CONTEMPT OF COURT. **I. L. R. 45 Calc. 169**

See LIBEL . . **I. L. R. 37 Calc. 760**
I. L. R. 48 Calc. 304

FAIR TRIAL.

See SECURITY FOR GOOD BEHAVIOUR.
I. L. R. 41 Calc. 806

FALLOW LANDS.

See MADRAS ESTATES LAND ACT, 1908, ss. 4, 27, 73, 143.
I. L. R. 40 Mad. 640

FALSE CHARGES AND COMPLAINTS.

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), s. 195.
I. L. R. 38 Mad. 1044
s. 250 . I. L. R. 37 Bom. 376
ss. 250 AND 423 I. L. R. 38 Mad. 1091

See JURISDICTION OF CRIMINAL COURT.
I. L. R. 40 Calc. 360

See PENAL CODE (ACT XLV OF 1860), s. 211 . . I. L. R. 39 All. 715

FALSE DEFENCE.

——— in suit against vakil—

See PROFESSIONAL MISCONDUCT.
I. L. R. 40 Mad. 69

FALSE DOCUMENT.

See FABRICATING FALSE DOCUMENT.

See FORGERY . I. L. R. 38 Calc. 75
14 C. W. N. 1076

FALSE EVIDENCE.

See FALSE STATEMENT.
I. L. R. 38 Calc. 368

See "JUDICIAL PROCEEDING."
I. L. R. 37 Calc. 52

See PENAL CODE (ACT XLV OF 1860), s. 192 . . I. L. R. 40 All. 36

See THUMB-IMPRESSION.
I. L. R. 39 Calc. 348

... missibility of the statements on subsequent trial for giving false evidence—"Compelled to answer"—Evidence Act (I of 1872), s. 132, proviso. An incriminating statement in a deposition made by a party to the ... to questions ... and objected ... by his pleader, is not admissible against him on his subsequent trial for giving false evidence, he being in fact "compelled to answer" within the meaning of s. 132 of the Evidence Act. Such objection may be taken by counsel or pleader representing the party. *Thomas* v. *Newton, 1 Moo. and M. 48n*, and *Rex* v. *Adey, 1 Moo. and Rob. 91*, distinguished. *Queen* v. *Gopal Dass, I. L. R. 3 Mad. 271*, explained and distinguished. *Per* TEUNON, J. When such an objection has been taken and overruled, *if any objection or privilege* personal to the witness remains, it is still open to him to assert that objection or claim that privilege. EMPEROR *v.* PRAMATHA NATH BOSE (1910) . . . I. L. R. 37 Calc. 878

FALSE IMPRISONMENT.

——— *Preventing intending passenger of ferry boat to return from wharf through turnstile without payment—Reasonable condition.* The plaintiff with a view to take the defendant Company's ferry boat paid the usual charge of a penny on entering the defendant Company's wharf, then changed his mind and wanted to return through a turnstile provided by the Company for exit, but having refused to pay the penny which he was asked to do to be allowed to go through the turnstile, was by force prevented from going through it. There being no complaint of any excessive violence having been used: *Held*, that there was no false imprisonment, as the defendant Company was entitled to ... exit. The payment of one penny was a quite fair condition, and if the plaintiff did not choose to comply with it, the defendant was not bound to let him through. *Held*, further, that the question whether the attention of the plaintiff had been sufficiently drawn to the Company's notices saying that the fare must be paid was immaterial for the decision of the case. ARCHIBALD NUGENT ROBERTSON *v.* THE BALMAIN NEW FERRY COMPANY, LIMITED (1909) . 14 C. W. N. 410

FALSE INFORMATION—

See PENAL CODE, 1860, s. 182 . . I. L. R. 1 Lah. 410

See JURISDICTION OF CRIMINAL COURT.
I. L. R. 37 Calc. 250

See SANCTION FOR PROSECUTION.
I. L. R. 43 Calc. 1152
I. L. R. 44 Calc. 650

——— *Criminal Procedure Code, s. ... tion for— ... case.* A ... is entitled to have his case judicially determined before he is called upon to answer the charge of giving false information under s. 182 of the Indian Penal Code. ISSER *v.* KING-EMPEROR (1910)
14 C. W. N. 765

——— *Information to the police reported false—Subsequent petition to the Magistrate impugning the report and praying for trial—Complaint—Proper procedure—Reference of complaint to another Magistrate for inquiry and report, legality of—Power of latter to hold inquiry and direct prosecution of informant for offences under ss. 182 and 211 of the Penal Code —Jurisdiction of referring Magistrate to try such charges on the police report without previous disposal of the complaint—Discretion—Prejudice—Criminal Procedure Code (Act V of 1898), ss. 192, 200 to 203, 476, 537.* A petition impugning the police report, and praying that the accused be placed on trial is a "complaint" under the Criminal Procedure Code. ... or he should make it over to another Magistrate for disposal. The latter may then, after inquiry, make a proper order dismissing the complaint and pass an order under s. 476 of the Code. The

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FALSE INFORMATION—*contd.*

Code does not permit a Magistrate to refer a complaint to another Magistrate for inquiry and report, and the latter has no jurisdiction in such a case to pass an order under s. 476. Where in such a case the police have reported the information as false, and have asked for a prosecution, the Magistrate has jurisdiction to try the charge on the police report. *Queen-Empress* v. *Sham Lall, I. L. R. 14 Calc. 707,* referred to. There is no statutory provision requiring such petition to be finally disposed of as a complaint before a prosecution under s. 211 of the Penal Code commences. It is a matter of discretion, and the High Court will not, having regard to s. 537 of the Code, interfere with a conviction if the accused has not been prejudiced. GANGADHAR PRADHAN *v.* EMPEROR (1915)

I. L. R. 43 Calc. 173

———————— *Penal Code (Act XLV of 1860), ss. 201, 203—Circumstances of grave suspicion against the informer of having committed the crime—Insufficient evidence—Legality of conviction under ss. 201, 203 of the Penal Code.* Where notwithstanding circumstances of grave suspicion, it is impossible on the record, as it stands, to hold that a person is the murderer or one of the murderers, his conviction under ss. 201 and 203 of the Indian Penal Code is not vitiated by the existence of such circumstances. *In the matter of Behala Bibi, I. L. R. 6 Calc. 789,* and *Torap Ali* v. *Queen-Empress, I. L. R. 22 Calc. 638,* distinguished. *Sumanta Dhupi* v. *King-Emperor, 20 C. W. N. 166,* referred to. TETRINESSA *v.* EMPEROR (1918)

I. L. R. 46 Calc. 427

———————— *Police report in non-cognizable case, whether a complaint—Non-examination of complainant an irregularity not affecting jurisdiction—Informant called upon to show cause—Proceeding on showing cause—Inquiry not ultra vires—Reference of proceeding to subordinate Magistrate for disposal—Power to issue process thereafter without withdrawing the case—Criminal Procedure Code (Act V of 1898), ss. 4 (1) (h), 190 (1) (a), 200, 202 and 528.* A police report in a non-cognizable case is either a "complaint" under s. 4 (*h*) or a "police report" within s. 190 (*1*) (*b*) of the Criminal Procedure Code, and the Magistrate has jurisdiction to take cognizance of an offence under s. 211 of the Penal Code disclosed therein. *Harihar Roy* v. *Emperor, I. L. R. 46 Calc. 810 footnote, followed. Dilan Singh* v. *Emperor, I. L. R. 40 Calc. 360,* and *Gangadhar Pradhan* v. *Emperor I. L. R. 43 Calc. 173,* referred to. *King-Emperor* v. *Sada, I. L. R. 26 Bom. 150,* and *Chidambaram Pillai* v. *Emperor, I. L. R. 32 Mad. 3,* not followed. It is a complaint, the omission of the Magistrate to examine the police officer under s. 200 of the Code is a mere irregularity not going to the root of his jurisdiction. When an information to the police has been reported false, and the Magistrate receiving the report, orders the informant to show cause against his prosecution under s. 211 of the Penal Code, and makes over the proceeding on showing cause to a Subordinate Magistrate for hearing, and the informant produces witnesses, in support of the original charge, before the latter who examines him and reports the result of the enquiry :—*Held,* that the enquiry by which opportunity is given to substantiate the original charge is not one within the scope of s. 202 nor expressly sanctioned by the Code, but s warranted by the Full Bench ruling in *Queen-Empress* v. *Sham Lall, I. L. R. 14 Calc. 707,* and the Magistrate holding such enquiry does not act without jurisdiction. *Sarba Mahton* v. *Emperor, 17 C. W. N. 824,* and *Tayeb-ullah* v. *Emperor, I. L. R. 43 Calc. 1152,* referred to. *Semble:* That if the enquiry is *ultra vires,* the result is that it is null and void, but the Magistrate's jurisdiction to issue process on taking cognizance is not thereby affected. The order making over the proceeding, on cause shown, for disposal to another Magistrate, was not in form or effect under s. 202 of the Code, and the Magistrate who took cognizance had, therefore, jurisdiction to issue process, without a further order under s. 528, though such latter order might have been necessary if the proceeding made over had been one under s. 202. *Hari Charan Gorait* v. *Girish Chandra Sadhukhan, I. L. R. 38 Calc. 68,* referred to. BHAIRAB CHANDRA BARUA *v.* EMPEROR (1919)

I. L. R. 46 Calc. 807

FALSE MEASURE.

See PENAL CODE (ACT XLV OF 1860), s. 266 . . **I. L. R. 40 All. 84**

———————— **False returns—**

See SALE . **I. L. R. 48 Calc. 119**

FALSE STATEMENT.

———————— **before Committing Magistrate.**

See SANCTION FOR PROSECUTION.

I. L. R. 37 Calc. 618

———————— **in an application for mutation proceedings**—*Obligation to make a true declaration therein—Verification of application—Validity of Rules of the Board of Revenue, Chap. V, Rule (5)—Penal Code (Act XLV of 1860), ss. 191, 193—Land Registration Act (Beng. Act VII of 1876), ss. 42, 53, 88.* An applicant for mutation of names under s. 42 of the Bengal Land Registration Act is bound by Rule 5, Chapter V, of the Rules of the Board of Revenue, framed under s. 88 of the Act, to make a true declaration on the subject of his application, and is punishable under ss. 191 and 193 of the Penal Code for making false statements therein. *Debi Saran Misser* v. *Emperor, 11 C. W. N. 470,* referred to. *Queen-Empress* v. *Appayya, I. L. R. 14 Mad. 484, Durga Das Rukhit* v. *Queen-Empress, I. L. R. 27 Calc. 820, Ezra* v. *Secretary of State, I. L. R. 30 Calc. 36,* and *British India Steam Navigation Co.* v. *Secretary of State for India, I. L. R. 38 Calc. 230,* distinguished. Rules passed by the Board of Revenue under s. 88 of the Act, provided they refer to the procedure as to presentation, admission and verification of an application for registration under Part IV of the Act, and as to inquiries under s. 52 thereof, have the force of law. NALOO PATRA *v.* EMPEROR (1910) . . **I. L. R. 38 Calc. 368**

FALSE SUIT.

See CRIMINAL PROCEDURE CODE, s. 537

I. L. R. 42 All. 12

FALSIFICATION OF ACCOUNTS.

See CHARGE . **I. L. R. 40 Calc. 318**

FAMILY ARRANGEMENTS AND SETTLEMENTS.

See CONTRACT . I. L. R. 38 Mad. 788

See EVIDENCE . I. L. R. 35 All. 502

See HINDU LAW—ADOPTION.
I. L. R. 40 Bom. 668
24 C. W. N 274

See REGISTRATION ACT (XVI OF 1908), ss. 17, 49. . I. L. R. 38 All. 366
I. L. R. 43 All. 1

——— **Will creating a division**—When a document styled a Will effects to divide family property in presenti among the sons who acted upon it, it is an effective family arrangement even though one of the parties gets a bigger share than the other. BRIJRAJ SINGH *v.* SHEODAN SINGH . . . I. L. R. 35 All. 337

istence of a
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ade. C. HARTI
v. PARMAL . . . I. L. R. 41 All. 611

——— **Limited owner**—As the creation of the ijara and darijara by a Hindu widow in respect of her husband's estate is part of a general family arrangement for the benefit of the estate and injured no one and as the conduct of the reversioners raised a presumption that they believed the arrangement to have been made in good faith and necessity according to *Hindu law, they could* not question it. BIJOY GOPAL MUKERJEE *v.* GIRINDRA NATH MUKERJEE. I. L. R. 41 Calc. 793

——— **Not Binding**—*Claim to property to which the claimant must have known he had no title—Relinquishment to save litigation—Such relinquishment not binding on reversioners.* One *D. R.* upon the death of his wife, laid claim to certain property which had been the property of the wife's father and had been given to the wife by her mother. The mother and the surviving sister of the wife, in order to avoid litigation, relinquished *a substantial portion of the property to D. R. Held,* on a suit by the reversioners entitled to succeed to the property upon the death of the survivor of the two ladies, that the relinquishment made by them could not properly be called a family settlement and was not valid as against the reversioners who were minors at the time when the so-called family settlement was made. *Bihari Lal* v. *Daud Husain, I. L. R. 35 All. 240,* and *Hiran Bibi* v. *Sohan Bibi, 18 C.W. N. 929,* referred to. HIMMAT BAHADUR *v.* DHANPAT RAI (1916) . . . . I. L. R. 38 All. 335

—In the absence of proof of mistake, inequality of position, undue influence, coercion, fraud or any similar ground, a partition of family arrangement made in settlement of a disputed or doubtful claim is a valid and binding arrangement which the parties thereto cannot deny, ignore or resile from. If the parties have settled a dispute, such settlement will not be set aside on the ground that it gave to one of them more than what he ought possibly to have recovered if he had taken the judgment of the Court upon the matters in difference between them. The Courts will not be disposed to scan with much nicety the *quantum* of consideration. *There is nothing in this doc*trine of family arrangements opposed to the general principle that when it is sought to bind a minor by an agreement entered into on his behalf, it must be shown that the agreement was for the benefit of the minor. If improper advantage has been taken of the minor's position, a family arrangement can be set aside on the ground of undue influence or inequality of position or one of the other grounds which would vitiate such an arrangement in the case of adults. But when there is no defect of this nature, the settlement of a doubtful claim is of as much advantage to a minor as to an adult, and where a genuine dispute has been fairly settled, the dispute cannot be re-opened solely on the ground that one of the parties to the family arrangement was a minor. KERAMAT-ULLAH MEA *v.* KERAMATULLAH MEAH (1918) . . . . 23 C. W. N. 118

——— **Estoppel**—A Hindu died in 1856 leaving a widow and 3 daughters. Under an arrangement in 1875 the widow divided the whole of the property between her 3 daughters and a grandson who took possession and there was mutation of names and subsequently the daughters dealt with their allotted parts as their own property. In 1884 one of the daughters sold a portion of her share to the defendant. She died in 1912 and in 1913 her surviving sister brought a suit for recovery of possession thereof claiming *that in consequence of the death of her mother* and sisters she had become sole heir of her father. *Held,* that Plaintiff was bound by her own agreement and in view of the long period that had *elapsed she could not be allowed to repudiate it.* MUSSAMMAT HARDEE *v.* BAGWAN SINGH (1920)
24 C. W. N. 105

FAMILY CUSTOM.

See CUSTOM. I. L. R. 45 Calc. 450 & 835

FAMILY FIRM.

——— *Mortgage by manager—Suit upon the mortgage—Dismissal of the suit on the ground that the estate was not legally represented by the mortgagor on the date of mortgage—Reversal of the decree—Claim based upon a mortgage purporting to bind the partners in the firm and the mortgaged property.* One Kavasji Mancherji had three sons, Ardeshir, Phirojsha and Eruchsha. They constituted a family firm known as Kavasji Mancherji *and Sons. After the death of Kavasji* Ardeshir, in his capacity as the manager of the said firn
the 17th
attested
nesses.
purpose of paying off a judgment-creditor who had attached one of the family properties. The plaintiff having brought a suit for the recovery of the mortgage-debt, the first Court dismissed the suit on the ground that the estate of Kavasji was not legally represented by Ardeshir at the time of the mortgage. On appeal by the plaintiff: *Held,* reversing the decree, that the mortgage debt could not be a debt of Kavasji because it was incurred after his death, therefore, it would not give rise to any claim against the estate of Kavasji. The claim was based upon a mortgage which purported to bind the partners in the firm of Kavasji Mancherji and Sons and a certain property which was specified in the mortgage. The *interest which was intended to be conveyed in*

FAMILY FIRM—*contd.*

the mortgaged property was the interest of Ardeshir, Phirojsha and Eruchsha. AHMEDABAD UNITED PRINTING AND GENERAL AGENCY COMPANY, LD. *v.* ARDESHIR KAVASJI (1912)
I. L. R. 36 Bom. 515

FAMILY NECESSITY.

See HINDU LAW.

FAMILY PROPERTY.

See HINDU LAW.

———— Sale of—

See HINDU LAW—DEBT.
I. L. R. 48 Calc. 341

———— *Division of family property under an award—House of residence—Prohibition of sale by a co-sharer of his portion to an outsider—Pre-emption—Construction—Court sale—Prohibition not effective.* An award under which family property was divided among co-sharers provided that in case of a sale by any of the co-sharers of his portion of the house of residence he should sell it to his co-sharer for a certain sum and that he should not sell it to an outsider until the expiration of two months from the date of a notice in writing saying that they (co-sharers) were not willing to buy it. Subsequently a portion of the house belonging to one co-sharer having been sold in execution of a decree against him, it was purchased by an outsider. The sons of one of the other co-sharers, thereupon ,having brought a suit for a declaration that the Court-sale was not binding upon them: *Held,* that the term of pre-emption in the award was contemplated to attach to sales made privately and willingly and not to attachment and sales *in invitum* the judgment-debtor. VITHAL NARAYAN *v.* MARUTI NARAYAN (1910) . . . I. L. R. 34 Bom. 567

FAMILY PURPOSE.

See MORTGAGE . I. L. R. 40 Calc. 342

FAMILY SETTLEMENT.

See EJECTMENT. . 6 Pat. L. J. 604

See REGISTRATION ACT 1908, ss. 17 AND 49 . . I. L. R. 38 All. 366

See HINDU LAW, FAMILY SETTLEMENT.

———— *One D. R. on the death of his wife laid claim to certain property which had belonged to the wife's father and given to the wife by her mother.* The mother and surviving sister of the wife to avoid litigation relinquished a substantial portion of the property to D. R. *Held,* on a suit by the Reversioners on the death of the two ladies that the relinquishment could not be called a Family Settlement and was not valid against the Reversioners who were minors. HIMMAT BAHADUR *v.* DHANPAT RAI . . I. L. R. 38 All. 335

FAMILY RECORD.

See EVIDENCE . L. R. 43 I. A. 256

FARD REWAJ BHAOLI.

See BENGAL TENANCY ACT, 1885, s. 103B . 2 Pat. L. J. 187

FARIAHS.

See JUTE . . I. L. R. 44 Calc. 98

FATAL ACCIDENTS ACT (XIII OF 1855).

See RAILWAY COMPANY.
I. L. R. 41 All. 488

FATHER.

See HINDU LAW—MORTGAGE.
I. L. R. 42 Calc. 1068

———— contract to sell by—

See HINDU LAW—ALIENATION.
I. L. R. 38 Mad. 1187

FATHER'S BROTHER'S SON.

See HINDU LAW—SUCCESSION.
I. L. R. 39 Calc. 319

FATHER'S DEBTS.

See HINDU LAW—JOINT FAMILY.

FATHER'S ESTATE.

———— possession of, daughter's suit for—

See CIVIL PROCEDURE CODE (ACT X OF 1908), s. 2, CL. (11), O. XXII, R. 1.
I. L. R. 39 Mad. 382

FATHER'S HEIRS.

———— right of, to continue suit—

See CIVIL PROCEDURE (ACT V OF 1908), s. 2, CL. (11), O. XXII, R. 1.
I. L. R. 39 Mad. 38

FATHER'S LIABILITY.

See HINDU LAW—SURETY.
I. L. R. 39 Calc. 843

FATHER'S SISTER'S SON.

See HINDU LAW—SUCCESSION.
I. L. R. 37 Calc. 214

FAZENDARI TENURE.

———— *Sub-lease by a Fazendar.* The plaintiff, claiming under the original Fazendar, sublet certain land to the defendant's predecessor. The agreement, after reciting (*inter alia*) that the sub-tenant took the land on Fazendari tenure, continued:—"I shall live there till the Wadi remains in your possession. If the Wadi ceases to be in your possession, and if the land be required, you are to pay me the valuation of the said house whatever the same may come to:" *Held,* on the facts, that, on the true construction of the lease, the plaintiff was not entitled to eject the defendants. The meaning of the word 'Fazendari' when it occurs in a written document embodying the contract between the parties, considered, and the remarks of Farran J., in *Parmanadas Jivandas* v. *Ardeshir Framji, I. L. R. 39 Bom. 320* note, approved. YESHWANT VISHNU *v.* KESHAVRAO BHAIJI (1914)
I. L. R. 39 Bom. 316

FEE CERTIFICATE.

———— *General Rules (Civil) of the High Court, 1911, Chapter XXI, r. 1—Date for filing certificate—Civil Procedure Code (1908), O. XVIII, r. 2.* *Held* on a construction of Chap. XXI, r. 1, cl. (*1*), of the general rules (Civil) of the High Court, 1911, that a fee certificate which is not filed on or before the day fixed for the hearing of the suit referred to in Order XVIII, r. 2 (*1*), of the Code of Civil Procedure is not within time and cannot be taken into consideration in assessing the costs of the suit. RAM NATH *v.* HUB NATH . . . I. L. R. 42 All. 542

FEEDING THE ESTOPPEL.

———— doctrine of—

See BENAMI TRANSACTION.
I. L. R. 46 Calc. 566

FEES.

———— return of—

See BARRISTER . **I. L. R. 44 Calc. 741**

FEMALES.

———— exclusion of—

See DARBHANGA RAJ.
I. L. R. 42 Calc. 582

———— right of, to inherit religious office—

See HINDU LAW—SUCCESSION.
I. L. R. 40 Mad. 105

———— right of, to representation—

See CUSTOM (SUCCESSION).
I. L. R. 2 Lah. 383

FEMALE HEIRS.

See HINDU LAW—STRIDHAN.
I. L. R. 43 Calc. 64

———— exclusion of—

See HINDU LAW—INHERITANCE.
I. L. R. 38 Calc. 603

FEMALE MEMBERS.

See MORTGAGE . **I. L. R. 40 Calc. 378**

FERRIES ACT.

———— **IV of 1878**—s 522—*Collection of excessive tolls.* A servant of the Lessee of a Ferry who makes unauthorised tolls is liable but not the lessee if he took no part in it. EMPEROR *v.* BEHARI LAL . . . **I. L. R. 34 All. 146**

to ask the Court to restrain any unauthorised intrusion of his property committed even by Government. There is a clear distinction between a public ferry under s. 6 and a subsidiary ferry under s. 11. The latter is a private ferry establishable by the District Magistrate but his powers are limited and he cannot create one beyond 2 miles of the Ghât of a public ferry. PARDIP SINGH *v.* THE SECRETARY OF STATE FOR INDIA . . . . . **5 Pat. L. J. 500**

FERRY.

See GENERAL CLAUSES ACT (X OF 1897), s. 3 (25) . **I. L. R. 35 All. 156**

See NORTHERN INDIA FERRIES ACT (XVII OF 1878), s. 22.
I. L. R. 34 All. 146

See RENT . . **14 C. W. N. 994**

See SPECIAL CONSTABLES.
I. L. R. 43 Calc. 277

———— *Private and public ferries—Maintaining a private ferry within two miles from the limits of a public ferry—Limits*

by the Local Government under s. 6 of the Bengal Ferries Act, 1885, a conviction under ss. 16 and

FERRY—*contd.*

28 thereof for maintaining a private ferry, without sanction, to or from any point within two miles of the public ferry, is bad. MAHARAJ MANDAL *v.* POKAR SINGH (1910)
I. L. R. 37 Calc. 543

FESTIVAL.

———— right to perform, in a Temple—

See HINDU LAW—CUSTOM
I. L. R. 40 Mad. 1108

FICTITIOUS ENTRY.

See REGISTRATION
I. L. R. 41 Calc. 972

FICTITIOUS INCLUSION OF PROPERTY.

See MORTGAGE **I. L. R. 48 Calc. 509**

FICTITIOUS TITLE.

See EX-PARTE DECREE.
I. L. R. 45 Calc. 920

FIDUCIARY RELATIONSHIP.

See BANKER AND CUSTOMER.
I. L. R. 34 Mad. 128

See GIFT . **I. L. R. 39 Calc. 933**

See SHEBAIT . . **26 C. W. N. 133**

———— Debtor and creditor—*Direction by creditor to debtor—How far such direction can create fiduciary relationship between creditor and debtor.* A customer who had certain amount standing to his credit in a Bank, gave directions to the Bank to utilise the money for a certain purpose and the officers of the Bank, when the customer called at the Bank, informed him that his instructions would be carried out in due course. The Bank became insolvent before the directions were so carried out. On a motion by the creditor to have his amount paid in full: *Held, per* MUNRO, *J.*, that, by virtue of the direction by the customer, the Bank held the money for a specific purpose and that a fiduciary relationship was established between the customer and the Bank. The customer was therefore entitled to be paid his money in full. *Per* ABDUR RAHIM, *J.*—The direction by the customer did not alter the relation of creditor and debtor between the customer and the Bank into a fiduciary relationship. Such relationship could not be created unless the debtor by some unequivocal act, shows that he had changed his position into that of a bailee. The mere promise to carry out the customer's directions, without doing anything to appropriate the money, is not sufficient. The customer was only entitled to prove for his debt. OFFICIAL ASSIGNEE OF MADRAS *v.* LUTTRIAN (1919) . . . **I. L. R. 33 Mad. 145**

———— *When banker holds money as agent—Banker holding money as agent not a debtor.* O, who owed certain money to *M.C.* sent a cheque to Bank *A* for the amount asking *A* to place the amount to the credit of *M.C.*, who at the time had no account with *A*. *M.C.* was informed by *A* that the amount was placed to her credit. *M.C.*, on the 5th October, asked *A* to send her the amount and *A* sent *M.C.* a form of receipt to be signed by her. *M.C.* signed the receipt and sent it to *A*, who received it before the 20th when *A* suspended payment. *A* applied to the Court for the relief of insolvent debtors and the estate of *A* was vested in the

FIDUCIARY RELATIONSHIP—*contd.*

Official Assignee. On a motion by *M.C.* claiming payment :—*Held,* that the relationship of debtor and creditor did not exist between *A* and *M.C.* and that the former held the money as agent of the latter when payment was suspended. *Per* MUNRO, *J.*—As the receipt and demand for payment reached *A* before payment was suspended, the result was the same as if *M.C.* attended in person and demanded payment. On *A*'s failure to remit the money, which it was *A*'s duty to do, *A* held the money in a fiduciary capacity. *Per* ABDUR RAHIM, *J.*—As *A* received the money for a particular purpose and, as there was no account between *A* and *M.C.*, *A* had no right to appropriate the money and did not purport to do so. Even supposing the case were otherwise, the subsequent communication by *A* to *M.C.* that he held the money for *M.C.* in accordance with the instructions received was an act of appropriation, sufficient to show *A*'s consent to hold the money in a fiduciary capacity. *In re Hallett's Estate, L. R. 13 Ch. D. 696,* referred to. OFFICIAL ASSIGNEE OF MADRAS *v.* THE ORIENTAL GOVERNMENT SECURITY LIFE ASSURANCE COMPANY (1909) . **I. L. R. 33 Mad. 150**

———— *Person in representative capacity, not strictly a trustee, if may delegate his authority.* "Fiduciary duties cannot be made the subject of delegation," so that where property was in the hands of one P., charged with expenses necessary for certain religious and charitable purposes, and P.'s son purporting to act as P's attorney executed a mourasi mokurari pattah: it was *held* to be *ultra vires,* as even if P was not a trustee his position was a representative one. BONNERJI *v.* SITANATH DAS

26 C. W. N. 236

FINAL DECREE.

See APPEAL . **I. L. R. 48 Calc. 1036**

See KUMAUN RULES, 1894, No. 17.
I. L. R. 42 All. 642

———— expenses incurred in the—

See TRUSTEES OF A TEMPLE.
I. L. R. 39 Mad. 456

FINAL DISCHARGE.

See PROVINCIAL INSOLVENCY ACT (III OF 1907), ss. 4, 5, 6, ETC.
I. L. R. 36 Mad. 402

FINAL ORDER.

See CRIMINAL PROCEDURE CODE, s. 145.
25 C. W. N. 1007

See "COURT," MEANING OF.
I. L. R. 37 Calc. 642

FINDING OF FACT.

See APPELLATE COURT.
I. L. R. 39 Bom. 386

See DOCUMENTARY EVIDENCE.
25 C. W. N. 881

See EVIDENCE ACT (I OF 1872), s. 32 (5)
I. L. R. 39 All. 426

See PRE-EMPTION. **I. L. R. 37 All. 524**

See REGISTRATION ACT, 1908, s. 32.
25 C. W. N. 73

See REMAND . **I. L. R. 42 Calc. 888**

See SECOND APPEAL.
I. L. R. 38 All. 122

FINDING OF FACT—*contd.*

See SPECIAL APPEAL.
I. L. R. 46 Calc. 189

See SPECIFIC RELIEF ACT (I OF 1877), s. 39 . **I. L. R. 39 Bom. 149**

See TRANSFER OF PROPERTY ACT (IV OF 1882), s. 41 . **I. L. R. 36 All. 308**

———— *Finding, whether of fact or law, difficulty in determining—Exclusion of joint family, finding as to, if may be finding of law.* It is not always an easy matter to separate a finding of fact from a question of law. It may often be open to argument that the materials which have been accepted by one Court as establishing a certain conclusion were not in themselves sufficient for its support, if their legal weight had been properly measured and ascertained. A question of what constitutes exclusion from a joint estate may well, in many cases, be a question of law: *Held,* however, in this case, that the concurrent findings of the lower Courts were findings of fact and there were no reasons for reversing their findings. SHYAMANANDA DAS PAHARAJ *v.* RAM KANTA DAS (1917) . . **21 C. W. N. 1142**

FINDINGS.

———— repugnancy in—

See DACOITY . **I. L. R. 41 Calc. 350**

FINE.

See CALCUTTA MUNICIPAL ACT, ss. 374, 376 . . . **15 C. W. N. 906**

See UNITED PROVINCES MUNICIPALITIES ACT (II OF 1916), s. 307.
I. L. R. 40 All. 569

———— daily fine—

See ENCROACHMENT.
I. L. R. 37 Calc. 671

FINE ARTS COPY RIGHT ACT OF 1862 (25 & 26 VICT., C. 68).

———— Extension of the Act to British Dominions—

See CONTRACT ACT (IX OF 1872), s. 23.
I. L. R. 44 Bom. 720

FINGER IMPRESSION.

See JURY, TRIAL BY.
I. L. R. 46 Calc. 635

FIRE-ARMS.

———— parts of—

See MISJOINDER OF CHARGES.
I. L. R. 42 Calc. 1153

FIRE INSURANCE.

See INSURANCE.
I. L. R. 34 Bom. 1
I. L. R. 37 Bom. 183
I. L. R. 41 Calc. 581

FIRM.

See FOREIGN JUDGMENT.
I. L. R. 36 Mad. 414

FIRST CHARGE.

See PUTNI TENURE.
I. L. R. 37 Calc. 747

See RATES AND TAXES.
I. L. R. 42 Calc. 625

FIRST-CLASS MAGISTRATE.

See PERJURY . **I. L. R. 43 Calc. 542**

FIRST INFORMATION.

See CRIMINAL PROCEDURE CODE, s. 154. **15 C. W. N. 198**

See CRIMINAL PROCEEDINGS. **I. L. R. 37 Calc. 49**

See EVIDENCE ACT 1872, s. 27. **25 C. W. N. 788**

FIRST MORTGAGE.

See MORTGAGE . **I. L. R. 37 Calc. 907**

FISH.

——— **capture of, in irrigation tank—**

See THEFT . . **I. L. R. 36 Mad. 472**

——— **Sale of—**

See NUISANCE . **I. L. R. 48 Calc. 1012**

FISHERY.

See CRIMINAL PROCEDURE CODE, s. 146. **15 C. W. N. 163**

See JALKAR.

See PRIVATE FISHING ACT

——— **presumption from—**

See NAVIGABLE RIVER. **I. L. R. 46 Calc. 390**

——— *Right to fishery in tidal and navigable river, how acquired—Limitation Act (XV of 1877), s. 26.* To establish an exclusive right of fishery in a tidal and navigable river, it is necessary to prove that the plaintiff's user was in assertion of a right other and higher than the general right of the public to fish. *Baban Mayacha* v. *Nagu Shravucha, I. L. R. 2 Bom. 19,* and *Narayya* v. *Sami, I. L. R. 12 Mad. 43,* relied on. *Quære:* Whether exclusive right of fishery in such a river can be acquired by proof of mere enjoyment in the manner provided in s. 26 of the Limitation Act of 1877, without a grant from the Crown. *Arzan* v. *Rakhal Chunder Roy Chowdhry, I. L. R. 10 Calc. 214,* referred to. *Veresa* v. *Tatayya, I. L. R. 8 Mad. 467,* not followed. *Secretary of State for India* v. *Mathurabhai, I. L. R 14 Bom. 213,* and *Nityahari Roy* v. *Dunne, I. L. R. 18 Calc. 652,* approved. ABHOY CHARAN JALIA v. DWARKA NATH MAHTO (1911) **I. L. R. 39 Calc. 53** **15 C. W. N. 972**

——— *Small rivers, tidal but not navigable, right of fishery in.* In Bengal the rights of fishery in small rivers which are tidal but not navigable, belong to the proprietors through whose estates they run. Navigability does not necessarily follow tidality, and the two terms cannot be regarded as equivalent. SRIMANTU BAGDI v. BHAGWAN JALIA (1913) **17 C. W. N. 1108**

——— *Right of jalkar or fishery in tidal navigable river in Bengal—River forming new channel not gradually but suddenly —Right of grantee of jalkar to follow the river where the subjacent soil does not belong to his grantor, the Crown, but to a riparian proprietor—Grant of rights by the Crown—Proof of title when no actual grant is in existence—Jalkar in existence from before the Permanent Settlement—English law of*

FISHERY—*contd.*

waters—Alluvion—Regulation XI of 1825. The appellants claimed as proprietors of a several jalkar or fishery in certain tidal navigable waters in Eastern Bengal a decree for possession of an exclusive fishery in a portion of a suddenly and newly formed river channel as falling within the upstream and downstream limits of their several fishery, and alleged that the respondents were trespassers when they fished in it. The respondents pleaded their right to fish in a portion of the channel, of which they owned both the bed and the banks, as owners of the subjacent soil. There was no actual grant proved but the appellants produced documentary evidence which showed the existence of the jalkar as appertaining to their zamindari from before the Permanent Settlement: *Held,* that original grants of jalkar prior to the Permanent Settlement are but rarely forthcoming, and resort must be had to secondary evidence of them, or to the inference of a legal origin to be drawn from long user. *Horidas Mal* v. *Mahomed Jaki, I. L. R. 11 Calc. 434,* per GARTH, C. J.; and the rule in *Fitzwalter's Case, 3 Keble 242,* that the evidence of a Government grant of an exclusive fishery in navigable waters ought to be conclusive and clear, followed. *Held,* in the present case, so far as such evidence can now be expected to be forthcoming as to particular grants more than a century old, that the evidence was sufficient to show that the competent authority—the Government of India in right of the Crown—did actually grant to the appellants' predecessors in title, or settle with them so as in effect to grant a jalkar right of several fishery in certain of the waters of the Ganges system in this suit: *Held,* also, (following a numerous body of decisions in the Indian Courts) that it must now be taken as decided in Bengal that the Government grantee of a jalkar right can follow the shifting river for the enjoyment of his exclusive fishery so long as the waters form part of the river system within the upstream and downstream limits of his grant, whether the Government owns the soil subjacent to such waters as being the long-established bed, or whether the soil is still in a riparian proprietor as being the site of the river's recent encroachment. The whole series of decisions in Bengal on the subject from 1807 to 1905 reviewed and discussed. The English common law admittedly does not apply to the mofussil of India, yet the Indian Courts have in many respects followed the English law of waters: and their Lordships have given careful consideration to the arguments that principles established under and for English conditions afford a sound guide to the rules which should be enforced in India; though they would in any case be slow to disturb decisions by which rules have been established for Bengal governing exclusive and important rights such as rights of jalkar, and unless they could be shown to be manifestly unjust or flagrantly inexpedient, their Lordships would not supersede them. The analogous rule in the United Kingdom connecting the subject's right to an exclusive fishery in tidal navigable waters with the limits of the Crown's ownership of the subjacent soil, is the result of conditions partly historical and partly geographical which have no counterpart in Lower Bengal, where above all the difference, indeed the contrast, of physical conditions is capital. By no analogy can rules applicable to the small, slow-running and comparatively un-

FISHERY—*concld.*

changing rivers of England be profitably applied to such differing conditions. In the case of alluvion as applied to rights of jalkar, and the argument that the right to follow the river ought to be limited to cases where the river encroachments were gradual, and should not be extended to an irruption as sudden and rapid as was the formation of the new channel in the respondents' lands, the Indian law, doubtless guided by local physical conditions has adopted in Regulation XI of 1825, ss. 1 and 4, a rule varying somewhat from the rule established in England, and the analogy of the English law can hardly be called in aid when Indian legislation has thus an established and different rule on the same subject. As to the Indian rule working injustice in that a landowner not only loses the use of his land when the river overflows it, but also the right to fish over his own acres in order that another may unmeritoriously fish in his place, which cannot occur under the English rule, there is no such proof that one rule is better than the other as would even approach the conclusion that the rule established in India should be set aside. SRINATH ROY *v.* DINABANDHU SEN (1914)

L. R. 41 I. A. 221
I. L. R. 42 Calc. 489

——— *Right of owner of fishery in river to follow it when it changes its course.* The solution of the question whether the owner of a fishery in a river is entitled to follow it when it changes its course depends mainly on whether or not the invading river has lost its identity. It is impossible to prescribe any hard and fast rule for the purpose of ascertaining the conditions in which the river may be said to have lost its identity. The decision of the Privy Council in *Srinath Roy* v. *Dinabandhu Sen, I. L. R. 42 Calc. 489 : s.c. 18 C. W. N. 1217, is* confined to cases where the river made for itself a new channel where none existed. SARADA PRASAD RAY CHAUDHURY *v.* MUHAMAD YUSUF (1916)

21 C. W. N. 1007

FISHING LEASE.

——— *for 9 years void for want of registration—Removal of fish under authority of lease, if wrongful—License—Co-sharer —Transfer of Property Act (IV of 1882), s. 107.* Where in a suit by one co-owner against another for damages for wrongful removal of fish from a tank, the defendant's plea was that he had been put in possession of the tank with the right of fishery therein for a period of nine years under an arrangement with his co-sharers and he proved that he had removed the fish under such authorisation: *Held,* that the arrangement proved was a sufficient answer to the suit, irrespective of any rights the defendant might have as a co-sharer, even if as a lease it was void under the provisions of the Transfer of Property Act. BEHARY LAL NANDY *v.* KEDAR NATH NEBU (1915) . . . **19 C. W. N. 872**

FITNESS OF SURETY.

See SURETY . **I. L. R. 41 Calc. 764**
I. L. R. 42 Calc. 706
I. L. R. 43 Calc. 1024
I. L. R. 44 Calc. 737

FIXED DEPOSIT.

See CHARGE . **I. L. R. 36 All. 507**

FIXED-RATE HOLDING.

See AGRA TENANCY ACT (II OF 1901), s. 79 . . **I. L. R. 39 All. 455**

See ESTOPPEL . **I. L. R. 34 All. 538**

See MORTGAGE . **I. L. R. 39 All. 539**

FIXED-RATE TENANCY.

See AGRA TENANCY ACT (II OF 1901), s. 9 . . **I. L. R. 34 All. 285**

See LANDLORD AND TENANT. **I. L. R. 34 All. 604**

See TRANSFER OF PROPERTY ACT (IV OF 1882), s. 91 . **I. L. R. 33 All. 111**

FIXED RENT.

See KABULIAT, CONSTRUCTION OF. **I. L. R. 37 Calc. 626**

FIXTURE.

See ADMINISTRATION. **I. L. R. 45 Calc. 653**

See CALCUTTA MUNICIPAL ACT, s. 341. **15 C. W. N. 730**

——— doctrine of—

See LANDLORD AND TENANT. **I. L. R. 37 Calc. 815**

——— English Law of—

See LAND REVENUE CODE (BOM. ACT V OF 1879), s. 83. **I. L. R. 38 Bom. 716**

——— notice to remove—

See CALCUTTA MUNICIPAL ACT (BENGAL III OF 1899), ss. 341 (1), etc. **I. L. R. 37 Calc. 384**

——— removal of—

See COMPENSATION. **I. L. R. 44 Calc. 87**

——— *Crop grown on another person's land, title if in owner of land—Suit by owner to recover value of crop cut and taken away —Fixtures, English law of if applies in this country.* When after purchasing a holding at an execution sale and taking delivery of possession thereof through Court, the plaintiff suffered the tenant to grow crop on the land: *Held,* that the plaintiff could not sue for recovery of the value of the crop cut and taken by another. The crop did not become the plaintiff's as soon as it was grown merely because the plaintiff had acquired ownership of the land. *Mofiz Sheikh* v. *Rasik Lal, I. L. R. 37 Calc. 815,* distinguished. *Lep Singh* v. *Nimar Khasia, I. L. R. 21 Calc. 244,* referred to. PRIYA NATH PAL *v.* KAMINI DASI (1912)

16 C. W. N. 1101

——— *Projections—Tin sheets attached to a shop by hinges and supported on movable props—Necessity of notice of removal—Limitation of period of prosecution in cases of obstructions to, or projections over, a public street—Calcutta Municipal Act (Beng. III of 1899), ss. 341 and 631, Bye-law (2), paragraph 3, made under s. 559 (18).* Sheets of tin attached to a shop by hinges and supported by movable props, so as to form a verandah over the street, and which hang vertically when the props are taken away, are not so attached as to become a part of the shop, and are not, therefore, fixtures within s. 341 of the Calcutta Municipal Act (Beng. III of 1899), requiring notice of removal

FIXTURE—*contd.*

thereunder. The period of limitation, under s. 631 of the Act, in the case of unauthorized obstructions to, or projections over, the public street, run from the date when they are first made, and not from the last date on which they were in existence. Where certain tin sheets, alleged to amount to such obstruction or projection, were put up more than *three months before the filing of the complaint,* the prosecution was *held* to have become barred. NARAYAN KISSEN SEN *v.* CORPORATION OF CALCUTTA (1920) . **I. L. R. 48 Calc. 602**

FOOTINGS.

———————— *Trespass—Survey Map, evidentiary value of—Mandatory Injunction—Specific Relief Act (I of 1877), Chap. X—Presumption.* The existence of footings to a wall, in the circumstances of the case, raised the presumption that the land covering such footings belonged to the owner of the wall, to which they appertained. Where a wall was constructed by the defendant on the land covering plaintiff's footings, and after its completion, a suit was brought by the plaintiff for trespass, the plaintiff not having been guilty of delay or acquiescence: *Held,* that the proper remedy was by way of mandatory injunction ordering the demolition of the defendant's wall. ABDUL HOSSAIN *v.* RAM CHARAN LAW (1911)
I. L. R. 38 Calc. 687

FORCE.

———— **use of—**

See BAILIFF . **I. L. R. 42 Calc. 313**

FORCIBLE EJECTMENT.

See RAILWAY PASSENGER.
I. L. R. 44 Calc. 279

FORCE MAJEURE.

See CONTRACT ACT (IX OF 1872), s. 56.
I. L. R. 40 Bom. 301

FORECLOSURE.

See APPEAL . **I. L. R. 41 Calc. 418**

See MORTGAGE . **I. L. R. 37 Calc. 796**
I. L. R. 39 Calc. 828

See MORTGAGE BY CONDITIONAL SALE.
I. L. R. 36 All. 327

See MORTGAGE—FORECLOSURE.

See REGULATION No. XVII OF 1806, s. 8 . . **I. L. R. 40 All. 387**

———— **right to decree for—**

See TITLE . **I. L. R. 37 Calc. 239**

———— **suit for—**

See CIVIL PROCEDURE CODE, 1908, s. 11.
I. L. R. 36 Bom. 548

See COURT FEES ACT (VII OF 1870), s. 7 (ix), SCH. I, ART. (*1*).
I. L. R. 36 All. 40

See LIMITATION ACT (IX OF 1908), s. 20.
I. L. R. 35 All. 378

See MORTGAGE.
I. L. R. 48 Calc. 22

FOREIGN BILLS.

See BILLS OF EXCHANGE.
I. L. R. 46 Calc. 584

FOREIGN COURT.

See FOREIGN DECREE.

See FOREIGN—JUDGMENT.

See MEMONS . **I. L. R. 43 Bom. 647**

———— **jurisdiction of—**

See FOREIGN JUDGMENT.
I. L. R. 37 Mad. 163

———— **Injunction on ground of suit pending in—**

See INJUNCTION. **24 C. W. N. 735**

1. ———————— *Appearance by the defendant—Protest against jurisdiction—Defence on the merits—To get refund from the creditor's son to whom the suit debt was repaid and to avoid arrest—Voluntary submission to jurisdiction.* The defendant who was sued in a foreign Court, *viz.,* a Court in the Cochin State, appeared and defended the suit against him on the merits but protested against the jurisdiction of the Court. His reasons for appearing and defending the suit were: (i) that the creditor's son to whom he had repaid the suit debt refused to refund the money unless he defended the suit brought by the father and (ii) that if a decree were passed against him, he might be arrested when he went to Cochin on business or to see his relations. *Held,* that the defendant must be deemed to have submitted to the jurisdiction of the foreign Court voluntarily notwithstanding his protest against its jurisdiction. *Parry & Co.* v. *Appasami Pillai, I. L. R. 2 Mad. 407,* overruled. RAMA *v.* KRISHNA (1915)
I. L. R. 39 Mad. 733

2. ———————— *Suit in, on cause of action tried and determined between the parties in a British Indian Court—Latter Court, if may issue perpetual injunction to restrain proceeding in Foreign Court—Res judicata—Civil Procedure Code (Act V of 1908), ss. 11, 13.—Specific Relief Act (I of 1877), s. 56 (B).* A A, a Mahomedan, died leaving estates situate partly within British India and partly within the ceded district of the Feudatory State of Rampur, and leaving him survivin[illegible] lren. The dau[illegible] A A was a S[illegible] ex- cluded t[illegible] nsti- tuted a [illegible] dian Court (*viz.,* the Court of the Subordinate Judge *at Bareilly), where their claim was opposed by the* residuaries, and finally obtained an *ex parte* decree upholding their claim, the defendants having failed to obtain an adjournment which they said was necessary to enable them to call witnesses. This decree was affirmed by the High Court at Allahabad. Meanwhile the residuaries instituted against the daughter and her children a suit in a Court of the Rampur State for possession of a moiety of the estate of A A situate in the ceded district of Rampur State claiming, as they had done in their defence in the other suit, that A A was a Sunni. The daughter and her children thereupon instituted another suit in the Court of the Subordinate Judge at Bareilly praying for a declaration that the previous decree of the Court was binding between the parties and operated as *res judicata* and that the defendants (the residuaries) be restrained by a perpetual

FOREIGN COURT—*contd.*

the injunction and dismissed the suit, the Privy Council on the appeal of the plaintiff's affirmed that decision and dismissed their appeal. *Maqbul Fatima* v. *Amir Hasan Khan, I. L. R. 37 All. 1*, affirmed. MAQBUL FATIMA *v.* AMIR HASAN KHAN (1916) . . . . **20 C. W. N. 1213**

FOREIGN CURRENCY.

———————— *Damages—Rate of exchange—Date of conversion.* In a suit for damages caused to the plaintiff by reason of negligence on the part of the second defendant as a common carrier, it was contended on behalf of the second defendant that the loss caused to the plaintiff being in the first instance measurable in sterling, judgment must be based upon the rate of exchange prevailing on the date of judgment. *Held*, that this contention must be overruled *Di Fernando* v. *Simon Smits & Co., Ld.*, [*1920*] *2 K. B. 704*, [*1920*] *3 K. B. 409*, *Barry and Others* v. *Van Den Hurk*, [*1920*] *2 K. B. 709*, and *Lebeaupin* v. *Crispin* [*1920*] *2 K. B. 714*, followed. DEKHARI TEA CO., LTD., *v.* ASSAM-BENGAL RAILWAY CO., LTD., (1921) . . . **I. L. R. 48 Calc. 886**

FOREIGN DECREE.

See DECREE . **I. L. R. 39 Bom. 34**
I. L. R. 40 Bom. 504

See FOREIGN COURT.

See FOREIGN JUDGMENT.
I. L. R. 36 Mad. 414

1. ———————— *Execution by British Court—The British Court can inquire if the decree was passed with jurisdiction—Ex parte decree—Absent defendant not submitting to jurisdiction—Decree, a nullity—Civil Procedure Code (Act V of 1908), st. 44, Order XXI, rule 7—Act XIV of 1882, s. 229 B.* It is open to a British Court executing a foreign decree to enquire whether the foreign Court had jurisdiction to pass the decree. A decree pronounced by a Court of a foreign state in a personal action *in absentem*, the absent party not having submitted himself to its authority, is a nullity. JIVAPPA TIMMAPPA *v.* JEERGI MURGEAPPA (1916)
I. L. R. 40 Bom. 551

2. ———————— *Execution of foreign decree in British India—Competency of British Indian Courts to question the jurisdiction—Appearance to save property from seizure—Denial of jurisdiction and claim—Jurisdiction, submission to, whether voluntary.* It is competent to the executing Court to refuse execution of a foreign decree sought to be executed in British India under s. 44 of the Code of Civil Procedure on the ground that such decree was passed without jurisdiction: Submission is not voluntary if the appearance is made only to save property which is in the hands of a foreign tribunal. *Voinet* v. *Barrett, 55 L. J. (Q. B. D.) 39*, *Guiard* v. *De Clermont and Donner, 30 T. L. R. 511*, and *Boissiere & Co.* v. *Brockner & Co., 6 T. L. R. 85*, followed. *Parry & Co.* v. *Appasami Pillai, I. L. R. 2 Mad. 407*, doubted. *Per* WALLIS, OFFG. *C. J.*—Whether submission was for the purpose of saving property or voluntary is a question of fact in each case. *Per* SESHAGIR AYYAR, *J.*—The change in the language between s. 225 of the Civil Procedure Code (Act XIV of 1882) and O. XXI, r. 7, of the Code of 1908 does

FOREIGN DECREE—*contd.*

not warrant the conclusion that in regard to decrees obtained within British India the executing Court has no jurisdiction to question the jurisdiction of the Court which passed the decree. The words "As if they have been passed by the Courts in British India." relate only to the mode of execution and have not the effect of giving foreign judgments all the incidents of a judgment of a British Court. VEERARAGHAVA AYYAR *v.* MUGA SAIT (1914) . **I. L. R. 39 Mad. 24**

FOREIGN DOMICILE.

See DIVORCE . **I. L. R. 40 Calc. 215**

FOREIGN JUDGMENT.

See CIVIL PROCEDURE CODE, 1908, s. 13
ss. 11, 13 . . **I. L. R. 37 All. 1**

See FOREIGN COURT.

———————— *Defence struck out—No decision on the merits—No cause of action.* Where in a suit in a foreign Court, defence was struck out and judgment entered for plaintiff: *Held*, that the judgment is not one decided on the merits and thus not being conclusive could not of itself constitute a cause of action to the suit. VISWANADHA REDDI *v.* KEYMER (1914)
I. L. R. 39 Mad. 95

———————— *Foreign Judgment, suit on—Jurisdiction of Foreign Court—submission to by defendants, when defendant carrying on business in foreign territory through agent—No residence thereby—Service of notice of suit on agent insufficient as against principals outside jurisdiction—Service on principals out of jurisdiction.* Submission to the jurisdiction of a foreign forum is largely a question of fact in each case or a mixed question of law and fact. Where defendants submitted to the jurisdiction of foreign Courts by giving a power of attorney as abovementioned to an agent and a decision is passed against them after service of summons of the suit on them while they were out of jurisdiction by order of Court, the defendants are *primâ facie*, bound by the judgment; and where no other defence is raised but that of non-submission and non-service of notice both of which were found against, a decree against the defendants in accordance with the foreign judgment must necessarily follow. Persons who carry on business in a foreign country through an agent submit to the jurisdiction of the Courts of that country by giving that agent a power-of-attorney containing very wide powers including right to institute or defend any suits that might be brought against them touching any matters connected with their business or otherwise. A power-of-attorney of this character which presumably is brought to the notice of persons dealing with the firm is evidence that the principals adopted the Court of the place wherein the business is carried on, as the forum before which their claims were to be brought. *Bank of Australasia* v. *Harding, 19 L. J. C. P. 345*, and *Inre Hainault Forest Act, 9 C. B. Rep. 648 at p. 661* and *Bank of Australasia* v. *Nias, 20 L. J. Q. B. 284*, followed. *Obiter:* A decree obtained in a foreign country against a firm after serving the agent of the firm with notice of the suit while the principals of the firm who were defendants in the case, were out of its juris-

FOREIGN JUDGMENT—*contd.*

diction cannot be enforced as a personal decree against them in other Courts. *Sahib Thambi* v. *Hamid, 22 Mad L. J. 109,* followed. Service of suit on an agent of a partnership whose members reside out of jurisdiction, does not create jurisdiction on the ground of residence. *Nalla Karuppa Settiar* v. *Mahomed Iburam Sahib, I. L. R. 20 Mad. 112,* distinguished. *Fazal Shau Khan* v. *Gafer Khan, I. L. R. 15 Mad. 82, Girdhar Damodhar* v. *Kassigar Hiragar, I. L. R. 17 Bom. 662, Annamalai Chetti* v. *Murugasa Chetti, I L. R. 26 Mad. 544, Copin* v. *Adamson, 9 Ex. 345, Russell v. Cambefort, 23 Q. B. D. 526, Rousillon* v. *Rousilon, 14 Ch. D. 351, Schibsly* v. *Westenholz, 6 Q. B. 155,* and *Emanuel* v. *Symon, (1908) 1 K. B. 302,* referred to. RAMANATHAN CHETTIAR *v.* KALIMUTHU PILLAI (1914) **I. L. R. 37 Mad. 163**

——— *Jurisdiction of Court over absent foreigner subject to the same sovereignty—Authority to bind absent foreigner must be conferred*

by their judgments bind absent foreigners who have not submitted to their jurisdiction is not restricted in its application to foreign Independent States only but is also applicable where the country in which the judgment was passed and that in which it is sought to be enforced have separate and distinct systems of administration and judicature, though owing allegiance to the same sovereign. A judgment of the Ceylon Court against a native of British India who was not at, the time of the action, resident in Ceylon and had not submitted to the jurisdiction of such Court, must be treated as a nullity when sued upon in Courts in British India. *Gurdial Singh* v. *Raja of Faridkot* [*(1895) I. L. R., 22 Calc. 222*], *referred to Emanuel v. Symon* [*(1908) 1 K. B., 302*], referred to. It may be competent to the common sovereign authority to confer jurisdiction on the Courts of one country over absent foreigners residing in the other but such jurisdiction must be conferred by clear and unambiguous words and cannot be inferred as a matter of implication. A decree based on a contract imposing personal obligation on an absent foreigner is not binding on him even when the contract is made in the territory of the forum which passed the decree. A person who appears in obedience to the process of the foreign Court and applies for leave to defend the action without objecting to the jurisdiction of the Court when he is not compellable by law to do either, must be *held* to have voluntarily submitted to the jurisdiction of such Court. *Parry & Co.* v. *Appaswami Pillai, I. L. R., 22 Mad. 407, Siva Raman Chetty* v. *Iburam Sahib I. L. R., 18 Mad. 327.* SHEIKH ATHEM SAHEB *v.* DAUD SAHIB . . **I. L. R. 32 Mad. 469**

——— *Suit on—Foreign Court decree—Decree for money against "firm"—Some partners not served in Foreign Court—No personal liability—Foreign decree enforceable only against partnership property of the partners.* The general rule of law, undoubtedly is that in suits where one person is allowed to represent others as defendants in a representative capacity, any decree passed can bind those others only with respect of the property of those others which he can in law represent and no personal decree can be passed against them, although the parties on record *eo nomine* may be made personally liable. The extent of the rule applicable to a case of defendants sued as partners is laid down in O. XXI, r. 50, Civil Procedure Code. A firm was sued in Singapore in the firm's name but only one of the partners was served and a decree was

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partners of the firm and the representatives of a deceased partner. *Held, that* the partners who were not served in the Singapore suit were not

for the decree of the Singapore Court. *Per* CURIAM: The same is the principle applied in suits against a Hindu family represented by its manager and in cases covered by O. I, r. 8, Civil Procedure Code, the result being that an injunction in a decree in the latter class of cases is not binding on those who are not actually parties to the record. *Sadagopachari* v. *Krishnamachari, I. L. R. 12 Mad. 356,* and *Srinivasa Aiyangar* v. *Arayar Srinivasa Aiyangar, I. L. R. 33 Mad 483,* referred to. SAHIB THAMBI *v.* HAMID (1913) . . . **I. L. R. 36 Mad. 414**

FOREIGN LAW.

See EVIDENCE ACT (I OF 1872), ss. 38, 45 . **I. L. R. 41 All. 248**

FOREIGN RECORDS.

See CRIMINAL PROCEDURE CODE, s. 491. **15 C. W. N. 1053**

See HEBEAS CORPUS. **I. L. R. 39 Calc. 164**

FOREIGN SHIP.

——— offence committed in—

See HIGH SEAS . **I. L. R. 42 Bom. 234**

——— Foreign State—

See EXTRADITION. **I. L. R. 48 Calc. 328**

FOREIGN TERRITORY.

See PENAL CODE, ss. 34, 109, 467. **I. L. R. 36 Bom. 524**

FOREIGNER.

——— offence committed by—

See HIGH SEAS . **I. L. R. 42 Bom. 234**

FOREST.

See FOREST ACT (VII OF 878), s. 25 (*i*). **L. R. 40 All. 38**

FOREST ACT (VII OF 1878).

See CONTRACT ACT (IX OF 1872), s. 23. **I. L. R. 40 Bom. 64**

——— s. 25 (*i*)—*Hunting without a permit in a reserved forest.* Four persons made up a party and went, without having a permit, to shoot in a reserved forest. Two of the party shot deer; the two other shot nothing. *Held,* that the two

FOREST ACT (VII OF 1878)—*contd.*

members of the party who had not shot anything could properly be convicted of hunting in a reserved forest within the meaning of s. 25 (*i*) of the Indian Forest Act, 1878. EMPEROR *v.* BARKAT ALI (1917) . **I. L. R. 40 All. 38**

———— s. 25, cl. (i), r. 3 (a)—*Shooting in a reserved forest without license—Tracking and shooting a tiger to preserve one's property.* The accused, finding that his cattle were killed by a tiger, tracked and shot the animal in a reserved forest without a license. *Held,* that the accused was guilty of a technical offence under r. 3 (*a*) framed under the provisions of s. 25, cl. (*i*) of the Indian Forest Act, 1878. EMPEROR *v.* AMIRSAHEB BALAMIYA (1918) . . **I. L. R. 42 Bom. 406**

———— s. 75—An occupier held entitled to cut certain sandalwood trees not proved to be in existance and reserved, at the time of settlement. EMPEROR *v.* YELLAPPA RAMANGOUDA **I. L. R. 45 Bom. 110**

FORFEITURE.

See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXII, R. 10. **I. L. R. 39 Bom. 568**

See LANDLORD AND TENANT. **I. L. R. 35 Bom. 239**
I. L. R. 39 Calc. 903
I. L. R. 40 Calc. 870

See LEASE . **I. L. R. 42 Bom. 734**
I. L. R. 45 Bom. 300

See LESSOR AND LESSEE. **I. L. R. 38 Mad. 445**

See PARDON. **I. L. R. 42 Calc. 756 & 856**

See PARTITION . **I. L. R. 37 Calc. 918**

See PASTURE LANDS **14 C. W. N. 372**

See PRINTING PRESS, FORFEITURE OF. **I. L. R. 38 Calc. 202**

See RIGHT OF SUIT. **I. L. R. 40 Bom. 200**

See TRANSFER OF PROPERTY ACT 1882
ss. 6 CL. (*b*), 109, 111, CL. (*g*). **I. L. R. 43 Bom. 28**
s. 111. **I. L. R. 35 All. 145**

———— of cash and ornaments found on the person of the gamblers—

See BOMBAY PREVENTION OF GAMBLING ACT (BOM. ACT IV OF 1887), s. 8. **I. L. R. 47 Bom. 686**

———— of adoption—

See BURMESE LAW. **I. L. R. 45 Calc. 1**

———— bond—

See CRIMINAL PROCEDURE CODE, S. 514. **I. L. R. 2 Lah. 204**

———— of deposit of earnest money—

See CONTRACT, BREACH OF. **I. L. R. 38 Mad. 801**

———— of land—

See LAND REVENUE CODE (BOM. ACT V OF 1879, AS AMENDED BY BOM. ACT VI OF 1901), s. 56. **I. L. R. 37 Bom. 692**

FORFEITURE—*contd.*

———— of lease—

See LANDLORD AND TENANT. **I. L. R. 44 Mad. 629**

See TRANSFER OF PROPERTY ACT (IV OF 1882), s. 111, CL. (*g*). **I. L. R. 42 Bom. 195**

———— of occupancy—

See LAND REVENUE CODE, BOMBAY, ss. 56, 214 . **I. L. R. 36 Bom. 91**

———— of pardon—

See PARDON . **I. L. R. 37 Calc. 845**

———— of property—

See PENAL CODE (ACT XLV OF 1860), s. 62 . **I. L. R. 36 All. 395**

———— of servient estate—

See MADRAS IRRIGATION CESS. **L. R. 46 I. A. 302**

———— relief against—

See LANDLORD AND TENANT. **I. L. R. 39 Mad. 834 & 1049**

———— suit to set aside collector's order of Limitation—

See LIMITATION ACT (IX OF 1908), SCH. I, ART. 14 . **I. L. R. 44 Bom. 451**

1. ———— **Forfeiture by Government of Deshgat Inam lands**—*Effect of forfeiture on prior mortgage—Payment of assessment to Government by mortgagee in possession—Suit to redeem by mortgagor—Mortgagee cannot deny mortgagor's title.* The plaintiff's ancestors mortgaged their Deshgat Inam lands to the defendant's ancestor with possession in 1855. The lands were in 1856 forfeited by Government; but the mortgagee was continued in possession and paid assessment in respect of the lands to Government. In 1901, the plaintiff's sued to redeem the mortgage: The defendant contended that the order of forfeiture deprived the plaintiffs of all right to the lands and that the title thereafter became vested in the defendant: *Held,* that the order of forfeiture had merely the effect of converting the lands from a service tenure into lands liable to pay assessment to Government; and that it did not deprive the plaintiff of all right and title to the lands, and extinguished the relation of mortgagor and mortgagee which existed between the parties. *Vishnoo Trimbuck* v. *Tatia, 1 Bom. H. C. R. 22* and *Gangabai* v. *Kalapa Dari Mukrya (1885) 9 Bom. 419,* followed. *Held,* also, that the defendant who came into possession of the lands as mortgagee of the plaintiffs could not turn round after the order of forfeiture and take the benefit of it and challenge the validity of the mortgage in virtue of which his title to the land as mortgagee had begun. GURBASAPPA *v.* RANGO VENKATESH (1912) . . **I. L. R. 36 Bom. 539**

2. ———— **Insolvency**—*Security for production of insolvent-debtor—Failure of insolvency application—Forfeiture of security money —Civil Procedure Code (Act V of 1908), s. 145.* The decree-holder is entitled to the money that has been deposited by the surety as security for the

FORFEITURE—*contd.*

benefit of the decree-holder, whose rights were interfered with, to enable the judgment-debtor to make an application in insolvency with a view to his protection from arrest, on the money being forfeited by the Court for failure to produce the debtor when required. The Court has no power to declare a forfeiture in favour of the Government. BASANTI LAL *v.* CHHEDO SINGH (1912)

I. L. R. 39 Calc. 1048

3. ——— **Under Press Act**—*Scope of s. 4—"Stating the grounds of its opinion"—Mandatory nature of direction in s. 12—Notification—Grounds—Onus of proof—Limited Jurisdiction of High Court—Executive and Judicial functions contrasted—Intention—Penal Code (Act XLV of 1860), s. 153A.* On an application under the Indian Press Act, 1910, to set aside the order of forfeiture of a pamphlet made by the Local Government: *Held,* that the onus was cast on the petitioner to establish that it was impossible for the pamphlet to come within the terms of s. 4 of the Act and that the functions of the High Court were limited under ss. 17 and 19 to considering whether the petitioner had discharged that onus: the High Court had no jurisdiction to pronounce on the wisdom or unwisdom of the order of forfeiture. The direction in s. 12 of the Act (" stating the grounds of its opinion was mandatory, and it was not a compliance with the direction merely to cite the words of the section invoked without setting out facts on which the opinion was based, but the High Court was debarred by s. 22 from questioning the legality of the forfeiture on that ground. In an enquiry under this Act, the question of the intention of the writer or publisher is not directly material. *Per* STEPHEN, *J.*—The omission of the Local Government to comply with the mandatory direction contained in s. 12, did not oust the jurisdiction of the High Court to revise the order of forfeiture on its merits. *In re Maho* MAHOMED ALI (1913)

I. L. R. 41 Calc. 466

4. ——— *Order made by Local Government of Delhi—Jurisdiction—Delhi Laws Act (XIII of 1912.* Where an order was made under s. 4 (*1*) of the Indian Press Act, 1910, by the Local Government of Delhi, directing the forfeiture wherever found of all copies of a newspaper published on a certain date in Delhi, on an application to set aside the order made by a pers a part ad no re ABUL KALAM AZAD (1915)

I. L. R. 42 Calc. 730

5. ——— *Security—Newspaper articles—Sedition and seditious libel—Competency of the High Court to set aside order of for-*

having a tendency to produce—Indian Press Act (I of 1910), ss. 4, 17, 19 to 22 The Press Act was framed to enable the Government and the Court

with a view to prevent crime, that is, crime imperilling the existence of the State, the safety of its officers, public order and the like. An offence under this Act is not sedition as such, but the

FORFEITURE—*contd.*

ure and self the t all re- ort into the Press Act the provisions of the law of sedition as enacted in the Indian Penal Code, or as administered in England. The power to declare the security forfeited, under the Press Act, can be

can be questioned only by the method mentioned in s. 17 and to the extent provided thereby. Although the order may have been made by the Local Government on the ground that the words, signs or visible representations were of the nature described in one or other of the six clauses of s. 4 (*1*), the High Court, under s. 19 (*i*), is competent to set aside the order of forfeiture on one ground, and one ground alone, namely, that the words contained in the newspaper in respect of which the order in question was made were not of the nature described in any of the clauses of s. 4 (*1*). The Court does not approach the case with the presumption that the order is erroneous; the burden lie upon the petitioner to establish the validity of his contention. If he fails to satisfy the Court that the words, signs or visible representations are not of the nature described in s. 4 (*1*), the application to set aside the forfeiture must be dismissed *Protab Chunder Mukerji* v. *Emperor, 11 C. L. R. 25, Rohimuddi* v. *The Queen-Empress, I. L. R. 20 Calc. 353,* and *Milan Khan* v *Sagai Bepari, I. L. R. 23 Calc. 347,* referred to. In the absence of any words of direct exclusion of evidence, it is fair to assume that if an article is ambiguous or doubtful, and, therefore, the Crown requires to supplement it by evidence of other articles from the same newspaper, the person against whom the order of forfeiture is passed should have the right to give evidence in rebuttal. The object of s. 20 of the Press Act was to widen, for a specified purpose, the rule of evidence embodied in s 14 of the Evidence Act. S. 20 may be utilised by the person affected by the order of forfeiture precisely in the same way as by the Crown *Amar Singh* v. *Emperor, 16 Cr. L. J. R. 555,* and *Ghulam Qadir Khan* v. *Emperor, 15 Cr. L. J. R. 493,* referred to. S. 20 only applies where, if the article stood alone, there may be doubt or ambiguity as to the character, nature or tendency of the words used and not when the meaning of the article is apparent on its face. *Annie Besant* v. *Emperor I. L. R. 39 Mad. 1085,* and *Annie Besant* v. *The Advocate-General, Madras, 23 C. W. N. 986 ; 35 T. L. R. 600* Question of Intention and Evidence discussed. *In re* AMRITA BAZAR PATRIKA PRESS, LIMITED (1919) . . **I. L. R. 47 Calc. 190**

FORGERY.

See CRIMINAL PROCEEDINGS, STAY OF.
I. L. R. 38 Calc. 106

See CRIMINAL PROCEDURE CODE, s. 195
I. L. R. 34 All. 654
I. L. R. 42 All. 130

See EVIDENCE.
I. L. R. 36 Mad. 159

See LIMITATION ACT (IX OF 1908), SCH. I, ARTS. 92, 93. **I. L. R. 40 Bom. 22**

FORGERY—*contd.*

See PENAL CODE, ss. 34, 109, 467.
I. L. R. 36 Bom. 524

ss. 463, 467. I. L. R. 37 Bom. 666

ss. 465, 471. . I. L. R. 43 All. 225

See SANCTION FOR PROSECUTION.
14 C. W. N. 479

See USING FORGED DOCUMENT.
I. L. R. 39 Calc. 463

——— copy of—

See FORGERY. I. L. R. 43 Calc. 783

——— antecedent—

See SANCTION FOR PROSECUTION.
I. L. R. 44 Calc. 1002

——— **False document, ingredients of**—*Material part of document, if altered—" Dishonestly and fraudulently."* Where the accused, after the execution and registration of a document, which was not required by law to be attested, added his name to the document as an attesting witness: *Held, per* HARINGTON and MOOKERJEE, JJ. (TEUNON, J. dissenting), that the accused was not guilty of an offence under s. 471. That the accused by the insertion of his name as an attesting witness cannot be held to have done the act either "dishonestly or fraudulently" within the meaning of these words as defined in ss. 24 and 25 of the Indian Penal Code. The word "fraudulently" defined. The interpolation of the name of a person as an attesting witness to a document not required by law to be attested subsequent to its execution and registration, is not an alteration of the document in a material part. SURENDRA NATH GHOSE *v.* EMPEROR (1910)
14 C. W. N. 1076
I. L. R. 38 Calc. 75

——— **Certified copy**—*filing of, whether user of forged document, if original be forged—Evidence of intention—Penal Code (Act XLV of 1860), ss. 466, 471.* A series of similar transactions which are not the offence charged can only be used as evidence of the intention of the person who forged the document and not as evidence of forgery. It is extremely doubtful whether the mere filing of a copy is the user of a forged document. A certified copy thereof is certainly not a forged document. But it is otherwise where the offender used the copy knowing or having reason to believe that the entries in the original documents were forgeries and intending to use them for fraudulent purposes. *Queen* v. *Nujum Ali, 6 W. R. Cr. 41,* and *Emperor* v. *Mulai Singh, I. L. R. 28 All. 402,* distinguished. KRISHNA GOVINDA PAL *v.* EMPEROR (1915).
I. L. R. 43 Calc. 783

——— **Signing certificate of purchase of arms and ammunitions in false name and giving wrong addresses.**—*Person legally entitled to possess the same—Act "fraudulent," if not "dishonest."—Penal Code (Act XLV of 1860), ss. 23, 24, 463 to 465.* A person lawfully entitled to possess arms and ammunitions signing the prescribed certificate of purchase of the same in the name of another with an address not his own, and thereby deceiving the gunsmith and the Government and defeating the object of the certificate, commits forgery: his act having been done "fraudulently," if not "dishonestly." *Reg.* v. *Toshack, 1 Den. C. C. R. 492, Empress* v. *Dhunum Kazee, I. L. R. 9 Calc. 53,* and *Queen-*

FORGERY—*contd.*

——— antecedent—*contd.*

Empress v. *Abbas Ali, I. L. R. 25 Calc. 512 followed.* CAUSLEY *v.* EMPEROR (1915)
I. L. R. 43 Cacl. 421

——— **Copy of forged document**—*whether constitutes a forgery—Penal Code (Act XLV of 1860), ss. 417, 420 and 511.* The making of a copy of a forged document does not constitute forgery unless the maker of the copy was authorised to make it. *Essan Chander Dutt* v. *Baboo Prannath Chaudhry, Marsh rep 270,* distinguished. *Emperor* v. *Ali Hussan, I. L. R. 28 All. 358,* referred to. LACHMAN LAL *v.* THE KING-EMPEROR . . 4 Pat. L. J. 16

FORM OF DECREE.

See CHARITABLE TRUSTS.
I. L. R. 34 Mad. 406

FORM OF ORDER.

See DISSOLUTION. I. L. R. 47 Calc. 620

FORM OF WARRANT.

See SEARCH WARRANT.
I. L. R. 45 Calc. 905

FORMALITIES.

See DEPOSITION. I. L. R. 45 Calc. 825

FORMÂ PAUPERIS.

See PAUPER SUIT.

——— appeal in—

See LIMITATION ACT (XV OF 1877), ss. 5 AND 7 . . I. L. R. 34 Bom. 588

FORMER COURT.

See TRANSFER OF PROPERTY (VALIDATING) ACT No. XXVI OF 1917, s. 3, PROVISO 3 . I. L. R. 42 All. 430

FORMER RECEIVER.

——— suit against—

See RECEIVER . I. L. R. 41 Calc. 92

FORUM.

See ADOPTION . I. L. R. 37 Calc. 860

FORWARD CONTRACT.

See CONTRACT ACT (IX OF 1872), s. 47.
I. L. R. 40 Bom. 517

FOUNDER.

——— descendant of—

See WAKF . I. L. R. 43 Calc. 467

——— intention of—

See MAHOMEDAN LAW ENDOWMENT.
I. L. R. 43 Calc. 1085

FRAME OF SUIT.

See CHAWKIDARI CHAKRAN LANDS.
I. L. R. 37 Calc. 57

See MORTGAGE . I. L. R. 38 Calc. 342

FRAUD.

See Accounts . I. L. R. 42 All. 230

See Assignee. I. L. R. 38 Mad. 36

See Civil Procedure Code (Act XIV of 1882), s. 258 . I. L. R. 34 Bom. 575

See Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 2. I. L. R. 43 Bom. 240

See Company . I. L. R. 36 Bom. 564

See Decree . . 4 Pat. L. J. 187

See Divorce. I. L. R. 48 Calc. 283

See Evidence Act (I of 1872), s. 92, I. L. R. 35 Bom. 93
I. L. R. 38 Calc. 892

See Execution of Decree. I. L. R. 38 Calc. 622

See Forgery . I. L. R. 43 Calc. 421

See Hindu Law—Adoption. I. L. R. 39 Bom. 441

See Hindu Law—Widow. I. L. R. 41 Bom. 93

See Immoveable property. I. L. R. 34 Mad. 143

See Limitation Act (IX of 1908), Sch. I, Art. 95. I. L. R. 37 Bom. 158

See Minor . I. L. R. 37 Mad. 535

See Mortgage . I. L. R. 38 Bom. 10

See Mortgage by Minor. I. L. R. 38 Mad. 1071

See Mistake . I. L. R. 43 Calc. 217

See Pleadings . I. L. R. 37 Calc. 856

See Possession by Fraud. I. L. R. 46 Calc. 331

See Presidency Small Cause Court. s. 94 . . 14 C. W. N. 695

See Railway Passenger. I. L. R. 44 Calc. 279

See Right of Suit. I. L. R. 37 Calc. 197

See Sale . I. L. R. 48 Calc. 119

See Specific Performance. I. L. R. 38 Calc. 805

See Suit to set aside decree. I. L. R. 32 All. 145
I. L. R. 38 All. 7

See United Provinces Land Revenue Act (III of 1901), s. 233 (*k*). I. L. R. 41 All. 182

———— by guardian—

See Minor . I. L. R. 38 All. 452

———— of creditors—

See Civil Procedure Code (Act V of 1908), ss. 47 and 50. I. L. R. 38 Mad. 1076

———— plea of—

See Evidence Act (I of 1872), s. 92. I. L. R. 42 Bom. 512

FRAUD—*contd.*

———— suit to set aside decree on the ground of—

See Civil Procedure Code (1908), s. 20 (c) . . I. L. R. 36 All. 564

See Compromise decree. I. L. R. 1 Lah. 344

———— upon creditor—

See Mortgage . I. L. R. 38 Bom. 10

———— whether vitiates order of settlement Officer—

See Santal Parganas Settlement Regulation. . . 6 Pat. L. J. 373

———— Fraudulent decree—*Presidency Small Cause Courts Act (XV of 1882), s. 94—Suit to set aside decree—Jurisdiction to set aside decree of Presidency Small Cause Court, how determined—Civil Procedure Code (Act V of 1908), if applies—Onus of proof.* A suit lies in one Court to set aside a decree of another Court on the ground that the decree was obtained by fraud, as the fraud gives rise to a fresh cause of action. Abdul Huq Chowdhry *v.* Abdul Hafez (1910) 14 C. W. N. 695

———— *Suit to set aside a decree on the ground of fraud—Personal service not effected—Conduct of plaintiff.* The mere fact that the personal service of a summons has not been effected on a defendant will not render the proceedings against him absolutely abortive. But where the non-service is due to the fraudulent conduct of the plaintiff in the suit and others acting with him, and a decree is thereby obtained such decree may be set aside as fraudulent. *Mahomed Gulab* v. *Mahomed Sulaiman, I. L. R. 21 Calc. 619,* followed. Tika Ram *v.* Daulat Ram (1909). I. L. R. 32 All. 145

———— Fraud and collusion of predecessors in title—*Parties by descent precluded from setting up fraud.* The property in dispute belonged originally to Mahomedsahib, who in 1829 gave it to his wife Sabinibibi as dower. Sabinibibi sold it in 1863 to Sardarkhan, one of the two brothers of her daughter-in-law Fatmabibi. Sardarkhan died in 1873, and in 1875 his brother Mahomedkhan gave it in gift to Shabusaheb, one of the sons of Fatmabibi. Subsequently on Shabusaheb's death, his creditor sued his son and obtained a decree against him. In execution the property was sold and was purchased at auction by one Ramchandra who having transferred his right to the plaintiff, her agent brought the present suit against Shabusaheb's sister and his two brothers to recover possession. *Held*, that the plaintiff was entitled to succeed. If all the said transactions were genuine, legal and valid, the defendants had no case at all, and if they were, as alleged by the defendants, fraudulent and collusive, the defendants were precluded, as parties by descent to the alleged fraud, from setting up their own iniquity to avoid the legal consequences of those transactions. *Doe, dem. Roberts* v. *Roberts*, 2 B. & A. 367, followed. Sayad Nahannu *v.* Sabinbibi (1911) . . . I. L. R. 37 Bom. 217

———— Ex parte decree procured by fraud—*Jurisdiction of another Court to set aside the ex parte decree—Investigation how far limited.* The defendant obtained an *ex parte* decree at Akyab upon a promissory note against the plaintiff who subsequently applied under s. 108 of the Code of

FRAUD—*contd.*

Civil Procedure to set aside the said decree. The *ex parte* decree who set aside and the suit was revived, but at the hearing the plaintiff could not appear and an *ex parte* decree was again passed. The plaintiff then brought a suit in the Court to which the *ex parte* decree was transferred for execution, for a declaration that the said decree was not binding on him, it being based upon no cause of action and being fraudulent inasmuch as he did not execute any promissory note in favour of the defendant, or receive any money from him. On an objection by the defendant that the Court had no jurisdiction to enter into the merits of the suit in the Akyab Court, and in any case the only matter that could be investigated was whether the plaintiff had by the action of the defendant been prevented from placing his case properly before the said Court :—*Held*, that the jurisdiction of the Court in trying a suit of this kind was not limited to an investigation merely as to whether the plaintiff was prevented from placing his case properly at the prior trial by the fraud of the defendant. The Court could and must rip up the whole matter for determining whether there had been fraud in the procurement of the decree. LAKSHMI CHARAN SAHA *v.* NUR ALI (1911) .

I. L. R. 38 Calc. 936

———— **Fraudulent transfer of possession**—*Reversioner getting into possession from an alienee of the widow—Mortgage by alienee—Suit for foreclosure—Reversioner setting up the plea that widow's alienation beyond her life-time was void—Estoppel between mortgagor and mortgagee—Estoppel binds reversioner—Practice.* In 1878, *G*'s widow, sold certain property, belonging to *G*, to *G A*, who mortgaged it to *D* in 1892. The widow died in 1897. After *G A's* death in 1901, *H* (defendant No. 3), who was a reversioner of *G*, slipped on it possession of the property by fraudulently inducing *G A*'s sons (defendants Nos. 1 and 2) to favour his claim. In 1908, the plaintiff who claimed through *D*, sued to recover his money by sale of the mortgaged property. It was contended by *H* that it was not competent to *G*'s widow to alienate the property beyond her life-time and that her alienation was not binding on him: *Held*, that *H* having obtained possession of the property by colluding with defendants Nos. 1 and 2, his fraud was sufficient in law to deprive him of the right to be heard in defence to the suit, that he was entitled to the property as reversionary heir of *G*. *Held*, further, that defendants Nos. 1 and 2 having been in possession of the property as mortgagors of the plaintiff were estopped from denying his right to foreclose the mortgage; and that that estoppel applied also to *H* who stepped into possession through a fraud common to *H* as well as defendants Nos. 1 and 2. The true owner of property is entitled to retain possession even though he has obtained it from a trespasser by force or other unlawful means. This principle applies only when the true owner gets into possession without bringing himself within the law of estoppel. As between a mortgagor and his mortgagee neither can deny the title of the other for the purposes of the mortgage. A mortgagor cannot derogate from his grant so as to defeat his mortgagor's title, nor can the mortgagee deny the title of his mortgagor to mortgage the property. HILLAYA SUBBAYA *v.* NARAYANAPPA TIMMAYA (1911) . . **I. L. R. 36 Bom. 185**

FRAUD—*contd.*

———— **Decree**—*When can be set aside for fraud—Res judicata —Evidence Act (I of 1872), s. 44.* It is beyond question that the jurisdiction to impugn a previous decree for fraud exists. But it is a jurisdiction to be exercised with care and reserve, for it would be highly detrimental to encourage the idea in litigants that the final judgment in a suit is to be merely a prelude to further litigation. The fraud used in obtaining a decree being the principal point in issue, it is necessary to establish it by proof before the propriety of the prior decree can be investigated. One who seeks to impugn a decree passed after contest takes on himself a heavy burden, and it is not satisfied by merely inducing the Court to come to the conclusion that the appreciation of the evidence and the ultimate decision in the former suit was erroneous. Nor can a prior judgment be upset on a mere general allegation of fraud or collusion, it must be shown how, when, where and in what way the fraud was committed. The fraud must be actual, positive fraud,—a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case and obtaining that decree by that contrivance. *Shedden* v. *Patrick et Al, 1 Macq. 535, Ochsenbein* v. *Papelier, L. R. 8 Ch. App. 695,* and *The Duchess of Kingston's Case, 2 Sm. L. C. 11th Ed. 731,* followed. The character of fraud vitiating a decree would vary with the circumstances of each class of decree. NANDA KUMAR HOWLADAR *v.* RAM JIBAN HOWLADAR (1914)

I. L. R. 41 Calc. 990

———— *Decree based on perjured evidence—Suit to set aside—Onus of proof —Res judicata. Held*, that a suit to set aside a decree on the ground that the decree had been obtained by perjured and false evidence is not maintainable : *Held*, further, that where a decree was impeached on the ground of fraud, the fraud alleged must be actual positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts of the case, and the obtaining of the decree by that contrivance. *Nand Kumar Howladar* v. *Ram Jiban Howladar, I. L. R. 41 Calc. 990, Munshi Mosuful Huq* v. *Surendra Nath Ray, 16 C. W. N. 1002,* followed. *Chinnayya* v. *Ramanna, I. L. R. 38 Mad. 203, Baker* v. *Wadsworth, 67 L. J. Q. B. D. 301, Vadala* v. *Lawes, L. R. 25 Q. B. D. 310, Abouloff* v. *Openheimer & Co., L. R. 10 Q. B. D. 295,* referred to. *Venkatappa Naik* v. *Subba Naik, I. L. R. 29 Mad. 179,* dissented from. JANKI KUAR *v.* LACHMI NARAIN (1915)

I. L. R. 37 All. 535

———— **Fictitious rent-sale**—*Collusive sale arranged between putnidar and tenure-holder to get-rid-of under-tenure—Abuse of process—Duty of tenure-holder to protect under-tenure-holders from paramount claims—Transaction, a private sale.* Where a tenure-holder having offered to sell his interest to the *putnidar*, the latter agreed to pay the price asked only if the tenure was rid of the interest of subordinate tenure-holders, and it was arranged that the tenure-holder would make default in paying rent, and that the *putnidar* would sue him for arrears of rent and put up the tenure for sale in execution of the decree and that a person who had no intention of buying the property would be made to bid up to a figure approaching the price settled, which thereupon

FRAUD—*contd*

would be offered by the *putnidar* ,and the sale was effected as arranged: *Held*, that the transaction should be viewed as a private sale which in fact it was, the form only of a Court sale having been gone through and abused with the object of defrauding the under-tenure holders. A suit by the purchaser *putnidar* to annul an under-tenure and to recover possession must therefore fail. UMA CHARAN MANDAL *v.* MIDNAPORE ZEMINDARY Co. (1914) . . . **19 C. W. N. 270**

———— **Fraudulent agreement**—*Collusive decree obtained on such agreement.—Fraud unsuccessful—Suit impugning agreement and decree—Defendant prevented from defending suit on the plaintiff's assurance that decree will not be executed against him—Suit to declare decree incapable of execution if lies.* The principle that a party to a fraudulent transaction is entitled to relief in a Court of Equity as against the fraudulent confederate so long as the fraud contemplated has not been carried into effect is not inapplicable merely because the party suffers a decree to be passed against him in a fictitious and collusive suit which is only a part of the fraudulent scheme *Akhil Prodhan* v. *Manmotha Nath, 18 C. W. N. 1331: s. c. 18 C. L. J. 616*, and *Param Singh* v. *Lalji Mal, I. L. R. 1 All. 403*, followed. Where one of two defendants was prevented from making a proper defence to the suit by the fraudulent assurance of the plaintiff that the decree obtained would not be executed against him: *Held*, that [illegible] by the decree [illegible] the decree was [illegible] *ppa* v. *Puttappa*, *I. L. R. 11 Bom. 708*, followed. RAJAB ALI CHOUDHURY *v.* HADAYET ALI CHOUDHURY (1915) **19 C. W. N. 1151**

———— **General allegations of fraud in pleading if should be noticed.** Under the Contract Law of India, as well, as by ordinary principles, coercion, undue influence, fraud and misrepresentation (though they may overlap or may be combined) are all separate and separable categories in law. General allegations, however strong, are insufficient even to amount to an averment of fraud of which any Court ought to take notice. The law of India is in no way different from this, and the Judicial Committee regret that the rule is not more strictly observed. *Gunga Narain Gupta* v. *Tiluckram Choudhury, L. R. 15 I. A. 119*, referred to. BAL GANGADHAR TILAK *v.* SHRINIWAS PANDIT (1915) . **19 C. W. N. 729**

———— **Suite to set aside a judgment for fraud**—**Discretionary relief**—*What acts constitute fraud—Obtaining decree by deliberate perjury, whether liable to be set aside as fraudulent.* A

[illegible]

vious suit. Suppression of material evidence is not fraud within the meaning of the rule enunciated in *The Duchess of Kensington's Case, 2 Sm. L. C., 11th Edn., 731* at p. 738, which is to the following effect:—In order that fraud may be a ground for vacating a judgment, it must be a fraud that is extrinsic or collateral to everything

FRAUD—*contd.*

that has been adjudicated upon but not one that has been or must be deemed to have been dealt with by the Court. The power of the Court to set aside a judgment on the ground of fraud is a discretionary one which will be exercised in favour of the petitioner only if he had been free from fraud or any turpitude, or laches, sloth or lack of diligence in protecting his own interests. *Quære:* Whether a judgment can be set aside for fraud on the ground that the successful party was guilty of deliberate prejury or suborning perjury English and Indian case law on the subject discussed. Examples of fraud which will vitiate a judgment, given. CHINNAYYA *v.* RAMANNA (1913) . . **I. L. R. 38 Mad. 203**

———— **Different from that alleged in plaint,** *—If can be relied on—Duty of plaintiff to state facts constituting alleged fraud—Document bearing genuine signature—Burden on signatory to prove falsity of recitals.* When a plaintiff impeaches a transaction on the ground of fraud the facts which constitute the alleged fraud must be distinctly, specifically and accurately stated. That a charge of fraud must be substantially proved or laid and when one kind of fraud is charged, another kind of fraud cannot, upon failure of proof, be substituted for it. That the rule that the Court will grant only such relief as the plaintiff is entitled to upon the case made by his pleadings is strictly enforced when the plaintiff relies on fraud That when a party seeks to avoid the Statute of Limitation on the ground of fraud the statement of claim should set forth specifically the particular acts which constitute the fraud as well as the time when

[illegible]

not have been made before BANSIRAM *v.* PANCHAMI DASI (1914) . . **20 C. W. N. 638**

———— **Ex parte decree and sale thereunder**—*Suit to set aside decree and sale on the*

[illegible]

to succeed. The mere circumstance that a defendant had failed to have an *ex parte* decree set aside under s. 108 C. P. C. (of 1882) or to have a sale set aside on the ground of material irregularity does not debar him from seeking relief in a suit properly framed for the purpose on the ground that the suit itself was a fraudulent suit and that the proceedings therein were vitiated by fraud. But to enable the plaintiff to succeed in a suit so framed, he must specifically allege the circumstances of fraud and he must prove the fraud as laid in the plaint. Fraud how to be pleaded and in what manner established discussed. NAGENDRA NATH BOSE *v.* PARBATI CHARAN (1914) . . **20 C. W. N. 819**

———— *Suit to set aside ex parte decree on ground of fraud if lies, when application to set aside refused.* A suit by the

FRAUD—*concld.*

defendant to set aside an *ex parte* decree as fraudulent does not lie after an infructuous application to set it aside under s. 108 of the Civil Procedure Code of 1882, if the fraud in respect of which the decree is sought to be set aside was properly in issue in the application under s. 108 and was determined upon such application. *Radha Raman Saha* v. *Pran Nath Roy, I. L. R. 28 Calc. 475* : s. c. *5 C. W. N. 756, Khagendra Nath Mahata* v. *Pran Nath Roy, I. L. R. 29 Calc. 395* : s. c. *6 C. W. N. 473, Bal Kishan Lal* v. *Topeswar Singh, 15 C. L. J. 446, 448, Gulab Koer* v. *Badshah Bahadur, 10 C. L. J. 428, Puran Chand* v. *Sheodat Rai, I. L. R. 29 All. 212,* and *Naidar Mal* v. *Ranuak Husain, I. L. R. 29 All. 608,* referred to. KHIRODE CHANDRA ROY *v.* SRIMATI ASHTULLABU (1916) . **20 C. W. N. 845**

——— Judgment obtained by perjured evidence—*Suit to set aside, whether maintainable.* A suit does not lie to set aside a judgment in a previous suit on the ground that it was obtained by perjured evidence. *Venkatappa Naick* v. *Subba Naick, I. L. R. 29 Mad. 179,* overruled. KADIRVELU NAINAR *v.* KUPPUSWAMI NAIKER (1918) . . . **I. L. R. 41 Mad. 743**

——— Small Cause Court decree—*Allegation that case false and proved by perjured evidence.* A Small Cause Court decree is not final on the sense that it may not be set aside on the ground of fraud by a separate suit. Where, as in the present case, it has been found not merely that the decree was obtained by perjured evidence but also that the suit or claim was a false suit or claim and the falsity of the claim was necessarily known to the party putting forward the claim: *Held,* that the decree in question had been properly set aside. *Manindra Nath Mitra* v. *Hari Mondal 24 C. W. N. 133,* referred to. RAJANI KANTA DASS *v.* PURNA CHANDRA KUNDU (1920) **I. L. R. 48 Calc. 298**

FRAUDULENT CONVEYANCE.

See FRAUDULENT TRANSFER.

——— Transfer of Property Act, s. 53—*Conveyance void if intended to convert land into cash and place it beyond reach of creditors—Equity on setting aside transfer—Transferee entitled to a charge for amount spent in discharging valid prior mortgage.* A transferee for value, who takes the transfer with the intention of helping the transfer or to convert his immoveable property into cash which can be easily concealed and thus to defeat or delay his creditors cannot be treated as a transferee in good faith within the meaning of s. 53 of the Transfer of Property Act. *Ishan Chunder Das Sarkar* v. *Bishu Sirdar, I. L. R. 24 Calc. 825,* followed. In such cases it lies on the transferee to prove good faith and valuable consideration; and where the latter is proved the Court will be slow in ordinary circumstances to hold that there was an absence of good faith. *Amarchand* v. *Gokul, 5 Bom. L. R. 142,* referred to. Where the transferee has discharged a valid prior mortgage on the property sold, the transfer will be set aside only on his being given a charge for the amount spent by him in discharging such mortgage. *Chidambaran Chettiar* v. *Sami Iyar, I. L. R. 30 Mad. 6,* distinguished. PALAMALAI MUDALIYAR *v.* SOUTH INDIAN EXPORT COMPANY (1909) . . . **I. L. R. 33 Mad. 334**

FRAUDULENT CONVEYANCE—*contd.*

——— *To defeat or delay creditors, whether binding until set aside by suit—Transfer of Property Act (IV of 1882), s. 53, nature of suit under—Attachment of alienated property—Claim by alienee—Suit by unsuccessful claimant—Plea of attaching decree-holder of fraudulent nature of alienation validity of.* An alienation which is not a sham transaction but is only a fraudulent one intended to defeat or delay creditors of the alienor is only voidable and continues in force until set aside in proceedings properly instituted for the purpose; and in a suit by the alienee to set aside an adverse order passed against him in claim proceedings, it is not open to an attaching decree-holder against the alienor to plead in defence the fraudulent character of the alienation. *Palaniandi Chetti* v. *Appavu Chettiar 30, Mad. L. J. 565,* approved and *Abdul Kadir* v. *Ali Mia, 14 I. C. 715; 15 C. L. J. 649,* not followed. *Quære:* Whether a suit by a creditor to avoid an alienation as infringing s. 53 of the Transfer of Property Act must be brought in a respresentative capacity on behalf of all the creditors? SUBRAHMANYA AYYAR *v.* MUTHIAH CHETTIAR (1917) . . . **I. L. R. 41 Mad. 612**

FRAUDULENT DECREE.

——— *Suit to set aside where lies—Decree, if open to attack as having been made on perjured evidence.* The mere fact that the decree was obtained by false evidence would not be sufficient by itself to have it set aside by suit. The case itself must be found to be a fraudulent one. KASISHUR GOSWAMI *v.* AMIRUDDIN GAZI (1918) . . . . **23 C. W. N. 133**

——— *Suit to set aside—Character of fraud to be proved—True test—Suit to eject on expiry of* kabuliyat *decreed* ex parte—*Later suit by Defendant to set aside decree on allegation that* kabuliyat *fraudulently obtained and case decreed false.* *A* sued *B* for ejectment on the expiry of the term of a *meadi kabuliyat.* B contested the suit alleging that he was in fact an occupancy raiyat and the *meadi kabuliyat* had been obtained from him by *A* by fraud. B having failed to appear at the hearing an *ex parte* decree was passed in *A's* favour. Without attempting to have the decree set aside by application or appeal, *B* instituted the present suit to have the *ex parte* decree set aside as fraudulent: *Held*—That assuming that the *kabuliyat* had been obtained by fraud, in the previous suit *A* was not bound to state the circumstances under which it was executed, and as there was in that suit no contrivance by which B was prevented by *A* from placing his case before the Court, it could not be said that there was any fraud practised on the Court in procuring the decree or that the claim was false. With respect to the question as to what constitutes fraud for which a decree can be set aside two propositions appear to be well-established. The first is that although it is not permitted to show that the Court (in the former suit) was mistaken it may be shown that it was misled, in other words where the Court has been intentionally misled by the fraud of a party, and a fraud has been committed upon the Court with the intention to procure its judgment, it will vitiate its judgment. The second is that a decree cannot be set aside merely on the ground that it has been procured by perjured evidence. *Quære:* —Whether in order to set aside a decree on the

FRAUDULENT DECREE—*contd.*

ground of fraud, it must be shown that the fraud was practised in relation to proceedings in Court and that the decree must be shown to have been procured by practising fraud upon the Court. MANINDRO NATH MITRA *v.* HARI MONDAL
24 C. W. N. 133

FRAUDULENT EXECUTION.

See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXI, R. 2.
I. L. R. 40 Bom. 333

FRAUDULENT PREFERENCE.

See COMPANIES ACT, 1913, s. 231.
I. L. R. 2 Lah. 102

See PROVINCIAL INSOLVENCY ACT, 1920, s. 54. . I. L. R. 43 All. 427

——— *State of mind of maker —Intention—Receiver—Onus—Provincial Insolvency Act (III of 1907), s. 37.* The question whether there has been a fraudulent preference depends not upon the mere fact that there had been a preference but also on the state of mind of the person who made it. It must be shown not only that he has preferred a creditor but that he has fraudulently done so. It depends upon what was in his mind. For this purpose, it is not true that the debtor must be taken to have intended the natural consequences of his acts. One must find out what he really did intend. *Dicta* of LORD HALSBURY in *Sharp* v. *Jackson, (1899) A. C. 419,* followed. It is not necessary to threaten criminal proceedings to constitute [illegible] on his debtor, it cannot be deemed as a spontaneous act. The onus is on the Receiver to show that it was an outcome of a fraudulent preference. NRIPENDRA NATH SAHU *v.* ASHUTOSH GHOSH (1915) . . I. L. R. 43 Calc. 640

FRAUDULENT REPRESENTATION.

See CONTRACT ACT (IX OF 1872), ss. 20 65 . . I. L. R. 40 Bom. 638

See PARTITION SUIT.
I. L. R. 44 Calc. 28

See RES JUDICATA.
I. L. R. 45 Calc. 442

FRAUDULENT SUPPRESSION.

See SUBROGATION. I. L. R. 43 Calc. 69

FRAUDULENT TRANSFER.

See ATTACHMENT I. L. R. 44 Calc. 662

See FRAUDULENT CONVEYANCE.

See PROVINCIAL INSOLVENCY ACT (III OF 1907), s. 36. . 2 Pat. L. J. 101

s. 43 . . I. L. R. 44 Bom. 673

See TRANSFER OF PROPERTY ACT (IV OF 1882), s. 53. . I. L. R. 43 Bom. 707
I. L. R. 39 Bom. 507

FREEDOM OF RELIGIOUS ACT (XXI OF 1850).

See CASTE DISABILITIES REMOVAL.

See HINDU LAW—CONVERSION.
15 C. W. N. 545

FREIGHT.

——— paid in advance—

See BILL OF LADING.
I. L. R. 44 Mad. 145

See CONTRACT ACT (IX OF 1872), ss. 56, 65 . . I. L. R. 40 Bom. 529

FRENCH SUBJECT.

——— will of—

See PROBATE AND ADMINISTRATION ACT, s. 5 . . 24 C. W. N. 713

FRESH PROCEEDINGS.

See JURISDICTION OF CRIMINAL COURT.
I. L. R. 40 Calc. 71

See NOLLE PROSEQUI.
16 C. W. N. 983

FRESH RULE.

See CRIMINAL REVISIONAL JURISDICTION.
I. L. R. 38 Calc. 933

FRESH SUIT.

——— *liberty to institute*—

See JURISDICTION.
I. L. R. 48 Calc. 138

FRIVOLOUS OR VEXATIOUS ACCUSATION.

See CRIMINAL PROCEDURE CODE, s 250.
I. L. R. 40 All. 79

FRIVOLOUS OR VEXATIOUS COMPLAINT.

See CRIMINAL PROCEDURE CODE, ss. 107, 250 . . I. L. R. 36 All. 382

FUGITIVE OFFENDER.

See EXTRADITION. I. L. R. 41 Calc. 400

See HABEAS CORPUS.
I. L. R. 39 Calc. 164

FULL BENCH.

See PRESIDENCY SMALL CAUSE COURTS ACT (XV OF 1882) ss. 37, 38.
I. L. R. 34 Bom. 316

s. 38. . . I. L. R. 42 Bom. 80

See REFERENCE TO FULL BENCH.

——— question referable to a—

See LIMITATION ACT (IX OF 1908), SCH. I, ART. 134. I. L. R. 40 Mad. 1040

——— *Judicial opinion, reversal of, by Full Bench—Effect.* The effect of the Full Bench decision in, *Bhupati Nath Smrithitirtha* v. *Ram Lal Moitra, 14 C. W. N. 18,* was not to make a new law but to declare the law as it stood and has always stood. SARADINDU MUKERJEE *v.* CHARU CHANDRA DUTTA (1919)
23 C. W. N. 872

——— *When a reference should be made to Full bench.* Advantage of referring matters, upon which a difference of opinion has arisen in the High Court, to a Full Bench adverted to. BUDDHA SINGH *v.* LALTU SINGH (1915)
20 C. W. N. 1

FURTHER INQUIRY.

See CRIMINAL PROCEDURE CODE.
s. 202.
s. 203. . . **5 Pat. L. J. 47**
s. 437. . . **25 C. W. N. 312**
. **I. L. R. 42 All. 128**

——— **after discharge of accused—**

See CRIMINAL PROCEDURE CODE, 1898, s. 437 . . **I. L. R. 1 Lah. 216**

——— *Power to direct further inquiry against a person not named in the complaint nor before the Court—Notice, necessity of—Criminal Procedure Code (Act V of 1898), s. 437.* The Court has no jurisdiction to direct a further inquiry, under s. 437 of Criminal Procedure Code, in respect of a person who was not named in the complaint and against whom no other regular process has been issued. An order under s. 437 of the Code made without previous notice to the accused is bad in law. *Giridahri Marwari v. Emperor, 12 C. W. N. 822,* followed. AMBAR ALI *v.* ANJAB ALI (1911) **I. L. R. 39 Calc. 238**

FUTURE MAINTENANCE.

——— **assignment of—**

See MAINTENANCE **I. L. R. 38 Calc. 13**

FUTURE RIGHTS.

——— **creation of—**

See REGISTRATION OF DOCUMENTS.
L. R. 46 I. A. 240

FUTURE WIFE.

——— **gift to—**

See HINDU LAW—WILL.
I. L. R. 39 Calc. 87

G

GAMBLING.

See BOMBAY PREVENTION OF GAMBLING ACT (BOM. IV OF 1887).

See PUBLIC GAMBLING ACT (III OF 1867)

——— **forfeiture for—**

See BOMBAY PREVENTION OF GAMBLING ACT (BOM. IV OF 1887), s. 8.
I. L. R. 44 Bom. 686

——— **in the courtyard of a mosque—**

See BOMBAY PREVENTION OF GAMBLING ACT (BOM. IV OF 1887), s. 12.
I. L. R. 41 Bom. 149

GAMBLING DEBT.

See EVIDENCE ACT (I OF 1872), s. 92.
I. L. R. 35 All. 558

GANGAPUTRA.

See HINDU LAW (MISC).
I. L. R. 43 All. 581

GANG OF THIEVES.

See PREVIOUS CONVICTIONS, EVIDENCE OF.
I. L. R. 38 Calc. 408

GANJA.

——— **illegal possession of—**

See MASTER AND SERVANT.
I. L. R. 39 Calc. 344

GANJAM AND VIZAGAPATAM AGENCY RULES.

——— *Agents' order under s. XVIII—Maintainability of petition to High Court under Rule XX—Interference of High Court in proper cases—S. 244, bar by—Who can set up.* A petition lies to the High Court under rule XX of the Ganjam and Vizagapatam Agency Rules, even though the Agent acted under Rule XVIII in dismissing an appeal. *Jagannadha* v. *Gopanna, I. L. R. 16 Mad. 229,* dissented from. An order of the Agent summarily dismissing an appeal is a decree as it disposes of the rights of the parties, and R. XX the High Court may in a proper case (as here, where the Agent gives no reasons for dismissal) direct the Agent to review his judgment. A person who was not a party to a previous suit cannot set up the effect of an order in execution in that suit as a bar to a suit against him. *Quære:* Whether when s. 244, Civil Procedure Code, does not apply to Agency Tracts, the principle of that section applies. VIKRAMA DEO *v.* RAGHUNATHA PATRO (1913) . . **I. L. R. 36 Mad. 128**

GANTI (TENURE)—

——— *Settlement-holder of* mehal *if bound to recognise* ganti *tenure created by previous settlement-holder where he is bound by* kabuliyat *to respect recorded rights of under-tenure-holder.* The temporary settlement-holder of a *mehal* created a *ganti* interest in favour of certain persons. Subsequently the *mehal* was sold for default in payment of Government revenue and purchased by the Plaintiff whereupon the Settlement Officer settled the rent for the *mehal* on the basis of the rent payable by the *gantidars* and the Plaintiff executed a *kabuliyat stipulating* to respect the recorded right of under-tenure-holders and other persons. *Held,* that the Plaintiff was bound to recognise the *ganti* tenure and could not question its existence. A controversy cannot be raised in second appeal for the first time in a matter regarding which no issue was framed. JARIP SARDAR *v.* JOGENDRO NATH CHATTERJI . **24 C. W. N. 53**

GAONTIA TENURE.

See CENTRAL PROVINCES LAND REVENUE ACT, 1881, s. 65A . **1 Pat. L. J. 293**

——— *Succession to—resignation of eldest heir, whether must be immediate to be effective—resignation as to part of the estate, validity of—proof of resignation, onus of—Estoppel.* The provisions of s. 65 (*a*) of the Central Provinces Land Revenue Act, 1881, were enacted not for the benefit of the *zamindar,* but to retain certain selected families in the *gaontiaships* of their villages and to protect them against transfers and subdivisions. The right of the eldest male heir to resign or renounce his rights as *gaontia* with a view to giving up all claim to inherit the estate which has by statutory devolution descended upon him must be exercised at the time when the succession opens, *viz.,* on the death of the last protected *gaontia* and it is not open to him subsequently to transfer the estate by sale, gift, or otherwise in favour of a younger brother. *Query*—whether, if he did so, he would be estopped from contesting

GAONTIA TENURE—*contd.*

the transfer. *Per* ATKINSON, *J.* (IMAM, *J.*, contra). If two or more villages form the protected tenure of a *gaontia*, even though they may have been declared protect by separate certificates at different times, the eldest male heir must exercise his choice of resignation or adoption in respect of all or none of such villages. There can be no splitting up of the estate or tenure into different parts having distinct entities. Where the election is made by the person upon whom the tenure devolves by inheritance it is irrevocable in its operation, and automatically one heir is succeeded by another of equal decree. In the absence of evidence to show that the eldest son of the last protected *gaontia* resigned his claim to the *gaontiaship* a younger son is not entitled to surrender the estate to the *zamindar*. *Per* ATKINSON, *J.* The onus of establishing the resignation lies on the person who affirms it. *Per* CHAPMAN, *J.* A *gaontia* is not entitled to surrender his estate in favour of his *zamindar*. The provisions of s. 132 were intended to enable the Deputy Commissioner merely to determine claims to protection under s. 65 (*a*) and to enforce the provisions of that section. It was never intended that the Deputy Com-

in the Civil Court. Where a younger son of the last protected *gaontia* was recorded in the Record-of-Rights. *Held*, that as the presumption arising

better title than the younger son *Held, further*, that the fact the eldest son had been treated by the

the entry in the Record-of-Rights. *Per* ATKINSON, *J.* The word "resign" in s. 65 (*a*) really means "release." LAL NRIPARAJ SINGH, RAI BAHADUR *v.* MOHAN GAONTIA (1918) . **3 Pat. L. J. 229**

GARDEN.

See HOMESTEAD LAND.

I. L. R. 42 Calc. 638

GARNISHEE.

See CIVIL PROCEDURE CODE (1882), ss. 268, 278, 283. **I. L. R. 38 Bom. 631**

See DECREE. . **I. L. R. 39 Bom. 80**

See EXECUTION OF DECREE.

I. L. R. 38 Bom. 631

———— **deposit by—**

See DEPOSIT IN COURT.

I. L. R. 43 Calc. 269

———————— *Execution of decree—attachment of property outside Court's jurisdiction—Corporation, place of residence of—Fidelity bond, construction of.* The jurisdiction of a Court in enforcing execution of its decrees is restricted by its territorial limits. A Court desiring to seize or attach the property of a judgment-debtor outside its jurisdiction, and when such property is in the hands of, or custody of another, also outside the jurisdiction, can only reach that property by means ... ree ... urt ... be ... ule,

GARNISHEE—*contd.*

however, only applies (*i*) when the property sought to be attached is *bonâ fide* without the jurisdiction of the Original Court whose decree is sought to be enforced; and (*ii*) when the property sought to be attached is in the hands of a third party not amen-

removed from one jurisdiction to another for the purpose of defeating the right, authority, and power of the executing Court in the execution of its

in its operation and effect, secure the recovery of the property fraudulently removed. *Begg, Dunlop & Co.* v. *Jugannath Marwari.* (*I. L. R. 39 Calc. 104*), approved. A corporation may be said to reside wherever it carries on its business irrespective of the location of its head office. If a corporation such as a Bank has branch offices in several separate and distinct jurisdictions it may be sued in any one of such jurisdictions for the enforcement of a right in respect of which a cause of action exists within the limits of each independent jurisdiction. *R* deposited certain securities with the

the securities in the event of any loss or damage being caused to it by *R*, and (*ii*) that *R* should be entitled to interest on the securities but the Bank should have power to suspend payment of interest if *R* occasioned any loss or damage as aforesaid. The Bank suspended payment of interest in accordance with the terms of the bond. A judgment-creditor of *R* applied for attachment of the securities and interest, which had accumulated since the suspension. *Held*, (*i*) that the true meaning of the fidelity bond was that the interest accumulated after suspension should form a fund as collateral security in the event of the main security proving insufficient to discharge the loss or damage sustained by the Bank; (*ii*) that *R*'s judgment creditor was entitled to attach the securities and interest, subject to the Bank's lien, even though such securities had been removed from Patna to Calcutta *with the consent of the parties.* BANK OF BENGAL *v.* SARAT CHANDRA MITTRA (1918)

4 Pat. L. J. 141

GAS COMPANY.

———— **liability of—Dangerous article—**

———————— *Gas plant set up in Railway Company's premises by Gas Company—Defective installation—Explosion—Liability of Gas Company for damages—Proximate cause—Liability independent of contract—Onus of proof.* A Gas Company installed a supply plant at the premises of a Railway Company. The plaintiffs, workmen of the Railway Company, were in charge of the boilers heated by the gas. The gas exploded and killed and injured the workmen. It was found by ... traceable to the ... *Held*, that the

mity. This duty arises irrespective of any con-

GAS COMPANY—*contd.*

tract. *Dixon* v. *Bell, 5 M. & S. 198; Thomas* v. *Winchester 6 N. Y. 409;* and *Parry* v. *Smith, 4 C. P. D. 325,* referred to. *Held,* further, that initial negligence having been found against the Gas Company, they were liable unless they proved that the proximate cause of the accident was the conscious act of another volition. DOMINION NATURAL GAS CO., LD. *v.* JAMES H. COLLINS (1909) . . . . . 14 C. W. N. 158

GAYAWAL.

——— *Whether gaddi of Gayawal is an office or business and inheritible—Improper use of gaddidar's name—Injunction.* Whether the occupant of the *gaddi* of the *Gayawal* has an hereditary office or not he has a business and that business is property capable of being inherited on his death. Where a person has been using the name of the occupant of the *gaddi* of a *Gayawal* with the express object of benefiting himself at the latter's express the court will restrain, by injunction, repetition of such improper using of the plaintiff's name. LACHMAN LAL PATHAK *v.* BALDEO LAL SHATHWARI (1917) 2 Pat. L. J. 705

GENERAL ACCOUNT.

See PARTNERSHIP. I. L. R. 34 Mad. 112

GENERAL CLAUSES ACT (I OF 1868).

——— s. 2 (1)—

See PLEADER . I. L. R. 44 Calc. 290

——— s. 3—

See HABEAS CORPUS.
I. L. R. 44 Calc. 459

GENERAL CLAUSES ACT (X OF 1897).

——— application of—

See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXXIII, R. 1.
I. L. R. 41 Mad. 624

——— s. 3 (25)—

See LIMITATION ACT, 1908, SCH. I, ART. 120, ETC. . . . 3 Pat. L. J. 522

See PUNJAB PRE-EMPTION ACT.
I. L. R. 1 Lah. 567

——— *Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 13—Court of Small Causes—Jurisdiction—Ferry—"Immovable property"—Suit to recover tolls alleged to be due to plaintiff as lessee of a ferry. Held,* that the right to a ferry is a benefit which arises out of land and comes within the definition of immovable property under s. 3 (*25*) of the General Clauses Act, 1897, and a suit by a lessee of a ferry to levy a toll alleged to be recoverable by him as such lessee, falls under, Art. 13 of the second Schedule to the Provincial Small Cause Courts Act and is therefore not cognizable by that Court. *Gokal Chand* v. *Lal Chand, Punj Rec., 1897, Case No. 48, p. 215,* and *Desa Singh* v. *Narain Das, Punj. Rec., 1898, Case No. 80, p. 278,* approved. ABDUL HAMID KHAN *v.* BABU LAL (1913).
I. L. R. 35 All. 156

——— Benefits arising out of Land are immovable property. GULAM MOHEDIN HASAN *v.* PARBATI. . I. L. R. 36 Calc. 665

GENERAL CLAUSES ACT (X OF 1897)—*contd.*

——— s. 3, (25)—*contd.*

See PROFITS A PRENDRE.
2 Pat. L. J. 323

——— a company is a 'person' and can therefore sue through its Liquidator in former pauperis.

See CIVIL PROCEDURE CODE, (1908. O. XXXIII) . I. L. R. 41 Mad. 624

——— s. 3. cl. (52)—

See TRANSFER OF PROPERTY ACT (IV OF 1882), s. 59 . I. L. R. 41 Bom. 384

——— s. 6—

See EX PARTE DECREE.
I. L. R. 39 Calc. 506

See EXECUTION OF DECREE.
I. L. R. 40 Calc. 704
1 Pat. L. J. 214

See HUSBAND AND WIFE.
I. L. R. 37 Bom. 393

See TRANSFER OF PROPERTY ACT, ss. 88, 89 . . . I. L. R. 34 All. 72

——— s. 6 (c) and (e)—

See CIVIL PROCEDURE CODE (ACT V OF 1908), O. XXI, R. 93.
I. L. R. 40 Mad. 1009

——— *Limitation Act (IX of 1908), s. 6, Sch. I, Art. 166—Sale of minor judgment-debtor's property before 1909—Minor's right to apply to set aside sale on attaining majority.* The right which accrued to a minor judgment-debtor under Act XV of 1877 to apply to set aside a sale which took place before the Limitation Act of 1908 came into force upon attaining majority is not taken away by the coming into operation of that Act, that being a privilege which has been preserved by s. 6, cl. (c) of the General Clauses Act. FAZL KARIM *v.* ANNADA MOHAN RAY (1911)
15 C. W. N. 845

——— ss. 6, 7—

See HABEAS CORPUS.
I. L. R. 44 Calc. 459

——— ss. 9 and 10—

See PROVINCIAL INSOLVENCY ACT, ss. 45 AND 46 . I. L. R. 42 Mad. 13

——— s. 10—

See LIMITATION ACT (IX OF 1908)—
s. 4. . . . I. L. R. 41 All. 47
s. 31 . . . I. L. R. 34 All. 375
I. L. R. 36 Bom. 268

See MADRAS ESTATES LAND ACT.
I. L. R. 42 Mad. 310

——— *Civil Procedure Code (Act V of 1908), O. XXI, r. 1—Decree—Payment of money ordered in a decree—Payment ordered on a fixed date—Delay in making payment into Court owing to closing of Court—Payment on the opening day—Practice.* A decree provided as follows: "The plaintiff should pay, by the 10th day of April 1909, to the defendant Rs. 100. If the moneys are not paid by the plaintiff as agreed upon, the property in dispute will remain with the defendants by right of ownership and the plaintiff will have

GENERAL CLAUSES ACT (X OF 1897)—*—contd.*

——— s. 10—*contd.*

no right of ownership over the same." The plaintiff chose to pay the money into Court, and finding it closed on the 10th, she paid the money on the 14th April 1909, the day on which the Court reopened. A question having arisen whether the payment so made was within the terms of the decree. *Held,* that the payment was properly made, for O. XXI, r. 1 of the Civil Procedure Code, 1908, intended to enact and did enact that payment into Court was a valid compliance with the decree even though the decree directed payment to the decree-holder. WANA MARD RAVJI *v.* NATU WALAD MURHA (1910) . **I. L. R. 35 Bom. 35**

——— s. 13—

See ARBITRATION ACT, ss. 8, 9. **I. L. R. 43 Bom. 809**

See PLEADER . **I. L. R. 44 Calc. 290**

——— s. 17, cl. (1)—

See DEFENCE OF INDIA ACT (IV OF 1915), s. 2 . . **I. L. R. 42 Mad. 69**

——— s. 26—

See CRIMINAL PROCEDURE CODE, s. 235. **3 Pat. L. J. 433**

——— *One act constituting two offences under different laws—conviction for both* [illegible] The accused was charged [illegible] under s. 101 [illegible] of resisting [illegible] by-standers [illegible] by one specific act. *Held,* that the conviction under s. 101 of the Railway Act could not stand. It is only when one act constitutes two offences under the same law, that separate sentences can be inflicted for each offence. RAHAMATULLA *v.* KING EMPEROR (1916) . . **1 Pat. L. J. 373**

——— s. 27—

See PRACTICE . **I. L. R. 35 Bom. 213**

GENERAL CLAUSES ACT (BENGAL).

See BENGAL ACT, I OF 1899.

——— s. 8, cl. (e)—

See EXECUTION OF DECREE. **I. L. R. 40 Calc. 623**

GENERAL CLAUSES ACT (BOMBAY).

See BOMBAY ACT, I OF 1904.

——— s. 3—

See MAMLATDARS' COURTS' ACT, BOMBAY (BOM. ACT II OF 1906), s. 23. **I. L. R. 39 Bom. 552**

GENERAL CLAUSES ACT (UNITED PROVINCES).

See UNITED PROVINCES ACT, I OF 1904.

——— s. 6—

See AGRA TENANCY ACT (II OF 1901), s. 20 . . **I. L. R. 32 All. 628**

——— s. 23—*Act (Local) No. I of 1900 (United Provinces Municipalities Act), s. 187—Municipality—Powers of Government to frame rules*

GENERAL CLAUSES ACT (UNITED PROVINCES)—*contd.*

——— s. 23—*contd.*

—Rules as to Municipal elections—"Previous Publication"—"Competent court." Certain draft rules relating to municipal elections were published in the local Gazette. These draft rules were then considered by the Government in connection with such criticisms and objections as had been presented, and finally a set of rules was published in the Gazette as having been made under s. 187 of the United Provinces Municipalities Act, 1900. *Held,* that such rules were none the less validity passed because in some details they differed from the draft rules previously published. The rules so made provided that a municipal election might be questioned by means of a petition presented to 'a competent Court.' *Held,* that the expression 'competent Court' so used meant a Civil Court of competent jurisdiction with reference to the valuation given by the petitioner in his petition. GUR CHARAN DAS *v.* HAR SARUP (1912) **I. L. R. 34 All. 391**

[illegible] reached one of the octroi barriers of Bareilly on the 19th of February 1917. The Officer in charge demanded a larger sum than *M* considered properly leviable. The matter was referred to the Octroi Superintendent who, as he had the right to do, assessed the duty at Re. 1-0-9. Under r. 40 of the Municipal Account Code framed under Act No. 1 of 1900, a person in the position of *M* could appeal against the decision within sixty days, but he could only exercise the right by first paying under protest the duty demanded. *M,* however, appealed against the decision without making the payment. On the expiry of sixty days a prosecution was instituted against *M* under Act No. II of 1916, and he was fined. He applied in revision to the High Court. *Held,* that the conviction was legal; the jurisdiction of the Court was saved by s. 24 of the Local General Clauses Act, and the fact that the prosecution had been instituted under the Municipal Account Code framed under the repealed Municipalities Act (I of 1900), did not affect the question. *Held,* also, that the mandatory direction in r. 40 of the Municipal Account Code lays down, by inference, a period of 53 days, on the expiry of which without payment as required the offence is complete and a prosecution may be started. EMPEROR *v.* MANIK CHAND (1917) **I. L. R. 40 All. 105**

GENERAL COMMITTEE.

——— sanction by—

See DEMOLITION OF BUILDING. **I. L. R. 37 Calc. 585**

GENERAL REPEALING ACT (XII OF 1873).

See CIVIL PROCEDURE CODE (ACT V OF 1908), s. 115 . **I. L. R. 40 Bom. 86**

GHARJAMAI.

See HINDU LAW—MAINTENANCE. **15 C. W. N. 205**

GHAT.

See HINDU LAW **I. L. R. 43 All. 531**

GHATWALI TENURE.

See [illegible]

I. L. R. 40 Calc. 173

See [illegible] 6 Pat. L. J. 687

See Limitation Act, Sch. I, Art. 144.

2 Pat. L. J. 505

———— *Attachment—Receiver, appointment of—Execution of decree.* On an application for execution of a decree, although an order directing attachment of a ghatwali estate may be erroneous, an order appointing a Receiver to receive the rents and profits of such estate is sanctioned by authority. *Uday Kumari Ghatwalin* v. *Hari Ram Shaha, I. L. R.* [illegible] *Calc.* [illegible], referred to. Kelobati v. Mohan Chandra Mandal (1912)

I. L. R. 39 Calc. 1010

———— *Suit for possession—Court-fee—Court-Fees Act (VII of 1870), s. 7, cl. v, sub. cls. (a), (c), (d).* Where a suit had been brought for recovery of possession of the Ghatwali lands of Rohini and Court-fees had been paid under sub-cl. (a) of cl. v. of s. 7 of the Court-Fees Act on ten times the revenue alleged to be payable, and the Court below held that sub-cl. (c) was applicable and the value of the subject-matter should be deemed to be fifteen times the net profits: *Held*, that the Ghatwali land formed part of the estate of the zemindar of [illegible] and the contention that sub-cl. (c) was applicable could not be supported. *Kastura Kumari* [illegible] *Raja Lilanand* v. *Moneher Deo, (1864) W. R. 39, Raja Lilanand* [illegible] *Moo. I. A. 101, Moohra* [illegible] *Government of Bengal, 6 Moo. I. A. 101,* [illegible] *Raja Leelanund* v. [illegible] *nund, 3 W. R. 84, Raja Leelanund* v. *Munoranjan, 13 W. R. 101, Lilanand Singh* v. *Munoranjan, 5 B. L. R. 124, Lilanund* v. *Munranjan, I. L. R. 3 Calc. 251,* referred to. *Held*, also, that sub-cl. (d) was applicable, as the land in suit formed part of an estate paying revenue to Government but did not constitute a definite share of such estate, nor was it separately assessed with revenue. Consequently, the value of the subject-matter must be deemed to be the market value of the land. Chandra Narayan Singh *v.* Asutosh De (1914)

I. L. R. 41 Calc. 812

———— *Suit for resumption of land by proprietor—Jaigir, two kinds of—Not necessarily conditional and inalienable—Tenure created by document, evidence necessary to prove incidents of—Fact of descent of land from father to son for a long time, inference to be drawn from—Facts necessary to be proved even if grant originally made subject to performance of service—Limitation—Fact of service being incapable of being enforced, effect of, on service tenure.* The plaintiff brought a suit for the possession of two mouzahs within his zemindari against the defendants who were in possession, having acquired them by a series of purchases from the persons who previously held them under the plaintiff. The plaintiff's case was that the mouzahs in question were a *jaigir* conditional on the performance of *Ghatwali* services and as such were inalienable and the original holders having alienated them the plaintiff was entitled to resume possession: *Held*, on the evidence, that the plaintiff had failed to prove that the land was held on a service tenure, whether *Ghatwali* or otherwise. That a *jaigir* is not necessarily conditional; it may be unconditional and the mere fact that a tenure is described as a *jaigir* by no means conclusive and its incidents must be determined from other circumstances.

GHATWALI TENURE—*contd.*

That where the tenure in question was created by a document, the terms on which the land is held, its alienability and its liability to forfeiture must depend on the terms of the particular grant and not on the terms of grants that may have been made to others. Bhagwat Baksh Ray *v.* Sheo Prosad Sahu (1913) . . 18 C. W. N. 297

———— *Liability to sale for arrears of rent.* The contention that no *ghatwali* tenure is liable to be sold in execution of a decree is not a sound contention. Kharagpur *ghatwali* lands are liable to be sold in execution of a decree for rent. Where a *ghatwal* is liable to render service to the Deputy Commissioner of the Santal Parganas, and derives his appointment from the Deputy Commissioner, his land can be sold only with the consent of the Deputy Commissioner. When a *ghatwal* is appointed by a local Raja and is not shown to be liable to render service to any body but such Raja, his *ghatwali* lands may be sold by the Raja. The only *ghatwals* over whom the Deputy Commissioner of the Santal Parganas has jurisdiction are those who are subject to the provisions of the Bengal *Ghatwali* Lands Regulation (XXIX of 1814). The Deputy Commissioner has power to put up for sale for arrears of revenue the lands of *ghatwals* subject to Regulation XXIX of 1814. Lakshmi Narain Mahto *v.* Satya Narain Chakravarty (1916) . . 1 Pat. L. J. 197

———— Where the right to [illegible] the *ghatwal* rests with the Government a *ghatwali* tenure is not saleable in execution of a decree for arrears of rent. Midnapur Za[illegible]mindari Co., Ltd. *v.* Ajambar Singh Mur[illegible]a (1916)

1 Pat. [illegible] L. J. 601

———— *Ghatwali la*[illegible]*d, tenants of—Acquisition of right of occupa*[illegible]*cy—Bengal Tenancy Act (VIII of 1885), s. 181—*[illegible] *Act*, *Act X of 1859, s. 6*, and *Act VIII (B.C.) of 1869, s.* [illegible]*ved.* Tenants in occupation of *ghatwali* land coul[illegible] acquire occupancy right therein under s. 6 of [illegible] Act X of 1859 and s. 6 of Act VIII (B.C.) of 1869 [illegible] and such right acquired between 1859 and 1885 [illegible] has not been taken away by s. 181 of the Bengal Te[illegible]nancy Act. Sitikanta Roy *v.* Bipra Das Charan (1[illegible]918)

22 C. W. [illegible]N. 763

———— *Mode of succession—Incidents of tenure—Rights of male members of family other than the acutal Ghatwals.* The result of the decisions of the Privy Council as to the nature of the Ghatwali tenure, is that it is ordinarily hereditary, the estate descending to such male member of the family as the zemindar approves as competent; and that it is the right of of the family, so long as they have male members competent to perform the duties, to have one or more of them appointed Ghatwals. The incidents of the Ghatwali tenure in this case are not such as to give the family any rights over the property while it is in the hands of the Ghatwal, on which point their Lordships are in full agreement with the Courts in India. If the scheme of the pottah was to preserve family rights there would still be no reason for holding that they extended so as to give any beneficiary interest in the mouzahs to the male members of the family, other than the actual grantees. *Nilmani Singh* v. *Bakranath Singh, I. L. R. 9 Calc. 187 ; L. R. 9 I. A. 104,* and *Kali Pershad Singh* v. *Anand Roy, I. L. R. 15 Calc. 491 ;*

GHATWALI TENURE—*contd.*

L. R. 15 I. A. 18, referred to. DURGA PRASAD SINGH *v.* TRIBENI SINGH (1918)
I. L. R. 46 Calc. 362
L. R. 45 I. A. 251

GHEE.

See ADULTERATION.
I. L. R. 39 Calc. 682

———— *Adulteration—Chemical tests for determination of the purity of ghee—Corporation standard—Value of the same—Necessity of testing the value of such standard by evidence in each case—Calcutta Municipal Act (Beng. III of 1899), s. 495A (1)—Amendment Act (Beng. I of 1917), s. 2.* There is no standard of purity of ghee fixed by the Indian Legislature and the Courts of Law have, therefore, to decide the question of adulteration upon such evidence as is available in each case. As there is no statutory presumption every case must depend on its own evidence. The High Court was strongly of opinion that a statutory standard should be laid down as raising a presumption of adulteration, and that such cases should not be made to depend on evidence forthcoming in each case to test the value of the Corporation standard. The Court should determine whether [illegible] ation on account of the limited number of its expert's experiments, and the fact that sufficient allowance had not been made for climatic conditions, nature of food, period of lactation, breed, stabling and local conditions, nor for the temperature of manufacture; but considered the Corporation *B. R.* and *Saponification* figures to be fair. Where the two samples of *ghee*, in respect of which [illegible] was adulterated. GRANDE VENKATTA RATNAM *v.* CORPORATION OF CALCUTTA (1920)
I. L. R. 47 Calc. 633
22 C. W. N. 745

GHEE ADULTERATION ACT. (Ben. I of 1919).

—— [illegible]), *s. 2* [illegible] *of 1899),* [illegible] — *Standard raising presumption as to adulterated nature of ghee.* The Ghee Adulteration Act does not lay down a standard raising a presumption that ghee not satisfying the standard is not genuine and in the absence of such statutory presumption every case must depend upon its own evidence. Where it was found that the ghee sold by the accused contained a percentage of foreign fat: *Held*, that it was adulterated with the meaning of sub-cl. 2 of s. 2. GRANDE VENKATTA RATNAM *v.* CORPORATION OF CALCUTTA
24 C. W. N. 383

GIFT.

See CIVIL PROCEDURE CODE, 1882, ss. 13, 44 (*b*) . . I. L. R. 35 Bom. 297

See CONSTRUCTION OF DOCUMENT.
I. L. R. 33 All. 665

GIFT—*contd.*

See CONTRACT ACT, s. 19.
I. L. R. 36 Bom. 57

See HINDU LAW—ALIENATION.
I. L. R. 45 Bom. 105

See HINDU LAW—ENDOWMENT.
I. L. R. 33 All. 253

See HINDU LAW—GIFT.

See HINDU LAW—JOINT FAMILY.
I. L. R. 45 Calc. 733
I. L. R. 42 Bom. 69

See HINDU LAW—WIDOW.
I. L. R. 34 Bom. 165
I. L. R. 32 All. 176
I. L. R. 37 Calc. 1
I. L. R. 39 All. 520

See JOINT TENANCY.
I. L. R. 34 Mad. 80

See LIMITATION . L. R. 46 I. A. 285

See LIS PENDENS I. L. R. 41 All. 534

See MAHOMEDAN LAW—GIFT.

See MALABAR LAW.
I. L. R. 38 Mad. 79

See NAIKINS . *I. L. R. 37 Bom. 116*

See REGISTRATION . I. L. R. 35 All. 3

See TRANSFER OF PROPERTY ACT (IV OF 1882)—
ss. 123, 129 . I. L. R. 38 All. 212
ss. 55, 123 . I. L. R. 34 Bom. 287

See TRUSTS ACT, *s. 5.*
I. L. R. 36 Bom. 396

See WILL . . I. L. R. 43 Bom. 88
I. L. R. 45 Bom. 711

———— **absolute, to son—**

See HINDU LAW—WILL.
I. L. R. 40 Calc. 274

———— **actionable claims—**

See TRANSFER OF PROPERTY ACT, 1882, ss. 3, 8 . I. L. R. 44 Mad. 196

———— **after unauthorised occupation—**

See TRANSFER OF PROPERTY ACT, 1882, s. 123 . I. L. R. 45 Bom. 164

———— **alteration of deed of—**

See TRANSFER OF PROPERTY ACT, IV OF 1882, s. 123 . I. L. R. 44 Bom. 231

———— **by adoptee—**

See HINDU LAW—ADOPTION.
I. L. R. 35 Bom. 169

———— **by husband to wife—**

See MALABAR LAW.
I. L. R. 38 Mad. 79

———— **by karta—**

See HINDU LAW—JOINT FAMILY PROPERTY . . I. L. R. 40 All. 159

———— **by Hindu widow—**

See HINDU LAW—GIFT.
I. L. R. 37 Calc. 1
I. L. R. 45 Bom. 105

GIFT—*contd.*

———— by Mahomedan widow—

See WASTE . **I. L. R. 44 Bom. 727**

———— by widow and next reversioner—

See HINDU LAW. **I. L. R. 44 Bom. 488**

———— Mortgage on half gifted land—Effect of—

See MAHOMEDAN LAW—GIFT.

I. L. R. 45 Bom. 1296

———— for religious purpose—

See HINDU LAW—GIFT.

I. L. R. 42 Bom. 136

———— of land, by co-parcener—

See HINDU LAW—PARTITION.

I. L. R. 39 Mad. 587

———— of land to a stranger—

See CUSTOM (SUCCESSION).

I. L. R. 2 Lah. 284

———— revocation of—

See MAHOMEDAN LAW—TRUST.

I. L. R. 34 Bom. 604

See ADOPTION . **I. L. R. 35 Bom. 169**

———— substantially to charity—

See MAHOMEDAN LAW—WAKF.

L. R. 44 I. A. 21

———— to a class —

See HINDU LAW—WILL.

I. L. R. 38 Calc. 188
I. L. R. 41 Calc. 1007

———— to Brahmins—

See HINDU LAW—GIFT.

I. L. R. 44 Bom. 304

———— to daughter—

See CUSTOM . **I. L. R. 39 Calc. 418**

See HINDU LAW—REVERSIONER.

I. L. R. 44 Bom. 255

———— to future wife—

See HINDU LAW—WILL.

I. L. R. 39 Calc. 87

———— to wife for life with directions to appoint—

See WILL . **I. L. R. 45 Bom. 711**

———— to illegitimate son—

See HINDU LAW—GIFT.

I. L. R. 39 Mad. 1029

———— to unborn person, validity of—

See HINDU LAW—GIFT.

I. L. R. 40 Mad. 818

———— to wife and children or children alone—

See MALABAR LAW.

I. L. R. 39 Mad. 317

———— validity of—

See OCCUPANCY HOLDING.

I. L. R. 45 Calc. 434

See RES JUDICATA.

I. L. R. 48 Calc. 499

GIFT—*contd.*

———— with obligation—

See CONTRACT ACT (IX OF 1872), s. 69.

I. L. R. 42 Bom. 93

———— **Gift burdened with an obligation**—*Alienation by donee—Restrictions on alienation.* When it is doubtful, whether a deed embodies a complete dedication to a religious trust or merely creates a gift of that property, subject to an obligation to perform certain services, the question should be decided by reference to the deed itself. In the former case the property would be inalienable, and in the latter alienable, subject to the obligation, and notwithstanding restrictions as to selling or mortgaging the said property. DASSA RAMCHANDRA *v.* NARSINHA

I. L. R. 35 Bom. 156

———— **Purdanashin illiterate donor**—*Fiduciary relationship—Cancellation—Independent and competent advice—Duty of solicitor—Power of revocation—Transfer of Property Act (IV of 1882), s. 126—Costs.* Where an old illiterate *purdanashin* woman executes an improvident deed of gift in favour of a person standing towards her in a fiduciary capacity, the *onus* lies on the donee to establish not only that the donor understood the transaction, but that she was in a position to exercise a free and unfettered judgment, that the intention to give was her own voluntary act, and that she had independent and competent advice. *Huguenin* v. *Baseley, 14 Ves. 273 ; Hall* v. *Hall, L. R. 8 Ch. App. 430,* followed. *Kanai Lall Jowhary* v. *Kamini Debi, 1 B. L. R. 31* (note); *Lyon* v. *Home, L. R. 6 Eq. 655,* referred to. It is the duty of a solicitor who acts as the sole solicitor in such a transaction, to try and protect the lady against herself, and to make all proper enquiries. A solicitor does not discharge his duty by satisfying himself simply that the donor understands and wishes to carry out the particular transaction. He must also satisfy himself that the gift is one that it is right and proper for the donor to make under all the circumstances; and if he is not so satisfied it is his duty to advise his client not to go on with the transaction, and to refuse to act further if the client persists. *Powell* v. *Powell, [1900] 1 Ch. 243, Wright* v. *Carter, [1903] 1 Ch. 27,* followed. *Coomber* v. *Coomber, [1911] 1 Ch. 273,* distinguished. In considering the validity of a deed of gift, the absence of a power of revocation is of importance, though not sufficient by itself to show that the gift is invalid. *Hall* v. *Hall, L. R. 8 Ch. App. 430,* referred to. KAMINI DASSEE *v.* KRISHNA CHANDRA MUKERJEE (1912)

I. L. R. 39 Calc. 933

———— **Death of donor before registration of deed**—*Registration by donee without consent of donor's legal representatives—Transfer of Property Act (IV of 1882), s. 123—Registration Act (III of 1877), effect of.* A deed of gift registered by the donee after the death of the donor without the consent of the legal representatives of the donor is valid. There is nothing in s. 123 of the Transfer of Property Act which requires the donor to have the deed registered; all that is required is that he should have executed the deed. Once such an instrument is duly executed, the Registration Act allows it to be registered even though the donor may not agree to its registration, and upon registration the gift takes effect from the date of execution. *Ramamirtha*

GIFT—*concld.*

Ayyan v. *Gopala Ayyan, I. L. R. 19 Mad. 433, Dasi Svarnam* v. *Deivanayagam Pillai, 28 Mad. L. J. 378* and *Amirdam* v. *Muthukumaru Chetty, 13 Mad. L. J. 303*, overruled. VENKATI RAMA REDDI v. PILLATI RAMA REDDI (1916)
I. L. R. 40 Mad. 204

——— *Construction of deed of gift—Zamindar giving away all his properties to his son retaining an allowance and some "zirat land" for maintenance—Donor's interest in "zirat land" a reversion—Sale of zamindari how affects "zirat land"—Construction of decree and sale proceedings—Symbolical possession, effect of, as against a party to proceedings.* Where a zamindar conveyed by gift all his properties to his only son, stipulating for a maintenance allowance of Rs. 400 a month to be paid to him by his son for his life and retaining 150 bighas of land in his "possession and occupancy as zirat land." *Held*, that the expression "zirat land" merely meant land retained by the donor for his personal use and maintenance without paying any rent thereof, etc.; that on the determination of his interest, the land was again to form part of the general zamindari property of the family, so that his son had in it a vested zamindari interest in reversion during the donor's lifetime. That the plaintiff who got possession of the zamindari property at a mortgage sale obtained possession of the reversionary interest in the "zirat land" subject to the life interest of the donor That the fact that the Court deleted from the description of the properties ordered to be sold, the words "*mararazi zirat*" to bring it into conformity with the property as described in the mortgage bond did not lead to the exclusion of the "zirat land" from the sale, inasmuch as the true construction of the decree depended on what the Court actually ordered, not on what it refused to order. That symbolical possession given to the plaintiff was sufficient to dispossess the defendants in the *mortgage suit and were donor's interest in*

RADHA KRISHNA CHANDERJI v. RAM BAHADUR (1917) . . . . . **22 C. W. N. 330**

GIFT OVER.

See HINDU LAW—WILL.
I. L. R. 42 Calc. 561

See WILL . **I. L. R. 40 Calc. 192**
I. L. R. 46 Calc. 485

GODOWNS.

See LAND ACQUISITION.
I. L. R. 43 Calc. 665

GOLDEN TEMPLE (DARBAR SAHIB), AMRITSAR—

——— Succession to office and property of granthi—

See CUSTOM (RELIGIOUS INSTITUTIONS).
I. L. R. 1 Lah. 511 and 540

GOOD FAITH.

See WRONGFUL CONFINEMENT.
I. L. R. 47 Calc. 818

——— presumption of—

See DEFAMATION. **I. L. R. 41 Calc. 514**

GOODS.

See CONFISCATION.
I. L. R. 42 Calc. 334

See LOSS OF GOODS.
I. L. R. 46 Calc. 56

——— non-delivery of—

See SPECIFIC MOVABLE PROPERTY.
I. L. R. 39 Mad. 1

——— property in, at the time of capture—

See CONFISCATION.
I. L. R. 42 Calc. 334

——— ultimate destination of—

See SALE OF GOODS ACT (56 AND 57 VIC., c. 71), ss. 45 AND 47.
I. L. R. 34 Bom. 640

GOOD-WILL.

See TRADE-MARK **I. L. R. 38 Calc. 110**
I. L. R. 42 Calc. 262

——— sale of—

See CONTRACT (56).
I. L. R. 48 Calc. 1030

GORS.

——— right of—

See HINDU TEMPLE.
I. L. R. 44 Bom. 150

GOSAVIS.

See DEKKHAN AGRICULTURISTS' RELIEF ACT, s. 2 . **I. L. R. 36 Bom. 543**

GOTRAJA-SAPINDA.

See HINDU LAW—SUCCESSION.
I. L. R. 37 Calc. 214

GOVERNMENT.

See ADVERSE POSSESSION.
14 C. W. N. 317

See BHAGDARI VILLAGE.
I. L. R. 37 Bom. 87

See CANTONMENT TENURE.
I. L. R. 36 Bom. 1

See GRANT . **I. L. R. 36 Bom. 438**

See CROWN.

See SECRETARY OF STATE.

See LAND ACQUISITION ACT (I OF 1894), ss. 3 (*b*), 11, AND 31 (*1*) AND (*2*).
I. L. R. 37 Bom. 76

——— attachment for non-payment of Jama—

See BOMBAY LAND REVENUE CODE (BOM. ACT V OF 1879), ss. 141, 160.
I. L. R. 43 Bom. 6

——— acquisition by—

See LAND ACQUISITION ACT (I OF 1894), s. 18 . . **I. L. R. 35 Bom. 146**

——— acts of—

See ACT OF STATE.
I. L. R. 39 Calc. 615

——— assignment of jodi by—

See INAMDAR . **I. L. R. 40 Mad. 93**

——— Digwar appointed by—

See LANDLORD AND TENANT
I. L. R. 39 Calc. 696

GOVERNMENT—*contd.*

——— forfeiture by—

See Forfeiture I. L. R. 36 Bom. 539

——— jodi payable to—

See Inamdar . I. L. R. 40 Mad. 93

——— liability of—

See Pensions Act (XXIII of 1871), ss. 4, 5, 6 . I. L. R. 37 All. 338

——— loss to—

See Actio personalis moritur cum persona . I. L. R. 35 Bom. 12

——— order of—

See Habeas Corpus. I. L. R. 39 Calc. 164

——— right of, to assess Revenue—

See Assessment . I. L. R. 43 Calc. 973

——— right of, to streets, drains, etc.—

See Municipal Council. I. L. R. 38 Mad. 6

——— share of—

See Land Acquisition—Compensation. I. L. R. 40 Calc. 64

——— suit against—

See Abkari Act (Bom. Act V of 1878). ss. 32, 67 . I. L. R. 37 Bom. 101

See Civil Procedure Code (Act XIV of 1882), s. 424 I. L. R. 35 Bom. 42

See Civil Procedure Code (Act V of 1908), s. 80 . I. L. R. 40 Bom. 392

——— ultra vires order of—

See Limitation Act (IX of 1908), Sch. 1, Art. 14 . I. L. R. 39 Bom. 494

GOVERNMENT CIRCULAR.

——— effect of—

See Criminal Revisional Jurisdiction. I. L. R. 40 Calc. 41

GOVERNMENT DEPARTMENT.

——— *Government department, discretion vested in, by Statute, if arbitrary and uncontrolled—Colourable exercise, amounting to refusal—Court's power to interfere.* The plaintiff, an employee in the Public Service of the State of New South Wales, on his retirement in 1905 became entitled, under s. 4 of the Public Superannuation Act of 1903, "to a gratuity not exceeding one month's pay for each year of service from the date of his permanent employment," the gratuity "to be calculated on the average of his salary during the whole term of his employment and to be payable in the case of retirement, after the commencement of the Public Service Act of 1902, only in respect of service prior to such commencement." The Public Service Board awarded him a gratuity based on the average of his salary, reckoning his service, however, up to a certain date in 1895. Plaintiff having asked his service to be reckoned up to the date of the commencement of the Public Service Act in 1902, he was first informed that in respect of that claim no further sum could be paid, but subsequently the Board allowed him one penny for each year of service subsequent to

GOVERNMENT DEPARTMENT—*contd.*

the said date in 1895. No fault was thereby admittedly intended to be found with the manner in which the plaintiff had discharged his duties when in service: *Held*, that the discretion which the Government purported to exercise (through the Public Service Board) was not an arbitrary uncontrolled discretion but a discretion to be exercised reasonably, fairly and justly. An illusory award such as this—an award intended to be unreal and unsubstantial—though made under guise of exercising discretion is at best a colourable performance and tantamount to a refusal by the Board to exercise the discretion entrusted to them by Parliament. Williams *v.* Giddy (1911) 15 C. W. N. 669

"GOVERNMENT ESTABLISHED BY LAW IN BRITISH INDIA."

See Press Act, 1910, s. 4. I. L. R. 42 All. 233

GOVERNMENT IRRIGATION SOURCE.

See Madras Irrigation Cess Act, s. 2. I. L. R. 34 Mad. 366

GOVERNMENT LAND.

See Land Acquisition Act (I of 1894). I. L. R. 34 Bom. 618

See Madras Estates Land Act (I of 1908), ss. 6, sub-s. (6), 8. I. L. R. 39 Mad. 944

GOVERNMENT NOTIFICATION.

See Transfer of Property Act (IV of 1882), s. 59 . I. L. R. 36 Bom. 617

GOVERNMENT OFFICER.

——— suit against—

See Bombay Court of Wards Act (Bom. Act I of 1905), s. 3 (c). I. L. R. 37 Bom. 313

GOVERNMENT OF INDIA ACT, 1833 (3 and 4 William IV, c. 85).

——— ss. 39, 45, 46 and 51—

See Defence of India Act. 3 Pat. L. J. 537

GOVERNMENT OF INDIA ACT, 1858 (21 & 22, VICT., c. 106).

——— ss. 39, 42, 55—

See Execution of Decree. I. L. R. 38 Calc. 754

——— s. 64—

See Lease to appeal to Privy Council. I. L. R. 42 Calc. 35

——— ss. 65 to 67—

See Jurisdiction of Civil Court. I. L. R. 40 Calc. 391

GOVERNMENT OF INDIA ACT, 1859 (22 and 23 Vict. c. 41).

——— s. 1.

See Execution of Decree. I. L. R. 38 Calc. 754

GOVERNMENT OF INDIA, ACT, 1865—(28 & 29 Vict, c. 17).

——— s. 4—*Notification by Governor-General in Council defining the boundaries of the Ballia and Shahabad Districts—Notification by Local Govern-*

mines the jurisdiction of Civil Courts situate therein. Notifications by the Local Government issued for general information that in consequence of a change in the course of the deep-stream certain villages have been transferred from one Province to the other do not affect the matter. MAHARAJA KESHO PRASAD SINGH *v.* NIRMAL KUMAR
5 Pat. L. J. 451

GOVERNMENT OF INDIA ACT, 1915 (5 and 6 Geo. V, c. 61).

——— ss. 65 and 72 and Amendment Act 1916 (6 and 7 Geo. V), s. 2—

See GOVERNOR-GENERAL IN COUNCIL.
I. L. R. 1 Lah. 326

——— s. 72—

See DEFENCE OF INDIA ACT, 1915, SS. 1 TO 11 . . . 3 Pat. L. J. 537

——— ss. 106, 107—

See DEFENCE OF INDIA ACT, 1915, SS. 1 TO 11 . . . 3 Pat. L. J. 537
See INCOME TAX ACT 1916, s. 51.
I. L. R. 44 Mad. 718

See PRESS ACT (I OF 1910), s. 3 (*1*), PROVISO . I. L. R. 39 Mad. 1164

——— s. 107—

See HIGH COURT, JURISDICTION OF.
I. L. R. 48 Calc. 522

——— s. 107, ss. 71 and 217—

See CHOTA NAGPUR TENANCY ACT, 1908, s. 71 . . . 3 Pat. L. J. 143

See CONTEMPT OF COURT.
I. L. R. 42 All. 26

See CIVIL PROCEDURE CODE, 1908, O. XXI, R. 66 . . 2 Pat. L. J. 130

See CRIMINAL PROCEDURE CODE, 1898, s. 195 . . 4 Pat. L. J. 609

s. 145 . . . 24 C. W. N. 96

I. L. R. 40 All. 364
I. L. R. 41 All. 302
I. L. R. 39 All. 612

See DISMISSAL FOR DEFAULT.
4 Pat. L. J. 277

See HIGH COURT, JURISDICTION OF.
I. L. R. 48 Calc. 522

See LAND ACQUISITION ACT (I OF 1894), SS. 3 AND 18 . I. L. R. 42 Mad. 231

See LEGAL PRACTITIONERS ACT, 1879, s. 14 . . 1 Pat. L. J. 576

See LETTERS PATENT.

See PROVINCIAL SMALL CAUSE COURT ACT, 1887, s. 25 . . 1 Pat. L. J. 465

GOVERNMENT OF INDIA ACT, 1915 (5 and 6 Geo. V, c. 61)—*contd.*

——— s. 107, ss. 71 and 217.—*contd.*

See RECEIVER . . 4 Pat. L. J. 20
See REVISION . I. L. R. 47 Calc. 438
See RETRIAL . 3 Pat. L. J. 632
See WITHDRAWAL OF SUIT.
2 Pat. L. J. 682

——— *On a difference of opinion between two Judges exercising revisional powers the decision of the Senior Judge prevails.* MONRAH BHWAH *v.* MIRZAN SARDAR
24 C. W. N. 97

——— *Superintendence, High Court's powers of—Code of Criminal Procedure (Act V of 1898), s. 145.* In exercise of its power of

irregularity in the proceedings or an erroneous decision on a question of fact or law, but it can and will interfere when there has been a material irregularity which amounts to a refusal to exercise, or an usurpation of jurisdiction, or which has prejudiced a party to the proceedings. It is not always incumbent upon the Magistrate to give effect to a recent decision or proceeding of a Civil or Criminal Court. No hard and fast rule can be laid down on this matter. PARMESHWAR SINGH *v.* KAILASHPATI . . . 1 Pat. L. J. 336

GOVERNMENT OFFICIALS IN BOMBAY.

See RESUMPTION.
I. L. R. 39 Bom. 279

GOVERNMENT ORDERS.

See MADRAS IRRIGATION CESS ACT (VII OF 1895), s. 1 I. L. R. 38 Mad. 997
See SECRETARY OF STATE FOR INDIA.
I. L. R. 39 Mad. 781

GOVERNMENT PROCLAMATIONS.

See SALE OF GOODS.
I. L. R. 40 Bom. 11

GOVERNMENT RESOLUTION.

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), SS. 197, 210, 215.
I. L. R. 42 Bom. 172

GOVERNMENT REVENUE.

See BABUANA GRANT.
18 C. W. N. 42, 129

——— assignment of—

See UNITED PROVINCES LAND REVENUE ACT (III OF 1901), SS. 51, 52 AND 99.
I. L. R. 33 All. 556

GOVERNMENT SALE.

See WASTE LANDS L. R. 43 I. A. 303

GOVERNMENT SECURITIES.

See SECURITIES.
See EXCESS PROFIT DUTY ACT.
25 C. W. N. 875

GOVERNMENT SERVANTS.

——— **Conduct Rules for—**

See Hindu Law. **I. L. R. 40 Bom. 126**

——— *Acquitted at Criminal trial dismissed without opportunity to defend himself—Notification of dismissal in Gazette—Suit for declaration that dismissal without good grounds and in contravention of Government rules and that notification illegal, if lies—Suit against Crown by dismissed servants for wrongful dismissal or libel, if lies—Specific Relief Act (I of 1877), s. 42.* Where plaintiff who held a ministerial post in the Burdwan Collectorate, having been tried under ss. 116, 161, and 466 of the Penal Code and acquitted, was dismissed by the Collector who based his conclusion not only on the materials on the record of the criminal trial but also on matters outside the record, and this was followed by a notification in the *Calcutta Gazette* to the effect that " *R. H.* having been dismissed from Government service is debarred from re-employment in any capacity under Government :" *Held,* that since a servant of the Crown is liable to dismissal without cause assigned, the plaintiff was not entitled to sue in a Civil Court for a declaration that there were no good grounds for dismissing him. *Voss* v. *Secretary of State, I. L. R. 33 Calc. 669, King* v. *Secretary of State, 13 C. L. J. 357 : s. c. 15 C. W. N. 486n, Cursetji* v. *Secretary of State, I. L. R. 27 Bom. 189,* relied on. That he was not entitled to a declaration that his dismissal was in contravention of the rules framed by Government, because such a relief does not come within the scope of s. 42 of the Specific Relief Act, any claim for consequential relief in respect thereof against Government not being maintainable. *Deokali Koer* v. *Kedar Nath, I. L. R. 39 Calc, 704 : s. c. 16 C. W. N. 838,* relied on. That as the Crown could not be sued for libel, the plaintiff was not entitled to a declaration that his dismissal should not have been notified, assuming that the notification affected his reputation. That Government is within its rights in notifying the dismissal of a servant and forbidding his re-employment. *Per* Mookerjee, *J.*—Under Government rules, plaintiff was entitled to be heard in defence before his dismissal. Ram Das Hazra *v.* Secretary of State for India (1912)

18 C. W. N. 106

GOVERNMENT SOLICITOR.

See Costs . . **I. L. R. 40 Bom. 588**

GOVERNMENT TENURES.

See Sale for Arrears of Revenue.

I. L. R. 39 Calc. 981

GOVERNOR-GENERAL IN COUNCIL.

See Government.

——— **powers of—**

See Habeas Corpus.

I. L. R. 44 Calc. 459

See Jury, right of trial by.

I. L. R. 37 Calc. 467

See Leave to appeal to Privy Council.

I. L. R. 42 Calc. 35

——— **power of, to make Regulations—**

See Election . **I. L. R. 41 Calc. 384**

——— **sanction by—**

See University Lectureship.

I. L. R. 41 Calc. 518

GOVERNOR-GENERAL IN COUNCIL—*contd.*

——— *Power of—Emergency Legislation to deal with rioting and acts committed in open rebellion—supersession of ordinary Criminal Courts—Martial Law—Ordinances I and IV of 1919 setting up Commissions for trial of offences—Legislation affecting laws on which depend the allegiance of subjects of the Crown—Government of India Act, 1915 (5 and 6 Geo. V, c. 61) s. 65, sub-s. (2) and (3) and s. 72—Government of India (Amendment), Act, 1916 (6 and 7 Geo. V), s. 2—Competency of Commissions appointed by Local Government to try offences —Laws in part repugnant not wholly void.* The question in this appeal is as to the competency of the Commissions appointed under the Martial Law Ordinance of 1919 to try the appellants for offences committed in rioting and acts of open rebellion. The rioting during which the offences were committed broke out into open rebellion at Amritsar on 10th April 1919. The appellant Bugga was arrested on 12th April, and the other appellants on subsequent dates : none of them was taken in arms or in the act of committing the offences alleged against them. On 13th April the Governor-General in Council, acting under the Bengal State Offences Regulation (X of 1804), which was extended to the Punjab by the Punjab Laws Act, 1872, made an order whereby he suspended the functions of the ordinary Criminal Courts within the districts of Lahore and Amritsar (and subsequently in Gujranwala and Gujrat) as regards the trial of persons for offences such as the appellants were charged with, and established Martial Law within those districts ; and by the same order he directed the immediate trial by Court Martial of all such persons. On 14th April the Governor-General in Council acting under s. 72 of the Government of India Act, 1915, made and promulgated the Martial Law Ordinances of 1919 whereby it was provided that every trial in the districts of Lahore and Amritsar (and the other districts) held under the Bengal State Offences Regulation, 1804, instead of being tried by Court Martial, should be held by a Commission of three persons appointed by the Local Government. S. 7 of Ordinance I of 1919 enacted that " save as provided by s. 6, the provisions of the Ordinance shall apply to all persons referred to in the Regulation who are charged with any of the offences therein described committed on or after the 13th April 1919." By Ordinance IV of 1919 made on 21st April the Commissioners were empowered to try any person charged with offences committed after March 30th, 1919. S. 65 of the Government of India Act, 1915, while giving the Governor-General in Council a general power to make laws for British India, enacted by sub-s. (2) that he should not be able to make " any law affecting the authority of Parliament, or any part of the unwritten law or constitution of the United Kingdom of Great Britain and Ireland whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom or affecting the sovereignty or dominion of the Crown over any part of British India," and by sub-s. (3) enacted that he should have no power " without the previous approval of the Secretary of State in Council to make any law empowering any Court other than a High Court to sentence to the punishment of death any of His Majesty's subjects born in Europe, or the children of such subjects, or abolishing any Court." By s. 72 the Governor-General in cases of emergency was empowered to make " Ordinances for the peace and

GOVERNOR-GENERAL IN COUNCIL—*concld.*

good government of British India, *which are to* have, for not more than six months, the same force of law as Acts passed under s. 65, the power being subject to the restrictions in that section." The appellants, natives of India, were at the trial charged with offences under the Penal Code, and some of them were sentenced to death: *Held*, that Ordinance IV could not be construed as intended only to extend the operation of Ordinance I to offences committed before 13th April, but not earlier than the 30th March, and therefore did not apply only (like Ordinance I) to persons taken in the act of committing one of the offences specified in Regulation X of 1804. It was clearly stated in the recital introducing the Ordinance that its operation was not confined to the persons and offences described in the earlier Ordinance. *Held*, also, that Ordinance IV was not invalid by reason of sub-s. (2) of s. 65 of the Government of India Act, 1915, as
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not prevent the Indian Government from passing a law which may modify or affect a rule of the con-

of India Act, 1915, as infringing the provision which prevents the Governor-General in Council from empowering any Court other than a High Court to sentence to death any of His Majesty's subjects born in Europe; for s. 2 of the Government of India Amendment Act, 1916, which at the end of s. 84 of the Act of 1915 has added a clause which enacts that "a law made by any authority in British India and repugnant to any provision of this or any other Act of Parliament shall, to the extent of that repugnancy, but not otherwise, be void." If Ordinance IV, therefore, contravened s. 65, sub-s. (3), and was repugnant to that section so far as British-born subjects are concerned, it is void only to the extent of that repugnancy. BUGGA *v.* KING-EMPEROR . . I. L. R. 1 Lah. 326

"GOWNA" CEREMONY.

———— gift at—

See HINDU LAW—GIFT. I. L. R. 37 Calc. 1

GRACE, DAYS OF.

———— for payment of rent—

See LANDLORD AND TENANT. I. L. R. 39 Mad. 834

GRAMOPADHYA.

See VATANDAR JOSHI. I. L. R 40 Bom. 112

GRANT.

See BOMBAY LAND REVENUE CODE, 1879, ss. 68 AND 79. I. L. R. 45 Bom. 920

ss. 56 AND 214. I. L. R. 39 Bom. 915

GRANT—*contd.*

See BOMBAY HEREDITARY OFFICES ACT (BOMBAY ACT III OF 1874), s. 15. I. L. R. 44 Bom. 237

See CUSTOM . I. L. R. 45 Calc. 835

See DEKKHAN AGRICULTURISTS' RELIEF ACT, s. 2, EXPL. (*b*). I. L. R. 36 Bom. 151

See GRANT BY CROWN.

See INAM . I. L. R. 42 Mad. 673

See FISHERY . I. L. R. 42 Calc. 489

See HINDU LAW ADOPTION. I. L. R. 43 Bom. 778

See JAIGIR . I. L. R. 46 Calc. 685

See ITMAM . I. L. R. 47 Calc. 979

See MINERAL RIGHTS. I. L. R. 42 Calc. 346
I. L. R. 47 Calc. 95

See SARANJAM . I. L. R. 41 Bom. 403

See TRANSFER OF PROPERTY ACT (IV OF 1882), s. 10 . I. L. R. 38 Mad. 967

See VRITTI . I. L. R. 37 Bom. 409

———— as inam—

See LANDLORD AND TENANT. I. L. R. 38 Mad. 155

See MADRAS ESTATES LAND ACT (I OF 1908), s 8. . I. L. R. 38 Mad. 891
I. L. R. 41 Mad. 1012

s. 6 . . I. L. R. 59 Mad. 494

See MADRAS IRRIGATION CESS ACT. I. L. R. 40 Mad. 886

———— by Crown—

See FISHERY . I. L. R. 42 Calc. 489

———— conflicting descriptions of—

See LEASE . I. L. R. 37 Calc. 293

———— doctrine of—

See LEASE . . I. L. R. 36 All. 387

———— of melvaram—

See MADRAS ESTATES LAND ACT (I OF 1908), s. 8 . I. L. R. 38 Mad. 891

———— to wife and minor son—

See TRANSFER OF PROPERTY ACT (IV OF 1882), s. 10. . I. L. R. 38 Mad. 867

———— whether on political tenure—

See BOMBAY REVENUE JURISDICTION ACT 1876, s 12 . I. L. R. 45 Bom. 463

————

Tenancy by
1877), Sch. I
Adverse posses
not by itself make the possession of the holder

ance into a tenancy from year to year, and in such a case the limitation applicable is that provided by Article 139 of the Second Schedule to the Limitation Act. RAM CHANDRA SINGH *v.* BHIKHAMBAR SINGH (1910) . . I. L. R. 37 Calc. 674

GRANT—*contd.*

——— **Grant of occupancy by Government under a kabuliyat**—*Condition as to resumption for Government purposes, that is, for Railway and other purposes—Sale by Government—Construction of the condition—Government full proprietors.* Under a *kabuliyat* the occupancy of certain land had been granted to the plaintiff by the Collector subject only to the condition that it should be competent to Government to resume the land whenever it should be required by Government for Government purposes, that is, for Railway or other purposes. Afterwards the land was resumed and was sold to defendant 2 (from whose grandfather it was originally acquired for a Railway). The plaintiff, thereupon, brought the present suit against the Secretary of State for India in Council and defendant 2 for the recovery of the land on the ground that the sale to defendant 2 was not for Government purposes. *Held*, dismissing the suit, that Government were the proprietors of the land and as such they could resume it whenever they required it for their proprietary purposes. Government purposes must be construed as meaning that they were purposes of Government as the State proprietor, purposes which Government alone were entitled to prescribe in the exercise of their discretionary powers. SAPURLO SABSHETTI *v.* SECRETARY OF STATE FOR INDIA (1912)

I. L. R. 36 Bom. 438

——— **Ekrarnama**—*Lease or License—Construction—Practice.* Where a grant involved a transfer of an interest in immovable property, the grantees were in the position of tenants; if it did not, they were at least in the position of licensees. Where in an on *ekrarnama* there were clauses by which the grantors reserved to themselves certain rights for limited purposes, but which, properly construed, gave the grantees exclusive possession of the property, the grant amounted to a lease. To give exclusive possession there need not be express words; it is sufficient if the nature of the acts to be done by the grantee requires that he should have exclusive possession. *Roads* v. *The Overseers of Trumpington, L. R. 6 Q. B. 56*, referred to. Distinction between a license and a lease lies in the fact that in the case of license there is no transfer of interest in land, whereas in the case of a lease there is transfer of such interest. Upon the construction of the instrument as a whole: *Held*, that the paramount intention of the parties was to create a present demise, and that the grantee was in the position of a tenant. MOHIPAL SINGH *v.* LALJI SINGH (1912) . . . **17 C. W. N. 166**

——— **Conduct of parties**—*Reliance on or ascertaining intention of grantor. Held*, that reliance could not be placed on the conduct of the parties to ascertain the intention of the grantor except in the case of ancient grants where the terms are ambiguous. CHRISTIAN *v.* TEKAITNI NARBADDA KOERI (1914).

19 C. W. N. 796

——— **Water-cess**—*Madras Water-cess Act (VII of 1865)—Free grant of water before—No right to impose water-cess thereafter.* If for some consideration or other or even for no consideration a grant was before the passing of Madras Water-cess Act (VII of 1865) made by the Government, of a particular quantity of water or a certain definite share of the water of a tank to a person irrespective of the use he might make of it, the grant is in law a free grant and the Government is not entitled to any kind of payment thereafter for the water under Madras Act VII of 1865. *Maria Susai Mudaliar* v. *The Secretary of State for India, 14 Mad. L. J. 350*, followed. *Secretary of State for India* v. *Swami Naratheeswarar, I. L. R. 34 Mad. 21*, distinguished. VENKATASUBBIAH *v.* SECRETARY OF STATE FOR INDIA (1912)

I. L. R. 38 Mad. 424

——— **Grant for Barki service**—*Resumption of grant—Non-production of grant—Presumption as to right to resume cannot be made—Right of resumption must be proved.* In the Bombay Presidency where Deshgat Vatan lands are granted for the performance of personal services, no presumption can be made that the grantor has the option to determine the services and to resume the lands. If a grantor takes up that position and claims that as his right, he must show either that the terms of the grant give him that right or if the terms of the grant are unknown, that the proved circumstances justify an inference that he has that right. YELLAVA SAKREPPA *v.* BHIMAPPA GIREPPA (1914) . . . . **I. L. R. 39 Bom. 68**

——— **Grant of land, "besides poramboke"**—*Construction of—Padugai lands in Trichinopoly and Tanjore taluks, ownership of 'Padugai' meaning of.* A grant of land by the Government acknowledging the grantee's title to a whole village consisting of certain specified area 'besides poramboke' gives the grantee a right to all the unassessed waste in the village such as waste or padugai land, *i.e.*, land between a river-bed and the high flood bank of the river though it may not operate to give communal property such as burying-grounds, temple-sites, etc., to the grantee. *Narayanasami* v. *Kanniappa*, Second Appeal No. 1445 of 1910, and *Secretary of State* v. *Kannapallee Venkataratnammah, 23 Mad. L. J. 109*, referred to. Padugai land in Trichinopoly and Tanjore taluks mean land on the lower level bank breadth of the river between the edge of the sandy stream bed and the high flood level bank. SADASIVA AYYAR, *J.*—The grant of poramboke does not operate to give the grantee the bed of the river. Meaning of the word 'Poramboke.' considered. SECRETARY OF STATE *v.* RAGHUNATHA TATHACHARIAR (1912) . **I. L. R. 38 Mad. 108**

——— **Custom of primogeniture**—*Grant by the Maharaja of Chota Nagpur—Impartibility of the estate—Proof of custom, onus of*—Lex loci *custom of Chota Nagpur—Meaning of putra pautradi.* Certain grants of *jaigirs* by the Maharaja of Chota Nagpur to a person related to him or to his descendants dating from 1768 to 1786 were in terms to the grantee and his sons and grandsons (*putra pautradi*). The family of the grantee had for several generations interpreted the words "*putra pautradi*" in the literal sense, namely, to mean, son and son's son. *Held*, that at the time of these grants the words had not acquired in Chota Nagpur the technical meaning which according to the Privy Council in *Lalit Mohun* v. *Chukkun Lal, L. R. 24 I. A. 76 : s. c. 1 C. W. N. 387*, they came to have by 1868 when used in Wills executed in Bengal, and the grants in this case did not convey an absolute estate

GRANT—*contd.*

unconditioned and unlimited. *Per* ATKINSON, *J.*—That although as held by the Privy Council the words convey an absolute estate in lands descendable from generation to generation coupled with full power of alienation, those words of limitation may be controlled by custom limiting their scope and operation. *Perkash Lal* v. *Rameswar Nath Singh, I. L. R. 31 Calc 561, 569*, relied on.

male descendant of that line dying leaving a widow, the Maharaja proceeded to resume the property whilst two brothers, the descendants of a younger son, claimed to succeed to the property. The disputes terminated in two deeds, one executed by the brothers agreeing that the widow should hold possession of the property as long as she lived upon payment of rent to the Maharaja and that they should take possession after her death, and the other by the Maharaja purporting on receipt of consideration to release the lands to the brothers in equal shares. *Held*, that as there was no failure of heir in the line of the grantee, the Maharaja had no right to resume and the *sanad* to the brothers was a nullity. *Per* CHAPMAN, *J.*—That as the younger of the brothers had the right to succeed on the death of the elder without male issue, his concurrence to the deed in favour of the widow might have been taken to avoid future trouble. *Per* ATKINSON, *J.*—That the agreement was ineffective to alter or vary the impartible

the property so granted is deemed impartible and descends to the eldest male heir by lineal descent applies with greater force in the case of grants of

raja's family, but also as the *lex loci* custom of Chota Nagpur. GAJENDRA NATH SAHI DEO *v.* MATHURA NATH SAHI DEO (1916)

1 Pat. L. J. 109
20 C. W. N. 873

———— Presumption of lost grant—*In absence of proof of legal title, on the basis of user exercised and enjoyed.* Where a Court is asked to presume a grant in favour of a party in the nature of a lost grant, *i.e.*, a lawful origin of a long and continuous user and enjoyment of property in the absence of legal proof of title, it should presume a grant on the basis of the user exercised and enjoyed by that party. NAWAGARH COAL COMPANY, LD. *v.* BRIJABILAL TRIGUNAIT (1916)

20 C. W. N. 1135

———— Grant by Government—*Is bounded by a non-navigable river—Right of grantee to half the bed of the river, presumption as to—Onus of proving contrary on grantor.* *Held*, by the Full Bench, (i) that in the case of a grant of land by Government described as bounded by a non-navigable river, the presumption (which may be strong or weak according to circumstances of each case) is that the grant passes to the grantee the bed of the river *ad medium filum aquae*, and (ii) that the onus of showing the contrary is on the grantor. VENKATA LAKSHMINARASAMMA *v.* THE SECRETARY OF STATE (1918) . . I. L. R. 41 Mad. 840

———— Grant by zamindar of Talabi Brahmottar tenure—*Antecedent to Permanent Settlement—Tenures, permanent, hereditary, and transferable—Grantee, rights of, to minerals—Absence of express evidence that they formed part of the grant—Protraction of Indian litigation.* A "grant" in India has not the special and technical meaning attached to the same word in English law. A Talabi Brahmottar grant of a zamindar's village at a fixed rent made before the Permanent Settlement by the then Raja of Pachete to the prede-

Minerals will not be held to have formed part of the grant, in the absence of express evidence to that effect. *Hari Narayan Singh Deo* v. *Sriram Chakravarti, I. L. R. 37 Calc. 723 ; L. R. 37 I. A. 136*, and *Durga Prasad Singh* v. *Braja Nath Bose, I. L. R. 39 Calc. 696 ; L. R. 39 I. A. 133*, followed. Protraction of Indian litigation deprecated. SHASHI BHUSAN MISRA *v.* JYOTI PRASAD SINGH DEO (1916) . . . I. L. R. 41 Calc. 585

———— Grant of land, proof of—*Title-deeds, what are—Original grant not forthcoming—Subsequen*

derived, if

them as title-

parties—Error vitiating judgment—Real question not considered—Drainage-channel, dispute between

vary boundaries in title-deeds. Plaintiffs who sued for recovery of possession of a strip of land lying between their premises and a public road, including a *khal* or *nulla* which lay between the said premises and the road, proved a clear title for over 50 years by a succession of duly registered conveyances, mortgages, reconveyances and other title-deeds and also proved that during that period they had

that Government would include it in their grant without securing the continued maintenance in the public interest of a water channel which existed from time out of memory and played a conspicuous part in the drainage system of the local Municipality; and that in the absence of the original grant none of the other documents referred to in the case could be regarded as "being in any sense title-deeds," they being "obviously insufficient to create title" and being "at most mere assertions

GRANT—*contd.*

of title made from time to time by the predecessors-in-interest of the plaintiffs." In this view, it treated the case as though it was one in which the Court had nothing relevant before it but the conduct of the parties to decide whether the plaintiffs or the defendant Municipality were entitled to the land. *Held,* affirming the trial Judge, that it was scarcely possible to conceive of a clearer title by deeds than that which was proved by the plaintiffs, and the High Court was wrong in saying that the plaintiffs had no title-deeds—in consequence of which error it never considered the real question in the case. That having regard to the boundary consistently found in the deeds, which was stated to be the public road, it was impossible to hold that the title of the plaintiffs went up only to the centre line of the *khal* and thus make the deeds convey lands marked out by different metes and bounds from that which there appeared. JOHN KING & Co. *v.* HOWRAH MUNICIPALITY (1914)
18 C. W. N. 898

———— **Resumption of grant**—*Deshgat Vatan—Grant for peon's services—Resumption of grant—Grant burdened with service,* primâ facie *irresumable—Grant of office to which lands are annexed by way of remuneration,* primâ facie *resumable—Burden of proof.* In the Bombay Presidency where ancient grants of lands are sought to be resumed, all grants of the kind for the purpose of applying the law of resumption fall into two main categories: (i) grants of lands burdened with service, and (ii) grants of office to which lands are annexed by way of remuneration instead of or along with cash. The former grants are always irresumable, unless the grantor can show that they have been specially conditioned so as to enable him to resume for failure to perform these services, or at his own will to discontinue the services and resume lands. Grants under the second category are always resumable, unless the grantee can show that they have been specially conditioned otherwise so as to prevent their resumability. CHANDRAPPA *v.* BHIMA BIN DASSAPPA (1918) . . . **I. L. R. 43 Bom. 37**

———— *Of land by owner not running with any specified plots if binding on assignees from owner—Privy Council, leave to appeal to to—Certificates granted in exercise of discretion, requirements of—Grant or covenant—Covenant not running with the land, does not bind assignees—Grant not vesting in present, but to take effect by entry at an uncertain future date, offending against rule of perpetuities.* It is of the utmost importance that certificates of leave to appeal to the Privy Council, when it is suggested that they are made in the exercise of discretion conferred, should make plain upon their face that the discretion has in fact been exercised. In an agreement between the Raja of Paresnath Hills and the Sitambari Jain Society the former stipulated that "if the Society shall require any place on the Hill and below thereof at Madhuban for erecting *mandir* and *dharamsala* and for doing repairs and making bricks for the said purpose, in that case I and my heirs shall give for making *mandir, dharamsala* and bricks, land, stones from the hill and timber, free of costs and if I and my heirs refuse to give, in that case the Sitambari Jain Society shall take the same of its own power." The Sitambari Jain Society on proceeding to exercise this power was resisted by the defendants who subsequently to the agreement had acquired leasehold interests

GRANT—*concld.*

in lands on which the Society sought to erect a temple: *Held,* that the agreement did not create in the Society some present estate or interest which would prevent the owner from making a grant to the defendants: and the covenant not being one running with the land could not be enforced against the assignees from the Raja. That if the agreement were regarded as one to grant in the future whatever land might be selected as a site for a temple, as the only interest created would be one to take effect by entry at a later date and as this date was uncertain, the provision was bad as offending the rule against perpetuities. MAHARAJ BAHADUR SINGH *v.* BALCHAND CHAUDHURY (P. C.) . . . **25 C. W. N. 770**

GRANTEES.

———— **estate of—**

See TRANSFER OF PROPERTY ACT (IV OF 1882), s. 10 . **I. L. R. 38 Mad. 867**

GRANTOR AND GRANTEE.

See ADVERSE POSSESSION.
I. L. R. 40 Calc. 173

See RENT . **I. L. R. 38 Calc. 278**

See TITLE . **I. L. R. 44 Calc. 771**

GRATUITOUS PAYMENT.

See CONTRACT ACT (IX OF 1872), s. 70.
I. L. R. 40 All. 555

GRAVEL.

———— **stocking of, on a military road—**

See TORT . . **I. L. R. 39 Mad. 351**

GRAVEYARD.

See MAHOMEDAN LAW—ENDOWMENT.
I. L. R. 40 Calc. 297

———— *Trespass—Erection of a shed over a visible grave in a disused private graveyard—Penal Code (Act XLV of 1860), s. 297.* The erection of a shed over a visible grave belonging to the complainant's family in a disused grave-yard, claimed to be private property of the trespasser with the knowledge that the feelings of the complainant would be likely to be thereby wounded, is an offence under s. 297 of the Penal Code. *Per* RICHARDSON, *J.*—The word "trespass" in s. 297 has not the same meaning as "criminal trespass" in s. 441 of the Code, but implies any violent or injurious act committed in the place, and with the knowledge or intent, defined in s. 297. JHULAN SAIN *v.* EMPEROR (1913) . **I. L. R. 40 Calc. 548**

GREAT-GRANDFATHER'S SON'S DAUGHTER'S SON—

See HINDU LAW—SUCCESSION.
I. L. R. 43 Calc. 1

GRIEVOUS HURT.

See PENAL CODE.

ss. 100, 325 . **I. L. R. 40 Bom. 105**
ss. 300, 325, EXCEP. 4.
I. L. R. 35 All. 329
I. L. R. 40 All. 686
ss. 304, 325 . **I. L. R. 40 All. 103**
I. L. R. 42 All. 302

See RIOTING . **I. L. R. 41 Calc. 43**

GROUND-RENT.

——— exemption from, to be express—
See RIGHT OF SUIT.
I. L. R. 36 Mad. 373

GROUNDS OF FORFEITURE.

See FORFEITURE . **I. L. R. 41 Calc. 466**

GROUNDS OF BELIEF.

See AFFIDAVIT . **I. L. R. 37 Calc. 259**

GROUNDS OF REVISION.

See CRIMINAL REVISION.
I. L. R. 40 Calc. 41

GROVE LAND.

See AGRA TENANCY ACT (II OF 1901)—
s. 4 . . **I. L. R. 35 All. 200**
ss. 4, 167 . **I. L. R. 39 All. 605**
ss. 18 AND 88 . **I. L. R. 43 All. 606**
ss. 19 AND 58 . **I. L. R. 42 All. 36**
See LANDLORD AND TENANT.
I. L. R. 34 All. 545
See MORTGAGE . **I. L. R. 41 All. 45**
See OUDH RENT ACT.

——— *Mortgage and sale of a grove—Claim of mortgagors to be ex-proprietary tenants—"Sir."* Land which is simply grove and not agricultural land cannot be *sir* of the proprietor, of which he could become the proprietary tenant, even though it may have been recorded as *sir* in the village papers. BHAGWAN DIN *v.* PIARI LAL
I. L. R. 42 All. 483

——— *Customary rights of grove-holder—Right to maintain grove by plantation of new trees—Wajib-ul-arz—Relation of rights*

to debar a grove-holder from his usual right to

as a grove had ceased to be grove-land and for an injunction to prevent him planting more trees thereon, it was found that the grove-holder had for some years been planting trees to replace trees which had fallen, and this without interference on the part of the zamindars, also, on a construction of the wajib-ul-arz, that, although the planting of new groves or trees without the permission of the zamindars was forbidden, there was no specific provision barring the customary right of a grove-holder to replace dead or fallen trees, and the conclusion was that the grove-holder still possessed the customa[ry] right of a grove-holder to plant fresh trees. CHOKHE LAL *v.* BIHARI LAL
I. L. R. 42 All. 634

GUARANTEE.

See CONTRACT ACT (IX OF 1872), ss. 126, 128 . . **I. L. R. 42 Bom. 444**

——— continuing—
See CONTRACT . **L. R. 47 I. A. 164**

——— contract of—
See PRINCIPAL AND SURETY.
I. L. R. 44 Calc. 978

——— Letter of—
See CONSTRUCTION OF DOCUMENT.
16 C. W. N. 769

——— *Contract, construction, of—Whether contingent or unconditional agreement—Inadmissibility of evidence of what took place after the execution of the contract on question of its construction—Contract Act (IX of 1872), ss. 32, 34, 56 and 65.* The question for determination in this appeal was the construction of the following letter dated 7th August, 1909, which was signed by the defendant, and given to the plaintiffs as security for the repayment of the loan of Rs. 1½ lakhs mentioned therein:—"In consideration of your having at my request acceded to the proposal of the Secretaries, Treasurers and Agents of the Tricumdas Mills Company, Limited, to advance to the Mills Rs. 1½ lakhs, I hereby bind myself to procure a loan within two weeks of Rs. 11 lakhs on the first mortgage of the Mills' block property, and to pay you thereout the said sum of Rs. 1½ lakhs agreed to be advanced by you to the Mills." In a suit for damages for breach of the contract contained in the letter, the Courts in India held

and to pay thereout Rs. 1½ lakhs to the plaintiffs. *Held* (reversing that decision), that on its true construction the document amounted to a substantial undertaking by the defendant that a loan of Rs. 11 lakhs should be procured, and that out of that loan the sum of Rs. 1½ lakhs should be repaid to the plaintiffs. *Semble*: Evidence of what took place after the execution of the document was not admissible on the question of its construction. VISSANJI SONS & CO. *v.* SHAPURJI BURJORJI (1912)
I. L. R. 36 Bom. 387

GUARDIAN.

See CIVIL PROCEDURE CODE ACT (XIV OF 1882), s. 443 . **I. L. R. 44 Bom. 202**
See COMPROMISE.
I. L. R. 48 Calc. 469
See COSTS . **I. L. R. 34 Bom. 374**
See GUARDIAN AD LITEM.
See GUARDIANS AND WARDS ACT (VIII OF 1890).
See HINDU LAW—CO-PARCENER.
I. L. R. 41 Mad. 561
See HINDU LAW—GUARDIAN.
See HINDU LAW—REVERSIONER.
I. L. R. 45 Calc. 590
See HINDU LAW—WILL.
I. L. R. 37 Bom. 18
See LUNACY ACT (IV OF 1912), s. 72.
I. L. R. 39 All. 158

GUARDIAN—*contd.*

See Mahomedan Law—Guardian.

See Mahomedan Law—marriage.
I. L. R. 42 Calc. 351

See Minor.

———— alienation by—

See Guardian and Ward Act, 1890, s. 7.
I. L. R. 37 Mad. 38

See Hindu Law—Guardian.
I. L. R. 38 Mad. 1125

See Limitation Act (IX of 1908), Art. 44 . . I. L. R. 44 Bom. 742

———— application by—

See Guardians and Wards Act (VIII of 1890), s. 25 . I. L. R. 39 Bom. 433

———— application for execution by—

See Limitation Act (XV of 1877), s. 8, Sch. II, Art. 179, Expl. I.
I. L. R. 34 Bom. 672

———— appointment of—

See Minor . L. R. 41 I. A. 314
I. L. R. 48 Calc. 802

———— for marriage—

See Mahomedan Law—Marriage.
I. L. R. 42 Calc. 351

———— natural, right of, to manage, pending appointment—

See Guardians and Wards Act (VIII of 1890), s. 34.
I. L. R. 40 Mad. 775

———— powers of—

See Mahomedan Law—Minor.
I. L. R. 37 Mad. 514

1. ———— Hindu widow—*Re-marriage—Guardians and Wards Act (VIII of 1890), s. 39—Whether a Hindu widow appointed guardian under the Act loses her right of guardianship on re-marriage—Hindu Widow's Re-marriage Act (XV of 1856), s. 3.* A Hindu widow who has obtained a certificate of guardianship in respect of the person and property of her infant sons, does not, merely on her re-marriage, lose her right to act as guardian of the minors. Ganga Pershad Sahu *v.* Jhalo 1911) . . . . I. L. R. 38 Calc. 862

2. ———— Appointment of nazir as guardian of the property of the minors by Court—*Minor—Guardians and Wards Act (VIII of 1890), ss. 8, 13—Applications by mother and grandmother—Purdanashin lady—Recording of Evidence.* Where a mother and grandmother of two minors separately applied to be appointed guardian of the persons and property of the minors and during the pendency of their applications it was agreed that a certain person should be appointed guardian of the property, but he refused to take up the appointment, the District Judge without holding an enquiry into the respective merits of the applications made an order appointing the Nazir of the Court to be the guardian of the property of the minors: *Held,* that the Court had no power to make an order appointing a guardian except on a substantive application under s. 8 of the Guardians and Wards Act (VIII of 1890), and that the appointment of the Nazir was *ultra vires.* Under s. 13 of the Guardians and Wards Act (VIII of 1890) the Court is bound to hear such evidence as may be adduced in support of or in opposition to the application before passing an order. The mere fact of the mother being a *purdanashin* lady was no obstacle to her being appointed guardian of the property; the safe custody of the property and its due administration could be sufficiently guaranteed by security being taken from the proposed guardian by the Court. Jaiwanti Kumri *v.* Gajadhar Upadhya (1911) . . I. L. R. 38 Calc. 783

3. ———— Guardians and Wards Act, VIII of 1890—Orders under, made without jurisdiction—*Proceedings not had* bonâ fide *orders in—Consent obtained by judicial pressure—Judge, no arbitrator.* One *D* died leaving a minor unmarried daughter by a predeceased wife and three widows. One *R* with a view to secure the marriage of his son with the girl (so that ultimately the property left by *D* might pass into the hands of the representatives of his own family) got the maternal grandfather of the girl, who was his servant, to apply for the appointment of himself as the guardian of the property and person of the minor, but no part of *D's* property had yet vested in her, the widows being according to Hindu law *D's* heirs. The widows objected to the application, but the District Judge having, owing to a misconception, passed orders directing that unless the widows placed their properties in charge of *R* he would remove the girl, whom they dearly loved, from their custody to that of the maternal grandfather, they were induced to grant a lease of the properties to *R,* after which they were made to present an application for the appointment of themselves as guardians of the person of the girl and they were formally appointed as guardians. *Held,* that no guardian was needed for the protection of the person of the girl and she had no property of which a possible guardian could take charge. The application of the widows for appointment as guardians of her person was not voluntary, and the application of the maternal grandfather was not made *bonâ fide,* and the orders passed by the Judge were without jurisdiction. "Orders passed in proceedings so instituted and conducted, even if they were nominally in conformity with statutory provisions could hardly be regarded as invested with the efficacy of legal orders made in *bonâ fide* judicial proceedings." That the Judge could not be deemed in this case to have acted as an arbitrator chosen by the parties voluntarily, the ladies having in fact acted under judicial pressure of the highest degree to which they were not in a position to offer effectual and successful resistance, and, consequently, *Ledgard* v. *Bull, I. L. R. 9 All. 191, L. R. 13 I. A. 134,* did not apply. Sahadra Koer *v.* Ramadin Chowdry (1911) . . . . 16 C. W. N. 444

4. ———— *Testamentary Guardian—Appointment by implication.* Where a testator by his will appointed one *D* whom he called his "trusted friend" the executor and provided that *D* was on his death to take care of and supervise all his properties and manage his family and educate and maintain his sons *S* and *N*: *Held,* that these words amounted to appointing *D* guardian of both the persons and the properties of *S* and *N.* Dhananjay Bhunjo *v* Nema Chand Das (1917) . 21 C. W. N. 1134

5. ———— Will—*Minor—Hindu widow—Guardians and Wards Act (VIII of 1890), s. 7, sub-*

GUARDIAN—*contd.*

s. (3)—Appointment of guardian to a minor widow—Whether before probate taken out, will may be considered in connection with appointment of guardian to a minor. In an application for the appointment of a guardian of a minor, the Court is bound to consider a will, although probate has not been granted. The fact that there is a contest as to the validity of the will may induce the Court to exercise its discretion one way or the other, but it is not open to the Court to say it will refuse to take notice of the will. *Sayad Shahu* v. *Hapija Begam, I. L. R. 17 Bom 560, Chinnasami* v. *Hariharabadra, I. L. R. 16 Mad. 380*, and *Pathan Ali Khan Badlukhan* v. *Bai Panibai, I. L. R. 19 Bom. 832*, referred to. SARALA SUNDARI DEBI *v.* HAZARI DASI DEBI (1915) . . . **I. L. R. 42 Calc. 953**

6.———— **Hindu father**—*Entrusting sons for custody and education in England to another person who defrays expense of their maintenance and education—Revocation of such authority and demand for sons to be restored to his custody—Suit to enforce demand in District Court—Questions to be determined in such a suit—Jurisdiction of the District Court—Guardians and Wards Act (VIII of 1890), s. 9—Ordinarily resident, meaning of—Suit, not the*

Court of competent jurisdiction in India could do under the circumstances—Order declaring a guardian, when to be made—Guardians and Wards Act (VIII of 1890), s. 19—Order declaring a guardian during

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cannot therefore during his lifetime substitute

of his children require it, he can, notwithstanding any contract to the contrary, take such custody and education once more into his own hands. If

associations or give rise to expectations on the part of the infants which it would be undesirable in their interests to disturb or disappoint, such Court will interfere to prevent its revocation. *Lyons* v. *Blenkin, (1821) Jac. 245*, followed. The plaintiff (respondent) a Brahman residing at Madras, and having only a small income, had been for many years a member of the Theosophical Society of which the defendant (appellant) was President. He had two sons born respectively on 11th May 1895 and 30th May 1898. In 1910 the

in February 1912 taken by her to England where she left them after making arrangements for giving them a course of tuition such as would enable them to enter the University. For reasons, to which it is unnecessary to refer, the respondent, on 11th

GUARDIAN—*contd.*

May 1912, cancelled his previous letter of 6th June 1910 and demanded that his sons should be restored to his custody, and on the appellant (then in India) refusing to comply with his demand he instituted in the District Court of Chingleput the present suit which was transferred to the High Court at Madras under clause 13 of the Letters Patent, 1865, and in the absence of the sons a decree was made and affirmed on appeal declaring that they were wards of Court, that the respondent was guardian of their persons, and ordering the appellant to make over custody of them to the respondent: *Held*, that the suit was entirely misconceived, that the respondent remained guardian of his sons notwithstanding that he had substituted the appellant in his place, that letter of 6th June 1910 has a revocable authority and that the real questions for decision were whether, in the events that had happened, the respondent was at liberty to revoke the authority, and was still entitled to exercise the functions of guardian, and resume the custody of his sons, and alter the scheme which had been formulated for their edu-

tion of the Crown over infants and in their presence, that the District Court had no jurisdiction over them except such as was conferred by the Guardians and Wards Act (VIII of 1890) which was confined to infants ordinarily resident in the district and as the infants who had months previously left India with a view to being educated in England and going to the University of Oxford, could not be said to be ordinarily resident in the district of Chingleput, that Court had no jurisdiction in the matter, that a suit *inter parties* is not the form of

the Letters Patent, 1865, would seem to be confined to the powers which, but for the transfer, might have been exercised by the District Court, that a

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could not be enforced if they refused to return to India and ought not to have been made, that the most which a Court of competent jurisdiction could do under the circumstances such as existed in the present case was to order the appellant to concur with the respondent as the infants' guardian in taking proceedings in England to retain the custody and control of his sons: *Held*, further, that with respect to the order declaring the infants wards of the Court and appointing the respondent as their guardian which the District Court could not have made in a suit which it was alleged that the High Court could in its general jurisdiction make; that whatever may have been the jurisdiction of the High Court, to declare infants wards of the Court, an order declaring a guardian could only be made if the interests of the infants required it, and that an order made when the infants were not before the Court and without adequately considering them their interest could not be supported, that no order declaring a guardian could by reason of s. 19 of the Guardians and Wards Act, 1890, be made during respondent's life unless, in the opinion of the Court, he was unfit to be their guardian. Since the admission of the appeal the infants had

GUARDIAN—*contd.*

been allowed to intervene, and they stated through counsel that they did not wish to return to India and abandon the chances of a University education in England. The appeal was allowed, and the suit dismissed without prejudice to any application the respondent might think fit to make to the High Court in England touching the guardianship, custody and maintenance of his children. BESANT *v.* NARAYANIAH (1914) . I. L. R. 38 Mad. 807

7. ——————— *To minor girl—mother or grandmother—right of selecting bridegroom —Hindu Law.* *Held*, that under Hindu Law the mother is, after the father, the natural and legal guardian of her minor daughter, and she does not lose her right by re-marriage where such re-marriage is recognised as valid by custom. *Mussammat Nur Bibi* v. *Mussammat Mehran (44 P. R. 1887)* and *Ganga Pershad* v. *Jhalo (I. L. R. 38 Calc. 862)*, referred to—also Mayne's Hindu Law, 8th edition, page 276 and Ram Krishna's Hindu Law, Vol. II, pages 406-407. *Held*, also, that the mother or a maternal grandmother has a preferential title to the guardianship of a girl to a paternal grandfather. *Mussammat Ambo* v. *Ganga Sahai (18 Indian Cases 141)*, *Mussammat Fatima* v. *Mussammat Rani (28 Indian Cases 507)* and *Bindo* v. *Sham Lal (I. L. R. 29 All. 210)*, referred to. *Held*, further, that Hindu Law does not confer on the grandfather a right to dispose of his grand-daughter in marriage in opposition to the wishes of the mother, but gives the latter preferential right to select a bridegroom. *Ranganaiki* v. *Ramanuja (I. L. R. 35 Mad. 728)*, *Bai Ramkore* v. *Jamnadas (I. L. R. 37 Bom. 18)*, *Mul Chand* v. *Bhudhia (I. L. R. 22 Bom. 812)*, and *Mussammat Maya Devi* v. *Ram Chand (20 P. R. 1916)*, referred to—also *Dayal* v. *Narain Das (64 P. R. 1884)* and Mayne's Hindu Law, 8th edition, page 101. MUSSAMMAT INDI *v.* GHANIA . I. L. R. 1 Lah. 646

GUARDIAN AD LITEM.

See CIVIL PROCEDURE CODE, 1882, ss. 440-445.

See CIVIL PROCEDURE CODE (ACT V OF 1908)—

Ss. 47 AND 50. I. L. R. 38 Mad. 1076

s. 99. 25 C. W. N. 258

O. IX. R. 13. I. L. R. 37 All. 179
I. L. R. 39 All. 8

O. XXXII, R. 4. I. L. R. 43 All. 104

R. 7. I. L. R. 39 Mad. 853
I. L. R. 44 Bom. 574

See HINDU LAW—JOINT FAMILY. I. L. R. 35 All. 571

See MINOR . I. L. R. 32 All. 287
I. L. R. 37 Mad. 535

See MORTGAGE . I. L. R. 37 Calc. 897

See MORTGAGE DECREE. 4 Pat. L. J. 213

——————— *Person of unsound mind.* The provisions of the Civil Procedure Code (Act XIV of 1882) with respect to the representation of lunatics not being exhaustive, a guardian *ad litem* should be assigned to a defendant who is of unsound mind although not so found. LAKHYA DASYA *v.* UMA KANTA CHAKERBUTTY (1909) 14 C. W. N. 256

——————— *Joint Hindu family—Suit on mortgage against father and sons—Irregular appointment of father as guardian of minor sons—Ex parte decree—Suit by sons to recover their shares.* In a suit for sale on a mortgage executed by the father of a joint family governed by the *Mitakshara* the plaintiffs impleaded as defendants the father and his three sons, two of whom were minors. The plaintiffs named the father as guardian *ad litem* of the minors but no steps were taken, as required by the rules of the High Court, to ascertain whether the father was willing to act as guardian. The father did not appear, and an *ex parte* decree was passed, in execution whereof the family property was sold. Subsequently, on attaining majority, the minor sons brought a suit for possession of their shares; alleged that the original debt was an immoral debt which they were not bound to discharge, and also they had not been legally represented in the previous suit. The Court of first instance having dismissed the suit without going into the merits, the lower Appellate Court made an order of remand. *Held*, that there had been a serious irregularity, if nothing worse in the appointment of the father as guardian *ad lietem*, and as it was impossible to tell, without knowing to what extent the plaintiffs were in a position to establish their case regarding the immorality of the debt, how far the appointment of their father as guardian had prejudiced them, the order of remand was right. BAIJNATH RAI *v.* DHARAM DEO TIWARI (1916) . . . I. L. R. 38 All. 315

——————— *Absence of proposed guardian's consent to appointment, effect of—Whether person who has executed a bond on behalf of minor should be appointed guardian* ad litem *in a suit on the bond.* Mere omission to obtain the consent of a person appointed guardian *ad litem* to a minor is not a defect which is fatal to a suit against the minor unless the minor is prejudiced by the omission. The Court however should be jealous on behalf of the infant. Where a mother, with full knowledge of its contents, executed a bond on behalf of her minor son, for necessity, and the son benefited by the money, *held*, on a plea that the mother should not, in a suit on the bond, have been appointed guardian *ad litem* to the minor, that the mother had no interest in the suit adverse to the minor and that the appointment was not improper. To succeed on a plea of adverse interest a particular adverse interest must be proved. The Courts will not act on surmise 2 Pat. L. J. 390

GUARDIAN AND MANAGER.

——————— power of—

See SPECIFIC PERFORMANCE. I. L. R. 39 Calc. 232

GUARDIAN AND MINOR.

See ARBITRATION. I. L. R. 43 Calc. 290

See CONTRACT ACT (IX OF 1872), ss. 10 AND 11 . . I. L. R. 33 All. 657

GUARDIAN AND MINOR—*contd.*

See GUARDIANS AND WARDS ACT (VIII OF 1890) CH. II.
I. L. R. 36 All. 282

See MAHOMEDAN LAW—ALIENATION.
I. L. R. 34 All. 213

See MAHOMEDAN LAW—GUARDIAN.
I. L. R. 36 All. 280

See MAHOMEDAN LAW—MINOR.
I. L. R. 38 All. 466

See MAJORITY ACT (IX OF 1875), s. 3.
I. L. R. 35 All. 150

See MORTGAGE . I. L. R. 38 All. 92

———— **mistake of guardian**—

See RES JUDICATA.
I. L. R. 45 Bom. 805

———— *Contract—Specific performance—Specific performance of a contract not favourable to minor refused.* The District Judge sanctioned the sale by the certificated guardian ... minor for a ... wever, some ... of sale and ... Meanwhile other offers were made for the property, and ulti- ... at the house ... ,000. *Held,* ... e favour the ... at the Court was in the circumstances justified in refusing to grant a decree for specific performance. *Chhitar Mal* v. *Jagan Nath Prasad, I. L. R. 29 All. 213,* referred to. IMAMI *v.* MUSAMMAT KALLO (1916)
I. L. R. 38 All. 433

GUARDIAN AND WARD.

See GUARDIANS AND WARDS ACT (VIII OF 1890)—

S. 17 . . I. L. R. 33 All. 222

Ss. 30, 47, 48 . I. L. R. 42 All. 514

S. 41 . . I. L. R. 42 All. 1

See PENAL CODE, 1860, s. 361.
I. L. R. 42 All. 146

GUARDIANS AND WARDS ACT (VIII OF 1890).

See MAHOMEDAN LAW—WAKF.
I. L. R. 39 All. 288

———— *Jurisdiction of District Court—No power to order payment of money for minor's marriage by person not guardian—Concurrent jurisdictions when order passed under one jurisdiction can be taken to be passed under another.* The Guardians and Wards Act (VIII of 1890) does not give the District Court any power or authority over persons other than the guardian or the minor ... or not and for the purpose of restoring the ward to the custody of the guardian. Under the Guardian and Wards Act no order can be passed directing a person not a guardian to pay a sum of money for ...

GUARDIANS AND WARDS ACT (VIII OF 1890)—*contd.*

order cannot be treated as a decree in a suit. The two jurisdictions are wholly distinct though exercisable by the same official. *Sadasiva Pillai* v. *Ramalinga Pillai, L. R. 2 I. A. 219,* and *Ledgard* v. *Bull, I. L. R. 9 All. 191,* distinguished. SOMAKKA *v.* RAMIAH (1913) . I. L. R. 36 Mad. 39

———— *Petition under, whether only remedy for a father seeking custody of his child—Suit by father for custody of his minor child in ordinary Civil Courts of the mufassal, maintainability of.* No mufassal Court has jurisdiction to entertain a suit by a father for the custody of his child. *Besant* v. *Narayaniah, I. L. R. 38 Mad. 807, at p. 820,* relied on. *Achratlal Jekisandas* v. *Chimanlal Parbhudas, I. L. R. 40 Bom. 600,* not followed. SATHI *v.* RAMANDI PANDARAM (1919)
I. L. R. 42 Mad. 647

... the age of 18, notwithstanding (that under) the Shafi School to which he is subject, his personal emancipation would have taken place when he attained the age of 15 or when he attained puberty between the ages of 9 and 15. The word "guardian" in s. 21 includes the guardianship both of persons and property. *Reade* v. *Krishna, I. L. R. 9 Mad. 391,* followed. *Per* NAPIER, *J.*—The object of ss. 24 and 25 is to declare the right of the guardian of the person of a minor to the continuous custody of his person and to provide a machinery for enforcing it. The writ of *Habeas Corpus* proceeds on the fact of an illegal restraint and can have no application to cases where there is no question of restraint. IBRAHIM NACHI *v.* IBRAHIM SAHIB (1915) . . I. L. R. 39 Mad. 608

———— **ss. 4 (2), 24, 25, 26, 41, 47**—

See MAHOMEDAN LAW—MARRIAGE.
I. L. R. 42 Calc. 351

———— **ss. 5 to 20 (Chapter II)**—

———— *Procedure—Evidence.* Three persons applied to the District Judge to be appointed guardian of the person and property of a minor. The Judge asked the Collector to say which of the three was the fittest. He in turn called for a report from the girdawar qanungo who reported in favour of the respondent. The District Judge thereupon appointed him as guardian of the person and property of the minor. *Held,* that the report could not be treated in law as evidence and that the Judge should have called the different claimants before him. SUBHAG SINGH *v.* RAGHUNANDAN SINGH . I. L. R. 36 All. 282

———— **s. 7**—*Appointment of guardian—Welfare of minor—Application for appointment of guardian, if may be summarily rejected—Contents of application—Grounds for dismissal—Mala fide application—Amendment of petition.* The key-note to the Guardians and Wards Act lies in the intro-

GUARDIANS AND WARDS ACT (VIII OF 1890)—*contd.*

———— s. 7—*contd.*

ductory words of s. 7 that proceedings under this Act are to be taken for the benefit of the minor. If an application is made for an ulterior purpose it ought not to be entertained. Before proceeding with it the Court should under s. 11 be satisfied that there is ground for proceeding with the application. One of the material facts to be taken into consideration is the cause or causes which led to the making of the application. Where the real object of the application by a husband for appointment as guardian of his minor wife was to recover her from the custody of her father who, on his part, alleged ill-treatment of his daughter by the husband, but this object was not disclosed in the application: *Held,* that it was within the powers of the Judge to dismiss the application summarily on the ground that it did not disclose the cause which led to the making of the application as required by s. 10, sub-s. (1), cl. (*k*) of the Act. The Court being satisfied that the application was wholly *malâ fide* and not for the benefit of the minor, it refused permission to the petitioner to amend his petition. SARAT CHANDRA NANDAN *v.* GIRINDRA CHANDRA GUIN (1910) . . . **15 C. W. N. 457**

———— ss. 7 (2), 29 and 30—*Guardian appointed by Court encumbrance of minor's property by natural guardian while Court guardian in existence—Encumbrance void—Void deed no consideration for fresh contract on attaining majority.* The appointment of a guardian under the Guardians and Wards Act (VIII of 1890) has the effect of extinguishing the rights of the minor's natural guardian to deal with the minor's property. Where the natural guardian with rights thus extinguished but purporting to act as a *de facto* guardian encumbered the minor's property with his consent: *Held,* that the encumbrances were null and void. An encumbrance thus created without authority cannot be ratified by the minor on attaining majority. There can be no ratification of a transaction which is void owing to the promisor possessing no contractual capacity at the time. Nor can a void deed form a good consideration for a fresh contract made by the minor on attaining majority. ARUMUGUM CHETTI *v.* DURAISINGA TEVAR (1914) **I. L. R. 37 Mad. 38**

———— s. 7 (*3*)—

See GUARDIAN . **I. L. R. 42 Calc. 953**

———— s. 7—*Application for guardianship of property—Resistance to the guardianship order on the ground that the property was joint-family property—Elaborate inquiries into the character of the property not competent—Summary nature of the inquiry.* In an application for guardianship of a minor's property under s. 7 of the Guardians and Wards Act (VIII of 1890), the applicant alleged that the property was the separate property of the minor's husband. The opponents resisted the application contending that the property was joint-family property which had survived to them. The Court conducted a lengthy inquiry into the character of the property, and having come to the conclusion that it was joint, rejected the application. The applicant having appealed: *Held,* reversing the order, inasmuch as the application was made on the footing and with the claim, that the minor was separately entitled to separate property the Court ought to appoint a guardian of the property of the minor, and leave it to him to institute suits for the recovery of the property. S. 7 of the Guardians and Wards Act (VIII of 1890) contemplates only a summary enquiry followed by an order made for the welfare of the minor. GURAPPA SHIVGENAPPA *v.* TAYAWA SHIDDAPPA (1916) . **I. L. R. 40 Bom. 513**

———— ss. 8, 13—

See GUARDIAN . **I. L. R. 38 Calc. 783**

———— ss. 8, 11, 21—*Application, by relative or friend of minor—Notifying such application, object of—Step-mother, if disqualified from being guardian of person of step-son, where parties governed by Mitakshara school of Hindu law—Purdanashin lady, if may be appointed guardian of person and property of infant—Minor step-mother, if competent to act as guardian of infant adopted son—Considerations which should guide Courts in appointing guardian—Appointment of stranger as guardian of person.* One Dayanidhi died leaving a widow *S*, a daughter and an infant son whom he had adopted during the life-time of his first wife before marrying *S*. The widow applied to be appointed guardian of the person and property of the infant: the application was opposed by the relations of her husband. The objection was that the widow was herself a minor and was not competent as a *purdanashin* lady to take effective charge of the person and property of the infant, and that the application in substance was not made *bonâ fide* in the best interests of the minor concerned. One of the objectors proposed that *G*, a pleader, who was related both to the widow and to the infant, should be appointed guardian and the Collector also acting under s. 8 of the Guardians and Wards Act intimated to the District Judge that a guardian should be appointed, and that the other objector was the most suitable person available for appointment as guardian. The District Judge appointed *G* guardian of the person and property of the infant: *Held,* that the petition of objection suggesting the appointment of *G* as guardian was in substance an application by a relative or friend of the minor for the appointment of a guardian within the meaning of s. 8, cl. (*b*) of the Act, and that the fact that this application was not notified in accordance with s. 11 did not constitute a fatal defect inasmuch as the object of s. 11 is to bring the application to the notice of persons interested in opposing it, and in the present case all the persons interested in the matter of the appointment of a suitable guardian for the minor were present before the Court. That under the Mitakshara school of Hindu law the step-mother is not the heir of her step-son and she cannot be deemed disqualified from being appointed guardian of the step-son on that ground. That it cannot be laid down as an inflexible rule of law that a *purdanashin* lady should not be appointed guardian of the person and property of her infant son, but in the circumstances of the present case the widow could not be appointed guardian of the property of the infant with any prospect of advantage to the infant. That s. 21 of the Act clearly refers to the guardian of the person of an infant and there is much force in the contention that the section is wide enough to cover the case of an adopted son and the step-mother, even if a minor, is competent to act as guardian of the person of the infant adopted son. That in the matter of

GUARDIANS AND WARDS ACT (VIII OF 1890)—*contd.*

——— ss. 8, 11—*contd.*

mother should be appointed guardian of the person of the infant, such appointment being for the benefit of the infant. The effect of the appointment of a stranger as the guardian of the person of a minor considered. SUNDARMANI DEI *v.* GOKULANAND CHOWDHURY (1912)

18 C. W. N. 160

——— s. 9—

See MINOR . I. L. R. 48 Calc. 802

See MAHOMEDAN LAW—GUARDIAN.

I. L. R. 36 All. 280

——— *Application for guardianship of minor—Jurisdiction—Domicile—Place*

leaving him surviving a widow and two sons, Lallu and Wadilal, the latter a minor, who all lived in the house. Panachand's widow died about a year

his minor brother, who was also baptized in the American Mission Boarding House at that place Afterwards Lallu renounced Christianity and in the beginning of February 1909 clandestinely

the Mission

d him in the

The minor

March 1909, and on the next day he was removed from Ahmedabad at the instance of the appellant, a member of the

to Baro

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for his appointment as the guardian of the minor person. The appellant (opponent) at whose instance the minor was taken back to Baroda, contended that inasmuch as the minor lived at Baroda which was beyond the Court's jurisdiction, the Court had no jurisdiction to entertain Lallu's application under s 9 of the Guardians and Wards Act (VIII of 1890). The Court dismissed Lallu's application, he being found unfit for the appointment, but in the same proceeding appointed the respondent, a Jain Pleader, on his application, as the guardian of the minor's person and property, on the ground that as the minor lived with his father till the father's death at Kapadwanj which was within the jurisdiction of the Court and as the minor's domicile followed that of his father which was Kapadwanj, the minor's domicile was in British India and he ordinarily resided within the Court's jurisdiction. *Held,* on appeal by the opponent, setting aside the order, that the question of domicile was wholly irrelevant to the question of jurisdiction. The minor was living at Baroda and had no other place of residence. He had lived at Baroda for three years with the exception of twenty-eight days. Therefore Baroda was the place where the minor ordinarily resided within the meaning of s. 9 of the Guardians and Wards Act (VIII of 1890). ROBERT WARD (REV.) *v.* VELCHAND (1919) . I. L. R. 24 Bom. 121

——— ss. 9, 10—

See MINOR . L. R. 41 I. A. 314

——— ss. 9 and 19—

See GUARDIAN. I. L. R. 38 Mad. 807

——— s. 11—

See s. 8. . . 18 C. W. N. 160

——— s. 12, cl. 3 (*b*)—*Power to order money to be paid into Court—Civil Procedure Code (Act V of 1908), s. 141, O. XXXIX, r. 10, O. XL, r. 1.* *H* petitioned the Court under the Guardians and Wards Act, 1890, to be appointed guardian of the property of *J.* a minor; he also applied to the Court in the following terms.—"In the meanwhile and pending these proceedings a receiver may be appointed to take charge of the amount of Rs. 4,141-9-1 due and payable to this minor by *G* or such other order may be passed to protect the property of the said minor as to this Honourable Court may seem meet." *Held,* that it was open to the Court to pass an order directing *G* to forthwith deposit in Court the sum of Rs. 4,141-9-1 to abide by the further order of the Court. *In re* BAI JAMNABAI (1911) . . I. L. R. 36 Bom. 20

of a minor girl applied to be appointed her guardian. The girl was alleged to have been taken away by her elder sister but no action under s 12 of Act

Held, that she was entitled to do so. She was charged with the custody of the ward and could ask the Court to assist her to perform the duties imposed upon her by s. 24 of the Act The District Judge was empowered to enforce all the provisions contained in the Act for the benefit of the minor. Further, that no separate suit could have been brought for the purpose. *Sham Lal* v. *Bindo, I. L. R. 26 All. 594,* followed. *Quære.* Whether an appeal lay from the order of the Judge rejecting the application. UTMA KUAR *v.* BHAGWANTA KUAR (1915) . . . . I. L. R. 37 All. 515

——— ss. 12, 13, 17, 19, 24 and 25—*Minor never in the custody of his father—Application by father for custody of his son under Guardians and Wards Act—Refusal of the District Court to make an*

minor's person by reason of s. 19 of the Guardians and Wards Act, 1890, but appointed the Deputy

appeal to the High Court: *Held,* that the only remedy of the father was to file a suit for the custody of his son. *Sharifa* v. *Munekhan, I. L. R. 25 Bom. 574,* followed. *Held,* further, that the jurisdiction of the District Court was defined by the Guardians and Wards Act and that it had no inherent power

GUARDIANS AND WARDS ACT (VIII OF 1890)—*contd.*

——— s. 12—*contd.*

to make orders with reference to minors which were not expressly conferred upon it by that Act. *Annie Besant* v. *Narayaniah, I. L. R. 38 Mad. 807*, followed. ACHRATLAL JEKISANDAS *v.* CHIMANLAL PARBHUDAS (1916) . **I. L. R. 40 Bom. 600**

——— ss. 12, 43 and 47—*Appointment of guardian of the person of a minor—Custody of minor with a relative pending appointment—Order passed by the Court regarding marriage of minor—Jurisdiction of the Court to pass the order.* A minor girl was left in the custody of her grand-mother pending the appointment by the Court of a guardian of her person. In the meanwhile, a proposal of marriage of the girl was brought before the Court, which sanctioned it at first; but the sanction was later rescinded. A second proposal was similarly brought up and sanctioned by the Court. An application having been made to the High Court against the order. *Held*, that though the order as to the temporary custody of the girl was a proper order under s. 12 of the Guardians and Wards Act, 1890, yet the order as to the marriage could not be brought under that section or s. 43 of the Act and was made without jurisdiction. LAXMINARAYAN SHESHGIRI *v.* PARVATIBAI (1919).

I. L. R. 44 Bom. 690

——— s. 13—

See GAURDIAN.

I. L. R. 38 Calc. 783

——— s. 17—*Infant son of pre-deceased out-casted son residing with mother in the family of mother's sister—Mother appointing her sister guardian by will—Grandfather nominating a nephew as guardian, but latter unwilling to admit him in family circle—Infant's preference for aunt—Court's discretion in appointing guardian—Welfare of minor, chief consideration—Home influence, value of—Purdanashin lady, if unfit to be guardian of infant of 15 years.* *I*, who had been outcasted, died in April 1899, leaving an infant son who in 1914 was about 15 years old, a widow who died in 1913 and his father *B* who was appointed guardian of the person and property of the infant, in July 1899. *B*, being unable owing to caste difficulties to keep the infant in his custody acquiesced in the appointment, in December 1905, of the infant's mother as guardian of his person, he himself continuing to be the guardian of the infant's property. The infant and his mother took up residence with the latter's sister *F*, and before her death she made a will clearly expressing therein her wish that her sister *F* should after her death be the infant's guardian. On her death *B* applied for the appointment of a nephew of his as the guardian of the person of the infant, and *F* also made a similar application. The uncle and not the aunt was appointed by the District Court. On appeal the High Court ascertained on enquiry from *B* as well as his nominee that neither of them was willing to take the infant into his family circle, and their idea was to place him in charge of a tutor. The infant himself on being examined by the High Court expressed his preference for the aunt. It was found by the District Judge that the education of the infant in her aunt's house had been satisfactory. *Held*, that it was desirable for the welfare of the minor that the aunt and not the uncle should be appointed guardian of the infant's person, and that her being a *purdanashin* lady did not make her unfit to be so appointed as it was undesirable that the infant should at his age be removed from the influences of home life. But it was ordered and the aunt gave assurance that the grandfather and the uncle should have free access to the infant. The primary point for consideration in such a case is what in the circumstances of the case is for the welfare of the infant. In appointing a guardian the Court will pay great attention to the wishes of the father or mother of the infant unless such a course would be disadvantageous to the infant and regard is always paid to the wishes of the minor if he be of years of discretion. FULKUMAREE BIBEE *v.* BUDH SINGH DHUDHURIA (1914) . . **18 C. W. N. 1198**

——— *Guardianship of minor children—Father, marrying a second time, no disability.* Under s. 19 of the Guardians and Wards Act, the Court must be satisfied that the husband or father is unfit to be the guardian of his wife or child respectively before it can appoint another person as guardian. The fact of the father marrying a second time is no ground for depriving him of the guardianship of his minor children. *Bindo* v. *Sham Lal, I. L. R. 29 All. 210*, dissented from. AUDIAPPA PILLAI *v.* NALLENDRANI Pillai (1915)

I. L. R. 39 Mad. 473

——— *Guardian and Ward—Considerations by which a court should be guided in the selection of a guardian.* In considering the appointment of a guardian for a minor the proper test is the welfare of the minor. Where the applicant was a distant relation of the husband of a childless widow of some 12 or 13 years of age who was living happily with her father, it was *held* that the father of the minor widow was her proper guardian. *Khudiram Mookerjee* v. *Bonwari Lal Roy, I. L. R. 16 Calc. 584*, referred to. TOTA RAM *v.* RAM CHARAN (1910) . . **I. L. R. 33 All. 222**

——— *Adopted son minor—Death of adoptive parents—Natural father if may be appointed guardian—Guardian of property of minor appointed executor of same property under father's Will—Probate supersedes guardianship order—Security, inventory, accounts.* Both the adoptive parents being dead the natural father of the minor adopted son was appointed guardian of his person in preference to the brothers of the adoptive mother and the daughters of the adoptive father. *Lakshmi Bai* v. *Sridhar Vasudev Takle, I. L. R. 3 Bom. 1*, referred to. The appellant who had been appointed by the District Judge the guardian of the properties of a minor was required by the Judge to furnish security and to produce an inventory of the minor's properties and accounts within six months. During the pendency of the appeal, the appellant having obtained probate of the unadministered effects belonging to the estate of the father of the minor. *Held*, that the properties to which under his father's Will the minor was beneficially entitled having by the grant of probate become legally vested in the executor, no guardian in respect of that property could be appointed, so long as the executorship continued, and the order of the District Judge calling on the appellant to furnish security and file inventory and submit accounts became inoperative upon such grant and should be cancelled. GANGAPRASAD BHATTACHARJEE *v.* HARA KANTA CHOUDHURI (1910) . . **15 C. W. N. 553**

GUARDIANS AND WARDS ACT (VIII OF 1890)—*contd.*

——— **s. 19**

See s. 12 . **I. L. R. 40 Mad. 600**

See s. 17 . **I. L. R. 39 Mad. 473**

See GUARDIAN. **I. L. R. 38 Mad. 807**

——— **s. 21—**

See s. 8 . . **18 C. W. N. 160**

——— **ss. 24 and 25—**

See s. 12 . **I. L. R. 37 All. 515**
I. L. R. 40 Bom. 603

———**s. 25**—*Custody of Minor—Application by guardian—Guardian—need not be a certificated guardian.* An application under s. 25 of the Guardians and Wards Act (VIII of 1890) for the custody of a minor can be made by a guardian, who need not be a certificated guardian. DAYABHAI RAGHUNATHDAS *v.* BAI PARVATI (1915)

I. L. R. 39 Bom. 438

——— **s. 27—**

See HINDU LAW . **23 C. W. N. 50**

See MORTGAGE . **1 Pat. L. J. 563**

——— **s. 29—**

See MORTGAGE . **1 Pat. L. J. 563**

———*Guardian and Minor—Certificated guardian—Sale—Powers of certificated guardian different from those of a guardian under the general rule of law.* The powers of a certificated guardian are regulated and defined by the Guardians and Wards Act, and the rule of law, that, there being no mutuality in a contract to which a minor was a party, it could not be enforced by him, does not apply to a contract for the sale of immoveable property entered into by the certificated guardian of a minor with the sanction of the Court; such a contract is valid and a suit for damages for breach of the contract will lie on behalf of the minor. *Mir Sarwarjan* v. *Fakhruddin Mahomed Chawdhuri, I. L. R. 39 Calc. 232,* distinguished. BABU RAM *v.* SAID-UN-NISSA (1913) . **I. L. R. 35 All. 499**

——— **ss. 29, 30—**

See MORTGAGE . **16 C. W. N. 715**

an alleged debt of theirs and further directs him to put in the bonds after these have been satisfied and so endorsed by the creditors it does not follow that non-compliance with the latter direction vitiates the sale if actually carried out and the vendee has all along been in possession of the purchased property. Where the same property is held partly by adult co-sharers and partly by minors, the very fact that the minors' share was sold for a price a little over that for which the shares of the adults are sold goes to show *bona fides.* DYAM KHAN *v.* SARAT CHANDRA DAS

26 C. W. N. 218

GUARDIANS AND WARDS (ACT VIII OF 1890)—*contd.*

———**s. 31, sub. s. (4)**—*Construction of word "any person."* The words "any person" in the last part of sub-s. (4) Guardians and Wards Act (VIII of 1890), are not limited by the words "relative or friend" in the previous part of the section. The Court is competent to hear a person who is not a relative or friend. VENU GOPAL BAHADUR *v.* KADIRVELUSWAMI NAICKER (1912)

I. L. R. 35 Mad. 743

———**s. 34**—*Civil Procedure Code (Act V of 1908), s. 36—Order—Decree—Marriage expenses of person dependent on the ward—Order against guardian—Ward attaining majority—Discharge of guardian—Application for execution against ward after majority—Jurisdiction of Court to order execution—Omission to object before attachment—Waiver—Estoppel.* An order under s. 34 of the Guardians and Wards Act directing a guardian to pay a sum of money out of his ward's estate for the marriage expenses of a person dependent on his ward is neither a decree nor an order executable as a decree under the Civil Procedure Code, and cannot be enforced against the ward after he has attained majority and the guardian has been discharged. There being an initial want of jurisdiction in the Court to execute such an order, the omission of the ward to object, after notice, to an order for attachment of his property, does not estop him from objecting to the jurisdiction of the Court to sell the property after attachment. *Somakka* v. *Ramiah, I. L. R. 36 Mad. 39,* referred to. PARVATHIAMMAL *v.* CHOKKALINGA CHETTY (1917)

I. L. R. 41 Mad. 241

——— **ss. 34, 35**—*Bonds given to Court by guardian and sureties—Court obligee under the bonds—Persons entitled to sue on the bonds—Breach of conditions of bond, when.* Under s. 34 of the Guardians and Wards Act (VIII of 1890) it is the Court that is the obligee under the bonds given by the guardian and his sureties in respect of the management of a ward's estate and except under an assignment from Court under s. 35 of the Act nobody else can sue on the bonds. The conditions of bonds given under s. 34 (*c*) and (*d*) of the Guardians and Wards Act and under Form No. 93 of Civil Rules of Practice, being to exhibit such accounts as may be directed by Court or pay such balance of the minor's moneys in the guardian's hands as the Court may direct, there is no right of suit as for a breach of the conditions of the bonds unless there is a preliminary order of the Court either to exhibit accounts or to pay any specified balance and a breach thereof. An assignment of the bonds by the Court without any such preliminary order, on the ground that there was a *primâ facie* case of maladministration is invalid and does not give a right of suit on the bonds. *Obiter:* The loss of the bond is no impediment to its assignment. KRISHNA CHETTIAR *v.* VENKATACHELLAPATHI CHETTIAR (1918) . **I. L. R. 42 Mad. 302**

in discharge of old debt—Daily fine, order to pay, if legal. Where a certificated guardian of minors obtained permission to sell a portion of their estate on the representation that the money (about Rs. 3,000) was wanted to repair their house, and submitted accounts showing that 5,0

GUARDIANS AND WARDS ACT (VIII OF 1890)—*contd.*

——— ss. 34, 35—*contd.*

obtained by the sale, Rs. 4,000 had been retained by the purchaser in payment of a sum of Rs. 4,000 which the guardian had borrowed from her to give the minors in marriage, and the Judge thereupon called upon the guardian to pay the said amount of Rs. 4,000 in Court within a specified time and directed that on failure to do so the guardian was to pay a fine of Rs. 5 per diem. *Held,* that the amount the guardian was called upon to pay was not an amount of balance due from the guardian as the same had not been paid to her, nor was it a balance due on accounts filed in compliance with a requisition under cl. (*d*) of s. 34 of the Guardians and Wards Act, and the order imposing a daily fine was *ultra vires.* NIKHRANNESSA BIBI, *Re.* (1915) . . . . . **20 C. W. N. 663**

——— *Order of appointment of guardian, conditional on giving security, when effective—Natural guardian's right to manage, pending appointment.* Where a guardian is appointed by a Court unconditionally, the order takes effect at once although under s. 34 of the Guardians and Wards Act (VIII of 1890), he may be required to furnish security subsequently. But where the order is conditional upon the furnishing of security, it does not take effect until the security has been furnished. Such a conditional order does not therefore deprive the natural guardian of his or her power of management of the minor's estate till the condition is satisfied. Hence an endorsement of a negotiable instrument belonging to the minor by the natural guardian before the condition is satisfied is not invalid. *Defries* v. *Creed, 34 L. J. (Ch.) 607,* followed. *Semble.* Rr. 240 to 242 and Forms Nos. 92 and 93 of the Civil Rules of Practice which make the appointment of a guardian take effect only on furnishing security, are not *ultra vires.* The dictum of SADASIVA AYYAR, *J.*, to the contrary in *Gopammal* v. *Srinivasa Ayyangar, 30 Mad. L. J. 508,* not followed. SUBBA NAICK *v.* RAMA AYYAR (1916)

I. L. R. 40 Mad. 775

——— ss. 34A, 35 and 36—*Person acting as a guardian—Appointment of guardian who passes a bond—Ward dying leaving minor widow heir—Reappointment of guardian without bond—Liability to account to minor—Liability of legal representatives of the guardian.* A minor having been left as the sole surviving male member of his family, his estate was for a time managed by his maternal grandfather. The latter was subsequently appointed by the Court as guardian of the property and passed a bond under s. 34 (*a*) of the Guardians and Wards Act, 1890. On the death of the minor, he retained management of the property on behalf of the minor's widow, without re-appointment as guardian. Some months afterwards he was again appointed guardian of the property by the Court, but without a bond. The guardian having died the minor's widow sued his legal representatives for an account of his management. *Held,* that the suit was maintainable, for, neither s. 35 nor s. 36 of the Guardians and Wards Act, 1890, operated as bar. *Held,* also, that the legal representatives of the guardian were liable to account, if it was established that property of the minor did go into the hands of the guardian and thence into the hands of his representatives. NARAYAN BALAJI *v.* KASHIBAI KESHAV (1920) . **I. L. R. 44 Bom. 852**

GUARDIANS AND WARDS ACT (VIII OF 1890)—*contd.*

——— ss. 34A, 35 and 36—*contd.*

——— *Guardian if can be removed without opportunity to show cause*—ss. 34 (*c*) AND 45 (*1*), *cl.* (*b*)—*Punishment of guardian for non-payment of balance due from him—Considerations which should prevail with Courts in appointing and removing guardians.* The Guardians and Wards Act does not prescribe the procedure to be followed when the Court finds it necessary either of its own motion or at the instance of a party interested in the welfare of the infant to take steps for the removal of a guardian appointed by itself. But on the elementary rule that no order adverse to a party litigant should be made by a Court of Justice till he has been apprised of the charges brought against him and has been allowed reasonable opportunity to show cause, no order for removal of a guardian should be made till the guardian has been apprised of the charges brought against him and allowed reasonable opportunity to explain and, if possible, to defend his conduct. S. 45, sub-s. (*1*), cl. (*b*), authorises the Court to impose a fine on a guardian, if the guardian fails to pay into Court the balance due from him on the accounts exhibited by him in compliance with a requisition under s. 34 (*c*). The payment contemplated has to be made in compliance with a requisition under s. 34 (*d*), and no fine can validly be imposed on a guardian for failure to comply with a requisition calling upon him to bring into Court a larger sum than found due from him on the accounts exhibited under s. 34 (*c*). That the sole point for considerations in cases where the management of the infant's property by the guardian in question is at issue is the welfare of the infant and the investigation should be from that point of view alone and it is eminently desirable that no person should be appointed guardian of the person or property of an infant without some enquiries about his fitness for the office. JAGANNATH PANJA *v.* MOHESH CHANDRA PAL (1916)

21 C. W. N. 688

——— s. 35—*Act XL of 1858—District Judge's power to take security bond from manager—Assignment of bond by District Judge—Suit against representatives of a deceased manager in respect of liability incurred by him, if lies.* It was competent to a District Judge acting under Act XL of 1858 to take a security bond in his own favour for the due discharge of his duties by a manager appointed by him. Such a bond can be validly assigned by the District Judge under s. 35 read with s. 2 (*2*) of the Guardians and Wards Act. BAHADUR SINGH *v.* BASUNTA KUMAR ROY (1913) . **17 C. W. N. 695**

——— s. 36—*Suit against a guardian—Leave of the Court not obtained before filing the suit—Leave can be granted subsequently.* Under s. 36 of the Guardians and Wards Act, 1890, proceedings are not entirely nullified because leave of the Court is not obtained before a suit is filed. It would be open to the Court on a proper application by the plaintiff to remedy the mistake and to empower the plaintiff to continue the proceedings against a guardian. MAINA *v.* SHANKAR MORU (1919)

I. L. R. 44 Bom. 602

——— s. 39—

See GUARDIAN . **I. L. R. 38 Calc. 862**

See MAHOMEDAN LAW—GUARDIAN.

I. L. R. 36 All. 280

GUARDIANS AND WARDS ACT (VIII OF 1890)—*contd.*

——— s. 39 and 47—*Appointment by a Hindu father of a guardian for the person and property of his undivided minor son—Validity of appointment of guardian of property—Will written under instructions of testator partly on blank sheets previously signed, validity of.* A Hindu father is entitled to appoint by will, a guardian of the person of his minor son, but not of the properties in which his minor son will have a right by birth. A will appointing a guardian of such properties being invalid, it need not be set aside and cannot be set aside in an application made on behalf of the minor son under s. 39 of the Guardians and Wards Act for removal of the guardian. *Dr. Albrech* v. *Bathee Jellamma, 22 Mad L. J. 247* and *Kanakasabai Mudaliar* v. *Ponnusami Mudaliar, 21 I. C. 848*, followed The appointment of a guardian of the properties being invalid, the mother as natural guardian, becomes the guardian of the properties and if she be competent, there is no necessity for the Court to appoint her as such. Properties attached to *Tirumaligais* (houses of religious preceptors) are private and not trust properties A will signed by the testator after completion on the sixth and the seventh sheets, is not invalid because he signed some of the earlier sheets before the will was written, in them. *Namberumal Chetty* v. *Pasumarthy Kannia Chetty, 28 I. C. 959*, followed. ALAGAPPA AYYANGAR *v* MANGATHAI AMMANGAR (1916) . . . . I. L. R. 40 Mad. 672

——— ss. 39, 47, 48—*Revocation of an order appointing a guardian on the ground that alleged minor attained majority before appointment of guardian, if an order under s. 39 and if appealable—S. 39 if exhaustive—Jurisdiction of District Judge*

before the order appointing the appellant as her guardian was made The District Judge took evi-

ian appointed under the statute, and the order in que[illegible]

seen[illegible]

powers under the Guardians and Wards Act has ample inherent jurisdiction to deal with matters brought before it of which cognizance may be require[illegible]

Judge[illegible]

questio[illegible]

vides t[illegible]

limit or otherwise ... Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court, does not formulate a new doctrine,

GUARDIANS AND WARDS ACT (VIII OF 1890)—*contd.*

——— s. 39—*contd.*

Civil Courts. If an order has been obtained from the Court by a suppression of facts, if the Court has been overreached and has been induced to assume jurisdiction over a matter in which, upon a *true state of facts, it does not possess jurisdiction*, the Court is competent to recall the order obtained from it by suppression or misrepresentation of facts. That s 48 was not a bar to the present proceedings and the District Judge had jurisdiction to entertain the application in the exercise of his inherent power. RASHMONI DASSI *v.* GANODA SUNDARI DASSI (1914) . . . 19 C. W. N. 84

of the Guardians and Wards Act, 1890. ANWAR ALI KHAN *v.* DARA SHAH KHAN

I. L. R. 42 All. 514

——— s. 41 (3)—*Guardian and ward—Death of ward—Liability of guardian after ward's death. Held* that after the death of a minor during his minority it was not competent to the court which had appointed a guardian of the property of the minor to pass an order calling upon that guardian to deliver up the moveable property, cash and documents appertaining to the minor's estate. *In the matter of the application of Narmadabai, I. L. R. 8 Bom 14*, referred to CHANDRA BHUKHAN SINGH *v* SUJAN KUNWAR . . I. L. R. 42 All. 1

——— ss. 43, 45—*Order upon guardian not to marry ward without Court's leave, disobedience of, if punishable, when order without jurisdiction—Order if may be passed when minor a Hindu—Guardian's fail[illegible] may be[illegible] of—Civ[illegible] XIX, rr 1 and 2.* Before proceedings can be taken on account of disobedience of an injunction issued by

disobeyed it cannot be punished for the alleged offence There is in this respect a clear distinction between an order erroneously made with jurisdiction and an order made absolutely without jurisdiction. Sub-s. (4) of s. 43 of the Guardians and Wards Act applies to all cases of disobedience of an order passed under sub-s. (1) or sub-s. (2) of that section, whether or not the effect of the disobedience is capable of removal or reparation. *Quære:* Whether there is any bar to a District Judge giving directions in an order appointing a guardian of the person of a minor Hindu that the minor should not be married by the guardian without the consent of another relation and without the Court's leave, where the guardian appointed is also the guardian for marriage, according to Hindu law. *Bai Diwali* v. *Moti Karson, I. L. R. 22 Bom. 504*, referred to. Where it was found that the application upon

GUARDIANS AND WARDS ACT (VIII OF 1890—*concld*).

———— ss. 43 and 45—*contd.*

which the order for appointment of a guardian was made was not made voluntarily. *Held*, that the order was without jurisdiction and disobedience on the part of the guardian of the directions relating to the marriage of the minor could not be punished under s. 43, cl. (*4*) of the Guardians and Wards Act like disobedience of an injunction. Cl. (*a*) of sub-s. (*1*) of s. 45 of the Guardians and Wards Act does not contemplate orders on the guardian appointed under the Act for the production of the ward, and such a guardian cannot be fined under the section for failing to produce the ward before the Judge when required. SAHODRA KOER *v.* DHAJADHARI GOSAIN (1911) . **16 C. W. N. 447**

———— ss. 43 and 48—

See s. 12. . **I. L. R. 44 Bom. 690**

———— s. 45—

See s. 34 . . **20 C. W. N. 663**
21 C. W. N. 688

———— ss. 47, 48, 50—*Application to be appointed guardian of minor, dismissed for default—Second application, if lies—Application refused—Appeal, if lies—Girl, infant, who has nearly attained majority—Marriage, consent of infant to, if necessary—Guardian of person, if should be appointed to enable giving her in marriage.* Where an application for appointment as guardian of an infant was dismissed for non-appearance, and an application for a re-hearing was refused. *Held*, that a second substantive application for appointment as a guardian is maintainable. Where the District Judge refused such an application as not maintainable. *Held*, that an appeal lies to the High Court against the order. Where a Mahomedan, after having divorced his wife, applied to be appointed guardian of his infant daughter, who was very close upon her majority, with the object of her giving her away in marriage to a suitable bridegroom. *Held*, that, at her age, the consent of the girl to the marriage was required, and the application should not be proceeded with. AHMAD ALI *v.* RAISUNNESSA (1913) . **17 C. W. N. 429**

———— s. 52

See MINOR . **L. R. 41 I. A. 314**

GUARDIANSHIP.

See GUARDIANS AND WARDS ACT (VIII OF 1890), ss. 17, 19.
I. L. R. 39 Mad. 473

See HINDU LAW—GUARDIANSHIPS.

See MAHOMEDAN LAW—MARRIAGE.
I. L. R. 45 Calc. 878

See PENAL CODE, ss. 361, 366 AND 368.
4 Pat. L. J. 74

———— **Minor girl**—*Right of selecting husband.* Hindu law. *Held*, that under Hindu Law the mother is after the father the natural and legal guardian of her minor daughter and does not lose her right by re-marraige where it is recognised by custom. MUSSAMMAT HUSSAIN BIBI *v.* NIGAHIA
I. L. R. 1 Lah. 146

GUJARAT TALUKDARS ACT (BOM. VI OF 1888).

See KASBATIS . **I. L. R. 39 Bom. 625**

GUJARAT TALUKDARS ACT (BOM. VI OF 1888)—*contd.*

See LAND REVENUE CODE (BOM. ACT V OF 1879), s. 79A.
I. L. R. 35 Bom. 72

———— ss. 28, 29B and 29E—*Civil Procedure Code (Act XIV of 1882), ss. 235, 320—Decree against Talukdar—Execution—Decree transferred to Talukdari Settlement Officer—Notification of management—Submission by persons having claims—Application for the continuance of the execution proceedings against the legal representative of the deceased judgment-debtor—Certificate under s. 29E of the Gujarat Talukdars Act (Bom. Act VI of 1888)—Managing Officer—Talukdari Settlement Officer.* When execution proceedings are commenced against a judgment-debtor, they can be continued after his death by substituting the name of the legal representative in place of that of the deceased judgment-debtor in the application for execution. It is not necessary to file a fresh application under the provisions of s. 235 of the Civil Procedure Code (Act XIV of 1882). *Hirachand Harjivandas* v. *Kasturchand Kasidas, I. L. R. 18 Bom. 224*, explained. The effect of s. 29E of the Gujarat Talukdars Act (Bom. Act VI of 1888) is that before the execution of a decree can be proceeded with, the Court must be satisfied that the decree-claim has been duly submitted. If the officer certifies that it has been duly submitted there is an end of the matter. If he does not so certify, the Court must wait for one month from the date of the receipt by the officer of an application for a certificate, and upon being satisfied that the claim has been duly submitted in accordance with the provisions of s. 29B of the Gujarat Talukdars Act (Bom. Act VI of 1888) it may then proceed with the execution. The expression 'managing officer' in s. 29E of the Act is merely a compendious term for "the Talukdari Settlement Officer or any other officer appointed by Government to take charge of the Talukdar's estate and keep the same in his management" referred to in s. 28 of the Act, and where the officer who takes charge of the estate and keeps the same in his management is the Talukdari Settlement Officer the 'managing officer' is merely a synonym for 'Talukdari Settlement Officer.' Where an application relating to a claim is presented to the Subordinate Judge and is forwarded by him to the Talukdari Settlement Officer, it amounts to a submission of the claim in writing within the meaning of s. 29B of the Act, if the Talukdari Settlement Officer is also the managing officer. PURUSHOTTAM *v.* RAJBAI (1909)

I. L. R. 34 Bom. 142

———— ss. 29, 29B (*1*), (*2*), (*3*) and 29E—*Suit upon a mortgage—Talukdari Settlement Officer—Guardian of the minor defendants—Proceedings up to second appeal—Intermediate notification by the said officer calling upon claimants to submit their claims within six months—Plaintiff's non-compliance with the notification—Plaintiff's application to the said officer for a certificate to execute the decree—Refusal of the application—Inability to comply with the notice—The word "inability" not confined to physical inability of the claimant.* In 1904, the plaintiff sued the defendants, who were minors represented by the Talukdari Settlement Officer as their guardian, for a decree upon a mortgage. The first Court held the mortgage to be invalid under the provisions of the Gujarat Talukdars Act (Bom. Act VI of 1888) and granted to the plaintiff a personal decree. On the 27th September

GUJARAT TALUKDARS ACT (BOM. VI OF 1888)—*contd.*

———— **ss. 29, 29B**—*contd.*

1905, the plaintiff appealed to the District Court against the said decree and a notice of the appeal was issued to the Talukdari Settlement Officer. On the 21st November following, the Talukdari Settlement Officer took over the management of the defendant's estate. The notice of the appeal

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5) calling

upon claimants to submit their claims within six months of the date of the notification. On the 14th March 1906 the District Court decided the

ing the defendants preferred a second appeal to the High Court against the District Court's decree. The second appeal having failed in August 1907, the plaintiff applied to the Talukdari Settlement Officer for a certificate in order that he might proceed with the execution of the decree and he was informed in reply on the 12th August 1908 that as he had not submitted his claim within six months of the date of the publication of the said notification, his claim was deemed to have been duly discharged and no certificate could be granted to him. One month after the date of the receipt of the said reply, the plaintiff applied for execution and both the lower Courts dismissed his application for execution on the ground that the want of a certificate under s. 29E of the Gujarat Talukdars Act (Bom. Act VI of 1888 as amended by Bom. Act II of 1905) was a valid bar to the execution. On second appeal by the plaintiff. *Held,* that the word "unable" in s. 29B of the Gujarat Talukdars Act (Bom. Act VI of 1888 as amended by Bom. Act II of 1905) was not confined to physical inability on the part of the claimant, that the plaintiff was unable to put forward his real claim at the date of the notification and at the date of the notice he was unable to comply with it within the meaning of s. 29B (3) of the Gujarat Talukdars Act (Bom. Act VI of 1888 as amended by Bom. Act II of 1905), and that the inability of the plaintiff having continued during the period of the six months from the date of the notification, the plaintiff was not barred by s. 29B from prosecuting the proceedings in Court. MANILAL POPATLAL *v.* KHODABHAI SARTANSANG (1914) . **I. L. R. 38 Bom. 604**

———— **s. 29 E**—*Talukdari Settlement Officer managing a Talukdar's estate—Creditor submitting his claim—Time taken up before the Talukdari Settlement*

Act (XV of

against *G*,

and presented his first *darkhast* for execution on the 8th December 1903. On the 21st September 1905, *G*'s estate came by notice to be in the management of the Talukdari Settlement Officer under s. 29B of the Gujarat Talukdars' Act, 1888. *B* submitted his claim to the officer on the 6th March 1906: but it was rejected on the 12th August 1908 *B* then applied to the Civil Court on the 12th March 1909, and sought to bring it within time, by claiming to exclude the period taken up before the Talukdari Settlement Officer. *Held,* that the period in question could not be excluded in computing the time for the *darkhast*, for s. 29E of the Act placed no absolute bar on *B*'s right to apply to the Court for execution by reason of the submission of his claim to the Talukdari Settlement

Judge and holding that the present *darkhast* of

is decree is not

HIMATSING *v.*

I. L. R. 35 Bom. 324

————*Decree against Talukdar—Execution of decree—Certificate from the managing officer—Exclusion of time from the date of the decree to the date of the application for the certificate—Prior application to execute the decree unaccompanied by the certificate—Is such application in accordance with law—Limitation Act (IX of 1908), Art. 182 (5).* On the 16th September 1910, an instalment decree was passed; on the 1st April 1911, on failure to pay the first instalment, the whole amount of the decree became payable. The decree was passed against Talukdars whose estate was taken under management under the provisions of the Gujarat Talukdars' Act (Bombay Act VI of 1888). The first application to execute the decree was made on the 1st April 1914; but as it was not accompanied by a certificate from the managing officer under the provisions of s. 29E of the Gurajat Talukdars' Act, 1888, it was rejected on the 15th June 1914. In August of the same year, the certificate was applied for; it was obtained on the 29th idem. The second application to execute the decree was made on the 28th February 1916. Against the contention that the application was barred by limitation, it was urged that the first application was in accordance with law within the meaning of Art. 182 of the Indian Limitation Act in spite of the absence of the certificate under the provision of s. 29E of the Gujarat Talukdars' Act, 1888; and that the applicants were entitled to exclude the time from the date of the decree to the date of the application for the certificate under s. 29E, sub-s. 3, of the Act. Both the lower Courts rejected the application as being time-barred. On appeal, *held,* allowing the appeal, that the second application for execution was within time, for under s. 29E, sub-s. 3, the applicants were entitled to exclude the time from the 16th September 1910 (the date of the decree) up to

of the Gujarat Talukdars' Act. SHAH, J. held that it ought, as the application of 1914 was "in accordance with law" within the meaning of Art. 182 of the Indian Limitation Act, 1908, though no certificate of the managing officer under s. 29E (1) of the Gujarat Talukdars' Act, 1888, was produced

GUJARAT TALUKDARS ACT (BOM. VI OF 1888)—*contd.*

———— s. 29 E—*contd.*

Semble: per MARTEN, *J.*, that the application of 1914 was not made to "the proper Court" as defined in Explanation II to Art. 182 of the Indian Limitation Act, as at its date it was the duty of no Court to execute the decree or order, there having been no certificate from the managing officer. HARGOVIND FULCHAND *v.* NAJA SURA (1918) . . . . **I. L. R. 43 Bom. 44**

———— **s. 29 (g)—**

———— **whether notice to Talukdari Settlement Officer necessary—**

See BOMBAY COURT OF WARDS ACT 1905, s. 31 . **I. L. R. 44 Bom. 986**

———— **s. 31—**

———————— *Talukdar's estate—Talukdari estate—Estate held by a Talukdar on any other tenure.* The expression Talikdar's estate means only the estate held by a Talukdar on Talukdari tenure and not property held on any other tenure which is distinguishable from the former. *Khodabhai* v. *Chaganlal, 9 Bom. L. R. 1122*, followed. BHACHUBHA MAVSANGJI *v.* PATEL VELA DHANJI (1909) **I. L. R. 34 Bom. 55**

———————— *Land Revenue Code (Bom. Act V of 1889)—Talukdari tenure—Wanta land (at Sarsa)—Alienated land—Attachment of income. Wanta* lands are lands held by Rajputs or the representatives of Rajputs who, after the Mahomedan conquest of Gujerath, received one-fourth of the land of certain villages on condition of keeping order in those villages. The lands were held either rent-free or at a small quit-rent. Where *Sarsa Wanta* land, the income of which is attached in execution of a decree is proved to have been entered as alienated land under the Land Revenue Code (Bom. Act V of 1889), the Court may presume that it is not land held upon Talukdari tenure in the strict sense of the word. The words "Talukdar's estate" in s. 31 of the Gujerath Talukdars' Act (Bom. Act VI of 1888) are used in a technical sense limited to the Talukdar's interest in the estate held by him by reason of his status as a Talukdar. *Khodabhai* v. *Chaganlal, 9 Bom. L. R. 1122,* and *Bhachubha* v. *Vela Dhanji, I. L. R. 34 Bom. 55,* followed. TALUKDARI SETTLEMENT OFFICER *v.* CHHAGANLAL DWARKADAS (1910) **I. L. R. 35 Bom. 97**

———————— *Incumbrance created by a Talukdar—Adverse possession for more than twelve years after the death of the Talukdar—Title—Limitation.* A person claiming as an incumbrancer for more than twelve years from the death of a Talukdar, can acquire title by adverse possession. The incumbrance which is claimed by virtue of adverse possession since the death of a Talukdar would not fall within s. 31 of the Gujarat Talukdar's Act (Bom. Act VI of 1888) but would be an incumbrance arising from the operation of the law of limitation. TALUKDARI SETTLEMENT OFFICER, GUJARATI *v.* RIKHAVDAS PARSHOTTAMDAS (1912) **I. L. R. 37 Bom. 380**

———————— *Talukdari estate—Incumbrance by Talukdar and his son—Son has no power to encumber property during his father's lifetime—Talukdar's encumbrance valid during his lifetime—Summary eviction by Talukdari Settlement Officer—Land Revenue Code (Bom. Act V of 1879), s. 79A—Jivaidar is a Talukdar.* The property in dispute, which was a Talukdari estate, was mortgaged with possession to the plaintiff by a Talukdar and his son. After the death of the Talukdar, the son sold the equity of redemption to the plaintiff. The estate having passed into the management of the Talukdari Settlement Officer, that officer issued a notice to summarily evict the plaintiff from the property under s. 79A of the Land Revenue Code, 1879. The plaintiff sued for a declaration that he was entitled to remain in possession of the property. *Held,* that all that was mortgaged was the life interest of the Talukdar, which came to an end with his death, under s. 31 (*1*) of the Gujarat Talukdars' Act, 1888. *Held,* further, that at the date of the mortgage the son was not a co-sharer with his father in the Talukdari property, and not having any interest in the property at the time, he was not competent to encumber the interest to which he might succeed on his father's death. *Held,* also, that the sale by the son of the mortgaged property was an invalid alienation under *s. 31 (2)* of the Gujarat Talukdars' Act. *Held,* therefore, that the notice of summary eviction of the plaintiff was properly issued under s. 79A of the Land Revenue Code, 1879. A Jivaidar is a Talukdar. *Per* MACLEOD, *C. J.* "The land held in Talukdari tenure is totally distinct from land ordinarily held as joint family property by a Hindu family. It is not subject to the ordinary law of inheritance or succession, and...partition of Talukdari land is governed by particular laws. It is only a person who has obtained a final decree of a Court of competent jurisdiction declaring him to be entitled to a share of a Talukdari estate, and every co-sharer whose name has been recorded, as such, in the Settlement Register prepared in accordance with s. 5 (Gujarat Talukdars' Act), who can be entitled to have his share divided from the rest of the estate. S. 79A of the Land Revenue Code refers to any person unauthorizedly occupying, or wrongfully in possession of, any land, and therefore, it does not matter whether a person is in unauthorized occupation of land before the date when the section became applicable." BHAIJI ISHWARDAS *v.* THE TALUKDARI SETTLEMENT OFFICER (1920). **I. L. R. 44 Bom. 832**

———— **s. 33—**

See LAND REVENUE CODE (BOM. ACT V OF 1879), ss. 144, 160. **I. L. R. 43 Bom. 6**

H

HABEAS CORPUS.

See CRIMINAL PROCEDURE CODE, s. 491.
See EXTRADITION ACT. **I. L. R. 46 Calc. 31**

———— **nature of—**

See GUARDIANS AND WARDS ACT (VIII OF 1890), s. 2. **I. L. R. 39 Mad. 608**

HABEAS CORPUS—*contd.*

——— writ of—

See JURY, TRIAL BY

I. L. R. 44 Calc. 723

——— High Court, jurisdic-

-sdiction of

ocedure (*Act*

Act (*XV of*

(*8*) *and s. 4,*

sub-s (*1*)—*Evidence Act* (*I of 1872*), *if exhaustive—English Extradition Act* (*33 and 34 Vict. c. 52*)

absence of accused—Evidence of offence on which Magistrate may act—Arrest, irregularity of, if vitiates proceedings otherwise regular—Magistrate who may be chosen by Government—Government of Bengal, if can issue order on requisition made to Government of India—If such order can be ratified by Government of India—Fresh proceedings, legality of, whilst previous ones pending—Magistrate, if can record evidence after sending report to Government—Refusal of reasonable opportunity to fugitive to produce evidence, whether affects jurisdiction of Magistrate. It must be shown clearly that a supreme right such as that to *habeas corpus*, or to directions in the nature of that writ, has been expressly (if that be possible to the Legislature) taken away. There is no such express provision in the Indian Extradition Act The English Extradition Act did not give the right to *habeas corpus*. It merely declared a right which existed independently of that the statute *In re Siletti 87 L. T. 332; 71 L. J. K B. 935;* and *Ex parte Besset 6 Q. B 481*, followed When a person appears before the High Court and says that he is illegally detained, the High Court can enquire whether the warrant for his custody was validly

ings. *Rudolf Stallmann* v *Emperor, I. L. R. 38 Cal. 547*, distinguished. Section 3, sub-s. (*6*) of the Indian Extradition Act, 1903, is not a substitute for, and does not interfere with, proceedings taken under s. 491 of the Code of Criminal Procedure, 1898, the provisions of which are as much binding as those of the Extradition Act. The Indian Evidence Act (I of 1872) does not contain the whole law of evidence governing this country. Under s. 2, which saves certain rules of evidence, the English Extradition Act, which is applicable to this country, is part of the *lex fori*. Records, therefore, of the Berlin Court, which are authenticated in the manner prescribed by ss. 14

of the German Court. There may, however, be cases in which the production of the original document may be necessary for the enquiry in this country. If there is evidence before the Magistrate, the fugitive criminal cannot ask the Court to determine whether a *primâ facie* case has been properly found on such evidence. *In re Siletti 87 L. T. 332; 71 L. J. K. B. 935*, followed. The High Court will not sit in appeal to review and weight the evidence. It is sufficient that there should be some evidence of the offence upon which the Magistrate may reasonably act. Any irregularity in the original arrest of the accused is

HABEAS CORPUS—*contd.*

immaterial, provided that the subsequent proceedings have been right. *R. v. Weil, 9 Q. B. D.; 701 15 Cox C. C. 189*, followed. The substantial question is not how the accused is brought into Court, but whether the Court which enquired into

he is one who has jurisdiction to enquire into the crime of the nature of that for which extradition is sought. Therefore, an enquiry into the case of a fugitive criminal under arrest in Calcutta can be made by the Magistrate of Alipore, if duly autho-

by a subsequent order of the Government of *India.* Where, however, the latter order directs the Magistrate in pursuance of the former order "and of

Act, 1903, can initiate fresh proceedings notwithstanding proceedings taken under a previous order. When the Magistrate sends up his report to the Government of India under s 3, sub-s. (*b*) of the Indian Extradition Act, 1903, he becomes *functus officio*, and renders himself incapable therefore, of recording evidence that may be subsequently produced. The Legislature intended that the fugitive criminal should be given an opportunity of defence. If such opportunity is not give

Magistrate.

ing to law,

valid. If the Magistrate suspected that the accused had no evidence, it is open to him to question the accused. If the latter stood on his right not to answer, the Court might draw such inference as the refusal to reply and the circumstances of the case suggested. *Per* MOOKERJEE, *J.*—The burden lies very heavily upon those who assert that a right of so much importance to the criminal as *habeas corpus*, given by the Common Law, has been taken away by implication. S. 491 of the the Code of Criminal Procedure, 1898, is applicable to cases under the Indian Extradition Act. *Rudolf Stallmann* v. *Emperor, I. L. R. 38 Calc. 547*, distinguished. The jurisdiction of the High Court has not been taken away merely because the Government of India has already issued a warrant for surrender under s. 3, sub-s. (*5*) of the Indian Extradition Act, 1903. Depositions which have not been taken in the presence of the accused may be admitted by the Magistrate: *In re Counhaye, L. R. 8 Q. B 410.* Where there is no evidence before the Magistrate, the Court will interfere. *R.* v. *Maurer 10 Q. B. D. 513*, approved. The Court will not consider questions regarding evidence, unless the objection is such that if effect were given to it, there would be no evidence left upon which the order for extradition could be supported. Under s. 4, sub-s. (*1*), the Magistrate may issue a warrant when the person to be arrested is within his jurisdiction. S. 4 merely provides a preliminary procedure. Under it an arrest may

HABEAS CORPUS—*contd.*

be effected before the receipt of the requisition mentioned in s. 3, otherwise the criminal might escape. The two sections do not overlap. Under s. 3, sub-s. (*1*) of the Indian Extradition Act, 1903, the only Government competent to issue the order for enquiry is the Government to whom the foreign state has made a requisition. This function must be performed strictly, and cannot be delegated. Where the provisions of the statute have not been followed, the report of the Magistrate cannot afford a foundation for the order of the Government of India under s. 3 of the Indian Extradition Act, 1903. *In the matter of* RUDOLF STALLMANN (1911) . . . **I. L. R. 39 Calc. 164**

2. ——————— *High Court, jurisdiction of—Power to issue writ—Procedure—Rights of the East India Company—Allegiance of the subject and sovereignty of the Crown—Prerogatives—Governor-General in Council, powers of legislation of—Emergency legislation—Act embodying provisions of Ordinances—Order for internment—Form of order—Warrant to arrest and imprison—Application for bail—Code of Criminal Procedure (Act V of 1898), s. 49—Emergency Legislation Continuance Act (I of 1915)—Ordinances III and V of 1914—Indian Councils Act (24 and 25 Vict., c. 67), ss. 22 and 23 —East India Company's Act (26 Geo. III, c. 57) s. 29—Foreign Jurisdiction and Extradition Acts (XI of 1872), (XXI of 1879) and (V of 1903)—Interpretation Act (52 and 53 Vict., c. 63) s. 11—General Clauses Acts (I of 1868), s. 3 and (X of 1897), ss. 6 and 7.* Under s. 23 of the Indian Councils Act, 1861 (24 and 25 Vict., c. 67) no Ordinance can have any force of law for more than 6 months from its promulgation, but the Governor-General in Council has the power to pass an Act embodying the provisions of an Ordinance. The Governor-General in Council has also the power to oust the jurisdiction of the Courts, and s. 11 of Ordinance III of 1914, which is embodied in Act I of 1915 and which seeks to oust the jurisdiction of the Courts, does not offend against s. 22 of the Indian Councils Act, 1861. Act I of 1915 is not an Ordinance extended, but an Act. It does not offend against the allegiance of the subject, or the sovereignty of the Crown It is not *ultra vires*, and this Court has no jurisdiction to call in question the orders which have been passed thereunder. It is for the Governor-General in Council to be satisfied on the materials before him. The Court cannot call for the materials to examine them. *In the matter of Rudolf Stallmann, I. L. R. 39 Calc. 164, Levinger* v. *Reg. L. R. 3 P. C. 282. In the matter of Tuckut Roy, 1 Boulnois 354. In the matter of Ameer Khan, 6 B. L. R. 392. The same Case on appeal, 6 B. L. R. 459. Alter Caufman* v. *The Government of Bombay, I. L. R. 18 Bom. 636. The Queen* v. *Burah, L. R. 3 A. C. 889 ; L. R. 5 I. A. 178*, and *Reg.* v. *Halliday, [1916] 1 K. B. 738, 20 C. W. N. (Notes) xci*, referred to. Where an Act repeals a previous Act, or a certain provision thereof, and the repealing enactment is itself subsequently repealed by another Act—*Held*, that the last repeal did not since 1850 revive the Act or provision before repealed unless words there are reviving them. There was nothing in any of the Acts subsequent to the repealing Act (XI of 1872) which revived s. 29 of the East India Company's Act (26 Geo. III, c. 57). Where a person is detained in custody and an application is made to the Court under s. 491 of the Criminal Procedure Code :—*Held*, that the usual procedure was to issue a Rule in the first instance, and not to order the production of the petitioner. *In re* JEWA NATHOO AND OTHERS (1916)
I. L. R. 44 Calc. 459

3. ——————— *Jurisdiction—Arrest—Criminal Procedure Code (Act V of 1898), ss. 54, 190, 491, 498—Procedure—Applications under s. 491, to whom should be made—Arrest under s. 54—"Reasonable suspicion" or "credible information" what to be based upon—Duties of police officer arresting—Practice.* Applictions under s. 491 of the Code of Criminal Procedure ought to be made to the Judge sitting on the Original Side, and exercising the Oridinary Original Criminal Jurisdiction of the High Court. *In the matter of Rudolf Stallmann, I. L. R. 39 Calc. 164*, referred to. S. 54 of the Code of Criminal Procedure gives very wide powers and ought to be rigorously construed. "Reasonable suspicion" or "credible information" upon which an arrest can be made by a police officer under s. 54, must be based upon definite facts and materials placed before him, which, the officer must consider for himself, before he can take any action under that section. He cannot delegate his discretion, or take shelter under another person's belief or judgment, but must act on his own personal responsibility. *Queen* v. *Behary Singh, 7 W. R. Cr. 3*, followed. CHARU CHANDRA MAZUMDAR, *In re* (1916)
I. L. R. 44 Calc. 76

4. ——————— *Extradition (Act XV of 1903)—Criminal Procedure Code (Act V of 1898), s. 491—Jurisdiction.* The High Court's power to issue a writ of *Habeas Corpus* has not been taken away by the procedure provided in the Indian Extradition Act (XV of 1903), s. 3, sub-ss. (*6*) and (*7*). The arrest and detention of the applicant having been outside the local limits, the Court had no jurisdiction. Detention of a fugitive criminal pending the consideration of the Government is not illegal. *In the matter of Rudolf Stallmann, I. L. R. 39 Calc. 164*, considered. A. C. TOPS *v.* EMPEROR (1918) **I. L. R. 46 Calc. 52**

HABIT.

——————— **evidence of—**

See PREVIOUS CONVICTIONS, EVIDENCE OF
I. L. R. 38 Calc. 408

HAKKS.

See SANAD, CONSTRUCTION OF.
I. L. R. 36 Bom. 639

HALF SISTER'S SON OF WIDOW.

See HINDU LAW—STRIDHAN.
I. L. R. 40 Calc. 82

HALAI MEMONS OF KATHIAWAR.

See MEMONS . **I. L. R. 43 Bom. 647**

HAND-NOTE.

See EVIDENCE ACT, s. 93 **14 C. W. N. 1100**

——————— *Demand note—No stipulation for interest—whether interest payable—date from which interest payable.* A hand-note payable on demand but which does not provide for the payment of interest carries interest at the rate of 6 per cent. per annum from the date the

HAND-NOTE—*contd.*

money ought to have been paid until the realization of the debt. BISHUN CHAND v. BABU AUDH BEHARI LAL. . . . 2 Pat. L. J. 451

HANDWRITING.

See WILL . . 15 C. W. N. 729

——— comparison of—

See CHARGE . I. L. R. 42 Calc. 957

See EVIDENCE. . I. L. R. 41 Calc. 545

——— proof of—

See SEDITION . I. L. R. 39 Calc. 606

———PROOF OF HANDWRITING—*Per* JENKINS, *C. J.*—Methods of proving handwriting discussed. A document does not prove itself, nor is an unproved signature proof of its having been written by the person whose signature it purports to bear S. 73 of the Evidence Act does not sanction the comparison of any two documents, but requires, *first*, that the standard writing shall be admitted or proved to be that of the person to whom it is attributed; and, *secondly*, that the disputed

one not conversant with the subject and without guidance from the arguments of counsel and evidence of experts. *Phoodee Bibee* v. *Govind Chunder Roy, 22 W. R. 272,* referred to. The value of expert evidence of handwriting discussed. *Reg.* v. *Harvey, 11 Cox C. C. 546,* referred to. *Per* CARNDUFF, *J.*—Handwriting may, in addition to the usual methods, be proved by circumstantial evidence under s. 67 of the Evidence Act, which prescribes no particular kind of proof. *Neel Kanto Pandit* v. *Juggobundho Ghose, 12 B L. R App. 18, Abdool Ali* v. *Abdoor Ruhman, 21 W. R 429,* and *Abdulla, Paru* v. *Gannibai, I. L. R. 11 Bom. 690,* referred to. BARINDRA KUMAR GHOSE v. EMPEROR (1909) . I. L. R. 37 Calc. 467

——— A comparison of handwriting is at all times, as a mode of proof, hazardous and inconclusive, and especially when it is made by one not conversant with the subject and without such guidance as might be derived from the arguments of Counsel and the evidence of experts. A comparison of writings has consequently been deemed a mode of ascertaining the truth which ought to be used with very great caution.
SREEMUTTY SARAJANI v. HARI DAS GHOSE.
26 C. W. N. 113.

HANSARD'S PARLIAMENTARY REPORTS.

——— admissibility of—

See LIBEL . I. L. R. 37 Calc. 760

HAQ CHAHARUM.

See AGREEMENT . I. L. R. 41 All. 417

See PROVINCIAL SMALL CAUSE COURT ACT 1887, SCH II, CH. 13.
I. L. R. 43 All. 681

HARVEST.

——— experimental, Landlord's right of—

See ESTATES LAND ACT (MAD, ACT I OF 1908), ss. 4, 27, 73, 143.
I. L. R. 40 Mad. 640

HAT.

———Right to hold the holding of a Hat on a man's land is not in itself a wrongful act. RAKHAL DAS SINGH v. EMPEROR
19 C. W. N. 248

——— *market franchise in, if exists—Grant of such franchise if may be presumed*

right to hold a market conferred by grant from the Crown, nor can such right be acquired by prescription. In Bengal the right to hold a market is treated as an incident to the ownership of land. The proprietor of the old market has no monopoly or privilege which is entitled to protection and no immunity from competition. Where illegal means in the nature of intimidation and physical compulsion were employed by agents of the Defendant acting within the scope of their employment to induce traders who would have gone to Plaintiff's old hat to attend Defendant's new hat, and as a natural consequence thereof there was diminution of Plaintiff's profits from his *hat*: *Held*—That the Plaintiff was entitled to a civil remedy by way of a suit for damages *Per* GREAVES, *J.*—whether mere besetting or watching, apart from violence, which according to the doctrine of common law is an unlawful means in cases of trade disputes, is unlawful in the case of rival *hat* owners. HEM CHANDRA ROY v. BEPIN BEHARY SAHA SARDAR . . . . 24 C. W. N. 800

HATCHITTA.

———*Acknowledgment—Limitation Act (IX of 1908), s. 19—Contract Act (IX of 1872), s. 25 (3).* A *hatchitta* is an acknowledgment within the meaning of s. 19 of the Indian Limitation Act. *Maniram Seth v. Seth Rupchand, I. L. R. 33 Calc. 1047,* followed. MAHENDRA NATH CHATTERJEE v LALIT MOHAN DATTA (1918)
I. L. R. 46 Calc. 746

HEADINGS OF CLAUSES.

See BOMBAY CITY MUNICIPAL ACT, s. 297.
I. L. R. 36 Bom. 405

HEADINGS OF STATUTES.

See NON-OCCUPANCY RAIYAT.
I. L. R. 44 Calc. 267

HEADS OF CHARGE.

See TRIAL BY JURY
I. L. R. 47 Calc. 795

HEARSAY EVIDENCE.

See EVIDENCE ACT (I OF 1872), s. 33
I. L. R. 39 Mad. 449

HEBA-BIL-EWAZ.

———*If valid without consideration.* The incidents of a gift for a consideration are very different from those of a simple gift. If the passing of a consideration be not proved a *Heba-bil ewaz* is not valid as a simple gift without consideration. Mahomedan Law. JIDDA JAN BIBI v. SHEIKH BAKTAR
24 C. W. N. 926

HEBA-BIL-EWAZ—*contd.*

———————— *Heba-bil-ewaz whether valid without consideration.* The incidents of a gift for a consideration are very different from those of a simple gift. If the passing of the consideration be not proved a *Heba-bil-ewaz* is not valid as a simple gift without consideration. *Rahimian Bibi* v. *Iman Jan, 17 C. L. J. 173*, distinguished. JIDDA JAN BIBI *v.* SHEIKH BAKTAR . . . . . **24 C. W. N. 926**

HEIR.

See NON-JOINDER OF PARTIES.
I. L. R. 48 Calc. 518

———— claim of—

See OCCUPANCY HOLDING.
I. L. R. 42 Calc. 254

———— of Legatee—

See SUCCESSION ACT (X OF 1865), s. 187.
I. L. R. 38 Mad. 988

———— of Promisor—

See PRE-EMPTION **I. L. R. 38 Mad. 114**

———— sale by one of several—

See MAHOMEDAN LAW—ALIENATION.
I. L. R. 40 Mad. 243

———— to self-acquired property of woman—

See ALIYASANTANA LAW.
I. L. R. 39 Mad. 12

HEREDITARY OFFICE.

See HINDU LAW—RELIGIOUS OFFICE.
See MAHOMEDAN LAW.
See LIMITATION **I. L. R. 42 Calc. 244**
See SHEBAIT . **I. L. R. 39 Calc. 887**
See VRITTI . **I. L. R. 37 Bom. 409**

———— emoluments of—

See MADRAS HEREDITARY VILLAGE OFFICES ACT, ss. 3, AND 5
I. L. R. 37 Mad. 548

HEREDITARY OFFICES ACT (BOM. III OF 1874).

See BOMBAY HEREDITARY OFFICES ACT.

———— s. 2——*Vatan-Inam—Jat or personal Inam—Grant for maintenance—Government Resolution declaring the Inam held on service tenure—Subsequent settlement with the Government whereby the property permanently enfranchised as private property—Sanad—Construction.* The property in suit was known as Vania Desai Vatan property. It consisted of four villages Sureli, Vinzol, Padardi and Kasanpur in the Panch Mahals. In 1860, the Panch Mahals passed by a treaty from the Maharaja Scindhia of Gawlior to the British Government which as a result of the investigation into the nature of the various holdings in the territory ceded by Scindhia found that the four villages were held on service tenure. The Desais presented petitions to Government in 1879 and 1882 and contended that their Inam was Jat or personal Inam, granted for maintenance (Jivak Badal) and not held for service. As a result of these petitions, the Government in a Resolution, dated the 8th May 1884, observed that the title asserted to the villages hardly brought them under the class of Hereditary Inam and arranged with the Desais for a two-anna settlement to be calculated on a full assessment of these villages. In 1888, Sanads were issued by Government to Vania Desais in respect of the villages Sureli and Vinzol, reciting that the villages had been found to be held as personal Inam without the condition of service. In respect of the other two villages Padardi and Kasanpur, the Sanads were not forthcoming but it appeared from the Alienation Register that the Sanads were issued in respect of these villages also and the register showed that the Inam lands in all these villages were "permanently enfranchised as private property." In 1913, the plaintiff as the daughter and reversionary heir of the last male holder of the Inam sued to recover a fourth share in the Inam lands and cash allowances. The defendants contended that the plaintiff being a female was excluded by the provisions of Act V of 1886 from participating in inheritance as the property in suit was all Vatan property. *Held*, that the plaintiff was entitled to succeed as the quality of the Inam was Jat Inam. The settlement of 1884 was a settlement in perpetuity giving to the holders full and complete rights of ownership free from service and subject only to the reserved quit-rent. *Bai Jadav* v. *Narsilal, I. L. R. 25 Bom. 470*, distinguished. DWARKADAS MOTILAL *v.* BAI JAKORE (1918) . **I. L. R. 43 Bom. 323**

———— ss. 4 & 18—

See BOMBAY REVENUE JURISDICTION ACT 1876, s. 4 . **I. L. R. 43 Bom. 277**

———— ss. 4 and 53 and (Bom. Act V of 1886), s. 2—*Vatan—family—Meaning of the term 'family,' as used in the Act.* One Gopinath, the original acquirer of a Vatan, died without leaving any lineal descendent. At the time of his death his nearest relations were his first cousins Girdharlal Bhulabhai (senior uncle's son) and Mahasukhra Maharaiji (younger uncle's son). In 1868 two commutation Sanads were issued by Government in respect of the Vatan and the grantees were Dinanath Girdharlal and Dinanath's great nephew Venilal Maneklal. The actual possession and enjoyment of the Vatan property thus continued with the family of Girdharlal down to the time of its last male holder Pransukhram and afterwards with his widow until her death. On widow's death the defendants (daughter and daughter's sons of Pransukhram) retained possession. The plaintiffs, therefore, representing the branch of Mahasukram claimed to be entitled to possession of the Vatan property on the strength of s. 2 of Bom. Act V of 1886. Both the lower Courts held that the plaintiffs were members of the family qualified to inherit and as such excluded the female defendants. In second appeal it was contended that the respondents (plaintiffs) were not descended from the original Vatandar and therefore they were not members of his family and were not entitled to oust the females in possession. *Held*, that the term 'family' as used in the Vatan Act, 1874, meant those descended from a common progenitor who must be a Vatandar, and that the respondents were not entitled to oust the appellants from possession. BAI LAXMI *v.* MAGANLAL (1917) . . . **I. L. R. 41 Bom. 677**

———— s. 5—

———— Vatan effect of Collector levying full assessment after execution sale where in consequence of a sale of Vatan Lands in execution of a decree against Vatandar the Collector levies full assessment and assigns it the land does not lose its charactor as Vatan property. SHIVRAM *v.* MAHADEV NARAYAN . **I. L. R. 37 Bom. 81**

HEREDITARY OFFICES ACT (BOM. III OF 1874)—*contd.*

——— **s. 5**—*contd.*

———*Mortgage by Vatandar—Suit for account and redemption—Adverse possession by mortgagee—Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 13—Mesne profits from the date of suit.* One Madhavrao, grandfather of the plaintiff, by a deed dated the 15th July 1867, mortgaged with possession certain Vatan Inam lands to Babaji Anant, an ancestor of the defendants. Madhavrao died, 1873, and in 1909 plaintiff sued to redeem the mortgage under the provisions of the Dekkhan Agriculturists' Relief Act, 1879. The defendants contended that by reason of the provisions of s. 5 of the Vatan Act, the mortgage became void on the death of Madhavrao and that they had been in possession adversely since that date. The Court of first instance disallowed the contention on the ground that the mortgagee claimed to hold the property as such and not as owner, and after taking accounts passed a decree in favour of the plaintiff awarding mesne profits from the date of suit till possession at rupees four hundred a year. This decree was confirmed by the lower appellate Court. On appeal to the High Court. *Held*, that the mortgagee remained a mortgagee for the purpose of the redemption suit, even assuming that he had been in possession for more than twelve years since the death of the original mortgagor. Unless there was some definite indication on the part of the person in possession that he would from a certain date claim as absolute owner, and not as mortgagee, he could only acquire by adverse possession the limited interest to which he was entitled at the mortgagor's death namely, that of a mortgagee. *Held*, further, that mesne profits from the date of suit could not be awarded as the enforcement of the provisions of s. 13 of the Dekkhan Agriculturists' Relief Act, 1879, placed the mortgagor in a much more favourable position than he would be in if he relied upon the terms of the contract, and no presumption could arise that the mortgagee was, apart from the provisions of the Act, not entitled to retain possession after the date of the institution of the suit. *Janoji* v. *Janoji, I.L.R. 7 Bom. 185*, applied. RAMCHANDRA VENKAJI NAIK *v.* KALLO DEVJI DESHPANDE (1915)

I. L. R. 39 Bom. 587

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by adverse possession against Vatandars—Collector's certificate—Jurisdiction. Certain lands with buildings thereon having been acquired by Government under the Land Acquisition Act (I of 1894), the Assistant Collector passed an award whereby he awarded, by way of compensation, one sum to the owner of the buildings on the land and another to certain Mahar Vatandars on account of the land being Maharki Vatan. The owner of the buildings having objected to the award, the Assistant Collector at the instance of the objector referred the matter to the District Court under s. 18 of the Act. The District Judge found that the objector had acquired title to the land by adverse possession and thus became entitled to the compensation on account of the land as against the Mahar claimants. Subsequently the Collector forwarded to the District Court a certificate issued under s. 10 of the Hereditary Offices Act (Bom. Act III of 1874) that the order for the payment of the compensation

HEREDITARY OFFICES ACT (BOM. III OF 1874)—*contd.*

——— **ss. 10 and 13**—*contd.*

to the objector should be set aside in accordance with the provisions of ss. 10 and 13 of the Act. Thereupon the District Judge, holding that he had no jurisdiction to decide whether the property was Vatan or not in the face of the Collector's certificate cancelled his order. The objector having appealed against the said order :—*Held*, restoring the award of the District Court, that an award under the Land Acquisition Act (I of 1894) was not a decree or order capable of execution under the Civil Procedure Code (Act V of 1908) and was therefore not within the purview of s 10 of the Hereditary Offices Act (Bom. Act III of 1874). *Held*, further, that the award of the District Court, which was the cause of the certificate, made it clear that the Mahar's property had been acquired by the objector by adverse possession before the commencement of the proceedings for the acquisition of the land by Government. *Per Curiam*. Even if it could be said that there was any danger of the passing of the ownership by virtue or in execution of a decree or order in the Land Acquisition proceedings it could not be said that that result was arrived at without the sanction of Government who set the machinery of the

f the land.

R. 22 Bom.

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Bom. 283, referred to. LADDHA EBRAHIM AND CO. *v.* THE ASSISTANT COLLECTOR, POONA (1910)

I. L. R. 35 Bom. 146

——— **ss. 11, 11 (A)**—*Revenue Jurisdiction Act (X of 1876), s. 4 (a)—Deshmukhi Vatan—Miras lease and mortgage by the Vatandar—Death of the Vatandar—Collector's order declaring the alienation null and void and directing the land to be restored to the representative of the deceased Vatandar—Adverse possession—Jurisdiction of Civil Courts.* A Deshmukhi Vatandar executed a *miras* lease and mortgage of certain vatan land to the plaintiff in the year 1877 and died in 1892 Before the expiry of twelve years from his death, his legal representative made an application to the Assistant

declared the alienation to be null and void under s. 11 of the Hereditary Offices Act (Bom. Act III of 1874) and directed the land to be restored to the applicant. Thereupon, the plaintiff brought the present suit in the year 1906 against the legal representative (applicant before the Assistant

the suit was not maintainable by reason of s. 4 (a) of the Revenue Jurisdiction Act (X of 1876). *Held*, that the order passed by the Assistant Collector directing the plaintiff to restore possession to the defendant being unauthorised under s. 11

that the mere fact that an application was made by the defendant to the Assistant Collector within twelve years of the death of the alienor, did not interrupt plaintiff's adverse possession against the defendants. MAGANCHAND *v.* VITHALRAV (1912)

I. L. R. 37 Bom. 27

HEREDITARY OFFICES ACT (BOM. III OF 1874)—concld.

——— s. 18—

See BOMBAY REVENUE JURISDICTION ACT (X OF 1876), s. 4 (*a*).
I. L. R. 43 Bom. 277

See LIMITATION ACT (IX OF 1908), s. 14.
I. L. R. 43 Bom. 201

——— ss. 25 and 36—Under s. 25 it is the duty of a Collector to determine the Custom of a Vatan and what person shall be recognised as representative Vatandar. A suit for a declaration that Plaintiff is the nearest heir of a deceased Vatandar is maintainable under s. 36 notwithstanding it is manifest that the declaration is sought for the purpose of establishing a fact which would enable the Plaintiff to have his name entered in the Vatan Register. RAHIM KHAN *v.* DADAMIYA HYDERKHAN
I. L. R. 34 Bom. 101

——— A suit for a declaration that Plaintiff is nearest heir of a deceased representative Vatandar is within the jurisdiction of a Civil Court although a declaration that the plaintiff is entitled to have his name entered in Vatan Register is beyond the jurisdiction of the Court. SHANKAR BABAJI KULKARNI *v.* DATTATRAYA BHIWAJI
I. L. R. 40 Bom. 55

——— ss. 25, 36, 63 and 64 (as amended by Bom. Act III of 1910)—*Mharki Vatan—Suit to be declared a Vatandar—Civil Court—Jurisdiction.*—The plaintiffs by a suit filed in the Civil Courts sought a declaration that they were the Vatandars of a *Mharki* Vatan. It was contended that although the Civil Courts had jurisdiction to make a declaration as to Vatandars claiming *Patilki* or *Kulkarniki* Vatans the Courts had no jurisdiction to make any declaration as regards *Mharki* Vatans. *Held,* that it was competent to the Civil Courts to grant a declaration that the plaintiffs were Vatandars of a *Mharki* Vatan. *Ramchandra Dabholkar* v. *Anant Sat Shenvi, I. L. R. 8 Bom. 25,* followed. RAOJI FAKIRA *v.* DAGDU (1916) . . **I. L. R. 41 Bom. 23**

——— s. 67—*Collector—Vatandars—Service Register—Suit for declaration as head of family—Civil Court—Jurisdiction.* The plaintiffs brought a suit to have it declared that they were entitled to a share of the vatan and to have their names recorded as such in the Service Register kept by the Collector. *Held,* that the suit fell under the ban of clause (*d*) of s. 67 of the Hereditary Offices Act (Bom. Act III of 1874) and was not cognizable by the Civil Court. *Govind Sitaram* v. *Bapuji Mahadeo, I. L. R. 18 Bom. 516,* and *Balkrishna Chimnaji* v. *Balaji Ramchandra, I. L. R. 9 Bom. 25,* explained. JIVAJI SAMBHAJI *v.* FAKIR SABAJI (1912) **I. L. R. 36 Bom. 420**

HEREDITARY OFFICES ACT (BOM. V OF 1886).

——— s. 2—

See HINDU LAW. **I. L. R. 37 Bom. 598**

HEREDITARY PRIEST.

See HINDU LAW—HEREDITARY PRIEST.

HEREDITARY TENURE.

——— if implies fixity of rent—

See LANDLORD AND TENANT.
24 C. W. N. 874

HEREDITARY VILLAGE OFFICES ACT (MAD. III OF 1895).

See PENSIONS ACT, s. 4.
I. L. R. 36 Mad. 559

——— s. 3—*Other offices, meaning of.* The words 'other hereditary village offices' in cl. 3 of s. 3, Mad. Act III of 1885 do not mean offices of a description different from those referred to in cls. (*1*) and (*2*) of the section but offices other than those in the localities dealt with by those clauses. A suit for the recovery of the office of karnam in an inam village falls within cl. (*3*) and not cl. (*1*) of s. 3 of the Act and is not cognisable by the civil courts. AUDIRAZU VEERAYYA *v.* AUDIRAZU SANGAYYA (1910)
I. L. R. 34 Mad. 177

——— ss. 3, 21—*Act applicable to offices mentioned in s. 3, cl. 4, only in villages other than proprietary estates.* Cls. 3 and 4 of s. 3 of Act III of 1895 must be read together. The Act is applicable to offices mentioned in cl. 4 of s. 3 only in villages other than those in proprietary estates and s. 21 of the Act does not oust the jurisdiction of Civil Courts in regard to such offices in proprietary estates. VEERADRAN ACHARI *v.* SUPPIAH ACHARI (1909) . . **I. L. R. 33 Mad. 488**

——— s. 5—

See CIVIL PROCEDURE CODE (ACT V OF 1908), s. 47, EXPL.
I. L. R. 41 Mad. 418

——— *Permanent lease not a transfer within the meaning of s. 5.* S. 5 of Madras Act III of 1895 only prohibits the transfer of ownership. A permanent lease of lands forming the emoluments of an office does not amount to a transfer of ownership within the meaning of s. 5 and is not prohibited by its provisions. *Vencataswara Yettiapah Naicker* v. *Alagoo Moothoo Servagaran, 8 Moo. I. A. 327,* referred to. KSHERABARO BISSOYI *v.* SOBHANAPURAM HARIKRISTNA NAIDU (1909) . . **I. L. R. 33 Mad. 340**

——— ss. 13, 21—*S. 21, is no bar to suit for recovery of land.* A suit in the Civil Courts for land, not based on the ground that such land constituted part of the emoluments of any of the offices described in s. 13 of Madras Act III of 1895 is not barred by s. 21 of the Act. The effect of the words in s. 13 of the Act, "but such decision, etc.," is to preserve the jurisdiction of the Civil Courts even in cases where the Collector decided the case on the assumption mentioned therein and not to oust such jurisdiction where he did not. GAVARA RAMAN *v.* ADABALA RATTAYYA (1909)
I. L. R. 33 Mad. 235

——— *Prohibition in s. 21 applies only when jurisdiction is conferred on Revenue Courts by s. 13—Construction of statute.* Notwithstanding the apparent generality of the language of s. 21 of Madras Act III of 1895, it must be held that the section takes away the jurisdiction of Civil Court only in those cases in which jurisdiction is conferred on Revenue Courts by s. 13. A suit for a village officers inam land on the expiry of a lease granted by such village officer to the defendant, is cognizable by the Civil Courts as the plaintiff has only to prove the letting and expiry of the term and he is not called upon to prove his title which the defendant will be estopped from disputing. The plaintiff cannot, however, lease his claim on his title to the land. *Narasimhulu* v. *Narasimhulu, 16 Mad. L. J. 336,* referred to

HIGH COURT—*contd.*

See CRIMINAL PROCEDURE CODE, ss. 145 435, 439 . I. L. R. 41 All. 302

See MUNICIPAL ELECTION.
I. L. R. 46 Calc. 132

——— power of interference by, under Charter Act—

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), s. 144.
I. L. R. 38 Mad. 489

——— powers of, to alter acquittal into conviction in revision—

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), ss. 423, 439.
I. L. R. 37 Mad. 119

——— powers to give directions to an administrator—

See SUCCESSION ACT 1865, s. 264.
I. L. R. 44 Bom. 682

——— power o interfere with the discretion of District Judge—

See DIVORCE ACT (IV OF 1869), s. 14.
I. L. R. 41 Bom. 36.

——— power to call for record or Interlocutory orders—

See CIVIL PROCEDURE CODE, 1908, s. 115.
I. L. R. 44 Bom. 619

——— practice of—

See CRIMINAL PROCEDURE CODE, s. 438.
I. L. R. 36 All. 378

——— revisional jurisdiction—

See CIVIL PROCEDURE CODE (1908), s. 115.

See CRIMINAL PROCEDURE CODE, ss. 145 AND 435. I. L. R. 36 All. 233
I. L. R. 42 All. 214

ss. 345 AND 439.
I. L. R. 37 All. 419

s. 435. I. L. R. 43 Bom. 864

s. 439. I. L. R. 41 Bom. 560

——— superintendence and control by—

See CIVIL PROCEDURE CODE (ACT V OF 1908), ss. 3, 115.
I. L. R. 37 Bom. 114

——— It is the duty of a subordinate court to follow the decision of the High Court to which it is subordinate (per Sir JOHN EDGE). PUTTU LAL *v.* PARBATI KANWAR.
I. L. R. 37 All. 359

——— *General Rules of, for Civil Courts, Chapters XXI, rule 1—Certificate of fee—"Authorized agent"* A fee-certificate filed by a pleader under rule 1 of Chapter XXI of the General Rules for Civil Courts was duly sworn to by the pleader and by a person who had actually paid the fee and who stated that he was the agent (or *karinda*) of the client. *Held*, that the certificate was in sufficient compliance with the rule, and there was no necessity that the agent of the client should be "authorized" in any special manner. GUDDAR MAL *v.* HET RAM (1918)
I. L. R. 41 All. 246

HIGH COURT—*concld.*

——— *Revision—Practice—Discretion of Court—Criminal Procedure Code, ss. 435 and 459—Indian Penal Code (Act No. XLV of 1860), ss. 448 and 451.* Where at the hearing of an application in revision it appears that the facts established by the record do not justify the conviction of the applicant of the offence of which he has been convicted but do justify his conviction of a minor offence of a similar nature, it is within the discretion of the Court to convict the applicant of such minor offence; but it is also within the discretion of the Court to refrain from doing so. The rule of practice according to which the High Court ordinarily refuses to entertain an application in revision where the applicant might have gone in the first instance to the Sessions Judge or to the District Magistrate, is not a rule of absolutely invariable application, and an order of admission made by a Judge of the High Court under cl. (*1*) of s. 435 of the Code of Criminal Procedure, though passed *ex parte*, will be sufficient to take the case out of the operation of such rule of practice. EMPEROR *v* MANSUR HUSAIN (1919) I. L. R. 41 All. 587

HIGH COURT, JURISDICTION OF.

See CIVIL PROCEDURE CODE 1908,
s. 115 . I. L. R. 43 All. 564
O. XLVI, R. 1; s. 141.
I. L. R. 36 Mad. 16

See CONTEMPT OF COURT.
I. L. R. 41 Calc. 173

See CRIMINAL PROCEDURE CODE (ACT V OF 1898).
s. 195, SUB-S. (*6*)
I. L. R. 41 Bom. 631
s. 203 . I. L. R. 38 Mad. 512
s. 307 . . I. L. R. 37 Mad. 236

See CRIMINAL REVISIONAL JURISDICTION.

See CRIMINAL TRIBES ACT, s. 5.
I. L. R. 47 Calc. 843

See DISPUTE CONCERNING LAND,
I. L. R. 38 Calc. 24

See DIVORCE . I. L. R. 44 Bom. 924

See DIVORCE ACT (IV OF 1869), ss. 3, 16, 37, 44 . I. L. R. 40 Bom. 109

See EXTRADITION I. L. R. 38 Calc. 547
I. L. R. 39 Calc. 164

See FORFEITURE I. L. R. 41 Calc. 466
I. L. R. 47 Calc. 190

See HABEAS CORPUS.
I. L. R. 39 Calc. 164
I. L. R. 44 Calc. 459

See HIGH COURT.

See JURISDICTION OF HIGH COURT.

See LAND ACQUISITION.
I. L. R. 38 Calc. 230

See LETTERS PATENT (AMENDED) OF THE BOMBAY HIGH COURT, s. 12.
I. L. R. 37 Bom. 494

See LUNACY ACT, s. 37. 25 C. W. N. 178

See MORTGAGE . I. L. R. 47 Calc. 770

See MUNICIPAL ELECTION.
I. L. R. 45 Calc. 950

HIGH COURT, JURISDICTION OF—*contd.*

See PARSIS . I. L. R. 38 Bom. 615

See PERJURY . I. L. R. 43 Calc. 542

See PRACTICE—WITHDRAWAL OF SUIT. I. L. R. 41 Calc. 632

See PRESS ACT (I OF 1910), ss. 3 (*1*), 4 (*1*), 17, 19, 20 AND 22. I. L. R. 39 Mad. 1164

See REVIEW . I. L. R. 41 Calc. 809

See SANCTION FOR PROSECUTION. I. L. R. 44 Calc. 816

See SONTHAL PARGANAS. I. L. R. 41 Calc. 876

———— to order person not to proceed in other court—

See CIVIL PROCEDURE CODE, 1908, s. 10. I. L. R. 44 Bom. 283

———— to re-instate legal practitioner after disbarment—

See MUKTEAR . I. L. R. 38 Calc. 309

———— to remand—

See INHERENT JURISDICTION I. L. R. 44 Calc. 929

———— to stay execution pending Appeal to Privy Council—

See PRIVY COUNCIL, PRACTICE OF. I. L. R. 38 Calc. 335

1. ———— Criminal Revisional Jurisdiction—*Order by a first-class Magistrate for discontinuance of a house as a brothel—Criminal Procedure Code (Act V of 1898), ss. 6, 435 and 439—Eastern Bengal and Assam Disorderly Houses Act (II of 1907), ss. 2 to 6—Procedure in cases under ss. 3 and 6 of the Act—Offence.* A Magistrate of the first class, acting under s. 3 of the Eastern Bengal and Assam Disorderly Houses Act, 1907, is a "Criminal Court" within s. 6 of the Criminal Procedure Code, and the High Court has jurisdiction to revise his proceedings under ss. 435 and 439. But where such proceedings were in themselves perfectly fair and reasonable, the only error being possibly the administration of oaths to the witnesses passed under s. 3. The procedure to be followed under the Act is that, upon a sanction, report or order under s. 5, the Magistrate must, if he intends to go further, summon the owner or other person mentioned in s. 3 to show cause, and in the event of his failure to appear, he may proceed in his absence. He must next satisfy himself that the house is used as described in s. 2 (*a*), (*b*) or (*c*), doing so in any way that does not violate the ordinary rules of fairness and propriety; bu he is not bound to act only on legal evidence, and he need not, and possibly may not, administer oaths to persons of whom he may make enquiry. If he makes an order under s. 3, proceedings for disobedience must be taken independently under s. 6, and conducted according to the ordinary procedure prescribed for the trial of offences. RAJANI KHEMTAWALI *v.* PRAMATHA NATH CHOWDHRY (1910) . . I. L. R. 37 Calc. 287

HIGH COURT, JURISDICTION OF—*contd.*

2. ———— *Criminal revisional jurisdiction—Interference on questions of law—Findings of facts when can be questioned—Criminal Procedure Code (Act V of 1898), s. 435—Indian Penal Code (Act XLV of 1860), ss. 511, 124A—Attempt to commit offences—Attempt to commit the offence of sedition—Intention, a question of fact.* It is the settled practice of the High Court of Bombay to refuse to interfere, in the exercise of its revisional jurisdiction, in regard to findings of fact, except on very exceptional grounds, such as a misstatement of evidence by the lower Court or the mis-construction of documents, or the placing by that Court of the *onus* of proof on the accused contrary to the law of evidence *Queen-Empress v. Shekh Saheb Badrudin, I. L R. 8 Bom. 197, Queen-Empress v. Mahomed Hasan (1886),* and ostensible of which the law can take hold as an act showing progress towards the actual commission of the offence. It does not matter that the progress was interrupted. An attempt to publish sedition is complete as soon as the accused knowingly sells a copy containing the seditious article. It is none the less an attempt because something external to himself happens which prevents a perusal of the article by the buyers or any other member of the public. In cases of sedition, the question of intention is one of fact EMPEROR *v.* GANESH BALVANT MODAK (1909) I. L. R. 34 Bom. 378

3. ———— *Revisional jurisdic-* ... *Procedure (Act V of 1898), ss. 195 (6), 439.* A Judge of the Presidency Small Cause Court, Calcutta, had summarily refused an application for sanction to prosecute the plaintiff for making a false claim in a suit before him. On an application to the High Court under s. 115 of the Code of Civil Procedure, to set aside this order and to compel the Judge to determine the application:—*Held*, that the jurisdiction of the High Court in all such revisional applications, whether in respect of suits or other matters, is vested in a single Judge sitting on the Original Side. *Samsher Mundul v. Ganendra Narain Mitter, I. L. R. 29 Calc. 498; Sarat Chandra Singh v. Brojo Lall Mukerjee, I. L. R. 30 Calc. 986,* followed. *Haladhar Maiti v. Choytonna Maiti, I. L. R. 30 Calc. 588,* referred to. A Civil Court, when acting under s. 195 of the Criminal Procedure Code, is not in any way exercising criminal jurisdiction, and is subject to the revisional jurisdiction of the High Court under s. 115 of the Code of Civil Procedure. *Salig Ram v. Ramji Lal. I.L. R. 28 All. 554, In the matter of the petition of Bhup Kunwar, I. L. R. 26 All. 249, Ram Prosad Roy v. Sooba Roy, 1 C. W. N. 400, Guru Churn Saha v. Girija Sundari Dasi, 7 C. W. N. 112, Kali Prosad Chatterjee v. Bhuban Mohini Dasi, 8 C. W. N. 75, Eranholi Athan v. King-Emperor, I. L. R. 26 Mad. 98,* referred to. An application under s. 195, sub-s. 6, of the Criminal Procedure Code is not an appeal, hence the revisional jurisdiction under s. 115 of the Civil Procedure Code is not excluded. *Hardeo Singh v. Hanuman Dat*

HIGH COURT, JURISDICTION OF—*contd.*

Narain, I. L. R. 26 All. 244, distinguished. RAMADHIN BANIA *v.* SEWBALAK SINGH (1910)

I. L. R. 37 Calc. 714

4. —————— *Revisional Jurisdiction—Error by Small Cause Court on a question of limitation—Civil Procedure Code (Act V of 1908), s. 115—Limitation.* An error by the Small Cause Court on a question of limitation, does not justify the interference of the High Court under s. 115 of the Civil Procedure Code. *Amritrav Krishna Deshpande* v. *Balkrishna Ganesh Amrapurkay, I. L. R. 11 Bom. 488; Sundar Singh* v. *Dura Shankar, I. L. R. 20 All. 78*, and *Amir Hassan Khan* v. *Sheo Baksh Singh, I. L. R. 11 Calc. 6*, referred to. RAMGOPAL JHOONJHOONWALLA *v.* JOURMALL KHEMKA (1912)

I. L. R. 39 Calc. 473

5. —————— **Trial of Indian Seaman** *for an offence committed on board a British vessel on the high seas—Stoppage of the vessel thereafter at intermediate ports—Accused brought to Calcutta in custody—Applicability of English law to the offence and the charge, and of Indian law to the procedure and sentence—Courts (Colonial) Jurisdiction Act (37 and 38 Vict. c. 27), s. 3—Merchant Shipping Act (57 and 58 Vict. c. 60), ss. 684, 686.* The High Court of Calcutta has jurisdiction in its Original Criminal Side, under ss. 684 and 686 of the Merchant Shipping Act (57 and 58 Vict. c. 60), to try a Native Indian seaman for murder or manslaughter committed on board a British vessel on the high seas, who is brought to Calcutta under custody, notwithstanding that the vessel touched, after the commission of the offence, at intermediate ports in the course of the voyage. The offence should be tried and the charge framed, under the English law, but the procedure at the trial and the sentence must be regulated by the law of India. S. 3 of 37 and 38 Vict. c. 27, does not deal with the trial of the case, but with the sentence after conviction. *Queen-Empress* v. *Sheikh Abdool Rahiman, I. L. R. 14 Bom. 227* and *King-Emperor* v. *Chief Officer of the "Mushtari," I. L. R. 2; Bom. 636*, dissented from. EMPEROR *v.* SALIMULLAH (1912) . . . . **I. L. R. 39 Calc. 487**

6. —————— **Restraint of suit outside the jurisdiction**—*Persons not residing within jurisdiction—Injunction.* The High Court has power only to restrain a person who happens to be within its jurisdiction from prosecuting a suit without its jurisdiction. On the principle of "equity acting *in personam*" the mere fact that he possesses property, moveable or immoveable, within the jurisdiction but does not reside within it, does not give the High Court jurisdiction over him, since in the event of an injunction being granted against him and that being disobeyed he could not be subjected to the process of contempt. *Vulcan Iron Works* v. *Bisshumbhur Persad, I. L. R. Calc. 233; 13 C. W. N. 346; 1 Ind. Cas. 927*, followed. *The Carron Iron Co.* v. *Maclaren, 5 H. L. C. 416 s. c. 24 L. J. Ch. 620, Maugle Chand* v. *Gopal Ram, I. L. R. 34 Calc 101*, relied on. JUMYA DAS *v.* HARCHARAN DASS (1911). **I. L. R. 38 Calc. 405**
16 C. W. N. 4

7. —————— **Trespass,** *High Court, 1865 cl. 12—Wrongful cutting and removal of coal—Trespass—Disputed boundary —Suit for land—Agreement between predecessors-in-title of parties—Privity of contract and estate.* The plaintiff company's predecessors-in-title who held certain coal lands known as Mouza Lodna in Manbhum, under a permanent lease, granted an under-lease of a share thereof to *S*, and it was agreed that the boundary should be demarcated between the portion underleased and the portion retained by the grantors, and that a barrier of 30 feet of coal should be maintained between the two portions of the mouza, and that if either party encroached within 15 feet of the boundary line, he should make good any loss sustained by the other party. No boundary was demarcated at the time. The permanent lease of the said mouza was, subject to the said underlease to *S*, subsequently assigned to *T* and others, and thereafter the boundary was laid down and marked by the respective agents of *T* and others, and of *S*, and a plan showing the boundary was signed by both parties. Subsequent thereto *T* and others assigned their permanent lease of the mouza to the plaintiff company, and *S* granted an underlease of his share in the mouza to *R. L. S.*, who granted an underlease of the same to the defendant who there carried on a colliery. The plaint alleged that the defendant had wrongfully cut into and removed portions of coal from the 30 feet of barrier and beyond it; that the trespass and conversion had taken place within two years; and that the coal so removed had been sold and delivered to the plaintiff company under an agreement to purchase the output of the defendant's colliery, and claimed damages for the value of the coal so removed and damages caused by the breach of contract in cutting through the barrier. The defendant denied that he had carried away any coal from the 30 feet barrier and stated that he had confined his operations well within the area underleased to him, and that the plaintiff company had never been in possession of the area from which he had carried away coal: *Held*, that the suit, so far as it sought to recover damages for carrying away the plaintiff company's coal, was founded on a case of tresspass *quare clausum fregit* which necessitated the title in respect of that coal being gone into, and was therefore a suit for land within the meaning of cl. 12 of the Charter. *Rajmohun Bose* v. *East Indian Railway Co., 10 B. L. R. 241*, distinguished. That so far as the agreement not to cut into the 30 feet of barrier was concerned, there was no privity of contract or estate between the defendant and the plaintiff company, and the defendant was not personally liable on any of the covenants in the underlease granted to *S*, and that the plaint did not disclose any cause of action against the defendant based on the agreement. LODNA COLLIERY CO., LD. *v.* BIPIN BHIHARI BOSE (1912)

I. L. R. 39 Calc. 739

8. —————— **Order under s. 476 of the Criminal Procedure Code**—*by Settlement Officer—Whether civil appellate or criminal appellate side can revise—Criminal Procedure Code (Act V of 1898), s. 439—Civil Procedure Code (Act V of 1908), s. 115—High Courts Act (24 and 25 Vict. c. 104), ss. 14 and 15.* In the case of an order passed by a Civil or Revenue Court under s. 476 of the Criminal Procedure Code, (i) S. 439 of the Criminal Procedure Code has no application; (ii) The High Court can exercise the powers vested in it by s. 115 of the Civil Procedure Code of s. 15 of the High Courts Act; and (iii) The Bench of the High Court exercising criminal jurisdiction cannot, as such, deal with the matter on revision, but the Judges composing the

HIGH COURT, JURISDICTION OF—*contd.*

Bench may do so, if authorised by the Chief Justice under s. 14 of the High Court Act. *Kali Prasad Chatterjee* v. *Bhuban Mohini Dasi, 8 C. W. N. 73* and *Emperor* v. *Gopal Barik, I. L. R. 34 Calc. 42,* considered and approved of to a certain extent. EMPEROR *v.* HAR PRASAD DAS (1913)

I. L. R. 40 Calc. 477

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VI

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jurisdiction, on appeal from an order of Deputy Collector—Judicial proceeding. Proceedings on applications for enhancement of rent under s. 27 the Chota Nagpur Tenancy Act are judicial proceedings, and Deputy Commissioners in the performance of their judicial duties under the Act are Courts subject to the appellate jurisdiction of the High Court The High Court has jurisdiction to interfere in cases where the Courts of Collectors have either exceeded the jurisdiction or failed or refused to exercise the jurisdiction vested in them by the Chota Nagpur Tenancy Act: *Chaitan Patgosi Mahapatra* v. *Kunja Behari Patnaik, I. L. R. 38 Calc. 832,* referred to. KARTIK CHANDRA OJHA *v.* GORA CHAND MAHTO (1913)

I. L. R. 40 Calc. 518

10.——— **Stay of Execution**—*Inherent powers of Court—Special leave to appeal to the Privy Council —Civil Procedure Code (Act V of 1908) ss. 112 and 151; O. XLI, r. 5 (2)—Letters Patent, 1865, cl. 36.* The High Court is competent to make an order for stay of proceedings in execution of its decree in view of an application by the Judgment-debtor to the Judicial Committee for special leave to appeal to His Majesty in Council. *Hurro Chandar Roy Chowdhry* v. *Shoorodhonee Debia, 9 W. R. 402, Panchanan Singha Roy* v. *Dwarka*

I. L. R. 40 Calc. 955

11.——————— **Power to set aside order under s. 145, Criminal Procedure Code**—*and to make consequential or incidental orders—Inherent powers of the Court—Criminal Procedure*

Government

s. 107.

Court has

of India Act (5 & 6 Geo. V, c. 61) to set aside proceedings under s. 145 of the Criminal Procedure Code instituted

standing s. 435

Narain Singh v.

26 Calc. 183, Laldhari Singh v. *Sukdeo Narain Singh, I. L. R. 27 Calc. 892, Jagmohan Pal* v. *Ram Kumar Gope, I. L. R. 28 Calc. 416, Kulada Kinkar Roy* v. *Danesh Mir, I. L. R. 33 Calc. 33, Sukh Lal Sheikh* v. *Tara Chand Ta, I. L. R. 33 Calc. 68, Khosh Mahomed Sirkar* v. *Nazir Mahomed, I. L. R. 33 Calc. 352,* referred to. The Court has power, under the general terms of s. 107, when setting aside the proceedings, to make such consequential or incidental orders as may be necessary in the interests of justice, in the circumstances of a particular case, and to reach and remedy all forms of judicial highhandedness. *Lekhraj Ram* v. *Debi Pershad, 12 C. W. N. 678,* relied on. Though the Criminal Procedure Code contains no provision analogous to s. 151 of the Civil Procedure Code (Act V of 1908), Criminal Courts, no less than Civil Courts, have inherent power to make such orders as are necessary in the ends of justice. Such power is not, however, to be exercised capriciously or arbitrarily, but *ex debito justitiæ* on sound general principles and subject to the statutory provisions applicable to the matters. *Pulin Behary Das* v. *King-Emperor, 15 C. L. J. 517, Budhu Lal* v. *Chattu Gope, I. L. R. 44 Calc. 816, Ram Chandra Mistry* v. *Nobin Mirdha, I. L. R. 25 Calc. 630, Rodger* v. *Comptoir D'Escompte de Paris, I. L. R. 3 P. C. 465, Ahmed Ali* v. *Kenoo Khan, I. L. R. 36 Calc. 44,* In re *Lakshman Govind Nirgude, I. L. R. 26 Bom. 552,* approved. *Basudeb Surma Gossain* v. *Naziruddin, I. L. R. 14 Calc. 834, Queen-Empress* v. *Fattah Chand, I. L. R. 24 Calc. 499, Prayag Mahaton* v. *Gobind Mahaton, I. L. R 32 Calc. 602, Arju Mea* v. *Arman Mea, 7 C. L. J. 369, Surjya Kumar Upadhya* v. *Dinabandhu Pal, 15 C. W. N. cc1iv, Karimuddi Fakir* v. *Naimuddi Kaviraj, 3 C. L. J. 573, Tulshi Ram* v. *Abrar Ahmad, I. L. R. 37 All. 655,* In re *Annapuranabai, I. L. R. 1 Bom. 630,* In re *Ratanlal Rangildas, I. L. R. 17 Bom. 718,* In re *Devidin Durgaprasad, I. L. R. 22 Bom. 814,* In re *Kuppammal, I. L. R. 29 Mad. 375,* and *Chenga Reddi* v. *Ramasamy Gounden, 16 Cr. L. J. 104,* referred to and explained The High Court has, therefore,

and the proceeds of the lac already sold, should be kept in the custody of the Subordinate Judge, pending the decision of a Civil Court as to the title to the same; and gave further directions in the matter. *Chenga Reddi* v. *Ramasamy, 16 Cr. L. J. 104, Hood Barrs* v. *Heriot,* [1896]. *A. C. 174, Peruvian Guano Co.* v. *Dreyfus Bros.,* [1892] *A. C. 166,* referred to. PIGOT *v.* ALI MAHAMMAD MANDAL (1920)

I. L. R. 48 Calc. 522

12.——— **Disciplinary Jurisdiction**—*Amended Letters Patent, clause 10—Bombay Regulation 2 of 1827, s. 56—Signing of a pledge to civilly disobey certain laws to be fixed thereafter*—Satyagraha *movement—Lawyers taking the pledge are amenable to the Disciplinary Jurisdiction—Advocates, Vakils and Pleaders, status and duty of.* The respondents, who were lawyers practising in the Courts of the Ahmedabad District, joined a movement called the Satyagraha Sahba which was started as a protest against the enactment of the Anarchial and Revolutionary Crimes Act (XI of 1919), and signed a pledge whereby they bound themselves "to refuse civilly to obey these laws (*viz.,* the Anarchical and Revolutionary Crimes Act) and such other laws as a Committee to be hereafter appointed may think fit." A question having arisen whether the respondents had, by taking the pledges, made themselves liable to be dealt with under the Disciplinary Jurisdiction of the High Court:—*Held,* that the action of the respondents brought them within the Disciplinary Jurisdiction of the High Court; but that, under the circum-

HIGH COURT, JURISDICTION OF—*concld.*

stances, a warning to them was sufficient. Per MACLEOD, C. J.:—"Advocates and pleaders are a privileged class enrolled not only for the purpose of rendering assistance to the Courts in the administration of justice, but also for giving professional advice, for which they are entitled to be paid, to those members of the public who require their services. Their position, training and practice give them immense influence with the public and their example must necessarily have a much greater effect whether for good or for evil than the example of those who do not occupy this privileged position. It is not necessary in order for us to be able to exercise our jurisdiction that any offence should have been committed, nor is it necessary that what the respondents have done should have subjected them to anything like general infamy or imputation of bad character." *In re* JIVANLAL VARAJRAY DESAI (1919) **I. L. R. 44 Bom. 418**

13.——— **Suit against Receiver** *without leave of Court —Application for leave after filing of suit—Amendment of title of plaint—Summons—Practice —Costs.* A suit was filed by the plaintiff against the defendants who were the Receivers of an estate appointed by the High Court in a certain suit. The defendants were not described in the title to the plaint as Receivers of the estate, nor was the leave of the Court first obtained before the filing of the suit. The plaintiff subsequently applied for leave to continue the suit against the defendants as Receivers and to amend the title of the plaint and the proceedings accordingly. *Held,* allowing the plaintiff's application, that the defect could be cured by leave subsequently granted, if there was no bar to the institution of the suit, that is, to the jurisdiction of the Court to admit the plaint. *Rustomjee Dhanjibhai Sethna* v. *Frederic Gaebele (1918), 46 Calc. 352,* followed. *Chandulal* v. *Awad bin Umar Sultan (1896), 21 Bom. 351* and *Narayan Shankar* v. *Secretary of State (1906), 30, Bom. 570,* referred to. *Per* CURIAM :—The necessity for leave to sue the Receiver rests upon two considerations: (*1*) that such a suit is incompatible with the dignity and authority of the Court; (*2*) that it might inferfere with the duty of the Court to maintain the Receiver's possession. Neither of these considerations affects the jurisdiction of the Court. They are matters which the Court can deal with after the suit is filed; and the Court could order the suit to be stayed until it was satisfied that there was no encroachment upon its authority, nor attempt to interfere with the Receiver's possession. JAMSHEDJI *v.* HUSSEINBHAI AHMEDBHAI (1919) . . **I. L. R. 44 Bom. 903**

HIGH COURT, POWER OF.

See under VARIOUS HIGH COURTS.
See CRIMINAL PROCEDURE CODE, SS. 145 AND 435 . **I. L. R. 36 All. 233**
s. 439 . **I. L. R. 25 All. 109**

See HIGH COURT.
See HIGH COURT, JURISDICTION OF.
See LAND ACQUISITION.
I. L. R. 48 Calc. 916

HIGH COURT RULES AND ORDERS.

See under VARIOUS HIGH COURTS.

——— **Allahabad, Chap. III, r. 2 (1908)—**

See CIVIL PROCEDURE CODE, (1908), s. 122 . . . **I. L. R. 40 All. 1**
OOXLIRR, 1 and 3.
I. L. R. 43 All. 660

——— **Ch. IV, rr. 5 and 8 (1911)—**

See EXECUTION OF DECREE.
I. L. R. 36 All. 33

——— **Ch. XXI, r. 1 (1911)—**

——— *Held* that there was no necessity that an agent for a client should be authorised in any special manner. GUDDAR MAL *v.* HET RAM . . . **I. L. R. 41 All. 246**

See FEE CERTIFICATE.
I. L. R. 42 All. 542

——— **Bombay (original), rr. 16 (2) and 17—**

See CIVIL PROCEDURE CODE, 1908, s. 47, XXI, R. 92.
I. L. R. 44 Bom. 551

——— **r. 62—**

See HIGH COURTS ACT (24 AND 25 VICT. c. 104), ss. 2, 9 AND 13.
I. L. R. 39 Bom. 604

——— **rr. 81, 321 and 323**—*Delegation of powers under rr. 321 and 323 to the Prothonotary—Power of the Prothonotary to deal with applications to give short service of notice of motion.* The plaintiff filed a suit against the defendants claiming, *inter-alia,* the appointment of an *interim* receiver and an *interim* injunction. The plaintiff obtained from the Prothonotary leave to give the defendants short notice of a motion in the said suit under rr. 321 and 323 of the Bombay High Court Rules. The defendants objected that the Prothonotary had no power to shorten the time for notice. *Held,* that the Prothonotary had such power. MOORJI MANECK *v.* PASSU PARBHAT (1911)
I. L. R. 36 Bom. 418

——— **rr. 397, 399—**

See COMMISSIONER.
I. L. R. 41 Bom. 719

——— **r. 704—**

See COSTS . **I. L. R. 39 Bom. 383**

——— **Bombay appellate, rr. 1 and 5—**

See HIGH COURTS ACT (24 AND 25 VICT. c. *104*), ss. 2, 9, 13.
I. L. R. 39 Bom. 604

——— **r. 65—**

See BOMBAY REGULATION II OF 1827, s. 52 . . **I. L. R. 37 Bom. 303**

——— **r. 517—**
See COSTS **I. L. R. 45 Bom. 1234**

——— **r. 725—**

See CIVIL PROCEDURE CODE, 1908, O. XLI, R. 10, AND S. 129.
I. L. R. 37 Bom. 572

——— **Bombay Civil Circular**
——— **51**

See CIVIL PROCEDURE CODE, 1908, O. XLI, R. 11. . **I. L. R. 37 Bom. 610**

HIGH COURT RULES AND ORDERS—*contd.*

——— **96, cl.** (*l*)—*Decree on mortgage—Mortgage executed by father and two sons for family purpose—Suit against the father and his sons—Decree—Execution against father and sons—Proclamation of sale putting up the right, title and interest of the father and sons for sale—A condition*

an undivided family, mortgaged family property to plaintiffs' father for family purposes. The plaintiffs brought a suit upon the mortgage against G., five of his sons and three grandsons by his sixth son who had died The suit was decreed in plaintiffs' favour. In execution of the decree, the mortgaged property was put up to sale and purchased by the plaintiffs at the Court-sale. In the proclamation of sale the right, title and interest of the defendants to the suit was mentioned; and one of the conditions of sale was in the terms of clause (*l*) to High Court Civil Circular 96. The plaintiffs were put in possession of the property. The defendants Nos. 7 to 14, 16 and 17 to 19, the

The defendants contended that their right to the property did not pass at the sale to the plaintiffs and they were not bound by the decree to which they were not parties The lower Courts disallowed the contention on the ground that the defendants were represented in the suit by their fathers and consequently their rights passed at the sale to the plaintiffs. On second appeal:—*Held*, that the defendants' interests in the mortgaged property did not pass to the plaintiffs at the Court-sales inasmuch as by an express declaration made by the selling Court and accepted by the purchasing plaintiffs, those interests were formally and deliberately excluded from the sale. TIMMAPPA *v.* NARSINHA TIMAYA (1913)

I. L. R. 37 Bom. 631

——— **17**—*Civil Procedure Code (Act V of 1908), O. XXI, rr. 89, 90—Indian Limitation*

of the High Court Civil Circulars at page 106

In every proclamation for sale carried out under

the decree has been sent for execution, within thirty days from the date of the sale. If in spite of the notification any person makes an application to the Collector to set aside the sale, he should be referred to the Court without a moment's delay.

SHANTMURTI DEVAPPA *v.* NARAYAN RAMCHANDRA.

I. L. R. 45 Bom. 1132

——— **rr. 127 to 133 (original side)**—

See THIRD PARTY NOTICE.

I. L. R. 45 Bom. 24

——— **Ch. VI, para. 2**—

See CIVIL PROCEDURE CODE (ACT V OF 1908), ss. 115, 151.

I. L. R. 38 Bom. 638

HIGH COURT RULES AND ORDERS—*contd.*

——— **Ch. VIII**—

See COSTS. . **I. L. R. 39 Bom. 383**

See THIRD PARTY NOTICE.

I. L. R. 45 Bom. 24

——— **Calcutta**—

See PLEADER . **I. L. R. 44 Calc. 290**

——— **r. 426**—A Registrar cannot be directed to enquire under this rule as to whether vendor could make a good title sold by the Commissioner of partition under order of Court. JOOLMAYA DASEE *v.* AKHOY COOMAR DAS.

I. L. R. 40 Calc. 140

——— **r. 740**—

See PROBATE . **I. L. R. 37 Calc. 224**

——— **Vol. I, Ch. XI, r. 45 (e)**—

See VAKALATNAMA.

I. L. R. 43 Calc. 884

——— **Ch. XIII, r. 9**—

See LEASE . . **24 C. W. N. 1007**

——— **Ch. XVII, r. 24**—

See EXECUTION OF DECREE

I. L. R. 47 Calc. 515

——— **Ch. XXIII, r. 1**—

—*Limitation Act (IX of 1908), if applies to such application—Arts. 31 and 181—Discretion of Court how to be exercised—Attorney's lien, if exercisable when debt barred—Limitation, if applies to claim of set off.* R. 69, Chap. 36 of the High Court Rules (Original Side) is technically free from the statute of limitation, neither Art. 31 nor Art. 181 applying thereto. It is impossible to hold that because the Limitation Act sets a limit only to suits and applications contemplated by the Civil Procedure Code and has provided none for other applications therefore the High Court's power under its charter to make rules to regulate proceedings can never be exercised by providing special forms or opportunities of making applications to the Court The rule, therefore, is not *ultra vires*. Under the rule in question the Court can exercise its discretion in favour of the attorney even in case where a suit if brought cannot succeed owing to the bar of limitation. The discretion of the Court is to be exercised upon the well-known lines and in the well-established manner or an particular

of remedy for other reasons, but the principle of limitation is itself a highly desirable safeguard. In the case of personal action for a debt, limitation merely bars the Plaintiff from having the particular remedy by way of suit and does not extinguish the debt; so that if the attorney has any form of lien upon property in respect of his bills of costs he can exercise that lien notwithstanding that by the terms of the Limitation Act he could not bring a suit. A Defendant may prosecute a set-off if the claim was not barred at the time of the issue of the plaint, but subject to this it is the law in India as well as in England that limitation applies to a set-off. RAJA NARENDRA LAL KHAN *v.* TARUBALA DASSI . . **25 C. W. N. 600**

HIGH COURT RULES AND ORDERS—*concld.*

——— Ch. XXXVI, r. 32—(Taxation). *Held* that the fact that the matter was not raised by means of a reference by the Taxing Officer does not deprive the Judge of his jurisdiction to deal with the application on its merits. SAILENDRA MOHAN DUTT *v.* DHARANI MOHAN ROY

26 C. W. N. 870

——— Ch. XXXVIII, r. 67—

See ATTORNEY AND CLIENT.

I. L. R. 46 Calc. 249

——— Ch. II, r. 5 (Appellate)—

See SANCTION FOR PROSECUTION.

I. L. R. 44 Calc. 816

——— Madras, rr. 35, 36 and 38—

See PRACTICE I. L. R. 43 Mad. 282

——— r. 161—*Held* that this rule is only directory and not mandatory and the time mentioned is not of the essence of the rule. VELLIAPPA *v.* SUBRAHMANYAM .

I. L. R. 39 Mad. 485

HIGH COURTS ACT, 1861 (24 & 25 VICT. CL. 104).

See CHARTER ACT.
See INDIAN HIGH COURTS ACT.

——— ss. 1, 8, 9 and 15—

See CONTEMPT OF COURT.

I. L. R. 41 Calc. 173

——— ss. 2, 9, and 13—*Amended Letters Patent, clauses 11 and 26—High Court Rules, Original Side, R. 62—High Court Rules, Appellate Side rr. 1 and 5—Single Judge sitting on the Original Side of the High Court—Power to stay suit pending before a Subordinate Judge's Court in the mofussil.* It is not competent to a single Judge of the Bombay High Court, exercising the ordinary original civil jurisdiction of the Court to stay the hearing of a suit pending for trial in a Subordinate Judge's Court in the mofussil, unless authorised so to do by rules. *Per* MACLEOD J.—A single Judge sitting on the Original Side of the High Court is competent to restrain the parties in a suit before him from proceeding with a suit in a Sub-Judge's Court in the mofussil, and so in effect stay the proceedings. NARAYAN VITHAL SAMANT *v.* JANKIBAI (1915) . I. L. R. 39 Bom. 604

——— s. 9—

See CIVIL PROCEDURE CODE (ACT V OF 1908), s. 115. I. L. R. 40 Bom. 86

See DIVORCE ACT (IV OF 1869), ss. 2, 4, 7 AND 45 . I. L. R. 38 Bom. 125

——— ss. 9, 11, 13 and 15—

See DEFENCE OF INDIA ACT.

3 Pat. L. J. 581

——— s. 11—

See HINDU LAW—WILL.

I. L. R. 44 Mad. 260

——— s. 13—

See APPEAL . I. L. R. 41 Calc. 323

——— ss. 14, 15—

See HIGH COURT, JURISDICTION OF

I. L. R. 40 Calc. 477

——— s. 15—

See JURISDICTION. I. L. R. 41 Calc. 915

See PRACTICE. I. L. R. 241 Calc. 632

HIGH COURT ACT, 1861 (24 & 25 VICT. CL. 104)—*concld.*

——— s. 15—*concld.*

See MADRAS CITY MUNICIPAL ACT (III OF 1904) . . I. L. R. 38 Mad. 581

——— s. 104—

See DEFENCE OF INDIA ACT, s. 1.

3 Pat. L. J. 537

HIGH SEAS.

——— offence committed on—

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), s. 188.

I. L. R. 41 Bom. 667

See HIGH COURT, JURISDICITON OF.

I. L. R. 39 Calc. 487

——— *Offence committed by a foreigner on a foreign ship—The ship 18 miles off Karwar coast—Jurisdiction of British Indian Court to try the accused—Admiralty Offiences (Colonial Act (12 and 13 Vic., c. 96)—Statute 23 and 24 Vic., c. 88. Merchant Shipping Act (57 and 58 Vic., c. 60), s. 686.* The accused who was a subject of the State of Junaghad, committed an offence on a ship owned by a subject of the Junaghad State, when it was on the high seas some 18 miles off the coast of the Kanara District. A question having arisen whether he could be tried for the offence by the First Class Magistrate of Karwar. *Held,* that the Magistrate had no jurisdiction to try the accused. EMPEROR *v.* PUNJA GUNI (1917)

I. L. R. 42 Bom. 234

HIGHWAY.

——— dedication— No formal Act is necessary for the acceptance of a highway dedicated to the public. SURAJ MAL KHURAD *v.* AKSHOY KUMAR ROY . . . 21 C. W. N. 595

——— religious processions—Continued user by the public of a way raises a presumption of dedication. All members of the public have a right to carry a religious procession through a public highway in a lawful way. MANNADA MUDALI NALLAYA GOUNDON

I. L. R. 32 Mad. 527

——— Obstructions as Special damage—The stopping of a highway in such a way as to make it necessary for a person to make a detour is sufficient special damage as would justify him is instituting a suit for the removal of the obstruction. RAM CHANDRA *v.* JOTI PRASAD (1910)

I. L. R. 33 All. 286

——— Suit for declaration—Requisites of a suit for a declaration of a public right of way discussed. HARIHAR DAS *v.* CHANDRA KUMAR GUHA . . . . . 23 C. W. N. 91

——— *Right to carry procession in—Where user of highway proved, presumption will be that the right is unrestricted—Trustees, dedication by.* Where user as a highway, sufficient to raise a presumption of dedication has been proved, the dedication will, in the absence of evidence to the contrary, be presumed, if possible, to be unrestricted. Marching in procession on a highway is not an excessive user of the highway; and a right of unrestricted user will include the right of marching in procession on the highway. *Shadagopachariar* v. *Krishnamurthy Rao, I. L. R. 30 Mad. 185,* referred to. A presumption of dedication by trustees will not be made when such dedication will contravene the purpose of the

HIGHWAY—*concld.*

trust. The illegality of such a dedication by the trustees must be clearly proved. VIBUDAPRIYA THIRTHASWAMY *v.* ESOOF SAHIB (1910)

I. L. R. 35 Mad. 28

———— *Right of a person or body of persons to go in procession along a highway—Order of Magistrate under Criminal Procedure Code (Act V of 1898) prohibiting a body of persons from going in procession—Right of suit of prohibited persons—Special damage whether should be alleged and proved—Trespass and public nuisance—Declaratory suit—Cause of action—English and Indian law* An order passed by a Magistrate under the Criminal Procedure Code forbidding a person or body of persons from using a highway for the purpose of processions invests the person or persons interdicted with a cause of action, if they allege it to be an infringement of their legal rights, though such order be in itself *intra vires* and no special damage be alleged or proved. A person or body of persons who claim a right to go in procession along a public highway, can bring a declaratory suit to establish that right against a person who threatens to obstruct it without allegation or proof of special damage. *Per* WALLIS, *C. J.* —If defendants assembled to prevent the plaintiffs from exercising their lawful right to pass along the highway in a particular manner, that would not be a case of public nuisance but of trespass or threatened trespass to plaintiffs and in trespass an action lies without proof of special damage. VELAN PAKKIRI TARAGAN *v* SUBBAYAN SAMBAN (1918) **I. L. R. 42 Mad. 271**

———— *Rights of user of general public—Religious procession—Obstruction caused by procession halting at frequent intervals—Suit for declaration of right to obstruct highway.* Although the members of religious procession may have a right to use a public highway for purpose of passage, just as any other members of the public, they have

Emperor, I. L. R. 26 Mad. 554, referred to. MUHAMMAD ZAMAN *v.* MANZUR HASAN

I. L. R. 43 All. 692

———— In determining whether a road through private property is a public highway although not expressly dedicated it is important to distinguish between evidence showing an intention to dedicate to the public generally and evidence showing that visitors to tenants whose shops abut on the road have by permission a right of passage MAHOMED RUSTAM ALI *v.* KARNAL CITY MUNICIPAL COMMITTEE.

L. R. 47 I. A. 25

HINDU COMMON LAW.

See HINDU LAW—WIDOW.

I. L. R. 36 Bom. 383

HINDU CONVERTS.

See SUCCESSION . **L. R. 43 I. A. 35**

See SUCCESSION ACT, 1865, SS. 2 AND 331.

I. L. R. 43 All. 525

HINDU DEITIES.

———— suit for removal of—

See LIMITATION **I. L. R. 38 Calc. 284**

HINDU FAMILY.

———— **Absconding member of, attachment of interest of—**

See CRIMINAL PROCEDURE CODE (ACT V OF 1898), s. 88 **I. L. R. 39 Mad. 831**

HINDU LAW.

See ACCUMULATION.

I. L. R. 47 Calc. 76

See BANKRUPTCY **I. L. R. 40 Mad. 581**

See CUTCHI MEMONS.

I. L. R. 41 Bom. 181

See KHOJAS . **I. L. R. 38 Bom. 449**

See SPECIFIC RELIEF ACT (I OF 1877),

s. 15 . . **I. L. R. 37 Mad. 387**

s. 42 . . **I. L. R. 42 Mad. 699**

———— **decree against uncle executed against nephew—**

See CIVIL PROCEDURE CODE, 1882, s. 234.

I. L. R. 32 All. 404

———— **Position of surviving members not heirs of deceased members—**

See CIVIL PROCEDURE CODE (1908),

O. II, R. 5 . **I. L. R. 38 Bom. 120**

O. XXIII, R. 3.

I. L. R. 38 Mad. 850

———— **rules of, when binding on Courts—**

See HINDU LAW—MAINTENANCE.

I. L. R. 37 Mad. 396

———— **whether applicable to illegitimate children of Hindu by Mahomedan—**

See CUSTOM (MAINTENANCE)

I. L. R. 2 Lah. 243

HINDU LAW—*contd.*

———— **Gangaputra**—*Right to place platforms on ghats for helping pilgrims—Rights of a ghatiya heritable under the Hindu law. Held* that the rights of a *ghatiya*, that is, the right to place platforms on a *ghat* and to use such platforms for the purpose of helping bathers and assisting them in their religious performances is a right to property and is heritable under the Hindu law. *Sukhlal* v. *Bishambhar, I. L. R., 39 All. 196*, and *Raghoo Pandey* v. *Kassy Purey, I. L. R. 10 Calc., 73*, referred to. *Bansi* v. *Kanhaiya, 18 A. L. J. 983*, distinguished. Suraj Prasad *v.* Ganesh Ram . . . . **I. L. R. 43 All. 581**

———— **A caste if may own property or acquire same by prescription**—*Suit to declare right of members of a caste to akhra and for recovery thereof.* Certain members of the Dhobi Community of Narainda, with the leave of the Court obtained under Or. I, r. 8 of the Civil Procedure Code, sued on behalf of the community for a declaration of its title to an *akhra* alleged to have been established by the ancestors of the community and for recovery of possession thereof. It was found as a fact that the Dhobi Community of Narainda had been owning the *akhra* and its properties from time immemorial through *panchayets* : *Held*—That the Dhobi Community of Narainda had the right to hold and manage the property and maintain suits with respect thereto through *panchayets* and that the present suit which was properly constituted under Or. I, r. 8, C. P. C., should succeed. Ownership of property by a fluctuating body of persons is recognised in Hindu law, and though there is no case in which the right of a particular caste or community to hold property has been decided, there are observations tending to show that such a body of persons is capable of owning property. *Navroia Manekji Wadia* v. *Dastur Kharsedji Mancherji, I. L. R. 8 Bom. 20 (1908)*, referred to. The fact found in the present case that the *akhra* and its property were enjoyed by the Dhobi Community of Narainda from time immemorial pointed to a legal origin, and any objection that a right cannot be acquired by a fluctuating body of persons by prescription was inapplicable to the case. *Lord Rivers* v. *Adams, L. R. 3 Exch. D. 361 (364) (1878)*, referred to. Probhat Chandra Sen *v.* Hari Mohan Dhupi **24 C. W. N. 206**

HINDU LAW—ADOPTION.

See Adoption.

See Contract . . **4 Pat. L. J. 542**

See Court Fees Act 1870, s. 7 . . . **5 Pat. L. J. 339**

See Estoppel . **I. L. R. 34 All. 398**

See Hindu Law—Custom. **26 C. W. N. 882**

See Hundu Law—Stridhan. **I. L. R. 43 Calc. 944**

See Limitation Act (IX of 1908), Sch. I, Art. 118 . **I. L. R. 37 Bom. 513**
I. L. R. 41 Bom. 728

See Transfer of Property Act, 1882, s. 6 . . **I. L. R. 40 All. 692**

———— **Mahesris of Delhi**—

See Declaratory Suit. **I. L. R. 1 Lah. 92**

1. ———— **Mother's sister's son also father's brother's son.**—The adoption of a mother's sister's son is invalid, even though he may also happen to be father's brother's son. The prohibition against the adoption of a sister's son, a daughter's son and a mother's sister's son is general, and not confined solely to persons who are neither *sapindas* nor *sagotras. Ramchandra* v. *Gopal, I. L. R. 32 Bom. 619*, followed. Walbai *v.* Heerbai (1909) . **I. L. R. 34 Bom. 491**

2. ———— **Adoption by widow**—*of predeceased co-parcener after estate had vested in the widow of survivor invalid, though made with the consent of the latter.* A power given to a widow to adopt is absolutely at an end when once the estate has vested in the heir of her deceased son and is not revived even if she afterwards succeeds to the estate. *Ramakrishna* v. *Shamrao, I. L. R. 26 Bom. 526*, and *Manikyamala Bose* v *Nandkumar Bose, I. L. R. 33 Calc. 1306*, referred to *Held*, also, that, in such a case, the consent of the son's heir in whom the estate had vested, will not validate the adoption. Wallis, *J. Semble* : The same rule would apply in the case of an adoption by the widow of a co-parcener who has lost her right to adopt independently of such consent by reason of the estate having devolved on the widow of the last co-parcener. *Annamma* v. *Mabbu Bali Reddy, 8 Mad. H. C. R. 108*, referred to. Adivi Suryaprakasa Rao *v.* Nidamarty Gangaraju (1909) **I. L. R. 33 Mad. 228**

3. ———— **Custom of adoption among Jains in United Provinces**—*Adoption of married man—Proof of custom. Held* (affirming the decision of the High Court), that a custom set up that "among the Jains adoption is no religious ceremony, and that under the law or custom there is no restriction of age or marriage among them" was established by the evidence. In this case the adopted son was a married man and was of the

HINDU LAW—ADOPTION—*contd.*

same gotra as his adoptive father. RUP CHAND v. JAMBU PRASAD (1910) **I. L. R. 32 All. 247**

4. ———— **Payment of money to adoptive widow by way of inducement to her to adopt a particular boy**—*Hindu Law—Payment is a*

sum paid

tion of gift.

of Rs. 8,000 to *B*, a widow, as an inducement to her to adopt *N*. After the adoption *B* conveyed by way of gift to *C* some lands at Chinchwad and got them transferred to his name. Later on, *N* conveyed in gift the lands in dispute, which formed part of the property belonging to his adoptive father, to his natural brother (the defendant) in consideration of the payment of Rs. 8,000 made by *C* to *B*, in exchange for the lands at Chinchwad, and also having regard to the benefit he had derived from his adoption. After the death of *N*, his sons (the plaintiffs) challenged the gift and sued to recover possession of the lands from the defendant:—*Held*, that the transaction amounted to a mere gift which was not supported by consideration; since the payment of Rs. 8,000 to *B* was vitiated by the fact that it was in the nature of a bribe and as such was illegal according to Hindu Law; and even if it be regarded as a debt contracted by *C*, it could not bind *N*, *first*, because it was contracted for an illegal purpose; and, *secondly*, because, *N* had by his adoption ceased to be

ed as supported by valuable consideration it could not bind the interest of the plaintiffs, inasmuch as the property conveyed formed part of the joint ancestral estate in which they took a vested interest by their very birth. *Held*, also, that if the transaction be regarded as one supported by valuable consideration on account of exchange of lands at Chinchwad, it could only amount to a sale of the property, and even then it was not competent to *N* to sell joint ancestral for a purpose, neither illegal nor immoral. *Per* property to the detriment of his sons, except for an antecedent debt which had been contracted for a purpose, neither illegal nor immoral, *Per Curiam:* Where on a Hindu's death an adoption is made by his widow, it must be made by her, without any coercion, free from any corrupt motive, and with an eye solely to the fitness of the boy to be adopted to fulfil the religious and secular duties binding on a son. That object is likely to be frustrated, if she is induced to adopt a boy out of

sell

as a

Hindu Law

be resumed

pply only as between the donor and the donee and relate to property which it is competent for the donor to give away. They cannot affect the joint ancestral estate of a Hindu and his sons. Their rights and liabilities are regulated by special texts dealing with that estate; and such of these special texts as relate to gift form exceptions to the general texts on the subject. SHRI SITARAM PANDIT v. SHRI HARIHAR PANDIT (1910) **I. L. R. 35 Bom. 169**

5. ———— **Prior right of adoption as between elder and younger widows**—*Anumatipatra, construction of—Simultaneous or successive adoption.* Where the deceased had executed an *anumatipatra* in these terms:—"In favour of the first wife, *S. B. S. D.*, and the second wife *S. D.* . . . giving permission that when I shall be no more, each of my two wives shall be at liberty to act according to their own religious tenets by adopting three sons successively, that is one after another":—*Held*, that the effect of such an instrument was not to sanction a simultaneous adoption, but to give a power of adoption to the two widows successively. That this being so, the elder widow had the prior right to exercise the power of adoption and that the younger widow had no right to adopt before the elder widow had exhausted her right, or refused to use it. *Rakhmabai* v. *Radhabai, 5 Bom. H. C. (App.) 181*, followed. *Amava* v. *Mahadgauda, I. L. R. 22 Bom. 416, Mondakini Dasi* v. *Adinath Dey, I. L. R. 18 Calc. 69*, and *Akhoy Chunder Bagchi* v. *Kalapahar Haji, I. L. R. 12 Calc. 406 : L. R. 12 I. A. 198*, referred to. BIJOY KRISHNA KARMAKAR v. RANJIT LAL KARMAKAR (1911)

I. L. R. 38 Calc. 694

5a. ———— **Anumatipatra—construction of**—*Adoption—Simultaneous or successive adoption—Preferential right of adoption of senior widow.* Where a Hindu, governed by the Bengal school of Hindu law, had previous to his death executed an *anumatipatra* in these terms: "This *anumatipatra* for taking adopted son is executed to the following effect . . . . in favour of first wife *B S* and second wife *S B*. . . I am giving permission in writing that when I shall be no more, each of my two wives shall be at liberty to adopt three sons successively, that is, one after another, and shall lead a moral life. It is also permitted that each of my wives shall live in my ancestral dwelling house with her adopted son . . . ." *Held*, that applying the canon of construction laid down in *Abhoy Chunder Bagchi* v. *Kalapahar Haji, I. L. R. 12 Calc. 406 ; L. R. 12 I. A. 198*, the document did not contemplate simultaneous adoption by the widows, but successive adoption in accordance with the rule of law. As between co-widows, the senior, that is to say, she, whose marriage was earlier, has in general a preferential right of adoption. RANJIT LAL KARMAKAR v. BIJOY KRISHNA KARMAKAR (1912) **I. L. R. 39 Calc. 582**

6. ———— **Rule that the adopted boy should be such that his mother could be legally married by the adopting father**—*Limits of the rule.* Under Hindu Law, the rule that no one can be adopted whose mother the adopter could not have legally married, is confined to the three cases of a daughter's son, sister's son and a mother's sister's son. *Ramchandra* v. *Gopal, I. L. R. 32 Bom. 619*, followed. A person can validly adopt the son of his mother's brother. YAMNAVA v. LAXMAN BHIMRAO (1912)

I. L. R. 36 Bom. 533

7. ———— **Ahirs**—*Validity of adoption after marriage of adopted son. Held*, that amongst Ahirs the adoption of son after his marriage has taken place is not permissible. *Pichuayyan* v. *Subbayyan, I. L. R. 13 Mad. 128*, followed. JHUNKA PRASAD v. NATHU (1913)

I. L. R. 35 All. 263

HINDU LAW—ADOPTION—*contd.*

8. ——————— **Implied prohibition in the will**—*absolute bequest to daughters—Hereditary Offices Act (Bom. Act III of 1874, amended by Bom. Act of 1886)—Amendment of the Act excluding daughters from succeeding to vatan lands—Adoption of a son of the daughter, by the widow—Adoption invalid—Will—Construction.* A testator by his will dated the 9th March 1885 bequeated his property, which for the most part consisted of vatan lands, to his two daughters "in perpetuity." He enjoined his wife not to make over the property to anybody "except to my daughters." The daughters were authorised only to relinquish their right in favour of each other but not to anybody else. In 1886, the Bombay Hereditary Offices Act (III of 1874) was amended by the Bombay Act V of 1886, whereby the female members of a vatan were postponed to male members in the matter of succession. The testator's widow thereupon adopted defendant No. 1 who was a son of one of the daughters. The plaintiffs, the reversioners of the testator, filed a suit to obtain a declaration that the adoption of defendant No. 1 was invalid, alleging that there was in the will an implied prohibition forbidding the widow to adopt. It was contended in defence that the right of the widow to make the adoption was not taken away by anything expressed in the will. *Held*, that the adoption was invalid, inasmuch as it could not be upheld without giving the go-by to the testator's expressed wishes. In the will, not only was there a complete bequest of the whole estate to the daughters, but the widow was in terms prohibited from disposing of the property to anyone except the daughters. *The Collector of Madura* v. *Moottoo Ramalinga Sathupathy, 12 Moo. I. A. 397*, distinguished. MALGAUD PARAGAUDA *v.* BABAJI DATTU (1912) . . **I. L. R. 37 Bom. 107**

9. ——————— **By widow of the last vatandar**—*Death of the adopted son unmarried—Second adoption by the adopted son—Vesting of the property in the male member of the vatandar family—Divesting of estate by adoption—Bombay Hereditary Offices Act (Bom. Act V of 1886), s. 2—Second adoption not valid.* On the death of the last vatandar, his widow went into possession of the vatan property. She adopted a son who died in 1902 unmarried. In 1904, she adopted another boy. The plaintiff, a reversioner, sued in 1909, for a declaration that he was the vatandar and to recover possession of the vatan property. *Held*, that the widow could not make a second adoption; for the property was, on the death of her first adopted son, vested in the plaintiff, a male member of the family, and it could not subsequently be divested by any adoption made by her. BHIMABAI *v.* TAYAPPA MURARRAO (1913) **I. L. R. 37 Bom. 598**

10. ——————— **Settlement of immoveable property by adopting widow** *in favour of her daughter—Settlement assented to by the natural father of the adopted boy—Attainment of majority by the adopted son—Repudiation of the Settlement—Settlement not enforceable.* A settlement of immoveable property by an adopting widow in favour of her daughter to take effect upon the daughter attaining majority, assented to by the natural father of the adopted boy at the time of adoption, cannot be enforced by the daughter against the adopted son who repudiated it on majority. VYASACHARYA *v.* VENKUBAI (1912) **I. L. R. 37 Bom. 251**

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11. ——————— **Consent of Sapinda, obtained for consideration**—*Evidence Act (I of 1872), s. 32, sub-ss. 3 and 5—Admissibility of statement made by deceased person.* Where under the Hindu Law, the consent of a sapinda is required to validate an adoption by a widow and that consent is obtained in exchange for a valuable consideration the transaction will vitiate the adoption. *Rami Reddi* v. *Rangamma, 11 Mad. L. J. 20*, followed. *Srinivasa Ayyangar* v. *Rangasami Ayyangar, I. L. R. 30 Mad. 450*, distinguished. A statement made by a deceased sapinda admitting that he had received sum of money in connection with an adoption was sought to be proved in order to invalidate the adoption:—*Held*, that the statement was admissible under s. 32, sub-s. (3) of the Evidence Act, it being a statement made against his pecuniary or proprietory interest. *Held*, also, that the statement was admissible under s. 32, sub-s. 5, as it related to the existence of a relationship; and this notwithstanding that the relationship was not in dispute at the time when the statement was made. DANAKOTI AMMAL *v.* BALASUNDARA MUDALIAR (1913) . . . **I. L. R. 36 Mad. 19**

12. ——————— **By mother with the assent of a eceased son**—*Objection by existing sapinda—Invalidity of adoption.* A consent previously obtained from a deceased sa pinda cannot be efficacious to validate an adoption which is not approved of or objected to by the persons who are the nearest sapindas at the time the adoption is actually made. Strange's Hindu Law, Vol. I, p. 80, and Sircar on adoption, p. 255, not followed. *Per* CURIAM: There is a distinction between the case of an adoption in an undivided family and that in a divided family, as regards the persons whose assent is sufficient. *The Collector of Madura* v. *Moottoo Ramalinga Sathupathy, 12 Moo. I. A. 396, 442, Vellanki Venkata Krishan Rao* v. *Venkata Rama Lakshmi, I. L. R. 1 Mad. 174*, and *Subrahmanyam* v. *Venkamma, I. L. R. 26 Mad. 627, 635*, referred to. MAMI *v.* SUBBARAYAR (1913) . **I. L. R. 36 Mad. 145**

13. ——————— **Authority to adopt given to two widows**—*Construction—Authority whether several or joint—Exercise of power by survivor—Restriction as to class of boys—Powers, how to be construed—Power given by a Hindu, how to be construed when ambiguous.* Where a testator by his will provided; "Permission will be granted to my two wives to adopt a boy to arrange to offer water and funeral oblations to me, the adopted boy will have to be taken from amongst my near representatives but my wives will adopt whomsoever they would select," and on the death of one of the widows, the surviving widow adopted her brother's son: *Held*, that the testator intended to confer authority to adopt by the will itself and not by a separate instrument. That the authority to adopt was conferred on the widows severally and not jointly, and the surviving widow could lawfully exercise the power of adoption conferred by the Will in construing a document of this description the Court would consider that the person giving the authority intended his widows to do that which the law allowed and not to do something which was, if not absolutely illegal very unusual and not practised amongst Hindus. *Quære*: Whether when an authority to adopt is in fact conferred on two widows jointly, adoption by the survivor of them alone is valid. *Venkata* v.

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Rangaya, I. L. R. 29 Mad. 437, 444, doubted. That the expression "from amongst my near representatives" being strictly speaking meaningless, no restriction as to the class of boys within which the choice was to be made was to be read into it. That it was not intended that the selection was to be made by the widows concurrently. Where the general intention of a Hindu to be represented by an adopted son is clear, effect should be given to such intention, *if it is possible to do so without*

in equity in furtherance of the purpose for which they were created. SARADA PROSAD PAL *v.* RAMA PATI PAL (1912) . . **17 C. W. N. 319**

14. ———— By widow of pre-deceased son—*Contemporaneous consent of her mother-in-law in whom estate vested as heir.* Under Hindu Law, the widow of a predeceased son can make a valid adoption with the contemporaneous consent of her mother-in-law in whom the estate of the

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Bom. 724

validly given in adoption either by himself or by any one else. *Subbaluvammal* v. *Ammakutti Ammal, 2 Mad. H. C. 129, Balvantrav Bhaskar* v. *Bayabhai et al, 6 Bom. H. C. 83,* and *Bashetiáppa* v. *Shivlingáppa, 10 Bom. H. C. 268,* applied. An invalid adoption does not *per se* destroy the *adoptee's rights in the natural family. Bhavani Shankara Pandit* v. *Ambabay Ammal, 1 Mad. H. C. 363,* and *Lakshmappa* v. *Ramava, 12 Bom. H. C. 364, 397,* followed. No estoppel arises in such a case unless in consequence of the adoption, the position of the party setting up the estoppel is changed to his disadvantage, so as to render it inequitable that the adoptee should be restored to his place in his natural family. *Gopalayyan* v. *Raghupatiayyan, 7 Mad. H. C. 250,* and *Parvatibayamma* v. *Ramakrishna Row, I. L. R. 18 Mad. 145,* followed. No presumption in favour of an adoption arises in the absence of evidence of the giving or acceptance or of circumstances by which such a presumption can be supported, though the adoption may have taken place long before, and been acquiesced in by all concerned. *Anandrav Shivaji et al* v. *Ganesh E. Bokil, 7 Bom. H. C. R., App. xxxiii at p. xxxiv,* distinguished. A suit in ejectment cannot be converted into a suit for partition. VAITHILINGAM *v.* NATESA (1914)
I. L. R. 37 Mad. 529

16. ———— Half-brother—*Mitakshara.* The adoption of a half-brother is not invalid under Hindu Law. GAJANAN BALKRISHNA *v.* KASHINATH NARAYAN (1915)
I. L. R. 39 Bom. 410

17. ———— Non-performance of ceremony of datta homam—*Will giving power to widow to adopt with consent of trustees where one declines to act—Omission to follow provisions of s. 145 of Evidence Act as to using documents to contradict witnesses—Inferences drawn from documents so used, and basing decision on them to prejudice of witnesses—General allegations of undue influence an...*

On this ap[...]

Committee, ...

adoption. *Held,* (reversing the decision of the High Court), that on the evidence and under the circumstances of the case the adoption was valid. Where the boy to be adopted is of the same *gotra* as the adoptive father the performance of the ceremony of *datta homam* is not essential to the validity of the adoption among Maratha Brahmins in Bombay. *Valubai* v. *Govind Kashinath, I. L. R. 24 Bom. 218,* approved, as being based not on the particular degree of relationship, but upon the broad ground of the identity of *gotra.* A Hindu testator by his will appointed five trustees of his property and gave power to his widow to adopt a son with their consent and advice; and one of the trustees declined to act. *Held,* that the consent of the declining trustee was not necessary, and the adoption made with the consent of the other four trustees was valid. It is a general salutary, and intelligible rule, and one substantially embodied in s. 145 of the Evidence Act (I of 1872) that if a witness is under cross-examination on oath, he should be given the opportunity, if documents are to be used against him to tender *his explanation and clear up the particular point* of ambiguity or dispute: and the duty of enforcing such a rule is clear, especially where a witness' reputation or character is at stake. In this case where the general principle of this rule and the specific provisions of s. 145 had not been followed but documents had been used for the purpose of contradicting witnesses without calling their attention to the portions of the documents so used, their Lordships were of opinion that the decision of the High Court on the evidence amounted to an inferential verdict of perjury against the witnesses which was not justified. *Semble:* Where coercion, undue influence, fraud and misrepresentation are set up as rendering a transaction invalid, each one should be specifically pleaded, and a definite

should be permitted to be raised by general allegations. *Wallingford* v. *Mutual Society. L. R. 5 App. Cas. 685,* per Lord Selborne; and *Gunga Narain Gupta* v. *Tiluckram Choudhry, I. L. R. 15 Calc. 533 : L. R. 15 I. A. 119,* referred to as to the defence of fraud. BAL GANGADAR TILAK *v.* SHRINIVAS PANDIT (1915) **I. L. R. 39 Bom. 441**

18. ———— Effect of invalid adoption—*Invalidly adopted son not entitled to maintenance—Declaration in writing that the declarant will give certain lands*

not executed—

tion—Incompl

a boy whose adoption ...

has no right to be maintained out of the estate of the adopted family. The plaintiff claiming to be the adopted son of the late Thakor of Mehelol, applied to obtain certain lands from the estate by way of maintenance, to the Collector who was in charge of the estate. The Collector persuaded the present Thakur (defendant) to settle the matter. Accordingly, the defendant made a declaration in writing that he would give the Kankanpur *wanta* by way of maintenance to the plaintiff and his

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direct lineal heirs. The defendant did not execute any formal deed to convey the lands. The plaintiff sued to recover the Kankanpur *wanta* from the defendant on the strength of the declaration:—*Held*, that the defendant was not bound by the declaration, which marked only a stage in the negotiations, which, unless completed, could be broken off at any time by either side. DALPATSINGHJI *v.* RAISINGJI (1915)

I. L. R. 39 Bom. 528

19. ———— Authority to adopt, construction of—*Extrinsic evidence, admissibility of—Successive adoptions—Limits for the exercise of the power to adopt—First adopted son, death of—His widow alive—Second adoption by widow of previous owner, validity of—Impartible zamindari, how far joint family property—Vesting of property in a co-parcener, meaning of—Divesting of property by adoption—Rule as to adoption to last male holder—Applicability of rule to ordinary co-parcenary and to impartible zamindari.* *A*, the holder of an impartible zamindari, died in 1868 without issue, leaving a widow *K*. Prior to his death, he executed a document authorising her to adopt a son to him. On his death his brother *R* succeeded to the estate. Subsequently in 1870, *K* adopted *B* who recovered the zamindari from *R* by suit and died in 1906 without issue leaving a widow *R.M.* On the death of *B*, the son of *R* succeeded to the zamindari but died fifteen days after his accession; the first and second defendants were his sons. In 1907, *K* purporting to act under the power given by her husband, adopted the plaintiff as a son to her husband, while *R.M.*, the widow of *B* was alive. The plaintiff sued to recover the zamindari from the defendants. The latter pleaded that the power to adopt given to *K* by *A* (her husband), did not authorise her to make a second adoption, that the existence of *R.M.*, was a bar to the exercise of the power even if it was not exhausted by the first adoption and that the adoption, not having been made to the last male holder, was invalid. *Held*, that the power to adopt given by *A* to *K* was wide enough to enable her to make a second adoption; but that the power was not exercisable by reason of the fact that *R.M.* (*B*'s widow) was alive when the second adoption was made by *K*. *Per* WHITE, *C. J.*—The rule that an adoption should be made to the last male owner is applicable to a joint Hindu family living under the Mitakshara law. *Sivagnanam Servaigar* v. *Ramasawmy Chettiar, 22 Mad. L. J. 85*, referred to. *Per* SESHAGIRI AYYAR, *J.*—The canon of construction regarding powers to adopt is not different from that of ordinary testamentary dispositions: the intention of the testator has to be gathered from the language employed by him and from the cirumstances existing at the time of the grant of the power. The authority given by a Hindu to his wife should be regarded as being general in its nature unless conditions have been imposed or limitations placed upon it by him. Where the exercise of a power to make a second adoption will not result in creating a new line of succession but will only transfer the estate from one intermediate owner to another with the prospect of the latter being eventually divested, the limit of the power to adopt should be held to have been reached. An estate taken by survivorship by a member of a joint Hindu family is a conditional estate subject to defeasance on the coming into existence by adoption or otherwise, of a new member into the co-parcenary; the rule of law that, in order that an estate once vested may be divested, the adoption should be made to the last male holder, is not applicable to co-parcenary property; and an impartible zamindari is joint family property subject to an exception. MADANA MOHANA *v.* PURUSHOTHAMA (1914) . . . . I. L. R. 38 Mad. 1105

20. ———— By widow of brother's son—*Acting with her deceased husband's authority—Authority to adopt a particular boy whom her husband could and would have adopted had he lived—Rejection of the extension by Nanda Pandit in Dattaka Mimansa to adoption by females of rule of Hindu Law against adoption of son whose mother the adopter could not have legally married.* The adoption by a Hindu widow acting in accordance with authority given her by her deceased husband is an adoption not to herself, but to her husband, and is therefore not according to Hindu Law, invalid by reason of the adopted boy being her brother's son. *Jai Singh Pal Singh* v. *Bijai Pal Singh, I. L. R. 27 All. 417, Sriramlulu* v. *Rammayya, I. L. R. 3 Mad. 15*, and *Bai Nani* v. *Chunilal, I. L. R. 22 Bom. 973*, approved of. The gloss of Nanda Pandit in the Dattaka Mimansa purporting to extend to adoption by females the rule of Hindu Law that no one can be adopted as a son whose mother the adopter could not have legally married, rejected as being an extension not based upon the authority of the Smritis or institutes of sages, and not being shown to have been accepted as the law of India, so far as adoptions by widows to their deceased husbands are concerned. In the present case the authority of the husband to the widow was a specific authority to her to adopt a particular boy whom she did adopt and whom he could and presumably would, have adopted had he lived. PUTTU LAL *v.* PARBATI KUNWAR (1915)

I. L. R. 37 All. 359

21. ———— By junior widow—*without consulting senior widow but with sapindas consent, invalidity of—Preferential right of senior widow to adopt.* An adoption made by a junior widow of a deceased Hindu purporting to be made with the consent of the sapindas, but without consulting the senior widow is invalid. *Kakerla Chukkamma* v. *Kakerla Punnamma, 28 Mad. L. J. 72*, followed. *Vellanki Venkata Krishna Rao* v. *Venkatarama Lakshmi, I. L. R. 1 Mad. 174*, referred to. *Per* WALLIS, *C. J.*—In the absence of an express authority by the husband to any one of the widows, the senior widow has the preferential right to adopt with the consent of the sapindas. The senior widow is one of the kinsmen whom it is the duty of the junior widow to consult within the meaning of the rule enunciated in *The Ramnad Case, 12 Moo. I. A. 397.* RAJAH VENKATAPPA NAYANIM BAHADUR *v.* RENGA RAO (1915)

I. L. R. 39 Mad. 772

22. ———— Consent of sapindas—*Refusal of consent by nearest sapinda on personal grounds, improper—Consent of remoter sapindas—Adoption, validity of.* Where the nearest sapinda refused to give his consent to an adoption by a widow on the ground that he would forfeit the right to property which he would otherwise get, and the widow made the adoption with the consent of remoter

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sapindas: *Held,* that the refusal of the nearest sapinda was based on improper grounds and that the adoption with the consent of the remoter sapinda was valid. VENKATARAMA RAJU *v.* PAPAMMA (1914) . . **I. L. R. 39 Mad. 77**

23. ———— Divesting of estate on—*Property of the natural father vested exclusively in the son before adoption —After adoption the property remains in the natural family.* Under Hindu Law, when a boy is given in adoption, he loses all the rights he may have acquired to the property of his natural father including the right to property which has become exclusively vested in him before the date of his adoption. *Rajah Venkata Narasimha Appa Row* v. *Sri Rajah Rangayya Appa Row, I. L. R. 29 Mad. 437,* dissented from. DATTATRAYA SAKHARAM *v.* GOVIND SAMBHAJI (1916) . . **I. L. R. 40 Bom. 429**

24. ———— Simultaneous execution of adoption deed as well as will—*Construction of documents—Adopted son's consent, binding effect of —Disposition good as a family arrangement* One B died leaving him surviving his widow L and a predeceased son's daughter K (plaintiff). B, before his death, recommended L to adopt A his brother's son. L made the adoption by a deed dated the 10th June 1895 and simultaneously executed a will in favour of K. On the strength of this will K claimed the properties in suit. The Subordinate Judge decreed K's suit holding that the will being made with the full consent and concurrence of A who was then major must take effect. On appeal the decree was reversed. On appeal to the
adoption deed a
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arrangement, (ii) that the adopted son who was of full age having deliberately accepted the family arrangement and its advantages must be held to it. *Visalakshi Ammal* v. *Sivaramien, I L. R. 27 Mad. 577,* referred to, (iii) that the disposition in favour of plaintiff was good not because it was a bequest made by L, but because it was a part of the single family arrangement which all parties accepted. KASHIBAI *v.* TATYA (1916) **I. L. R. 40 Bom. 668**

25. ———— By Brahmin—*Dattahoma ceremony not performed—Adoption if valid—Adopter and adoptee of same gotra. Held,* on a review of authorities, that the *dattahoma* ceremony is not essential when the adopted boy is of the same *gotra* as the adopter, even amongst the twice born classes. RETKI *v.* LAK PATI PUJARI (1914) **20 C. W. N. 19**

26. ———— Authority to adopt, verbally given, before death—*Proof —Relevancy of will, which contained no directions for adoption, made two months before death, in estimating probabilities—Probable change of intentions—Witnesses, testimony of, opinion of Trial Judge, value of discrepancy in witnesses' statements, consideration of —Non-citation by either side of witness who went over from one side to the other—Case raised in first Court, not urged in appeal, if should be allowed to be raised on further appeal.* R, a Hindu mahajan of means, died on 11th February 1896, leaving him surviving a widow and a daughter. He had been suffering from pthisis for some time. Two months before his death he executed a will, by which he made a very modest provision for his

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daughter, and gave his wife a life-interest in the bulk of his properties (which, however, she was liable to forfeit if she behaved contrary to the injunctions of the will). The testator had been hopeful that a son might be born to him, and the son, if born, was, under the will, to be the "sole executor, donee and owner." The will contained no power to adopt a son. Seven years after the death of R, his widow adopted an infant son of R's nephew J, born after R's death. By his will R had expressly excluded J, on account of his profligacy and irreligion, from participation in his funeral ceremonies, preferring for that purpose his sister's son B, in whom he had confidence and who lived in the same house with him and whom he appointed one of his executors. The authority for the adoption was alleged to have been given by R, shortly before his death (when he appeared to have become aware of the serious nature of his illness) verbally to his wife, in the presence of several respectable witnesses, most of whom deposed that R had expressly directed a son of J (should one be born) to be taken in adoption. The Trial Judge had held

of the several witnesses who spoke to R's giving authority to adopt. *Held,* by the Judicial Committee, that the probabilities were not adverse to the view that the testator might have modified his original intentions as expressed in his will which was executed before he came to realise how short his life was, and the balance of testimony being distinctly in favour of the story that the authority to adopt had been given, not only had the Trial Court not aproached the case with *bias* but had taken a fairer and less one-sided view of the facts than that which prevailed in the High Court. That the view of the Judge who tried the case and saw nearly all the witnesses on a question of evidence such as this was obviously entitled to great weight. That such discrepancies as these were might well be accounted for by the fact that the conversation which the witnesses described had taken place some 13 years previously. At the trial the widow of R, who first came forward to support the adoption, appeared later on to have gone over to the opposite camp, *viz.,* of B, who was opposing the adoption: *Held,* that the omission by both parties to cite her as a witness was in the circumstances justifiable. The question whether assuming authority to adopt to have been given, the adoption of J's son would make him a son of the testator capable of taking under the terms of the will was raised in the Trial Court and decided in favour of the adopted son and it was not raised in the Appeal Court. The Judicial Committee in the circumstances did not allow the question to be raised before them. ADWAITYA PRASAD *v.* BALDEO DASS (1916) **20 C. W. N. 659**

27. ———— Kayasthas, in Bengal—*Adoption, amongst Kayasthas, religious ceremonies if essential—Religious ceremonies postponed after actual giving and taking—Adoption during pollution through birth of agnate—Validity—Afterborn natural son of Sudra, and adopted son, shares of, if equal—Agreement by adoptive father to give equal share, if*

valid—Properties held by adoptive father as shebait's adopted son, if may claim to hold as shebait jointly with afterborn son—Pittrikrityas, and Debakrittyas —Proof that property has been endowed as debutter— Dattaka Chandrika, authority of Kayasthas, according to the law prevalent in Bengal, are considered as Sudras. No religious ceremony is necessary for an adoption amongst Kayasthas, mere giving and taking of a son being sufficient to give it validity. The *putresthi jag* and *namkaran* not being essential ceremonies in an adoption between Sudras, the fact that they took place subsequently to the giving and taking did not affect the validity of the adoption. Pollution on account of the birth of a relative does not vitiate an adoption. It is only a bar to religious acts and renders religious ceremonies inefficacious; but gift and acceptance of a son are secular acts. *Santappayya* v. *Rangappayya, I. L. R. 18 Mad. 397, 396,* followed. Such pollution results from the knowledge of the fact of birth. In laying down the rule that the adopted son of a Sudra shares the inheritance equally with the afterborn natural son, the Dattaka Chandrika has in no way deviated from the *Smritis*, and the rule, which has been accepted as correct by both the Madras and Calcutta High Courts, should not be departed from. An *ekrarpatra* of the adoptive father covenanting that an afterborn natural son of his shall not be entitled to claim a larger share but will divide the inheritance equally with the son he was adopting, is valid and operative. *Surendra Keshab Roy* v. *Doorga Soondary Dassee, I. L. R. 19 Calc. 513, 536,* and *Bhala Nahana* v. *Prabhu Hari, I. L. R. 2 Bom. 67,* referred to. It is now settled law that, as regards inheritance, the adopted son holds in all respects the same position as an *aurasa* son except in some special matters. An *aurasa* son has a superior right in respect of *pitri-matri krityas* but there is no such preference in respect of *shevas* or *deva-krityas*. *Held,* therefore, that an adopted son of a Sudra was entitled to inherit *debutter* properties in the right of *shebaitship* jointly with an afterborn natural son. ASITA MOHON GHOSH MOULIK *v.* NIRODE MOHON GHOSH MOULIK (1916) . . . **20 C. W. N. 901**

28. ——————— **Evidence of**—*Absence of any deed or written record of adoption —No entries of expenditure on ceremonies in account books—Adopted child's name not changed and child left with its natural parents.* In this appeal which arose out of a suit by the natural father of the appellant to have his adoption declared valid, their Lordships of the Judicial Committee (affirming the decision of the Court of the Judicial Commissioner of the Central Provinces) *held,* on the evidence, that the alleged adoption was never made. It appeared that though the suit might well have been brought in the life time of the alleged adoptive father, who consistently denied that the adoption ever took place, it was not commenced until some months after his death. There was no deed of adoption or any other formal record of the event. *Sootrugun Sutputty* v. *Sabitra Dye, 2 Knapp P. C. 287,* referred to. There was no reference to any expenditure on the ceremony in the account books of either the natural or the adoptive father. *Lal Kunwar* v. *Chiranji Lal I. L. R. 32 All. 104; L. R. 37 I. A. 1,* referred to. No feast was proved to have taken place on

the occasion of the alleged adoption; the ceremonies said to have been performed were of the briefest possible description; no notification was made to the authorities; the child's name was not changed, and he was never taken to live with his adoptive parents, or recognised by them in any way; and all the surrounding circumstances and conditions not only did not support the adoption, but made it highly improbable that the ceremony of adoption was ever performed in regard to the appellant. DIWAKAR RAO *v.* CHANDANLAL RAO (1916) . **I. L. R. 44 Calc. 201**

29. ——————— **Dvyamushyayana adoption**—*—Presumption.* In every case of *a nitya dvyamushyayana* form of adoption, there must be an agreement to that effect: such an agreement must be proved by the person setting up the *dvyamushyayana* adoption, like any other question of fact, as much in the case of the adoption of an only son of a brother as in any other case of such an adoption. *See* LAXMIPATIRAO *v.* VENKATESH (1916) . . . **I. L. R. 41 Bom. 315**

30. ——————— **Adoption by a minor widow**—*Want of independent, disinterested advice—Validity of adoption—Ratification by widow after attaining majority, effect of.* A widow, authorized by her husband to adopt a boy *if* and *when* she chose, adopted her own brother, when she was eleven years of age on the interested advice of her father. *Held,* that the adoption made by the widow while a minor and without independent advice, was void *ab initio* and could not be therefore validated by subsequent ratification. *Sri Rajah Venkata Narasimha Appa Row* v. *Sri Rajah Rangayya Appa Row, I L. R. 29 Mad. 437,* dissented from. SATTIRAJU *v.* VENKATASWAMI (1917) **I. L. R. 40 Mad. 925**

31. ——————— **By one adjudged a lunatic**—*valid only, if of sound mind at the time—Presumption of continuity of unsound mind—Onus of proving the contrary.* The effect of an adjudication under the Lunacy Act (XXXV of 1858) that a person is a lunatic, is to raise a presumption that he continued to be of unsound mind until the contrary is shown. *Van Grutteen* v. *Foxwell, [1897] A. C., 658,* and *Snook* v. *Watts, 11 Beavan, 105,* followed. Though the effect of an order under the Act appointing a manager for the properties of a lunatic is not to incapacitate him from making an adoption till the order is set aside; still, unless it is proved that the lunatic was of sound mind at the time he is alleged to have made the adoption, the adoption is invalid. *Semble:* Adoption is not an act which amounts to an alienation of property. It affects status and it has, in the opinion of Hindus, religious efficacy and it would not be right for a Court to hold that a Hindu is deprived by any statute, of the power of making an adoption unless there are clear unambiguous words to that effect. SESHAMMA *v.* PADMANABHA RAO (1916) . . . . **I. L. R. 40 Mad. 660**

32. ——————— **Of an orphan by a widow in 1862**—*Possession of estate by adopted son—Death of adopted son in 1864—Adoption by his widow—Possession of latter adopted son till 1876—Dispossession by former widow in 1876—Death of adopted son in 1881—Suit by latter's widow against former widow for possession—Decree—Death of former widow in 1902—Suit by reversioners of the original owner in 1905—Suit for possession against widow*

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and alienees from both widows, if, barred—Title of reversioners, if extinguished—Limitation Act IX of 1871, Art. 129 and s. 29—Later Limitation Acts (XV of 1877 and IX of 1908) effect of—Res judicata —Sudra ascetic or Tambiran—Entry into, order of —Right of inheritance, if forfeited—Texts as to Yat, applicability of, to Sudras—Usage—Civil Procedure Code (Act V of 1908), O. XLI, r. 4—Decree on appeal. *A*, a Hindu, died in 1849 without issue, leaving a widow *C*. She adopted *B*, an orphan, as a son to her husband in 1862 and put him in possession of her husband's properties, other than those alienated by her prior to adoption. *B* died issueless in 1864 leaving a widow *M*, who adopted *T*. The latter was in possession of the properties till 1876 when he was dispossessed by *C*. *T* died issueless in 1881, leaving a widow who also died in 1882. *M*, who succeeded to the estate as *T*'s heiress, sued *C* in 1887 and recovered possession of the estate from her. *C* died in 1902. In 1905, the plaintiffs, claiming to be the reversioners of *A* on *C*'s death, sued to recover the estate of *A* from the defendants. Some of the defendants were alienees from *M* who was the fourth defendant; some others were alienees from *C*, while the first defendant claimed a fourth share in the estate as the widow of one *K* who was a co-reversioner along with the plaintiffs but had become a *Tambiran* before *C* died in 1902. The defendants other than the first, contended *inter alia* that the suit was barred by limitation and by the rule of *res judicata*: *Held*, (i) that a suit by the reversioners of *A* for recovery of possession of such of *A*'s properties as were in the possession of the heirs of the adopted son had become barred in 1874 under art. 129 of the Limitation Act (IX of 1871) and that a title to such property was acquired by the heirs of the adopted son under s. 29 of the same Act and could not be affected by the pro-

by art. 129 expired, their title as reversioners was barred; (iii) that, consequently, the present suit as against the fourth defendant (the widow of the adopted son) and her alienees was barred by

barred by limitation *Jagadamba Choudhrani* v. *Dakhina Mohun Roy Chaodhri, I. L. R. 13 Calc. 308* and *Mohesh Narain Munshi* v. *Taruck Nath Moitra, I. L. R. 20 Calc. 487*, followed. *Tirubhuvan Bahadur Singh* v. *Rameshar Baksh Singh, I. L. R. 28 All. 727*, explained and applied: *Held*, also, that the present suit was not barred by the rule of *res judicata* by the decision in the previous suit instituted by *M*, against *C*. *Hari Nath Chatterjee* suit instituted by *M*, against *C*. *Hari Nath Chatterjee* v. *Mothur Mohun Goswami, I. L. R. 21 Calc. 8*, distinguished. The texts of Hindu Law as to disinheritance applicable to *Yati* or *Sanyasi* do not apply to Sudra ascetics unless a usage to this effect is established: *Dharmapuram pandara Sannadhi* v. *Vira Pandiyan Pillai, I. L. R. 22 Mad. 302* and *Harish Chandra Roy* v. *Atir Mahmud, I. L. R. 40 Calc. 545*, referred to: *Held* (on the evidence), that no usage was established in this case; consequently that the first defendants' husband was not excluded from inheriting as a co-reversioner with the plaintiffs

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by reason of his having entered the order of *Tambirans* before the succession opened in 1902 and that the first defendant was entitled to recover one-fourth share in the estate in right of her husband: *Held*, further, that where an appeal was preferred by some only of the alienees who were defendants but no appeal was preferred by the other alienees or the alienor who were also defendants, a decree can be passed in the appeal dismissing the suit in favour of the latter defendants also. *Kulaikada Pillai* v. *Viswanatha Pillai, I. L. R. 28 Mad. 229*, and *Subbarayalu Naidu* v. *Pappammal*, Second Appeal No. 557 of 1914, followed. Where some of the appellants who were defendants, died and their legal representatives were not brought on the record in the appeal: *Held*, that it was competent to the Court under O. XLI, r. 4, to set aside the decree as regards the whole of the plaintiff's claim and not merely in respect of the interest of those appellants only whose appeals had not abated. *Chintaman* v. *Gangabai, I. L. R. 27 Bom. 284*, followed. *Dhuttaloor Subbaya* v. *Padigantam Subbayya, I. L. R. 30 Mad. 470*, referred to. SOMASUNDARAM CHETTIAR *v.* VAITHILINGA MUDALIAR (1916) . . . **I. L. R. 40 Mad. 846**

33. ———— **Adopted person having a son in conception**—*Such son passes into the adoptive family.* At the time when a person was adopted he had no son born but had a son who was conceived. A question having arisen whether such a son passed on adoption into the adoptive family. *Held*, that for all purposes of succession and inheritance the legal entity of the after-born son must be taken to date from the date of his birth; and that, therefore, the after-born son passed into the adoptive family. ADVI *bin* FAKIRAPPA *v.* FAKIRAPPA ADIVEPPA (1918) . **I. L. R. 42 Bom. 547**

34. ———— **By widow of son to deceased husband**—*Subsequent suit by her to set aside adoption on ground that she had no authority—Estoppel, dismissal of suit on ground of —Decision by Privy Council that she had authority and that adoption was valid—Decree properly made against widow representing estate, binding effect of on reversioner—Res judicata—Civil Procedure Code (1908), s. 11.* After adopting a son to her deceased husband a Hindu widow in a suit by an alleged reversioner against her to set aside the adoption on the ground that she had no authority from her husband to make the adoption alleged in her written statement and stated in Court, through her pleader that she had authority to make the adoption, and that it was valid. The suit was dismissed because the plaintiff was found not to be a reversioner. The widow then brought a suit against the adopted son to set the adoption aside, pleading that she was not vested with authority from her husband to adopt and denied having made the adoption. The adopted son contested the suit

was valid. In a suit by an alleged reversioner to the estate of her husband against the adopted son for a declaration that the adoption was invalid and for possession of the estate. *Held*, that notwithstanding the personal estoppel which bound

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her, the widow represented the estate on the question of fact as to whether the defendant (respondent) had or had not been validly adopted, and that she represented it within the meaning of the rule laid down in *Katama Natchiar* v. *The Raja of Shivagunga, 9 Moo I. A., 539,* and under the circumstances the decree against her would bind the reversioners. Though the rule of *res judicata* as enacted in s. 11 of the Code of Civil Procedure, 1908, was not strictly applicable, as the appellants (plaintiffs) were not parties to the widow's suit against the adopted son, and did not claim through a party to that suit, yet the principle of *res judicata* had been rightly applied by Courts in India so as to bind reversioners by decisions in litigation fairly and honestly given for or against Hindu females representing estates. In the absence of all authority their Lordships could not decide that a Hindu lady, otherwise qualified to represent an estate in litigation, ceases to be so qualified merely owing to personal disability or disadvantage as a litigant, although the merits of the case were tried, and the trial was fair and honest. RISAL SINGH *v.* BALWANT SING (1918)
I. L. R. 40 All. 593

35. ———— Consent of nearest sapindas not sought—*Consent of remote sapindas whether sufficient—Knowledge that sapinda will refuse, whether a good ground for not asking for his consent.* In the Dravida country an adoption by a Hindu widow having no authority from her deceased husband to adopt, made with the consent of remote sapindas but without asking for the consent of the nearest sapindas is invalid. It is immaterial that the widow knew that the nearest sapindas, if asked for their consent, would have refused, it. *Collector of Madura* v. *Mootoo Ramalinga Sathupathy, 12 Moo. I. A. 397, 400, 440. Venkata Krishna Rao* v. *Venkata Rama Lakshmi, I. L. R. 1 Mad. 174, 190 ; L. R. 4 I. A., 1, 13, 14,* and *Raghunada Deo* v. *Brozo Kishore Patta Deo, I. L. R. 1 Mad. 69 ;* s. c. *L. R. 3 I. A. 154,* discussed and followed. *Quære* : Whether the widow of a co-parcener, who died in or before 1853 could adopt a son in 1896 after the joint family property had vested in the widow of his brother's son ? VEERABASAVARAJU *v.* BALASURYA PRASADA RAO (1918) . . . **I. L. R. 41 Mad. 998**

36. ———— Consent of Sapindas revoked—*Arbitrary revocation, whether competent—Delay in adoption or death of Sapinda, effect of—Divesting of estate.* A Sapinda, who has given his consent to a widow to make an adoption to her husband, cannot *arbitrarily* withdraw his consent before it is acted upon by the widow. The party giving his consent can deliberately revoke it for justifiable reason, but where no reasons are given by him, Courts will not find out a justification for the revocation. Mere lapse of time without more, or the death of the consenting *Sapinda* will not put an end to a consent freely and *bonâ fide* granted. The assent of the Sapinda is presumptive evidence of the goodness of the act of adoption by the widow. Analogy of the rules as to consent of the nearest reversioner to an *alienation* by a widow applied. *Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo Kishore Patta Deo, I. L. R. 1 Mad. 69, Bhimappa* v. *Basawa, I. L. R. 29 Bom. 400; Narasimha* v. *Parthasarathy, I. L. R. 37 Mad. 199,* referred to. *Mami* v. *Subarayar, I. L. R. 36 Mad. 145,* and *Subrahmanyam* v. *Venkamma, I. L. R.*

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26 Mad. 635, explained. Where a widow, having succeeded as heir to her adopted son who died unmarried, adopted, with the consent of the nearest Sapinda, another son to her late husband, the latter would divest the estate vested in the adoptive mother, whether the estate was the ancestral or the self-acquired property of the first adopted son *Vallanki Vendata Krishna Rao* v. *Venkata Rama Lakshmi, I. L. R. 1 Mad. 174,* and *Mussumat Bhoobum Noyee Debia* v. *Ram Kishore Acharj Chowdry, 10 Moo. I. A. 209,* referred to SURYANARAYANA *v.* RAMADOSS (1917)
I. L. R. 41 Mad. 604

37. ———— Dvyamushyayana,—Presumption. Under Hindu law, in the absence of any express agreement to the effect that the adoption was to be in the *Dvyamushyayana* form, it must be presumed to be an ordinary adoption. *Laxmipatirao* v. *Venkatesh, I. L. R. 41 Bom. 315,* followed. HUCHRAO TIMMAJI *v.* BHIMARAO GURURAO (1917) . **I. L. R. 42 Bom. 277**

38. ———— Successive adoptions—*Limit for exercise of power to adopt—Death of first adopted son leaving widow but no son—Second adoption by widow of previous owner of impartible zemindari—Family governed by Mitakshara Law—Divesting of property by adoption—Rule that adoption must be made to last male owner.* *A*, the holder of an impartible zemindari and a member of a joint family governed by Mitakshara Law, gave authority to his wife to adopt a son to him. On *A*'s death his brother *R* took possession of the property. The widow subsequently adopted a son *B* who recovered the estate of *R* and held it until 1906, when he died leaving a widow but no son. A descendant of *R* then took possession of the property but died in the same year, and was succeeded by his son the respondent. In 1907 *A*'s widow purported to make a second adoption to *A* under the authority from him by taking in adoption the appellant. In a suit brought by him to recover the zemindari : *Held,* that the law imposed a limit within which a widow can exercise a power of adoption conferred on her, and the limit to her power was reached when *B* died after attaining full legal capacity to continue the line of descent either by a natural born son, or by the adoption to him of a son by his own widow against whom it had not been established (she not being a party to the suit) that she had no power to adopt. This conclusion was in no way in conflict with the previous decision of the Board in *Raghunada Deo* v. *Broza Kishore Patta Deo, I. L. R. 1 Mad. 69 ; L. R. 3 I. A. 154.* It was therefore not necessary to decide whether the authority to adopt empowered *A*'s widow to take a second adoption. MADANA MOHANA DEO *v* PURUSHOTTHAMA DEO (1918) . . . . **I. L. R. 41 Mad. 855**

39. ———— Power to widow to adopt either in life-time of son or after his death—*validity of—Authority to adopt, how long can be exercised—Adoption, object of.* *R*, a Hindu, died leaving his only son *K*, and a widow *M*. By a will, *R* dedicated his 4 annas share in a certain property to the service of certain duties, and directed that the widow *M* should be *shebait,* and the son *K* should succeed her in that office. His other immoveable properties he divided between *K* and *M*, bequeathing 12 annas to *K* and 4 annas

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to *M* for her life. He next authorized *M* to adopt three sons in succession, whether in the life-time of *K* or after his death, and provided that on *M's* death, the adopted son, if any, and failing any adopted son, *K* should succeed to her 4 annas share. *K* died at the age of about 50, leaving no son, but his widow as heir. After *K's* death, *M* adopted the plaintiff. Later on, *K's* widow adopted defendant No. 1, which was not found to be a valid adoption. In a suit for declaring the plaintiff's right to the 12 annas of *R's* property bequeathed to *K* and for setting aside the adoption of defendant No. 1 and for other reliefs :—*Held*, that the authority to *M* to adopt was not vitiated as a whole because she was given power to adopt even in the life-time of her son. *Held, further, that the adoption by M* was valid, as it would confer spiritual benefit on the adoptive father *R* and as it did not involve a divesting of *K's* estate, and that *M's* power to adopt could be *exercised so long as the adoption did not involve* divesting of the heir's estate. *Bhoobun Moyee Debia* v. *Ram Kishore Acharj Choudhry, 10 Moo. I. A. 279; 3 W. R. P. C. 15, Puddo Kumaree Debee* v. *Juggut Kishore Acharjee, I. L. R. 5 Calc. 615, Padmakumari Debi Choudhrani* v. *Court of Wards, I. L. R. 8 Calc. 302; L. R. 8 I. A. 229, Thayammal* v *Venkatarama, I. L, R. 1. Mad. 205; L. R. 14 I. A. 67, Tarachurn Chatterji* v *Sureschunder Mukerji, I. L. R. 17 Calc. 122; L. R. 16 I. A. 166, Ramkrishna Ramchandra* v. *Shamrao Yeshuant, I. L. R. 26 Bom. 526, Amulya Charan Seal* v. *Kali Das Sen, I. L. R. 32 Calc. 861, Manikyamala Bose* v. *Nanda Kumar Bose, I. L. R. 33 Calc. 1306,* and *Madana Mohana Ranga Bheema Deo* v. *Purushottama Ranga Bheema Deo, I. L. R. 41 Mad. 855,* distinguished. The object of adoption among Hindus is not merely the due perpetuation of lineage, but is also to secure for the adoptive father and his ancestors the spiritual blessings which only an heir male can confer. KUMUD BANDHU SAHA *v.* RAMESH CHANDRA SAHA (1919) . . **I. L. R. 46 Calc. 749**

40. ———— Custom of illatom—*Adoption of son-in-law—Adoption by person who had a natural son living at the time and was a member of a joint family—Parties to suit, Sudras and members of the Kamma caste.* In this case in which the parties were Sudras of the Kamma caste and governed by the law of the Mitakshara, except where that law had been altered by custom, a custom was alleged by which an adoption made by a member of the caste of an *illatom* son-in-law was valid, though the adoptive father had a natural son living at the time, and was a member of a joint family with his brothers. The appellant contended that no such custom had been proved, and that such a custom, even if proved, would be invalid. The Courts below found that the custom had been judicially recognized by the High Court in an unreported case, *Hammayya* v. *Yellamanda, S. A. No. 45 of 1905,* in which many instances of *illatom* adoption by persons who had sons living were proved, and upheld it on that ground together with the evidence in the case. *Held,* that having regard to the decision in *Hymmayya* v. *Yellamanda, S. A. No. 45 of 1905,* and to the fact that the Courts below agreed that the adoption was valid in law, and had been so treated by the family for many years, their decisions should be affirmed and the appeal dismissed. KRISTNAMMA *v.* VENKATASUBBAYYA (1919)

I. L. R. 42 Mad. 805

41. ———— By two widows—*Special authority—Widow married first has a preferential right to adopt—Competency of minor to adopt—Age of discretion.* According to the recognised law in the Bombay Presidency *the senior widow, that is* the widow married first, has a preferential right to adopt. *She does not require any special authority* from her husband or from her husband's *Sapindas, but the junior widow unless the adoption* by her is consented to by the elder widow does require a special authority from her husband. A Hindu

married [illegible]

husband,

age of discretion and competent to adopt a son. BASAPPA *v.* SIDRAMAPPA (1918)

I. L. R. 43 Bom. 481

42. ———— Adopted son treated as having been from his birth in adoptive father's family —*Adopted son cannot acquire a vested interest in the property of his natural father.* Under Hindu law, an adopted son is treated as having been from his birth in the family of his adoptive father and therefore he cannot for any purpose be regarded as having existed so as to acquire a vested interest in the property of his natural father. The applicant having applied after the date of his adoption to execute a decree which was obtained by his natural father when the applicant was a member of the natural family. *Held,* that he could not execute the decree as by reason of his adoption he must be treated as non-existent for the purpose of the execution of the decree. RAMCHANDRA *v.* MANUBAI (1919).

I. L. R. 43 Bom. 774

43. ———— Of father's first cousin.—The adoption of father's first cousin is not invalid under Hindu law. MALLAPPA PARAPPA *v.* GANGAVA (1918) . . . **I. L. R. 43 Bom. 209**

44. [illegible]

under [illegible]

of the [illegible]

capacit [illegible]

conferr [illegible]

no question of divesting arose. The Hindu law no doubt recognises the validity of an authority given to a Hindu widow by her deceased husband to make a second, or even a third or fourth, adoption on failure of the previous adoption to attain the object for which the power is given, *viz.*, the perpetuation of the deceased's line to discharge the obligations that rest on a pious Hindu. But there is a limit imposed by law to the period within which a widow can exercise a power of adoption conferred on her, and when that limit is reached the power is at an end. Where the son first adopted under a written authority left to a Hindu

to him of a son by his own widow. *Held,* that apart from the question whether on a construction of the authority the widow had power to make a second adoption or not, in the circumstances of the case,

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the power, if any, had come to an end, specially when it was not established in the presence of the widow of the first adopted son that she had no power to make a valid adoption to him. MADANA MOHANA ANANGA BHEEMA DEO *v.* PURUSHOTHAMA ANANGA BHEEMA DEO (1918) **23 C. W. N. 177**

45. ———— **Time within which widow may adopt**—*Custom excluding widow from inheriting—Adopted son has all the rights of a natural-born son—Retrospective effect of adoption—Grant of part of estate for jivai or maintenance of junior member of family reverting to grantor on failure of grantee's male heirs—Words in deed conveying an absolute estate.* Unless there is a time limit imposed in the authority which empowers a Hindu widow to adopt or she is directed to adopt promptly, she may make the adoption so long as the power is not extinguished or exhausted. Her right to make an adoption is not dependent on her inheriting, as a Hindu female owner, her husband's estate; she can exercise the power even though the property is not vested on her. *Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo Kishoro, Patta Deo, I. L. R. 1 Mad. 69 : L. R. 3 I. A. 154*, and *Bachoo* v. *Mankorebai, I. L. R. 31 Bom. 373*, referred to. The rights of an adopted son, unless curtailed by express texts are in every respect the same as those of a natural-born son; and an adoption, so far as the continuity of the line of inheritance is concerned, has a retrospective effect. The respondent, the Thakor of Gamph, brought the present suit for possession of a village, which, in accordance with a family custom (the parties were Chudasama Girasias, a caste of Hindu Rajputs) had been granted for *jivai*, or maintenance, by one of his ancestors to a junior member of the family, to be held and enjoyed so long as the grantee's male line lasted, and then reverted to the Thakor. The last owner died without male issue in 1903; but he left a widow, who, though by custom not permitted to inherit her husbands estate, continued in possession of it, and on 12th March 1904 adopted the first appellant as a son to her husband: *Held* (reversing the decision of the High Court) that the *jivai* grant did not revert to the Thakor, but was inherited by the adopted son. Words in a deed executed in 1871 by the reigning Thakor in favour of a relative that " you and your vausa varas are maliks, mukhtiyars, dhanis " of a certain village confer an absolute estate on the donee. *Per curiam.* It is an explicit principle of the Hindu Law, that an adopted son becomes for all purposes, the son of his father, and that his rights unless curtailed by express texts are in every respect the same as those of a natural born son, and a learned authority on Hindu law has explained that the only express text by which the heritable right of an adopted son are "contracted" refers to the case of his sharing the heritage with an after-born natural (aurasa) son. In every other instance the adopted son and the son of the body stand exactly in same position. Again it is to be remembered that the adopted son is the continuator of his adoptive father's line exactly as an aurasa son, and that an adoption, so far as the continuity of the line is concerned, has a retrospective effect. In fact as Messrs. West and Buhler point out in their learned treatise on Hindu law, the Hindu lawyers do not regard the male line to be extinct or a Hindu to have died without a male issue until the death of the widow renders the continuation of the line by adoption impossible. PRATAPSINGH SHIVASINGH *v.* AGARSINGJI RAJASANGJI (1918)

I. L. R. 43 Bom. 778

46. ———— **Conditional adoption**—*Adoptive father directing payment of an annual sum in charity out of his property at the time of making the adoption—Consent of the natural father of the adopted boy—Grant of annuity not valid.* A Hindu, who was in possession of ancestral property, executed, when he took the defendant in adoption, a *vyavasthapatra*, with the consent of the natural father of the defendant, whereby he directed payment of an annual sum for the purpose of lighting lamps in a specified temple. A dispute having arisen as to the validity of the grant. *Held*, that the grant in favour of the temple was invalid as not having been recognized by custom to be appropriate at the time of adoption or binding upon the adopted son in modification of the strict rules of Hindu law. BALKRISHNA MOTIRAM *v.* SHRI UTTAR NARAYAN DEV (1918)

I. L. R. 43 Bom. 542

47. ———— **Madras school**—*Adoption by widow—Assent of what sapindas necessary when husband of widow had separated—Adoption without reference to nearest sapinda with assent of remoter sapindas, if valid.* An adoption is more a temporal than a spiritual institution and though there are expressions in the judgment of the Judicial Committee in the *Ramnad Case, 12 Moo. I. A. 397*, which might imply that the question of reversionary interest forms only a secondary consideration in determining what *sapinda's* assent is primarily requisite for the validity of an adoption by the widow of a Hindu governed by the Dravadian branch of the Mitakshara law, there are other passages in that and the subsequent judgment in *Raja Vallanki* v. *Venkatarama, L. R. 4 I. A. 1, 14 : s. c. I. L. R. 1 Mad. 174*, which clearly show that rights to property cannot be left out of consideration in the determination of the question. The fact that a Hindu had separated from the joint family does not affect the personal dependence of his widow or give her an independent status to alter by her own authority the succession to the estate which she takes as the widow of her husband. She is still dependent for counsel and protection upon the nearest *sapindas* of her husband who are the most closely united to him by ties of blood. The authorisation of the father of the deceased (who, if still alive, continues to be her natural guardian and protector and who has further a direct interest in the protection of the estate) is therefore essentially requisite to the validity of an adoption by her to her husband. In the absence of the father the assent of the divided brothers is equally requisite for the validity of the widow's adoption. If a majority assent and one refuses, his objection may be discounted. But the absence of their consent or in case there is only one, of his consent cannot be made good by the authorisation of distant relatives remotely connected whose interest in the well-being of the widow or the spiritual welfare of the deceased, or in the protection of the estate, is of minute character and whose assent is more likely to be influenced by improper motives.

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of divided ... *mutatis mut-* ... other than brothers, and when there is only one such *sapinda* to that of such a one. Where the assent of the nearest *sapinda* was not obtained: *Held*, that the adoption with the assent of some remoter *sapindas* was invalid, and the knowledge that the nearest *sapinda*, if applied to, would have refused his assent was no reason for not applying for it. KANDUKURI VEERA *v.* KANDUKURI BALASURYA PRASADA RAO PANTULU (1918) **23 C. W. N. 251**

47(a)———— Power of adoption contingent on testator not having issue—*Presumption—Hindu widow, surrender by, of whole estate, if to be made in any form—Admission for a consideration in favour of reversioner that she had no right, if surrendered.* Where a Hindu by his Will gave his widows power to adopt "if no male or female child was born to him," and a posthumous female child was born after his death: *Held*. That an adoption made after the death of the child was invalid as not being authorised by the Will. *Held*, on a true construction of the Will that the estate was given to the testator's widows successively for life and after the death of the survivor to the daughter so that the daughter became entitled at birth to a reversionary estate under s. 106 of the Indian Succession Act. On the death in 1872 of one of two Mitakshara brothers leaving a widow, ... a certificate to ... and was opposed ... n. The Judge found that the brothers were joint and granted the certificate. The widow instead of contesting the question of title in a civil suit, through her brother and attorney accepted the decision and executed an agreement on 17th May 1874 stipulating in consideration of certain property being allotted to her for maintenance during her life not further to contest the matter and thereupon the brother took possession of the estate, and the widow during a period of thirty years thereafter went on receiving the stipulated maintenance: *Held*, that the agreement having been accepted and acted upon for this length of time, was not open to attack on the allegation that it had been executed by the widow's attorney in consideration of a bribe paid to him. That though there was no formal surrender by the widow of her estate, and the document as drawn up on its footing was expressed as an admission that the right did not exist, in substance there was a complete self-effacement by the widow which precluded her from asserting any further claim to the estate. It is settled by long practice and confirmed by a series of decisions that a Hindu widow can renounce the estate in favour of the nearest reversioner, and by a voluntary act efface herself from the succession as effectively as if she had then died. This voluntary self-effacement is sometimes referred to as a surrender, sometimes as a relinquishment or abandonment of her rights; and it may be effected by any process having that effect, provided that there is a *bond fide* and total renunciation of the widow's right to hold the property. MUSAMMAT BHAGWAT KOER *v.* DHANUKDHARI PRASHAD SINGH . . . **24 C. W. N. 274**

48.———— Construction of will—*Position of Widow under Bombay School of Hindu Law as to adoption—Widows power to adopt—Will naming boy on bad terms with widow.* According to the Bombay School of Hindu Law, the duty of a Hindu widow to obey her husband's command compels her to act upon any mandatory direction that he may give by will as to the way in which her power of adoption should be exercised. The will of a Mahratta Brahmin governed by the Bombay School of Hindu Law directed that "my wife should as far as possible adopt Shankar, the second son of my elder brother. If he (the boy) cannot be obtained, any other boy should be adopted with the advice of the trustees. The will provided that the son adopted should keep the widow, treat her with affection and give her maintenance. Shankar and the family of which he was a member were on bad ... e advice ... time of ... obtained for adoption: *Held*, that the terms of the will left no discretion to the widow but imposed upon her a mandate which she was bound to obey and that the adoption she made was invalid SITABAI *v.* BAPU ANNA PATIL (1920) **I. L. R. 47 Calc. 1012**

49 ———— Brother's daughter's son—*adoption of, whether valid—Custom—South Kanara—Kshatriyas—Custom whether established.* Adoption of a brother's daughter's son is allowed by custom which has been proved to exist among a community of Rajputs of the Kshatriya caste settled in South Kanara. SEORATHA SINGA *v.* KANAKA SINGA (1920). . **I. L. R. 43 Mad. 867**

50. ———— By widow during life-time of a son adopted by her husband.—Under Hindu law, a widow cannot adopt to her husband when there is in existence a son adopted by her husband. Her right to adopt remains suspended so long as the adoption made by her husband is not set aside. BHUJANGOUDA ADGONDA *v.* BABU BALA BOKARE (1919) . . **I. L. R. 44 Bom. 627**

51. ———— By widow of twelve years of age—*Adoption invalid—Age of discretion.* A Hindu widow of twelve years of age, who has not reached puberty, cannot make a valid adoption. MURGEPPA *v.* KALAWA (1919)

I. L. R. 44 Bom. 327

52 ———— By widow after husband dying in union with co-parceners—*Widow succeeding as heir to her unmarried son after partition—Power of the widow to adopt—Validity of adoption.* One *B* died in union with his brothers leaving a minor son *M*. Thereafter, there was a partition between *M* and his uncles. *M* died unmarried leaving his mother *S* as his heir. Subsequently *S* adopted the plaintiff who sued to recover possession of *M*'s share in the hands of the latter's uncles, the defendants. The defendants contended that the adoption of the plaintiff was invalid because *B* died in union and thereafter his widow could not adopt without the consent of his co-parceners and that her right to adopt came to an end at the separation and could not be revived. *Held*, that the adoption of the plaintiff was valid as the widow's power to adopt remained suspended even after separation and could be exercised as there were no longer any co-parceners whose consent was necessary. MALLAPPA *v.* HANMAPPA (1919) . . . . **I. L. R. 44 Bom. 297**

53. ———— By widow of a co-parcener after death of surviving co- ... —*Absence of consent—Authority of* ...

HINDU LAW—ADOPTION—*contd.*

R, owning a *jivai* estate, died leaving a widow *S* and his brother's son *M*. *S* and *M* jointly mortgaged a part of the *jivai* estate. *M* died in 1882 leaving two widows, and in 1884 *S* adopted plaintiff's father. The plaintiff having sued to redeem the mortgage made by *S* and *M*: *Held*, that the plaintiff could not succeed as his father was not validly adopted by *S*, who as the widow of a deceased co-parcener of a joint Hindu family could not in the absence of any specific authority make an adoption subsequent to the death of a coparcener who survived her husband although the property was impartible. TEJRANI *v.* SARUPCHAND CHHAGANBHAI (1919)]

I. L. R. 44 Bom. 483

54. ———— By widow—authority of, to adopt—*Adoption called in question after the lapse of many years—Presumption as to widow's authority.* The question being whether *B* had been validly adopted as the son of *R* by *R*'s widow after his death, it was found that for a large number of years *B* had, as a matter of fact, been treated, and had behaved himself, as the adopted son of *R* and that the adoption had been recognized by persons who would have been interested in denying it. On the other hand, as the adoption must have taken place at some date between the years 1822 and 1847 there was no direct evidence as to the circumstances under which it took place or as to the authority of the widow to adopt. *Held*, that in the above circumstances it might be presumed that the widow was properly authorized to adopt. PREM DEVI *v.* SHAMBHU NATH

I. L. R. 42 All. 382

55. ———— By widow of last male holder —*Adopted son if has title—Custom alleged of exclusion of adopted son—Onus of proof—Power of widow to adopt, if subject to any timelimit not imposed by the authority to adopt—Power, if dependent on widow succeeding as heiress—Divesting of estate, resulting from adoption—Rights of alienee before adoption—*Jivai *grant defeasible on extinction of male line.* When a hereditary grant is made by a Hindu, subject to the limitation that it shall enure so long as the grantee's male line lasts, the existence of the line must be determined by the rules and provisions of the Hindu law, unless there be any custom varying those rules. Where a custom is alleged confining the line to the natural-born issue alone, it must be proved affirmatively and conclusively and not derived from implications: *Held*. Without deciding whether such a custom, even if proved to exist in certain localities, would be recognised in the British Indian Courts, that the Plaintiff had failed to establish the custom alleged by him. *Verabha Ajubhai* v *Bai Hiraba, L R 30 I. A. 234 :* s. c. *I.L. R. 27 Bom. 492 : 7 C. W.N. 716 (1903)*, referred to. It is an explicit principle of the Hindu law that an adopted son becomes, for all purposes, the son of his father, and that his rights unless curtailed by express texts are in every respect the same as those of a natural-born son. An adopted son is the continuator of his adoptive father's line exactly as an aurasa son, and an adoption, so far as the continuity of the line is concerned, has a retrospective effect. The right of the widow to make an adoption is not dependent on her inheriting as a Hindu female owner her husband's estate, and the rule applies to the case of a *jivai* (manintenance) grant as to any other kind of property. *Bamundoss Mookerjea* v. *Mussumat Tariti, 7 M. I. A. 169 (1858), Wise* v. *Bhoobun Moyee, 10 M. I. A. 165 (1865), Madana Mohana Deo* v *Purushothama Deo, L. R. 46 I. A. 156 :* s. c. *23 C. W. N. 177 (1918), Raghunadha* v. *Brojo Kishor, L. R. 3 I. A. 154 :* s. c. *I. L. R. 1 Mad. 69 (1876)*, and *Bachoo Harkisondas* v. *Mankorebai, L. R. 34 I. A. 107 :* s. c. *I. L. R. 31 Bom. 373 ; 11 C. W. N. 769 (1907)*, referred to. PRATAPSING SHIVSING *v.* THAKOR SHRI AGARSINGHJI RAISINGHJI . . . . **24 C. W. N. 57**

56. ———— By widow who has no authority from her husband—*Mitakshara law as administered in the Dravada district of the Madras Presidency—Consent of sapindas.* Under the law of adoption as administered in the Dravada district a Hindu widow, in the absence of any authority from her husband to adopt a son to him, may make such an adoption with the consent of his sapindas. *The Collector of Madura* v. *Mootoo Ramalinga Sathupathy (1868) 12 M. I. A., 397.* There should be such proof of assent on the part of the sapindas as should be sufficient to support the inference that the adoption was made by the widow not from capricious or corrupt motives in order to defeat the interest of this or that sapinda, but on a fair consideration by what may be called a family council of the expediency of substituting an heir by adoption to the deceased husband ; *Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi (1876) I. L. R. 1 Mad. 174 ; L. R. 4 I. A. 1.* The absence of consent on the part of the nearest sapindas cannot be made good by the authorization of distant relations whose assent is likely to be influenced by improper motives. *Veera Basavaraju* v. *Balasurya Prasada Rao (1918) I. L. R. 41 Mad. 998 (P. C.) ; L. R. 45 I. A. 265.* The consent required is that of a substantial majority of those agnates nearest in relationship who are capable of forming an intelligent and honest judgment on the matter. But save in what are obviously exceptional cases the nearest sapindas must be asked, and if not asked it is no excuse to say they would certainly have refused. *Venkamma* v. *Subrahamanyam (1907) I. L. R. 30 Mad. 50, 53 ; L. R. 34 I. A. 22, 26.* It is the duty of the Court to keep the power strictly within the limits which the law has assigned to it ; *Sri Virada Pratapa Raghunatha Deo* v. *Sri Brozo Kishono Patta Deo (1876) I. L. R. 1 Mad. 69 (P. C.).* In this case, on a consideration of the evidence, the widow was proved to have applied for the consent of the third plaintiff, but not of the other four plaintiffs, and that none of these five nearest sapindas is proved to have withheld his consent for any malicious or corrupt reason. The necessary consent of sapindas was not obtained, and the adoption was invalid. KRISTNAYYA *v.* LAKSHMIPATHI (1920) . . **I. L. R. 43 Mad. 650**

57. ———— Of daughter's son or sister's son—*Validity of—Custom among Brahmans of Andhra or Telugu portion of Madras Presidency—Adoption by widow—Consent of sapindas—Gnatis—Bhinnagotra sapindas—Consent of daughter's son whether necessary—Invalid adoption—Upanayanam in adopted family after an invalid adoption subsequent adoption, whether barred—Subsequent upanayanam, whether competent.* Adoption of a daughter's son is valid by custom among

HINDU LAW—ADOPTION—*contd.*

the Brahmans of the Andhra or Telugu portion of the Madras Presidency as it is in the southern districts. Consent of the sapindors to an adoption by the widow is material as guaranteeing the propriety of the widow's action in making the adoption. Where such consent has not been shown to have been obtained by fraud, coercion or corruption, it is sufficient authority for the adoption, and the Court's right to scrutinize the sapindas' reasons extends only to cases in which consent is refused, and not to cases where it is ...ot entitled to be ... by a widow who ... nearest sapindas, as he is not a *gnati*, and Bhinnagotra sapindas are not included under the term sapindas in the texts which require their consent to an adoption. An upanayanam is not valid unless performed by the father or, in his absence, by another kinsman in the family to which the boy concerned actually belongs. The performance of the upanayanam in a family, into which the boy is wrongly believed to have entered by an invalid adoption, is nullity and is no bar to his subsequent adoption. VISWASUNDARA RAO *v.* SOMASUNDARA RAO (1920)

I. L. R. 43 Mad. 876

58. ———— By junior daughter-in-law of a son with the consent of her father-in-law—*Validity of the adoption.* *P*, a Hindu, had a son living in union with him. The son died during *P*'s life-time leaving him surviving two widows. *Of the two widows, the junior had a son, who also* died a minor without attaining ceremonial competence. *P* adopted the plaintiff as his son. Later, the junior widow adopted defendant No. 11 with the consent of *P*. The plaintiff sued contending that the adoption of defendant No. 11 was invalid: *Held*, that the adoption of defendant No. 11 was valid under Hindu law. The preferential right of the senior widow to make an adoption exists when the widows inherit the property of their husband, that is, when the husband is a separated member of the family. ... dies in union with his father, and where the widow can adopt if at all with the consent of her father-in-law. *Vithoba* v. *Bapu (1890) 15 Bom. 110*, referred to. DNANU *v.* TANU (1919)

I. L. R. 44 Bom. 508

59. ———— Putrishta Jag—*Whether essential among twice born castes—Suit for declaration of fact of adoption, whether prayer for consequential relief is necessary.* The performance of the *putrishta jag* ceremony is not essential in an adoption among the twice-born castes where the adoptor and the adoptee belong to the same *gotra*. A suit by an adopted son against his adoptive father and the latter's natural sons for a declaration of the fact of plaintiff's adoption is not maintainable under s. 42, of the Specific Relief Act, in the absence of a prayer for recovery of joint possession or for confirmation of possession jointly with the defendants. The plaintiff cannot, however, be compelled to ask for partition. SHEOLOTAN RAY *v.* BHIGUN RAY . . . 2 Pat. L. J. 481

HINDU LAW—ADOPTION—*contd.*

60. ———— Kshatriyas—brother's son—*Adoption of —Doctrine of pollution whether applicable to adoption among twice-born castes.* There is no prohibition among *Kshatriyas* against the adoption of a brother's child before the eleventh day after birth by reason of the doctrine of pollution, or before the twenty-first day by reason of the impurity of the body of the child. Where religious rites are not a necessary requisite as, for instance, where a Hindu of one of the twice-born castes adopts a boy of the same *gotra* as himself, the omission of such rites cannot affect the validity of the adoption and, therefore, the fact of pollution, which only affects the degree of merit attached to the religious rights, is also immaterial to the validity of the adoption. SREEMATY LAKSHMIMALI JEMAMANI BAHURIA *v.* UDIT PRATAP SINGH

3 Pat. L. J. 499

61. ———— customs—*Proof of special —adoption*—Baisi Chowrasi gaddidars, *origin of, and inheritence among—marriage within* gotra, *applicability of rule—plaint, amendment of, at what state not permissible*—Res judicata—*Code of Civil* ... it is of more importance to have regard to the history of the main body then to the history of less important branches. The *Baisi-Chowrasi Gaddidars* are a recognised community. Probably the community was non-Hindu in origin but the members have all now accepted Hinduism *to such a degree as to raise a presumption that the* whole community has assimilated the law of adoption. SHAHDEO NARAIN DEO *v.* KUSUM KUMARI . . 5 Pat. L. J. 161

61(a). ———— By widow—*under authority in Will—Bombay School—Terms whether mandatory* ... wife should, as far as possible, adopt S, the second son of my elder brother T. If the boy cannot be obtained any other boy should be adopted, etc.:" *Held*—That this means that unless there were conditions outside the Will, preventing the possibility of the adoption, the widow, when she does adopt, is to exercise her power in favour. S. SITABAI *v.* BAPU ANNA PALIL. (P. C.)

25 C. W. N. 97

62. ———— Amongst Sitambari sect of Jains—*Sitambari sect—Adoption—Application of Hindu Law—Giving and taking only necessary—The person adopted may be of age and married*— ... to them in the absence of some contrary usage. It was common ground in this case that in the Sitambari sect of Jains, to which the parties belonged, the only ceremony necessary to the validity of an adoption was the giving and taking

HINDU LAW—ADOPTION—*contd.*

R, owning a *jivai* estate, died leaving a widow *S* and his brother's son *M*. *S* and *M* jointly mortgaged a part of the *jivai* estate. *M* died in 1882 leaving two widows, and in 1881 *S* adopted plaintiff's father. The plaintiff having sued to redeem the mortgage made by *S* and *M*: *Held*, that the plaintiff could not succeed as his father was not validly adopted by *S*, who as the widow of a deceased co-parcener of a joint Hindu family could not in the absence of any specific authority make an adoption subsequent to the death of a co-parcener who survived her husband although the property was impartible. TEJBANI *v.* SARUPCHAND CHHAGANBHAI (1919)

I. L. R. 44 Bom. 483

54. ———— By widow—authority of, to adopt—*Adoption called in question after the lapse of many years—Presumption as to widow's authority.* The question being whether *B* had been validly adopted as the son of *R* by *R*'s widow after his death, it was found that for a large number of years *B* had, as a matter of fact, been treated, and had behaved himself, as the adopted son of *R* and that the adoption had been recognized by persons who would have been interested in denying it. On the other hand, as the adoption must have taken place at some date between the years 1822 and 1847 there was no direct evidence as to the circumstances under which it took place or as to the authority of the widow to adopt. *Held*, that in the above circumstances it might be presumed that the widow was properly authorized to adopt. PREM DEVI *v.* SHAMBHU NATH

I. L. R. 42 All. 382

55. ———— By widow of last male holder—*Adopted son if has title—Custom alleged of exclusion of adopted son—Onus of proof—Power of widow to adopt, if subject to any timelimit not imposed by the authority to adopt—Power, if dependent on widow succeeding as heiress—Divesting of estate, resulting from adoption—Rights of alienee before adoption*—Jivai *grant defeasible on extinction of male line.* When a hereditary grant is made by a Hindu, subject to the limitation that it shall enure so long as the grantee's male line lasts, the existence of the line must be determined by the rules and provisions of the Hindu law, unless there be any custom varying those rules. Where a custom is alleged confining the line to the natural-born issue alone, it must be proved affirmatively and conclusively and not derived from implications: *Held*. Without deciding whether such a custom, even if proved to exist in certain localities, would be recognised in the British Indian Courts, that the Plaintiff had failed to establish the custom alleged by him. *Verabha Ajubhai* v *Bai Hiraba, L R 30 I. A. 234 :* s. c. *I.L. R. 27 Bom. 492 : 7 C. W.N. 716 (1903)*, referred to. It is an explicit principle of the Hindu law that an adopted son becomes, for all purposes, the son of his father, and that his rights unless curtailed by express texts are in every respect the same as those of a natural-born son. An adopted son is the continuator of his adoptive father's line exactly as an aurasa son, and an adoption, so far as the continuity of the line is concerned, has a retrospective effect. The right of the widow to make an adoption is not dependent on her inheriting as a Hindu female owner her husband's estate, and the rule applies to the case of a *jivai* (maintenance) grant as to any other kind of property. *Bamundoss Mookerjea* v. *Mussumat Tariti, 7 M. I. A. 169 (1858), Wise* v. *Bhoobun Moyee, 10 M. I. A. 165 (1865), Madana Mohana Deo* v *Purushothama Deo, L. R. 46 I. A. 156 :* s. c. *23 C. W. N. 177 (1918), Raghunadha* v. *Brojo Kishor, L. R. 3 I. A. 154 :* s. c. *I. L. R. 1 Mad. 69 (1876)*, and *Bachoo Harkisondas* v. *Mankorebai, L. R. 34 I. A. 107 :* s. c. *I. L. R. 31 Bom. 373 ; 11 C. W. N. 769 (1907)*, referred to. PRATAPSING SHIVSING *v.* THAKOR SHRI AGARSINGHJI RAISINGHJI . . . . 24 C. W. N. 57

56. ———— By widow who has no authority from her husband—*Mitakshara law as administered in the Dravada district of the Madras Presidency—Consent of sapindas.* Under the law of adoption as administered in the Dravada district a Hindu widow, in the absence of any authority from her husband to adopt a son to him, may make such an adoption with the consent of his sapindas. *The Collector of Madura* v. *Mootoo Ramalinga Sathupathy (1868) 12 M. I. A., 397.* There should be such proof of assent on the part of the sapindas as should be sufficient to support the inference that the adoption was made by the widow not from capricious or corrupt motives in order to defeat the interest of this or that sapinda, but on a fair consideration by what may be called a family council of the expediency of substituting an heir by adoption to the deceased husband; *Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi (1876) I. L. R. 1 Mad. 174 ; L. R. 4 I. A. 1.* The absence of consent on the part of the nearest sapindas cannot be made good by the authorization of distant relations whose assent is likely to be influenced by improper motives. *Veera Basavaraju* v. *Balasurya Prasada Rao (1918) I. L. R. 41 Mad. 998 (P. C.) ; L. R. 45 I. A. 265.* The consent required is that of a substantial majority of those agnates nearest in relationship who are capable of forming an intelligent and honest judgment on the matter. But save in what are obviously exceptional cases the nearest sapindas must be asked, and if not asked it is no excuse to say they would certainly have refused. *Venkamma* v. *Subrahamanyam (1907) I. L. R. 30 Mad. 50, 53 ; L. R. 34 I. A. 22, 26.* It is the duty of the Court to keep the power strictly within the limits which the law has assigned to it; *Sri Virada Pratapa Raghunatha Deo* v. *Sri Brozo Kishono Patta Deo (1876) I. L. R. 1 Mad. 69 (P. C.).* In this case, on a consideration of the evidence, the widow was proved to have applied for the consent of the third plaintiff, but not of the other four plaintiffs, and that none of these five nearest sapindas is proved to have withheld his consent for any malicious or corrupt reason. The necessary consent of sapindas was not obtained, and the adoption was invalid. KRISTNAYYA *v.* LAKSHMIPATHI (1920) . . I. L. R. 43 Mad. 650

57. ———— Of daughter's son or sister's son—*Validity of—Custom among Brahmans of Andhra or Telugu portion of Madras Presidency—Adoption by widow—Consent of sapindas—Gnatis—Bhinnagotra sapindas—Consent of daughter's son whether necessary—Invalid adoption—Upanayanam in adopted family after an invalid adoption subsequent adoption, whether barred—Subsequent upanayanam, whether competent.* Adoption of a daughter's son is valid by custom among

HINDU LAW—ADOPTION—*contd.*

the Brahmans of the Madras districts. Cons...

have been obtained by fraud, coercion or corruption, it is sufficient authority for the adoption, and the Court's right to scrutinize the sapindas' reasons extends only to cases in which consent is refused, and not to cases where it is granted. A daughter's son is not entitled to be consulted regarding an adoption by a widow who has obtained the consent of the nearest sapindas, as he is not a *gnati*, and Bhinnagotra sapindas *are not included under the term sapindas* in the texts which require their consent to an adoption. An upanayanam is not valid unless performed by the father or, in his absence, by another kinsman in the family to which the boy concerned actually belongs. The performance of the upanayanam in a family, into which the boy is wrongly believed to have entered by an invalid adoption, is nullity and is no bar to his subsequent adoption. VISWASUNDARA RAO *v.* SOMASUNDARA RAO (1920)

I. L. R. 43 Mad. 876

58. ———— **By junior daughter-in-law of a son with the consent of her father-in-law**—*Validity of the adoption.* *P*, a Hindu, had a son living in union with him. The son died during *P*'s life-time leaving him surviving two widows. Of the two widows, the junior had a son, who also ... om- ... on. ... 11 with the consent of *P*. The plaintiff sued contending that the adoption of defendant No. 11 was invalid: *Held*, that the adoption of defendant No. 11 was valid under Hindu law. The *preferential right of the senior widow to make an* adoption exists when the widows inherit the property of their husband, that is, when the husband is a separated member of the family. Even then it is subject to any authority given by the husband to the junior widow to adopt or any express or implied prohibition by the husband against the senior widow. The doctrine of the preferential right of the senior widow to adopt is not extended to a case where the husband dies in union with his father, and where the widow can adopt if at all with the consent of her father-in-law. *Vithoba* v. *Bapu (1890) 15 Bom. 110, referred to.* DNANU *v.* TANU (1919)

I. L. R. 44 Bom. 508

59. ———— **Putrishta Jag**—*Whether essential among twice born castes—Suit for declaration of* ...

the twice-born castes where the adoptor and the adoptee belong *to the same gotra.* A suit by an adopted son against his adoptive father and the latter's natural sons for a declaration of the fact of plaintiff's adoption is not maintainable under s. 42, of the Specific Relief Act, in the absence of a prayer for recovery of joint possession or for confirmation of possession jointly with the defendants. The plaintiff cannot, however, be compelled to ask for partition. SHEOLOTAN RAY *v.* BHIGUN RAY . . . **2 Pat. L. J. 481**

HINDU LAW—ADOPTION—*contd.*

60. ———— **Kshatriyas—brother's son**—*Adoption of —Doctrine of pollution whether applicable to adoption among twice-born castes.* There ...

rites are not a necessary requisite as, for instance, where a Hindu of one of the twice-born castes adopts a boy of the same *gotra* as himself, the omission of *such rites cannot affect the validity of* the adoption and, therefore, the fact of pollution, which only affects, the degree of merit attached to the religious rights, is also immaterial to the validity of the adoption. SREEMATY LAKSHMIMALI JEMAMANI BAHURIA *v.* UDIT PRATAP SINGH

3 Pat. L. J. 499

61. ———— **customs**—*Proof of special —adoption—*Baisi Chowrasi gaddidars, *origin of, and inheritence among—marriage within* gotra, *applicability of rule—plaint, amendment of, at what state not permissible*—Res judicata—*Code of Civil Procedure (Act V of 1908), s. 11,* Explanation *4—Limitation (Act IX of 1908), Articles 118 and 141*—. In dealing with the custom of an entire community it is of more importance to have regard to the history of the main body then to the history of less important branches. The *Baisi-Chowrasi Gaddidars* are a recognised community. Probably the community was non-Hindu in origin but the members have all now accepted Hinduism to such a degree as to raise a presumption that the whole community has assimilated the law of adoption. SHAHDEO NARAIN DEO *v.* KUSUM KUMARI . . . . **5 Pat. L. J. 164**

61(a). ———— **By widow**—*under authority in Will—Bombay School—Terms whether mandatory* ...

... son of my elder brother T. If the boy cannot be obtained any other boy should be adopted, etc.:" *Held*—That this means that unless there were conditions outside the Will, preventing the possibility of the adoption, the widow, when she does adopt, is to exercise her power in favour. S. SITABAI *v.* BAPU ANNA PALIL. (P. C.)

25 C. W. N. 97

62. ———— **Amongst Sitambari sect of Jains**—*Sitambari sect—Adoption—Application of Hindu Law—Giving and taking only necessary—The person adopted may be of age and married—Placing of son on lap, not necessary.* The Jains are of Hindu origin: they are Hindu dissenters: ...

for the dead. But though the due performance of the *shradhs* or religious ceremony for the dead is at the base of the religious theory of adoption the Jains have so generally adopted the Hindu law that the Hindu rules of adoption are applied to them in the absence of some contrary usage. It was common ground in this case that in the Sitambari sect of Jains, to which the parties belonged, the only ceremony necessary to the validity of an adoption was the giving and taking

HINDU LAW—ADOPTION—*contd.*

R, owning a *jivai* estate, died leaving a widow *S* and his brother's son *M*. *S* and *M* jointly mortgaged a part of the *jivai* estate. *M* died in 1882 leaving two widows, and in 1884 *S* adopted plaintiff's father. The plaintiff having sued to redeem the mortgage made by *S* and *M*: *Held*, that the plaintiff could not succeed as his father was not validly adopted by *S*, who as the widow of a deceased co-parcener of a joint Hindu family could not in the absence of any specific authority make an adoption subsequent to the death of a co-parcener who survived her husband although the property was impartible. TEJRANI *v.* SARUPCHAND CHHAGANBHAI (1919)]

I. L. R. 44 Bom. 483

54. ———— By widow—authority of, to adopt—*Adoption called in question after the lapse of many years—Presumption as to widow's authority.* The question being whether *B* had been validly adopted as the son of *R* by *R*'s widow after his death, it was found that for a large number of years *B* had, as a matter of fact, been treated, and had behaved himself, as the adopted son of *R* and that the adoption had been recognized by persons who would have been interested in denying it. On the other hand, as the adoption must have taken place at some date between the years 1822 and 1847 there was no direct evidence as to the circumstances under which it took place or as to the authority of the widow to adopt. *Held*, that in the above circumstances it might be presumed that the widow was properly authorized to adopt. PREM DEVI *v.* SHAMBHU NATH

I. L. R. 42 All. 382

55. ———— By widow of last male holder —*Adopted son if has title—Custom alleged of exclusion of adopted son—Onus of proof—Power of widow to adopt, if subject to any timelimit not imposed by the authority to adopt—Power, if dependent on widow succeeding as heiress—Divesting of estate, resulting from adoption—Rights of alienee before adoption*—Jivai *grant defeasible on extinction of male line.* When a hereditary grant is made by a Hindu, subject to the limitation that it shall enure so long as the grantee's male line lasts, the existence of the line must be determined by the rules and provisions of the Hindu law, unless there be any custom varying those rules. Where a custom is alleged confining the line to the natural-born issue alone, it must be proved affirmatively and conclusively and not derived from implications: *Held.* Without deciding whether such a custom, even if proved to exist in certain localities, would be recognised in the British Indian Courts, that the Plaintiff had failed to establish the custom alleged by him. *Verabha Ajubhai* v *Bai Hiraba, L R 30 I. A. 234 :* s. c. *I.L. R. 27 Bom. 492 : 7 C. W.N. 716 (1903)*, referred to. It is an explicit principle of the Hindu law that an adopted son becomes, for all purposes, the son of his father, and that his rights unless curtailed by express texts are in every respect the same as those of a natural-born son. An adopted son is the continuator of his adoptive father's line exactly as an aurasa son, and an adoption, so far as the continuity of the line is concerned, has a retrospective effect. The right of the widow to make an adoption is not dependent on her inheriting as a Hindu female owner her husband's estate, and the rule applies to the case of a *jivai* (manintenance) grant as to any other kind of property. *Bamundoss Mookerjea* v. *Mussumat Tariti, 7 M. I. A. 169 (1858), Wise* v. *Bhoobun Moyee, 10 M. I. A. 165 (1865), Madana Mohana Deo* v *Purushothama Deo, L. R. 46 I. A. 156 :* s. c. *23 C. W. N. 177 (1918), Raghunadha* v. *Brojo Kishor, L. R. 3 I. A. 154 :* s. c. *I. L. R. 1 Mad. 69 (1876)*, and *Bachoo Harkisondas* v. *Mankorebai, L. R. 34 I. A. 107 :* s. c. *I. L. R. 31 Bom. 373 ; 11 C. W. N. 769 (1907)*, referred to. PRATAPSING SHIVSING *v.* THAKOR SHRI AGARSINGHJI RAISINGHJI . . . . 24 C. W. N. 57

56. ———— By widow who has no authority from her husband—*Mitakshara law as administered in the Dravada district of the Madras Presidency—Consent of sapindas.* Under the law of adoption as administered in the Dravada district a Hindu widow, in the absence of any authority from her husband to adopt a son to him, may make such an adoption with the consent of his sapindas. *The Collector of Madura* v. *Mootoo Ramalinga Sathupathy (1868) 12 M. I. A., 397.* There should be such proof of assent on the part of the sapindas as should be sufficient to support the inference that the adoption was made by the widow not from capricious or corrupt motives in order to defeat the interest of this or that sapinda, but on a fair consideration by what may be called a family council of the expediency of substituting an heir by adoption to the deceased husband; *Vellanki Venkata Krishna Rao* v. *Venkata Rama Lakshmi (1876) I. L. R. 1 Mad. 174 ; L. R. 4 I. A. 1.* The absence of consent on the part of the nearest sapindas cannot be made good by the authorization of distant relations whose assent is likely to be influenced by improper motives. *Veera Basavaraju* v. *Balasurya Prasada Rao (1918) I. L. R. 41 Mad. 998 (P. C.) ; L. R. 45 I. A. 265.* The consent required is that of a substantial majority of those agnates nearest in relationship who are capable of forming an intelligent and honest judgment on the matter. But save in what are obviously exceptional cases the nearest sapindas must be asked, and if not asked it is no excuse to say they would certainly have refused. *Venkamma* v. *Subrahamanyam (1907) I. L. R. 30 Mad. 50, 53 ; L. R. 34 I. A. 22, 26.* It is the duty of the Court to keep the power strictly within the limits which the law has assigned to it; *Sri Virada Pratapa Raghunatha Deo* v. *Sri Brozo Kishono Patta Deo (1876) I. L. R. 1 Mad. 69 (P. C.).* In this case, on a consideration of the evidence, the widow was proved to have applied for the consent of the third plaintiff, but not of the other four plaintiffs, and that none of these five nearest sapindas is proved to have withheld his consent for any malicious or corrupt reason. The necessary consent of sapindas was not obtained, and the adoption was invalid. KRISTNAYYA *v.* LAKSHMIPATHI (1920) . . I. L. R. 43 Mad. 650

57. ———— Of daughter's son or sister's son—*Validity of—Custom among Brahmans of Andhra or Telugu portion of Madras Presidency—Adoption by widow—Consent of sapindas—Gnatis—Bhinnagotra sapindas—Consent of daughter's son whether necessary—Invalid adoption—Upanayanam in adopted family after an invalid adoption subsequent adoption, whether barred—Subsequent upanayanam, whether competent.* Adoption of a daughter's son is valid by custom among

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the Brahmans of the Andhra or Telugu portion *of the Madras Presidency as it is in the* southern districts. Consent of the sapindors to an adoption by the widow is material as guaranteeing the *propriety of the widow's action in making* the adoption. Where such consent has not been shown to have been obtained by fraud, coercion or corruption, *it is sufficient authority for the adoption*, and the Court's right to scrutinize the sapindas' reasons extends only to cases in which consent is *refused*, and *not* to cases where it is granted. A daughter's son is not entitled to be consulted regarding an adoption by a widow who has obtained the consent of the nearest sapindas, as he is not a *gnati*, and Bhinnagotra sapindas are not included under the term sapindas in the texts which require their consent to an adoption. An upanayanam is not valid unless performed by the father or, in his absence, by another kinsman in the family to which the boy concerned actually belongs. The performance of the upanayanam in a family, into which the boy is wrongly believed to have entered by an invalid adoption, is nullity and is no bar to his subsequent adoption. VISWASUNDARA RAO *v.* SOMASUNDARA RAO (1920)

I. L. R. 43 Mad. 876

58. ———— By junior daughter-in-law of a son with the consent of her father-in-law—*Validity of the adoption. P*, a Hindu, had a son living in union with him. The son died during *P*'s life-time leaving him surviving two widows. Of the two widows, the junior had a son, who also died a minor without attaining ceremonial competence. *P* adopted the plaintiff as his son. Later, the junior widow adopted defendant No. 11 with the consent of *P*. The plaintiff sued contending that the adoption of defendant No. 11 was invalid: *Held*, that the adoption of defendant No. 11 was valid under Hindu law. The preferential right of the senior widow to make an adoption exists when the widows inherit the property of their husband, that is, when the husband is a separated member of the family. Even then it is subject to any authority given by the husband to the junior widow to adopt or any express or implied prohibition by the husband against the senior widow. The doctrine of the preferential right of the senior widow to adopt is not extended to a case where the husband dies in union with his father, and where the widow can adopt if at all with the consent of her father-in-law. *Vithoba* v. *Bapu (1890) 15 Bom. 110*, referred to. DNANU *v.* TANU (1919)

I. L. R. 44 Bom. 508

59. ————Putrishta Jag—*Whether essential among twice born castes—Suit for declaration of*

the twice-born castes where the adoptor and the adoptee belong to the same *gotra*. A suit by an adopted son against his adoptive father and the latter's natural sons for a declaration of the fact of plaintiff's adoption is not maintainable under s. 42, of the Specific Relief Act, in the absence of a prayer for recovery of joint possession or for confirmation of possession jointly with the defendants. The plaintiff cannot, however, be compelled to ask for partition. SHEOLOTAN RAY *v.* BHIGUN RAY . . . **2 Pat. L. J. 481**

HINDU LAW—ADOPTION—*contd.*

60. ———— Kshatriyas—brother's son—*Adoption of —Doctrine of pollution whether applicable to adoption among twice-born castes.* There

where a Hindu of one of the twice-born castes adopts a boy of the same *gotra* as himself, the omission of such rites cannot affect the validity of the adoption and, therefore, the fact of pollution, which only affects, the degree of merit attached to the religious rights, is also immaterial to the validity of the adoption. SREEMATY LAKSHIMMALI JEMAMANI BAHURIA *v.* UDIT PRATAP SINGH

3 Pat. L. J. 499

61. ————customs—*Proof of special —adoption*—Baisi Chowrasi gaddidars, *origin of, and inheritence among—marriage within* gotra, *applicability of rule—plaint, amendment of, at what state not permissible*—Res judicata—*Code of Civil Procedure (Act V of 1908), s. 11,* Explanation 4—*Limitation (Act IX of 1908), Articles 118 and 141*—. In dealing with the custom of an entire community it is of more importance to have regard to the history of the main body then to the history of less important branches. The *Baisi-Chowrasi Gaddidars* are a recognised community. Probably the community was non-Hindu in origin but the members have all now accepted Hinduism to such a degree as to raise a presumption that the whole community has assimilated the law of adoption. SHAHDEO NARAIN DEO *v.* KUSUM KUMARI . . . . **5 Pat. L. J. 164**

61(a). ———— *By widow—under authority in Will—Bombay School—Terms whether mandatory or give widow a discretion.* By his Will, a Hindu governed by the Bombay School directed that "if I did not adopt a son during my life-time my wife should, as far as possible, adopt S, the second son of my elder brother T. If the boy cannot be obtained any other boy should be adopted, etc.:" *Held*—That this means that unless there were conditions outside the Will, preventing the possibility of the adoption, the widow, when she does adopt, is to exercise her power in favour. S. SITABAI *v.* BAPU ANNA PALIL. (P. C.)

25 C. W. N. 97

62. ———— Amongst Sitambari sect of Jains—*Sitambari sect—Adoption—Application of Hindu Law—Giving and taking only necessary—The person adopted may be of age and married—*

for the dead. But though the due performance of the *shradhs* or religious ceremony for the dead is at the base of the religious theory of adoption the Jains have so generally adopted the Hindu law that the Hindu rules of adoption are applied to them in the absence of some contrary usage. It was common ground in this case that in the Sitambari sect of Jains, to which the parties belonged, the only ceremony necessary to the validity of an adoption was the giving and taking

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of the adopted son. In this sect of Jains the widow of a sonless Jain can legally adopt to him a son without any express or implied authority from her deceased husband to make an adoption and the adopted son may at the time of his adoption be a grown up and married man. Where it was proved that the natural mother did in fact give her son as an adopted son to the adopting widow and the latter did in fact accept him as an adopted son to her deceased husband, the adoption was valid though the adopted son was not placed on the lap of the widow as was unnecessarily alleged on behalf of the adopted son SHEOKUARBAI *v.* JEORAJ (P. C.) . . . . **25 C. W. N. 273**

63. ———————**Proof of**—*Mere acknowledgement whether would make one an adopted son—Widow—Maintenance, assessment of.* Under Hindu law, if giving and taking of an alleged adopted son is not established as a fact, no amount of acknowledgment would make him an adopted son. But where direct evidence of such giving and taking was given, evidence of such acknowledgment was relied on in proof of the adoption. As regards the amount of maintenance no hard and fast rule can be laid down that a Hindu widow is entitled to a particular fraction of the income. The circumstances of each case must be considered, such as the value of the estate and its income, the position and the status of the deceased husband and his widow, the expense involved by the religious and other duties which she has to discharge and so forth, and where the widow has been given separate property for her maintenance, the fact that such separate property has been given to her. KRISHNA BHAMINI DASI *v.* BROJA MOHINI DASI.

25 C. W. N. 403

64. ——————— **Sudra**—*Adoption of a person of one sub-division of the Sudra castes into another sub-division of the Sudra caste, if valid—Law as to inter-marriage and inter-caste adoption, if identical.* The question of inter-marriage between two classes of Sudras and the question of adoption from one of these classes to the other is practically the same question. *Semble* :—Adoption by a person belonging to one sub-division of the Sudra caste of another person belonging to another sub-division of the same caste is valid. GIRISH CHANDRA ROY *v.* MUHAMED SHAJED CHOWDHRY.

25 C. W. N. 625

65. ——————— **By Widow on condition**—*that the adopted son should not claim property in which she has life-interest under her father's will—The agreement does not enlarge widow's estate—Reversioner has only contingent interest during widow's lifetime.* A Hindu widow inherited property under the will of her father, which gave her only a life-interest in it, and her son, who was then in existence, was given full interest after her death. The son having died shortly after the testator, the widow adopted the defendant on condition that he would not claim any right to the property. The widow having sued for a declaration that she had become absolute owner of the property and for an injunction to restrain the defendant from interfering with her possession and enjoyment : *Held*, that the widow was not entitled to the declaration but only to the injunction, since it was quite clear that though as soon as the defendant was adopted he would be the nearest reversioner on the death of the plaintiff, he w[illegible]

HINDU LAW—ADOPTION—*contd.*

have no right to surrender the reversion in favour of the life-tenant and so block out the interests of any one who might at the date of the widow's death be the nearest reversioner. During the life of a Hindu widow the reversion remains contingent, and there is no one who possesses a vested interest in the remainder which can be disposed of by any means known to the law. GANGABAI *v.* HARI GANESH . . **I. L. R. 45 Bom. 1167**

66. ——————— **By unchaste widow**—*Shudras.* In the Presidency of Bombay, a Shudra widow though unchaste can make a valid adoption. *Sayamalal Dutt* v. *Saudamini Dasi* (1870) *5 Beng. L. R. 362* and *Dnyancba* v. *Radhabai* (1894) *P. J. 22*, distinguished. BASVANT MUSHAPPA *v.* MALLAPPA KALLAPPA . **I. L. R. 45 Bom. 459**

67. ——————— **Of orphan.**—*Adoption of an orphan—"Factum valet," applicability of.* The adoption of an orphan is invalid under the Hindu Law and the doctrine of "*factum valet*" cannot be invoked to validate it. *Lakshmappa* v. *Ramava*, (1875) *12 Bom. H. C. R., 364*, at *398* and *Ganga Sahai* v. *Lakhraj Singh*, (1887) *I. L. R., 9 All., 253* at *297*, followed. MAREYYA *v.* RAMALAKSHMI.

I. L. R. 44 Mad. 260

68. ———————**Husband's Directions.**—The duty of a Hindu widow to obey her husband's commands compels her to act upon any mandatory direction he may give her as to the way in which she should exercise the power of adoption which she has under the Bombay School of Law. SITABAI *v.* BAPU ANNA PALIL . . **L. R. 47 I. A. 202**

69. ———————**Mahratta School— Widow's power to adopt without husband's authority and without consent of kindered**—*Authority by husband—Particular boy named—Direction if so operates as prohibition to adopt another boy on his death.* The rule laid down in *Rakhmabai* v. *Radhabai* that in the Marhatta Country, a Hindu widow may, without the permission of her husband and without the consent of his kindred, adopt a son to him, if the act is done by her in the proper and *bona fide* performance of a religious duty and neither capriciously nor from a corrupt motive, is equally applicable whether her husband at the time of his death was joint or separate and whether his property was or was not vested in her as his heir at the time when she made the adoption. Where the most that could be said was that the husband directed his wife to adopt a particular boy, but said nothing as to what should be done if the boy named should be unavailable or should die after he was adopted, and the boy who was adopted after the husband's death died in childhood and unmarried : *Held*—That there was no explicit or clearly expressed intention to prohibit the widow against adopting any boy other than the boy named, and a second adoption by the widow to her husband subsequently to his death was validly made. YADAO *v.* NAMDEO. **L.R. 48 I. A. P. 513.**
26 C. W. N. 394.

70. ——————— **Sudras**—*Partition—Respective shares of adopted and after-born aurasa son—Dattaka Chandrika—Joint Family property—Accountability of managing member.* In the case of Sudras in the Madras Presidency an adopted son on partition of the family property shares equally with a son or sons of [illegible]ptive father born after the [illegible]ption. So [illegible]unds that the rule [illegible] in the [illegible] (section 5, para-

HINDU LAW—ADOPTION—*concld.*

…29, 32) as to the share of an adopted son

…

supported by the … is not inconsistent with them. *Semble*, that the same rule applies among Sudras in Bengal. Judgment of the High Court reversed and the abovementioned decision disapproved. In the absence of proof of di… and improper … family estate, is liable to account … has received, not for what he ought or might have received if the family moneys had been profitably dealt with. ARUMILLI PERRAZU *v* SUBBARAYADU.

I. L. R. 44 Mad (P.C.), 656

71 …

Hindu without co-parceners authorizing, by his …

41 Mad., 301 (P.C.) and … *Agarsingji Rajasangji*, (1919) *I. L. R., 43 Bom., 778* (P.C.), distinguished. JAGANNADHA RAO *v* RAMAYAMMA.

I. L. R. 44 Mad. 1189

72. ———— **Jains**—*Custom—Adoption of an orphan boy among Jains in the Idar State—Onus of proof of Custom.* In a suit between Jains residing in the Idar State, in the Mahikantha Agency in the presidency of Bombay, for a declaration that … was … uced … rties and those claiming under them, to entitle the Court to dismiss the suit. Principles applicable discussed. *Bhagvandas Tejmal* v. *Rajmal* (1873) *10 Bom. H. C. 241* : *Rupchand* v. *Jambu Prasad* (1910) *32 All. 247* and *Chiman Lal* v. *Harichand* (1913) *40 Cal. 879*, referred to. PARSHOTTAM GANPAT *v.* VENICHAND GANPAT.

I. L. R. 45 Bom. 754

73. ———— **By widow of predeceased nephew**—*Adopting with the consent of the widow of the last co-parcener—Subsequent adoption by the latter widow not legal—Effect of invalid adoption—Status of a person in the natural family, when his adoption is invalid.* *K*, a Hindu, died leaving him surviving his widow *G* and *A* the widow of his pre-deceased nephew. *A* adopted a son with the consent of *G*. Afterwards *G* adopted defendant No. 1 to her husband. A question having arisen as to the validity of the defendant No. 1's adoption and whether he lost his rights in his natural family: *Held*, that on the adoption by *A* with the consent of *G*, the whole estate vested in the adopted son and the right of *G* to adopt to her husband came to …

in by any person in the family of *K*. VAMAN VITHAL *v.* VENKAJI KHANDO.

I. L. R. 45 Bom. 829

HINDU LAW—ALIENATION.

See HINDU LAW—WIDOW. AND LEGAL NECESSITY.

See HINDU LAW— JOINT FAMILY AND JOINT FAMILY PROPERTY.

See TRANSFER OF PROPERTY ACT 1882, s. 10.

I. L. R. 38 Mad. 867

s. 99. **I. L. R. 36 All. 516**

1. ———— **Alienation for marriage expenses**—*Joint Hindu family—Alienation by father—Lawful family necessity—Second marriage of member of the family—Marriage in the Asura form.* The first marriage of a member of Hindu joint family is a lawful family necessity for which an alienation of family property will be justified. *Sundrabai* v. *Shivnarayana, I. L. R. 32 Bom.* …

… property. *Held*, that the alienation under the circumstances was for lawful necessity and was binding on the son. *Per* RICHARDS, *J.*—Bearing in mind that this (*asura*) form of marriage is quite common and that the purchase of a bride in this sense is quite common, it cannot be held that the money which was raised was not part of the expenses of a legal marriage. BHAGIRATHI *v.* JOKHU RAM UPADHYA (1910) . **I. L. R. 32 All. 575**

2. ———— **Absolute estate cut down to** … estate. By a razinama filed in Court it …

… event of it becoming … should belong to *P*. *R* having subsequently sold the properties to *L*, died issueless; *Held*, that the alienation by *R* in favour of *L* was invalid beyond the lifetime of *R*. *Bhoobun Mohini Debya* v. *Hurrish Chunder Choudhry, L. R. 5 I. A. 138*, relied on. *Kristromoney Dossee* v. *Maharajah Nerendro Krishna Bahadur, L R. 16 I. A. 40*, relied on. LAKSHMINARAYANA NAINAR *v.* VALLIAMMAL (1910) . . . **I. L. R. 34 Mad. 250**

3. ———— **Legal necessity**—*how to be made out—Onus of proof of legal necessity as affected by lapse of time—Court of Appeal, power of, to make any order to meet justice. Civil Procedure Code (Act V of 1908), O. XLI, r. 33.* A property known as *taluk C* belonged to *G*, a Hindu. After *G*'s death there was litigation regarding the succession. *D*, the father of the plaintiff, *T C*, …

… in favour of *M G*. The Judicial Committee held finally in that suit that *D*'s suit was barred by *res judicata*, and refused to make any declaration regarding the alienation in the life-time of *G*'s mother. Before her death, *G*'s mother sold the entire estate *C* to *M G*. After her death, *T C*, the son of *D*, and two other persons sued *M G* for setting aside the alienations on the allegation that *T C* was the eldest male member in the eldest line, and as such, was entitled to the property by virtue of the rule of lineal primogeniture governing succession in the family. The plaintiffs prayed therein for a decree in favour of *T C* or, in the alternative, in … iffs The …

HINDU LAW—ALIENATION—*contd.*

On appeal to the High Court by the defendant. *Held*, that, if one or other of the plaintiffs were entitled to succeed the suit should not be dismissed simply, because the first of the plaintiffs alone had failed to make out a title, particularly when by so dismissing the suit, the right of the co-plaintiffs (who, if the first plaintiff were not joint with the last male holder would, on failure of the first plaintiff's case, be entitled) would be thereby barred; and that, in such a case, the Appellate Court could exercise the power provided for in the Code of Civil Procedure. O. XLI, r. 33. *Held*, also that lapse of time did not affect the question of onus of proof regarding legal necessity, except in so far as it might give rise to a presumption of acquiescence or save the alienee from adverse inference arising from the scanty proof which might be offered. *Held*, further, that in order to justify legal necessity, it must be shown that the expenses could not have been met from the income of the property in the widow's hands, and that they were reasonable. *Held*, lastly, that payment of full value for the property did not of itself justify a sale by a Hindu widow in the absence of legal necessity. RAVANESHWAR PRASAD SINGH *v.* CHANDI PRASAD SINGH (1911)

I. L. R. 38 Calc. 721

4. ———————— **Without the consent of a co-parcener**—*Legal necessity—Right of subsequently born co-parcener to impugn the transaction.* Where an alienation of ancestral property is invalid as having been made without legal necessity by one member of the co-parcenary without the consent of the rest, it is open to co-parceners to object to such alienation notwithstanding that they were born subsequently thereto. *Kali Shanker* v. *Nawab Singh, I. L. R. 31 All. 507,* referred to. *Chuttan Lal* v. *Kallu, I. L. R 33 All. 283,* distinguished. TULSHI RAM *v* BABU (1911) . . **I. L. R. 33 All. 654**

5. ———————— **Trustees of temple**—*power of, to grant permanent lease of trust property.* The grant of a permanent lease of temple property by the trustee is *prima facie* in excess of the powers of such trustee. Special circumstances of necessity may justify such alienation. *Maharanee Shibessouree Debia* v. *Mothooranath Acharjo, 13 Moo. I. A. 270,* followed. *Narasimhachari* v. *Gopala Iyengar, I. L. R. 28 Mad. 391,* referred to. There is no distinction in this respect between a religious institution like a temple and a charitable foundation. The powers of the trustee of a temple are analogous to those of the manager of an infant heir. *Hanuman Pershad's Case* referred to in *Konwar Doorga Nath Roy* v. *Ramachunder Sen, L. R. 4 I. A. 52,* referred to. The requirements of daily worship, of buildings suitable for the carrying out of such worship, and of performance of festivals are among the purposes for which the trustees of a temple may alienate the *corpus*, in the absence of other reasonable means of providing for such needs. In the case of such alienations, the alienee will be protected, if after proper enquiries he is satisfied of the existence of such necessity. SREEMUTH DEVASIKAMONEY PANDARASANNADHI *v.* PALANIAPPA CHETTIAR (1910)

I. L. R. 34 Mad. 535

6. ———————— **Widow**—*Enquiry to be made by purchaser as to necessity of transaction—What is sufficient enquiry.* Where it appeared that the purchaser of immoveable properties from a Hindu widow did not enquire from the creditors mentioned in the sale-deed as those who were to be paid off out of the consideration-money as to the necessities of the transaction, but satisfied himself with an enquiry merely from the widow herself, and it was found that the statement regarding the payment to the alleged creditors was false: *Held*, that the purchaser had not made the necessary enquiries as laid down in *Hunooman Pershad* v. *Mussumat Babooee Munraj Koonweree, 6 Moo. I. A. 393,* and the sale could not be supported. JANHABI *v.* BULBHADRA SUAR (1911) . **15 C. W. N. 793**

7. ———————— **Suit by alienee of a co-parcener in family property**—*Time when the share is ascertained.* In Hindu Law the alienee of the interest of a co-parcener is entitled to enforce his claim against the share to which the vendor was entitled to at the time of the alienation. The mortgagee of a Hindu father is therefore entitled to proceed against the share of a son subsequently born in family property mortgaged by the father. *Rangasami* v. *Krishnayyan, I. L. R. 14 Mad. 408,* dissented from. *Ayyagari Vekataramayya* v. *Ayyagari Ramayya, I. L. R. 25 Mad. 690,* followed. *Hardi Narayan Sahu* v. *Ruder Perkash Misser, I. L. R. 10 Calc. 626,* followed. CHINNU PILLAI *v.* KALIMUTHU CHETTY (1911) **I. L. R. 35 Mad. 47**

8. ———————— **Alienation by manager**—*Undivided family—Manager, position of—Effect of subsequent assent of co-parceners.* The Manager of a joint Hindu family is not, in the exercise of his powers, the agent of the family in the strict sense of the term and consequently no ratification of his act by the other members of the co-parcenary is possible. The assent of the other members of the family to an alienation by the manager is only evidence of justifiable family necessity. Where, therefore, it is found that there was no such necessity, such assent is no evidence for that purpose. As, however, the property vests in the undivided family, the manager with the assent of the other members may give a good title to an alienee even though the alienation is not for any family necessity. Such assent is not that of a principal to the acts of an agent but supplies the want of capacity on the part of the manager to alienate family property. An alienation by a manager without justifiable necessity is void as regards the shares of the other members of the family and where such necessity exists it is valid in its entirety. An assent by all the members at the time of alienation without taking part in it, will pass the property. An assent by some only, though evidence of necessity will not, in the face of positive evidence of the impropriety of such alienation, suffice to pass their interests. The subsequent assent if all the members will not apart from any question of estoppel, validate an alienation by the manager, which is void in its inception for want of justifiable necessity. *Annamalai Chetty* v. *Murugesa Chetty, I. L. R. 26 Mad. 544,* referred to. *Unni* v. *Kunchi Amma, I. L. R. 14 Mad. 26, 28,* referred to. KANDASAMI ASARI *v.* SOMASKANDA ELA NIDHI, LTD. (1910) . . . **I. L. R. 35 Mad. 177**

9. ———————— **Custom of agriculturists in the Punjab**—*Ancestral land—Power of father to alienate—Necessity—"Just debts"—Burden of proof—Debts of proprietor incurred by reckless extravagance and for illegal or immoral pruposes.* In a suit by the respondents to have set aside an alienation of part of the family property made by their father in favour of the appellant, alleging that by

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the custom of agriculturists in the Punjab he was not competent to sell ancestral land without necessity, that there had been no necessity for the sale, that their father was a debauchee and an extravagant person, and that the debts for which the sale was made were incurred for immoral and illegal purposes, the appellant did not deny the custom though he traversed all the other allegations in the plaint, and contended that, the alienation having been made for their father's antecedent debts, it was for the respondents to show that the debts were contracted for illegal or immoral purposes. There were concurrent findings by the Courts below that the respondents' father was recklessly extravagant and did not know how to manage his affairs properly, and that certain specific debts were "just debts," and others were not: *Held* (affirming the decision of the Chief

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appellant of such part of the purchase money as both Courts concurrently found to be just debts, the payment of which was a necessity. The ruling in *Devi Ditta* v. *Saudagar Singh*, (1900) Punjab Rec. No. 65, that a "just debt" means "a debt which is actually due, and is not immoral, illegal or opposed to public policy, and has not been contracted as an act of reckless extravagance or of wanton waste, or with the intention of destroying the interests of the reversioners," was approved of by their Lordships of the Judicial Committee. KIRPAL SINGH *v.* BALWANT SINGH (1912)

I. L. R. 40 Calc. 238

10. ——————— *Mortgage by widow of part of the estate——Legal necessity—Presumption—Reversioner.* Alienation by way of mortgage by Hindu widow as heiress, of a portion of the estate of her deceased husband without proof either of legal necessity or of reasonable enquiry and

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enquiry and honest belief raised by such consent

Nobokishore

[illegible] *, I. L. R. 10*

[illegible] *ngh* v. *Mano-*

[illegible] *All. I. L. R.*

[illegible] D CHOWDHURY

[illegible] I. L. R. 40 Calc. 721

11. ——————— By father in favour of adopted son whose adoption alleged to be illegal—*Form of suit—Suit for partition in case of stranger in Hindu family—Inaction and acquie-*

[illegible] *-ding on*

[illegible] In a

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[illegible] law to set aside their father's alienation of ancestral property, against the assignee, the first respondent, the father being made a *pro formâ* defendant, the appellants alleged that their father improperly made in 1898 a disposition of a specific portion of the property to the respondent who had been adopted by the widow of one or two brothers (with the consent of the other) from whom their father, (the adopted son of the other brother) inherited the family property and they contended that the adoption of the first respondent was invalid for various reasons, and that they were entitled to recover the property alienated. The defence so far as material, was that the appellants were bound by the acquiescence of their father in admitting the first respondent to the family, and that the suit was barred by limitation. The respondents also objected to the form of the suit which they contended should have been for partition. At the settlement of issues, the appellants' pleader admitted "that their father had actually given possession in 1898 of the property in suit to the first respondent to enjoy it exclusively: previously, since 1837, he was living as a joint member of the family, and jointly enjoying the profits by reason of the inaction and acquiescence of the appellants' father in that mode of enjoyment." The suit was decided without evidence on that admission, and on the allegations in the plaint and written statements, and was dismissed, and that decree was affirmed on appeal. *Held*, as to the form of suit, that to deny any relief except in a suit for partition would be to deny the right to relief altogether, since the basis of the claim was that the appellants were entitled to the estate as a joint and undivided estate, and desired to enjoy it as such. Also it might be that the first respondent was entitled to stand in the shoes of the appellants' father as to the share which would come to the latter on a partition; and if he established such a position, the Court would at the instance of the respondent decree a partition between the appellants and their father. Without therefore expressing any opinion as to its validity in law or fact, their Lordships thought that, on the pleadings, it was open to the first respondent to set up such a case. *Held*, also, that though a partition made by a Hindu father may under some circumstances bind his minor sons (as in *Balkishen Das* v. *Ram Narain Sahu, I. L. R. 30*

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unless it can be supported as a *bonâ fide* compromise of a disputed claim. If, therefore, the adoption of the first respondent were wholly invalid, the appellants were entitled to succeed in the absence of any other defence. The Appellate Court as to limitation had decided that the suit was not barred as against the first appellant, but only as against the rest of the appellants who were minors, and had not been born at the time (1837) when it was alleged the adverse possession began to run. *Held*, that if the first appellant was entitled to relief the other appellants would also be so entitled. Under the circumstances, their Lordships, in allowing the appeal, were of opinion that they could not, on the materials before them, finally determine the rights of the parties, and remanded the case for trial with a declaration that it was competent to the Court, in the event of the first respondent failing in his other defences to make the whole or any part of the relief granted to the appellant conditional on their assenting to a partition so far as regarded the father's interest in the estate, so as to give effect to any right to which the first respondent might be entitled claiming through his assignor. RAMKISHORE KEDARNATH *v.* JAINARAYAN RAMRACHHPAL (1913)

I. L. R. 40 Calc. 983

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12. ———— **By widow**—*Arrangement come to by the widow with consent of their reversioners—Alienation beyond life of widow—Acquiescence in arrangement by persons afterwards suing to set it aside—Ijara, beneficial to estate.* The question in this case was as to the validity of an *ijara* for 60 years, dated 7th September 1863, which had been executed by a Hindu widow, a *pardanashin* lady aged 42, with the consent of the then reversioners, and which was part of an arrangement of settlement in which all the branches of her husband's family shared. In a suit brought after the death of the widow by the reversionary heirs of her husband to set aside the *ijara* on the ground that it was an unauthorized interference by the widow with the reversionary interest which she had no power to make: *Held* (affirming the decision of the High Court), that under the circumstances the arrangement was one dictated by the necessities of the case, and the choice of the term of 60 years was for the benefit of the estate. In accordance with the practice of the Board their Lordships attached great weight to the sanction by expectant reversioners of an alienation of property by a Hindu woman as affording evidence that the alienation was made under circumstances which rendered it lawful and valid. In this case, from 1882 to 1893 when the widow died, the persons who now sought to set the *ijara* aside acquiesced in and took the benefit of the arrangement which it might therefore be inferred from their conduct had in their opinion been made in good faith and under such circumstances of necessity as would give it validity according to Hindu law; and the conduct of the appellants themselves during those years afforded evidence on which the respondents were entitled to rely. BIJOY GOPAL MUKERJI *v.* GIRINDRA NATH MUKERJI (1914) . . **I. L. R. 41 Calc. 793**

13. ———————— **Evidence of legal necessity**—*In mortgages or sale-deeds.* The *onus* of supporting a sale from a Hindu widow is on a purchaser. Recitals in mortgages or deeds of sale with regard to the existence of legal necessity for an alienation by a Hindu widow are not of themselves evidence of such necessity without substantiation by evidence *aliunde.* BRIJ LAL *v.* INDA KUNWAR (1914) . **I. L. R. 36 All. 187**

14. ———————— **Legal necessity**—*Spiritual welfare of her husband—To what extent alienation permissible—Recital in a deed, by itself not conclusive evidence.* Where a deed, by a limited owner with qualified power of alienation, is impeached, the test is whether the purpose for which the alienation was made was proper or legitimate. *Collector of Masulipatam* v. *Cavaly Vencata, 8 Mco. I. A. 529,* referred to. Necessity is only one of the phases of the test of propriety. *Raj Lukhee* v. *Gokool Chunder, 13 Moo. I. A. 209, Sham Sunder Lal* v. *Achhan Kunwar, I. L. R. 21 All. 71 ; L. R. 25 I. A. 183, Bejoy Gopal Mukerji* v. *Girindra Nath Mukerji, I. L. R. 41 Calc. 793,* referred to. The widow has a larger power of disposition for religious or charitable purposes or for purposes which are supposed to conduce to the spiritual welfare of her husband than what she possesses for purely worldly purposes. An exhaustive enumeration of these religious or charitable purposes is neither possible nor necessary. *Cossinant Bysack* v. *Hurrosoondry Dossee, 2 Morley's Digest 198,* referred to. This being a question purely of Hindu law, great care must be taken in coming to a decision upon that subject in order to prevent English Judges being warped by impressions made upon their minds in consequence of their habitual application of English law and the nature of English decision to which they are accustomed and to consider in what way a Hindu Court of Justice would have decided the point. The true rule appears to be that there is a distinction between legal necessity for worldly purposes on the one hand, and the promotion of the spiritual welfare of the deceased on the other hand, and that, within proper limits, the widow may alienate her husband's property for the performance of religious acts which are supposed to conduce to his spiritual benefit. *Mukhoda* v. *Kulliani, 1 Mac. Sel. Rep. 82, Ram Chunder Surma* v. *Gungagovind, 4 Mac. Sel. Rep. 147, Kartick Chunder* v. *Gour Mohun, 1 W. R. 48, Runjeet Ram* v. *Mohamed Waris, 21 W. R. 49, Ram Kawal Singh* v. *Ram Kishore Das, I. L. R. 22 Calc. 506, Churaman Sahu* v. *Gopi Sahu, I. L. R. 37 Calc. 1, Harmange* v. *Ram Gopal, 17 C. W. N. 782, Rama v. Ranga, I. L. R. 8 Mad. 552 Lakhsminarayana* v. *Dasu, I. L. R. 11 Mad. 288, Vuppuluri* v. *Garimilla, I. L. R. 34 Mad. 288, Puran Dai* v. *Jai Narain, I. L. R. 4 All. 481, Kupur* v. *Sebak Ram, 1, Bor. 405, Jogjiban* v. *Deoshankar, 1 Bor. 394, Chunilala* v. *Jussoo, 1 Bor. 55,* referred to. A gift of a moderate portion of the property of her husband by the widow with a view to his spiritual benefit is valid. whether the alienation covers a reasonable portion of the property of the husband of the lady is a question which must be determined with reference to the circumstances of each particular disposition. *Ram Chunder Surma* v. *Gungagovind, 4 Mac. Sel. Rep. 147, Churaman* v. *Gopi Sahu, I. L. R. 37 Calc. 1.* referred to. Recitals in a deed are not by themselves conclusive evidence of their truth and the facts alleged should be proved *aliunde. Brij Lal* v. *India Kunwar, I. L. R. 36 All. 187,* referred to. KHUB LAL SINGH *v.* AJODHYA MISSER (1915) **I. L. R. 43 Calc. 574**

15. ———————— *Legal necessity—Onus of proof of legal necessity as affected by lapse of time—Proof of custom of succession to estate—Limitation—Adverse possession—Res judicata.* On this appeal their Lordships of the Judicial Committee affirmed the decision of the High Court which is reported in *I. L. R. 38 Calc.* at page 725. RAVANESHWAR PRASAD SINGH *v.* CHANDI PRASAD SINGH (1915) . . **I. L. R. 43 Calc. 417**

16. ———— **Mortgages executed with alleged consent of reversioners**—*Nature of proof required of consent which must be established by positive evidence—Absence of proof of legal necessity—Presumption afforded by consent of reversioner.* In this appeal which arose out of suits to recover property mortgaged by a Hindu widow it was *held* (affirming the decisions of the Courts in India), that the part taken by the reversioners with respect to the mortgages in question did not, under the circumstances, amount to a consent to bind their interests. When a "stringent equity" arising out of an alleged consent by reversioners is sought to be enforced against them, such consent must be established by positive evidence that upon an intelligent understanding of the nature of the dealings they concurred in binding their interests ; and that such consent should not be inferred from ambiguous acts, or be supported by dubious oral testimony such as appeared to have been relied upon in this case. *Jiwan Singh* v. *Misri Lal, I. L. R. 18 All. 146 ; L. R. 23 I. A. 1, per* LORD

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HOBHOUSE, referred to. HARI KISHEN BHAGAT *v.* KASHI PERSHAD SINGH (1914)
I. L. R. 42 Calc. 376

17. ——————— **Construction of deed of sale** *executed by widow—Whether it conveyed an absolute interest in the property or only a limited interest—Legal necessity—Evidence of intention of parties—Construction of deeds executed by natives of India—Recitals in deed as showing necessity and intention of executants.* In this appeal their Lordships of the Judicial Committee held (reversing the decree of the High Court and restoring that of the Subordinate Judge) that on the construction of a deed of sale executed by a Hindu widow of property held by her as heir of her husband in favour of the appellant, she conveyed her absolute interest in such property, and not only the limited interest of a Hindu widow. Recitals to the effect, (*a*) that the husband did not leave property the produce of which was sufficient to meet her necessary expenses, (*b*) that she had been obliged to borrow money to provide the ordinary necessaries of life, (*c*) that there were ancestral debts still unpaid, and creditors pressing for payment, and (*d*) that the only way to discharge them was to sell a portion of the property of her deceased husband, recitals which were necessary if the executant were disposing of her absolute interest, but serving no purpose if the object was to convey merely the limited interest of a widow, were held to show that the circumstances were such as to give her power to dispose of her absolute interest, and from which the inference could reasonably be drawn that it was her intention so to dispose of it. Referring to the case of *Hunooman*

natives of India, their Lordships were of opinion that an examination in detail of the provisions of the deed in this case left no doubt in their minds that all the parties to it meant that the absolute interest in the property should be conveyed to the purchaser, and thought that it had by the deed been effectually conveyed to him. That interest might well be construed as meaning the right to and interest in the property which the widow had, in the particular circumstances of the case, powers, for the purpose indicated, to sell and dispose of, that is, the absolute interest, and not (as held by the High Court) as merely meaning the right and interest which a widow normally takes in the immoveable property which her husband owned at his death and leaves after him. Any other construction their Lordships thought would plainly defeat the object and intention of the contracting parties. VASONJI MORARJI *v.* CHANDA BIBI (1915)
I. L. R. 37 All. 369

18. ——————— **Contract by father to sell family lands**—*Suit for specific performance against father—Son added subsequently as defendant—No necessity for contract—Contract not binding on son—Plaintiff's right to conveyance from father of his share only—Partial performance, meaning of —Specific Relief Act (I of 1877), s. 15 —Contract by a co-parcener to sell his share in family property, and contract to sell specific family property, distinction between.* The plaintiff sued for specific performance of a contract or sale of certain lands and for possession. The contract was entered into by the first defendant, the undivided father of the second defendant who was subsequently added as a party to the suit. The first defendant pleaded that the contract was vitiated by undue influence and was a hard bargain that ought not to be enforced against him. The second defendant pleaded that the contract was entered into by the first without any legal necessity and was not enforceable in law. It was found that there was no undue influence or hard bargain and that there was no necessity to enter into the contract. The plaintiff offered to pay the full consideration for a conveyance of the lands which were the separate property of the first defendant and of his interest in the family lands. *Held*, that the plaintiff was not entitled to a decree for specific performance of the contract against the first defendant or the second defendant. *Per* SANKARAN NAIR, *J.*—A person is entitled to specific performance of a contract by a member of a Hindu family to sell his share of the family property. If a junior member of a Hindu family agrees to sell any specific property belonging to his family, a decree cannot be passed against him to sell his share of that specific property. *Kosuri Ramaraju* v. *Ivaluri Ramalingam, I. L. R. 26 Mad. 74*, *Srinivasa Reddi* v. *Sivarama Reddi, I. L. R. 32 Mad. 320*, and *Poraka Subbarami Reddi* v. *Vadlamudi Seshachalam Chetti, I. L R. 33 Mad. 359*, referred to. *Nagiah* v. *Venkatarama Sastrulu, I. L. R. 37 Mad. 387*, dissented from. *Nanjaya Mudali* v. *Shanmuga Mudali, 15 Mad. L. T. 186*, followed. *Maharaja of Bobbili* v *Venkataramanjulu Naidu, 16 Mad L T. 181*, referred to. SUBBA *v.* VENKATRAMI (1914)
I. L. R. 38 Mad. 1187

19. ——————— **Onus of proof of legal necessity**—*Recitals in deeds as to necessity—Evidence of representation to purchasers—Value of recital after lapse of time when actual proof of enquiry has become impossible—Attestation of deed, effect of, as evidence of knowledge of contents, or of consent by reversioner—Unexplained delay in prosecution of appeals—Costs disallowed if delay due to appellant.* In a suit for property alienated by a Hindu widow in possession of her husband's estate the burden of proving legal necessity for the alienations lies on the purchasers. *Maheshar Baksh Singh* v. *Ratan Singh, I. L. R. 23 Calc. 766 ; L. R. 23 I. A. 57*, followed. Recitals in deeds cannot by themselves be relied upon for the purposes of proving the assertions of fact which they contain. They can only be evidence as between the parties to the conveyances and those who claim under them. After a long period, however, has elapsed between the alienation and the suit to set it aside when all those who could have given evidence on the relevant points have grown old or have passed away, a recital consistent with the probabilities and circumstances of the case assumes greater importance and cannot lightly be set aside. The recital is clear evidence of the representation, and if the circumstances are such as to justify a resonable belief that an enquiry would have confirmed its truth, then when proof of actual enquiry has become impossible the recital coupled with such circumstances would be sufficient evidence to support the deed. Where the total value of the estate was small and there were expenses like the husband's *shradh* and any debts against his estate which [illegible] be paid, besi[illegible] the necessity for the [illegible]
which need not be

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sum to support existence, the periods at which, between 1848 and 1865, the properties were sold the small sums for which the sales were made, and the disposition of the property piece by piece with fair regularity for 16 years all went to support the view that the widows found themselves unable to provide sufficient maintenance out of the income of the estate, until their means came to an end in 1865, and the circumstances were such as would be sufficient to justify the assumption that proper enquiry would have disclosed that necessity existed. There was only the one fund for payment and if money was needed to pay debts, the amount of money available for maintenance would to that extent be reduced, and if the debts had been paid by the widows out of borrowed money it would make no difference whether the necessity to pay debts, or to maintain themselves was stated in the recitals as reason for the sale. Attestation of a deed proves no more than that the signature of an executing party has been attached to a document in the presence of a witness. It does not involve the witness in any knowledge of the contents of the deed, nor affect him with notice of its provisions. If it had been quite impossible for either of the widows lawfully to dispose of any interest in the properties, and it was shown that the witness knew the nature of the deed, more value might be given to his attestation, but by itself it would neither create an estoppel nor imply consent. *Hari Kishen Bhagat* v. *Kashi Prasad Singh, I. L. R. 42 Calc. 876 ; L. R. 42 I. A. 64,* referred to. Comments were made by their Lordships on the delay that had occurred between the decrees of the High Court in August 1909 and the setting down of the appeals for hearing in April 1916, for which no sufficient reason appeared. Unexplained, it constituted a grave reproach to the administration of justice. All the respondents had been unjustly attacked in the lawful possession of property, and for seven years had been subject to the anxiety and distress of knowing that the judgment of the High Court in their favour was subject to the inevitable uncertainties of the law. Their Lordships said that had the appeals succeeded they would have refused the appellants any costs of the appeals unless they could have cleared themselves of the imputation of having needlessly protracted the proceedings ; and that course would be taken in similar cases in the future, if occasion arose. BANGA CHANDRA DHUR BISWAS *v.* JAGAT KISHORE ACHARJYA CHOWDHURI (1916)
I. L. R. 44 Calc. 186

20. ———— **By father not for necessity—** *Mitakshara school—Joint family property—Alienation by father not for necessity and not for antecedent debt, son if bound by.* Joint property of a Mitakshara Hindu family cannot be alienated as against co-shares by way of mortgage or otherwise, except for necessity, or for the payment of an antecedent debt quite distinct from the debt incurred in the mortgage itself, and the sons of the mortgagors are not bound by any such alienation by reason of any pious obligation to pay their father's debt. JOGI DAS *v.* GANGA RAM (1917)
21 C. W. N. 957

21. ———————— *Joint Hindu family —Sale of ancestral property by father without legal necessity—Sale set aside at instance of sons—Vendee not entitled to refund of consideration by sons.* A sale of the property of a joint Hindu family made by the father for an antecedent debt or for the payment of an antecedent debt is binding on the sons; but if the consideration for such sale is not for any of the purposes mentioned above, the sons are entitled to recover the property. But in such case the sons are not liable to refund the purchase money to the vendee. *Ram Dayal* v. *Suraj Mal. 23 Indian Cases 891, Manbahal Rai* v. *Gopal Misra, All. Weekly Notes, 1901, p. 57,* and *Chandra Deo Singh* v *Mata Prasad, I. L. R. 31 All. 176,* referred to. *Koer Hashmat Rai* v. *Sundar Das, I. L. R. 11 Calc. 396,* dissented from. MADAN GOPAL *v.* SATI PRASAD (1917) . . **I. L. R. 39 All. 485**

22. ———————— *Sale by father of joint family property without legal necessity—Suit by sons to repudiate the sale—Mesne profits payable by purchase from date of such repudiation.* Where the father as manager alienates joint Hindu family property without legal necessity and the sons repudiate the sale, a purchaser who had no notice that the father was incompetent to sell the property is in equity only liable to pay mesne profits from the date of such repudiation. *Mugnu Chunder Chuttoraj* v. *Surbessur Chuckerbutty, 3 W. R. 479, Dakhina Mohan Roy* v. *Saroda Mohan Roy, I. L. R. 21 Calc. 142,* and *Grish Chander Lahiri* v. *Soshi Sikhareswar Roy, I. L. R. 27 Calc. 95 ; L. R. 27 I. A. 100,* referred to. BHIRGU NATH CHAUBE *v.* NARSINGH TIWARI, (1916)
I. L. R. 39 All. 61

23. ———— **By some members of joint Hindu family**—*Alienation of joint property of family governed by Mitakshara law—Mortgage not for family necessity or to pay antecedent debt—Suit on mortgage—Non-liability of sons and grandsons of mortgagors.* Where a mortgage had been made by some of the members of a Hindu joint family governed by the Mitakshara law who joined in borrowing Rs. 1,200 on the security of the property of the joint family of which they were the heads without the consent of their co-partners, and it was found that the mortgage was *primâ facie* invalid as against the family property as being neither for an antecedent debt, nor for any proved necessity of the joint family : *Held,* that the mortgage could not be upheld on the doctrine laid down in the case of *Mahabeer Prasad* v. *Ramyad Singh, 1 B. L. R. 190 ; 20 W. R. 192,* which was distinguishable on the ground that there were special circumstances in that case which did not exist in the present case, and it therefore did not lay down the general law. The general law was laid down in *Madho Parshad* v. *Mehrban Singh, I. L. R. 18 Calc. 157, 163 : L. R. 17 I. A. 194, 196,* which governed this and all other cases of the kind, and according to those principles the mortgage in suit was invalid as against the sons and grandsons of the mortgagors. LACHMAN PRASAD *v.* SARNAM SINGH (1917) **I. L. R. 39 All. 500**

24. ———— **By manager when benefits result to minors' estate**—*Of estate as justifying alienation—Speculative development of minor's estate, if for benefit.* The rule laid down by the Judicial Committee in *Hanooman Pershad Pandey* v. *Munraj Koonwar, 5 Moo. I. A. 373, 423,* is not restricted to cases of mortgage or other forms of partial alienation, nor is it restricted in its application to cases of necessity alone, for a " benefit " of the estate is there differentiated from the " need ".

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of the estate as a circumstance justifying alienation. But mere increase in the immediate income of the minor or of his estate does not necessarily justify the inference that the particular transaction is for the benefit of the estate within the meaning of the rule which could not have been intended to include cases of speculative development of estates of minors. KRISHNA CHANDRA CHOUDHURY *v.* RATAN RAM PAL (1915)

20 C. W. N. 645

25. —— [illegible] family—[illegible] *Burden of proof of legal necessity* [illegible] *Where no necessity proved the interest of such mortgagor not saleable in enforcement of mortgage—Mortgage only operative to the extent to which the mortgage money was proved to be necessary.* The mortgage of joint estate made by the manager of a joint family who is not the father of the other members of the family can only be justified so far as it is wanted for the joint family purposes. If the necessity cannot be established by direct evidence, it may be assumed if it can be shown that reasonable care was taken to ascertain if such circumstances [illegible] gage. *Bhaga Chandra Dhar* ... *Buree v. Jogal Kishore Acharjya Chaudhuri, I. L. R. 44 Calc. 186 : L. R. 43 I. A. 249,* followed. There was no difference between the burden of proof when [illegible] who has only a similar limited power of disposi[illegible] *Lachman Prasad v. Sarnam Singh, I. L. R. 39 All. 500 ; L. R. 44 I. A. 163,* referred to. In the [illegible] to the limited extent proved. ANANT RAM *v.* COLLECTOR OF ETAH (1917 I. L. R. 40 All. 171

26. ———— By Widow—*Subsequent adoption—Right of adopted son to set aside alienation and recover alienated property.* A Hindu widow alienated certain properties for a purpose not binding on the inheritance, and thereafter adopted a son. *Held* by the FULL BENCH, that the alienation was not binding on the adopted son and that he could sue, during the life time of the widow, to set aside the alienation and recover the properties so alienated, his cause of action arising from the time of his adoption. *Sreeramulu v. Krishtamma, I. L. R. 26 Mad. 143,* overruled. *Bonomali Roy v. Jagat Chandra Bhowmick, I. L. R. 32 Calc. 669,* and dictum in *The Collector of Madura v. Mootoo Ramalinga Sathupathy, 12 Moo. I. A. 397, 443,* followed. VAIDYANATHA SASTRI *v.* SAVITHRI AMMAL (1917)

I. L. R. 41 Mad. 75

27.———— ———— Circumstances justifying alienation—*Spiritual benefit of husband—To what extent alienation permissible.* For religious or charitable purposes or those which are

HINDU LAW—ALIENATION—*contd.*

supposed to conduce to the spiritual welfare of her husband, a Hindu widow has a larger power of disposition than that which she possesses for purely worldly purposes. [illegible] between legal necessity [illegible] on the one hand and the [illegible] on the other hand. A [illegible] welfare of the [illegible] of a moderate portion of the property [illegible] husband by the widow [illegible] benefit is valid. Whether an alienation [illegible] reasonable portion of the property [illegible] is a question which must be determined [illegible] reference to the circumstances of each [illegible] dependent. [illegible] *Lal Singh v.* [illegible] *Calc.* [illegible] *Mad.* [illegible] *I. L. R.* [illegible] *Kishore* [illegible] *Chand* [illegible] and [illegible] *Weekly* [illegible] BIHARI LAL *v.* [illegible]

I. L. R. 40 All. [illegible]

28. ———— Lease granted by a Hindu widow to her manager 40 years before suit—*Value of recitals of legal necessity* [illegible] *alienation, if may hold* [illegible] *necessity—Alienation of the widow* [illegible] *of part of the corpus of the estate.* [illegible] legal necessity in an alienation by a Hindu widow made more than 40 years before suit [illegible] be given the weight attached to similar [illegible] in *Banga Chandra v. Jagat Kishore, L. R. 43 I. A. 249 ; s. c. I. L. R. 44 Calc. 186 ; 21 C. W. N.* [illegible] inasmuch as in this case evidence was [illegible] as to the pecuniary condition of the widow at the time of the alienation and it was made to a person who in fact managed the estate for the widow : *Held,* on the evidence, that the alienation in this case, a permanent *ijara,* was not [illegible] for legal necessity, nor was it binding on the reversioners apart from legal necessity as being for the "benefit of the estate." *Held,* also, that the reversioners did not by getting themselves substituted as the legal representatives of the widow in a suit for arrears of *ijara* rent [illegible] had fallen due in her lifetime did not ratify the *ijara.* Property acquired by the widow out of the income of the estate became part of the corpus of the estate where it appeared that her intention was to treat the purchased property as part of the original estate. [illegible] *v.* [illegible] (1916),

22 C. W. N. 66

29. ———————— Power to alienate husband's estate—*Surrender or relinquishment by widow—Consent of reversioners—Whether* [illegible] *is binding on a* [illegible] As to the power of a Hindu widow to deal with the property of her husband to which she has succeeded [illegible] on his death, there is a distinction between the power of surrender or renunciation which is the first head of the subject and the power of alienation for certain specified purposes, as necessity, which is the second. The result of the consideration of the decided cases may be summarised as follows [illegible]

HINDU LAW—ALIENATION—*contd.*

by a widow of her deceased husband's estate held by her may be validated if it can be shown to be a surrender of her whole interest in the whole estate in favour of the nearest reversioner or reversioners at the time of the alienation. In such circumstances the question of necessity does not fall to be considered. But the surrender must be a *bonâ fide* surrender, and not a device to divide the estate with the reversioner. (ii) When the alienation of the whole or part of the estate is to be supported on the ground of necessity, then, if such necessity is not proved aliunde, and the alienee does not prove enquiry on his part, and honest belief in the necessity, the consent of such reversioners as might fairly be expected to be interested to quarrel with the transaction, will be held to afford a presumptive proof which if not rebutted by contrary proof will validate the transaction as a right and proper one. Where property was transferred by the widow to an alienee from whom a prospective reversioner takes a mortgage of a portion of it, he is not estopped on the death of the widow, from disputing the validity of the alienation. RANGASAMI GOUNDEN *v.* NACHIAPPA GOUNDEN (1919)

I. L. R. 42 Mad. 523
L. R. 46 I. A. 72

30. ———— **By daughter**—*Of entire house inherited by her to discharge debt of father—House not saleable piecemeal —Legal necessity—Suit by reversioner to recover house from vendees.* To pay off an antecedent debt of her father, the daughter of a separated Hindu sold a house which had been the property of her father in his life-time and had been previously mortgaged by herself and her mother jointly as security for the same debt. The debt at the time of the sale amounted to Rs. 7,775, and the house was sold for Rs. 19,500. On the other hand, it was found that the house was not one which could have been divided and sold piecemeal. *Held,* that the reversioner to the last male owner was not in the circumstances entitled to recover the house from the vendees. BAL KRISHNA DAS *v.* HIRA LAL (1918) . **I. L. R. 41 All. 338**

30(a). ———— **By father**—A suit was instituted against a Hindu father and his sons on a mortgage bond executed by the father alone. The Court found that it was not for any purpose binding upon the sons. *Held,* that the mortgagee was entitled to a conditional decree under O. XXXIV, r. 6 against the father personally and against the Joint Family property of himself and his undivided sons for the recovery of the balance in case the sale-proceeds of the father's share of the mortgaged property was insufficient. KANDASAMI GOUNDAN *v.* KUPPU MOOPPAN.

I. L. R. 43 Mad. 421

31.———— **By widow—Onus of proof of legal necessity**—*Suit to set aside an alienation after long lapse of time—Presumptions to complete proof.* The suit which gave rise to this appeal was one by a reversioner to set aside an alienation by a widow made in 1830 on the ground that it was made without legal necessity. The widow died on the 15th December 1900, and the suit was instituted on 12th December 1912 involving an inquiry into the circumstances of a transaction more than 82 years after it took place. The District Court found that there was no legal necessity for the sale and decreed the suit. The High Court held that legal necessity had been proved and reversed the judgment of the Trial Judge.

HINDU LAW—ALIENATION—*contd.*

In the course of their judgment they said, "It is not disputed that the onus lay upon the defendant to prove the necessity for the sale, but having regard to the great lapse of time since the transaction took place, perhaps, the highest on record, it will not be reasonable to expect such full and detailed evidence as to the state of things which gave rise to the sale in question as in the case of alienations made at more recent dates. In such circumstances presumptions are permissible to fill in the details which have been obliterated by time." Their Lordships of the Judicial Committee in affirming the decision of the High Court cited the above with approval as being in their opinion a correct statement of the law. VENKATA REDDI *v.* RANI SAHEBA OF WADHAVAN (1920)

I. L. R. 43 Mad. 541
L. R. 47 I. A. 6.

32.———— **By widow—proof of necessity** *debt paid to third person. Held,* that under Hindu Law a widow cannot alienate immoveable property inherited by her from her husband except for special purposes. For religious and charitable purposes or for those which are supposed to conduce to the spiritual welfare of her husband she has a larger power of disposition than that which she possesses for purely worldly purposes, and to support such an alienation she must show necessity. *Held, also,* that the payment of a debt contracted by the widow from a third person does not of itself justify an alienation by her of immoveable property. GOWARDHAN DAS *v.* VIRU MAL

I. L. R. 1 Lah. 48

33.———— **By widows in accordance with a decree for maintenance obtained against them** —*Suit by reversioners to challenge alienation—* Res judicata—*Bengal Tenancy Act (VIII of 1895), s. 22.* Where *S*, the daughter of a deceased Hindu by a wife who had predeceased him sued his two surviving widows on the ground that they declined to deliver a certain *pattah* and had also dispossessed her from a part of the property covered by the *pattah,* the said *pattah* having been executed by them in accordance with a custom prevalent in the family by which married daughters who resided in the family dwelling-house were entitled to receive a certain amount by way of maintenance for themselves, their husbands and their children, to be enjoyed after their death by their descendants, and it was found that the alleged custom did exist in the family, and the suit was accordingly decreed: *Held,* in a suit by the reversioners against the son of *S* for recovery of joint possession with the defendant of the land covered by the *pattah,* that the suit against the widows was not a suit to enforce an alienation made in their personal capacity, and that the decree obtained in that suit was binding on the reversioners inasmuch as in that suit the widows represented the estate of their deceased husband. ATUL CHANDRA METRA *v.* MIRTUNJOY BOSE . . . . . **3 Pat. L. J. 426**

34.———— **By widow before birth of son**—*Whether after-born son divests his mother's estate as a widow from the date of his birth or from the date of his father's death.* The house and site in dispute belonged to the plaintiff's father T, a Hindu, who died in May 1911. On the following July the property was sold by T's widow R. The plaintiff who was born to R five days after the sale, sued to contest its validity. This first Court decreed the claim, holding that the plaint[illegible]

HINDU LAW—ALIENATION—*contd.*

in contemplation of law actually existing at the time of his father's death, that at the time of the sale he, and not his mother, was the owner of the property, and *that, therefore, the sale* by the latter was void. This decree was upheld by the District Judge on appeal. *Held*, on second appeal that the rights of a son under Hindu Law in the estate by his father commence at birth and not before, and *that R was consequently* at the date of the sale competent to alienate the property for necessity. *Bamundoss Mookerjea* v. *Mussammat Tarinee (7 Moo. I. A. 169 P. C.)*, followed. Mayne's Hindu Law, 8th Edition, page 499, and West and Buhler's Digests of Hindu Law, 3rd Edition, volume I, page 803, referred to. *Jatindra Mohan* v. *Ganendra Mohan (9 Beng. L. R. 377, P. C.)*, *Mussammat Mangli* v. *Sobha Singh (20 Indian Cases 272)*, *Minakshi* v. *Virappa (I. L. R. 8 Mad. 89)* and *Ramakrishna* v. *Tripurabai (I. L. R. 33 Bom. 88)*, distinguished; *Sabapathi* v. *Somasundaram (I. L. R. 16 Mad. 76)* and *Hanmant Ramachandra* v. *Bhimacharya I. L. R. 12 Bom. 105)*, not followed. HIRA *v.* BUTA

I. L. R. 1 Lah. 128

35. ———— By way of Compromise—*—By Limited owner—whether binds reversioners.* An alienation by way of compromise entered into

who had no

time of the

oners. ANUP NARAIN SINGH *v.* MAHABIR PRASAD SINGH

3 Pat. L. J. 83

36. ———— Alienation of occupancy right by father, *whether binding on minor sons—Central Provinces Tenancy Act (XI of 1898), S. 46 (1)* An alienation by the father of a Hindu joint family of his interest in an occupancy holding appertaining to the ancestral property of the family is not binding on a minor except in those cases in which an alienation of the family property would ordinarily bind the son. SUKRU MALI *v.* SRI BRAHMAPURA BALBHADRA MAHAPARBHU . . **4 Pat. L. J. 354**

37. ———— Decree against father—*joint family property sold in execution—whether sons are bound.* Where the name of the father of a Hindu joint family was entered in the Record-of-Rights, as being in possession and he unsuccessfully defended a suit brought against him, *held*, that the sons were bound by an attachment of joint family property made at the instance of the successful plaintiff in execution of the decree which awarded him recovery of possession, mesne-profits and costs. The rule of Hindu Law under which a son is not liable for debts of his father incurred for an illegal or immoral purpose does not apply when the debt has merged in a decree. GANESH LALL *v.* DEO SARAN AHIR

4 Pat. L. J. 692

38. ———— Antecedent debt—*loan*

[illegible]

finding that he is not able to repay the loan, executes a mortgage bond as security, the bond is one, for an antecedent debt. In a suit on a bond by the mortgagee the onus of proving that the debt is an antecedent one lies on the plaintiff. SUKHDEO JHA *v.* JHAPAT KAMAT **5 Pat. L. J. 120**

HINDU LAW—ALIENATION—*contd.*

39. ———— Interest, necessity for high rate of—*burden of proving.* The principle that it is incumbent on those who support *a mortgage made by the manager of a joint Hindu* family to shew not only that there was a necessity to borrow but that it was not unreasonable to borrow at a high rate of interest applies to a case of a mortgage by a Hindu widow. In the *absence, however, of a specific plea in the written* statement that there was no necessity to borrow at a high rate of interest the burden of establishing that necessity does not lie on the mortgagee. JAG SAHU *v.* RAI RADHA KISHUN

5 Pat. L. J. 287

40. ———— Mortgage by member of the family, validity of—whether mortgagor's share liable—*Evidence Act (I of 1872). S. 32, Illustration (1)—horoscope, admissibility of.* A mortgage by an individual member of a *Mitakshara* family of the whole or a share of the joint family property, where no family necessity or antecedent debt is proved, is void and inoperative as against the property *hypothecated*

even against

Where, howeve., [illegible] separated from that of the other members of the family, actual partition by metes and bounds not being essential for this purpose, or where the share has by legal process been attached or sold at the instance of the creditor, it may become available as security for the mortgage debt. In special circumstances where the property has already passed into the hands of the mortgagee the court, if satisfied that the equities of the case require it, may in its discretion set aside the alienation upon the terms that the property when restored shall be held in separate shares, the share of the mortgagor being subject to a lien for the mortgage debt and interest. In a suit to enforce a mortgage against the joint family property, the mortgagors being in possession, no equities can arise as in a case where the property has been sold in execution of a decree or has otherwise passed *into the hands of the mortgagees.* An intention to separate from the rest of the joint family cannot be inferred from the fact that the member of the family executing the mortgage purported to hypothecate only his own share out of the whole property. A horoscope drawn up by a person who has since died is admissible in evidence to prove the age of the person mentioned in the horoscope by reason of *Illustration (1)* to s. 32 of the Evidence Act, 1872, but the horoscope is not conclusive of the age of the person. AMAR DAYAL SINGH *v.* HAR PERSHAD SAHU

4 Pat. L. J. 605

41. ———— By manager—Mitakshara—*Joint family*—karta, *power of, to deal with family property—alienations of joint property in order to purchase other property, validity of—enjoyment of proceeds by members of the family, whether amounts to ratifications—whether mortgagor's share liable—Contract Act (IX of 1872), s. 65-Burden of proof.* The power of the *karta* of a joint family to deal with the joint family property is the same as that of the manager for an infant heir under the Hindu Law as defined in 6 M. I. A. 393. Actual compelling necessity is not the sole test of the validity of an alienation by the manager acting without *the express consent of the other members.* When

HINDU LAW—ALIENATION—*contd.*

it can be shewn that the transaction was one which was clearly beneficial to the interest of the family as a whole the transaction is valid and the consent of the other members will be implied although not expressly given. Where the *karta* of a family has executed a mortgage which is not justified either as being necessary or as being for the benefit of the family the mortgagee is not entitled to proceed against the joint family property nor against the undivided share of the mortgagor. S. 65 of the Contract Act does not apply to a case in which the mortgagee has lost his remedy against the mortgagor personally, not on the ground that the mortgage was void, but by reason of the operation of the law of limitation. Where it is open to both parties to produce evidence concerning the existence or non-existence of a particular fact the party upon whom the onus of proving the fact lies does not discharge that burden by showing that the other side could equally well have proved the contrary. The mere fact that the manager borrowed money in order to purchase immoveable property on behalf of the family does not in itself create any presumption that the transaction was beneficial to the family so as to authorize the manager to hypothecate existing family property by way of security for the loan. Some necessity for the transaction or some benefit resulting to the family therefrom must in all cases be shewn. The mere fact that the members of the family have enjoyed the produce of the property purchased with the loan does not amount to their assent to, or ratification of the mortgage. Nor can it be said that the question as to whether the transaction has resulted in a benefit to the family is a matter which is specially within the knowledge of the family so as to shift the onus of proof to them. RAM BILAS SINGH *v.* RAMYAD SINGH **5 Pat. L. J. 622**

42. ———— **Temple property,** *permanent lease of, questioned after 100 years—Presumption that alienation was lawfully made.* The disability of a *shebait* of a Hindu Deity to make a permanent grant of endowed property is not absolute. Although the *shebait* for the time being has no power to make a permanent alienation of such property in the absence of proved necessity for the alienation, yet the long lapse of time between the alienation and the challenge of its validity is a circumstance which enables the Court to assume that the original grant was made in exercise of that extended power. The above principle was applied in the present case of a permanent lease of temple property which was challenged after the lapse of 100 years, when it had become completely impossible to ascertain the circumstances which caused the grant to be made. The importance to parties to litigation in India of defining at the earliest moment and in the simplest terms the exact character and extent of the dispute which is going to be made the subject of litigation adverted to. BAWA MAGNIRAM SITARAM *v.* SHETH KESTURBHAI MANIBHAI (P. C.).

26 C. W. N. 474

43. ———— **Gift by a Hindu widow**—*Alienation voidable, not void—Mortgagee cannot dispute the validity of alienation—Reversioners alone can dispute the validity of grant.* The plaintiffs who were the donees from a Hindu widow sued to redeem the land in the possession of the defendants as mortgagees. The defendants contended that

HINDU LAW—ALIENATION—*concld.*

the alienation in favour of the plaintiffs was void after the widow's death. *Held,* that the alienation was only voidable, not void and the mortgagee had no *locus standi* to resist the claim of the person who on the face of it had a perfectly good title to equity of redemption granted by a Hindu widow, and the only person who could dispute the validity of such a grant was the reversioner. *Raja Modhu Sudan Singh* v. *Rooke* (1897) *L. R. 24 I. A. 164,* referred to. *Jagannath Vithal* v. *Appaji Vishnu* (1868) *5 Bom. H. C.* (A. C. J.) *217,* considered. SITARAM *v.* KHANDU.

I. L. R. 45 Bom. 105

44. ———— **By Hindu mother**—*Succeeding to her son's estate for payment of her husband's debts—Legal necessity.* Although a Hindu son may be under a pious obligation to pay his father's debts, there is no authority which lays down that a mother is bound to satisfy that obligation on her son's death and can validly alienate for that purpose the estate which has come to her by inheritance from her son, unless such estate has been charged by the father with the payment of his debts. *Udai Chunder Chuckerbutty* v. *Ashutosh Das Mozumdar, I. L. R., 21 Calc., 190,* and *Bhala Nahana* v. *Parbhu Hari, I. L. R., 2 Bom., 67,* distinguished. *Per curiam.* The transferee comes here in second appeal. The argument put forward on his behalf to support the transfer for this account is that the son was under a pious obligation to pay certain debts contracted by his father and uncle respectively, and as the son died without paying those debts, his mother who succeeded to the estate which originally belonged to her husband her husband's brother, was justified in making the transfer of the family property to pay off those debts. The utmost extent to which the Hindu law has gone in this matter is that a son is under a pious duty to pay his father's debt, and also that a sonless widow can alienate her husband's estate to pay off her husband's debt. The Hindu law makes no difference between a time-barred debt and a debt which is not so barred, but there is no warranty or reason for holding that a nephew is bound to pay his uncle's debt and there is no authority which lays down that a mother is bound to pay his son's debt and can validly alienate the estate which has come to by inheritance from her son at her death. SHEO RAM PANDE *v.* SHEO RATAN PANDE.

I. L. R. 43 All. 604

HINDU LAW—BANDHUS.

See Hindu Law—SUCCESSION.

———————— *Mitakshara—Bandhu—Grandfather's great-grandson's daughter's son not a bandhu under the Mitakshara law. Held,* that for *bandhu* relationship to exist it is essential that the person claiming to be *bandhu* and the last male owner must have been *sapindas* of each other. The rule of *sapinda* relationship under the Mitakshara law extends to seven degrees on the father's side and five degrees on the mother's side including the last owner. Therefore a grandfather's great-grandson's daughter's son is not a *bandhu* under the Mitakshara law. SHIB SAHAI *v.* SARASWATI (1915) . . **I. L. R. 37 All. 583**

HINDU LAW—BOND.

———————— *Suit on bond executed by deceased Hindu against his widow and brothers—Form of decree.* Plaintiff, after the death of the obligor, a Hindu, sued his widow and brothers

HINDU LAW—BOND—*concld.*

to recover the amount due on a bond. It was found that the obligor and his brothers were joint. *Held*, that the plaintiff was still entitled to a decree against the widow which might be executed against any self-acquired property of the deceased obligor in her hands. PAHALWAN SINGH *v.* JANKI (1917) . . . . **I. L. R. 40 All. 17**

———————— *Bond held in the name of a member—Separate private transactions by individual members—Presumption of jointness, if rebutted.* The presumption is that a bond held in the name of the managing member of a joint Mitakshara Hindu family is joint property and it is for those who assert the contrary to make good their case. Proof that some of the members of the joint family had some private transactions by no means proves that the particular bond in question was the private property of the member in whose name it was held. *Held*, that while the *evidence on both sides was somewhat meagre* the presumption in favour of joint ownership was not displaced. BANDHU RAM *v.* CHINTAMAN SINGH . . . . . **26 C. W. N. 407**

HINDU LAW—CONVERSION.

See CASTE DISABILITIES REMOVAL ACT, 1850.

See HINDU LAW (JOINT FAMILY)

I. L. R. 40 Calc. 407

1. ———————— *Change of religion —Effect of conversion of a member of Joint Hindu family to Muhammadanism—Regulation VII of 1832, s. 9—Act XXI of 1850—Compromise—Effect of compromise entered into by members of family in settlement of disputes as to rights to property—Act XIV of 1859, s. 1, cl. 12—Act No. IX of 1871, Sch. II, Art. 141—Act No. XV of 1877, Sch. II, Art. 141—Suit by reversioner.* By Bengal Regulation VII of 1832, s. 9, and Act XXI of 1850 the Legislature virtually set aside the provisions of the Hindu Law which penalize the renunciation of religion, or exclusion from caste. Where, therefore, in a joint Hindu family consisting of a father and son, the father was converted to Muhammadanism in 1845. *Held* (reversing the decision of the High Court), that by the father's abandonment of Hinduism the son did not acquire any enforcible right to his father's share in the joint family property which he could either assert himself, or transmit to his heirs for enforcement, in a British Court of justice. *Semble:* Whatever right the son acquired under the Hindu law to the share of his father came into existence on the conversion of the latter in 1845; and no suit could have been brought (even if Regulation VII of 1832 and Act XXI of 1850 had permitted it) to enforce that right after the lapse of 12 years from the time the cause of action arose (s. 1, cl. 12 of Act XIV of 1859): and nothing in Art. 142 of Act IX of 1871, or in Art. 141 of Act XV of 1877 could revive a right which had already become barred. *Hari Nath Chatterjee* v. *Mothur Mohum Goswami, I. L. R. 21 Calc. 8: L. R. 20 I. A. 183*, referred to. After the death of the father (who survived the son) and their widows a compromise was in 1860 effected between the two daughters of the son on the one side and the grandson of the father on the other, under which an 8½-anna share was allotted to the daughters and a 7½-anna share to the grandson. The 8½-anna share eventually on the death of the survivor of the two daughters in 1899, devolved upon the respondents, her sons. In a suit by them in 1904 for possession of the 7½-anna share allotted to the grandson,

[illegible]

by the members then claiming title to the property in settlement of their disputes, "each one relinquishing all claim in respect of all property in dispute other than that falling to his share, and recognising the right of the others as they *had previously asserted it to the portion* allotted to them respectively." (See *Lalla Oudh Beharee Lall* v. *Ranee Mewa Koonwar, 3 Agra H C. 82, 84.* The compromise was therefore binding on the respondents. The true test to apply to a transaction which is challenged by reversioners as an alienation is whether the alienee derives title from the holder of the limited interest or life-tenant, which in this case the predecessor in title of the appellants did not do: for the compromise have was "based on the assumption that there was an antecedent title of some kind in the parties and the agreement acknowledges and defines what that title is." (See *Rani Mewa Kunwar* v. *Rani Hulas Kunwar, L. R. 1 I. A. 167*, KHUNNI LAL *v.* GOBIND KRISHNA NARAIN (1911)

I. L. R. 33 All. 356
15 C. W. N. 545

2. ———————— *Conversion of a Hindu widow to Muhammadan and marriage with a Muhammadan—S. 2 of Hindu Widow's Re-Marriage Act (XV of 1856)—Forfeiture of Hindu husband's estate. Held.* By the Full Bench (SHESHAGIRI AYYAR, J., dissenting), that a Hindu widow, who becomes a Muhammadan, forfeits under the Hindu Law, by her re-marriage, her interest in her Hindu husband's estate. *Murugai* v. *Viramakali, I. L. R. 1 Mad 226*, followed *Moniram Kolita* v. *Kery Kolitani, I. L. R. 5 Calc. 776*, distinguished; *Chowdappa* v. *Narasamma, 23 Mad. L. T. 81*, overruled. *Held*, further, by WALLIS, *C.J.* (OLDFIELD, *J.*, and SESHAGIRI AYYAR, *J.*, *contra*)—She forfeits also under s. 2 of Act XV of 1856, which only embodied the existing law on the subject. *Per* SESHAGIRI AYYAR, *J.*—Neither by Hindu Law nor by s 2 of Act XV of 1856, which is only an enabling Act, does she forfeit her interest. VITTA TAYARAMMA *v.* CHATAKONDU SIVAYYA (1918) **.I. L. R. 41 Mad. 1078**

HINDU LAW—COPARCENER.

1. ———————— *Decree against one coparcener—Right to attach and sell the interest of another co-parcener—Declaration, suit for.* The plaintiff sued for a declaration that the property of the defendant was liable to attachment and sale in execution of a decree obtained by the plaintiff in another suit (to which this defendant was not a party) against the defendant's undivided brother for money borrowed on the *defendant's* account. The declaration having been granted, the defendant appealed: *Held*, that where the stage of sale had not been reached, there was no reason for assuming jurisdiction to dispose of property belonging to one who was no party to the suit and was not a representative of the judgment-debtor. LAXMAN NILKANT *v.* VINAYAK KESHAV (1915) . . **I. L. R. 40 Bom. 3**

HINDU LAW—COPARCENER—*concld.*

2. ———————— *Co-parceners—Junior member of a joint Hindu family—Bond in the name of manager—Payment to a junior member during lifetime of manager—Liability of promisor—Discharge—Rule, as to co-heirs and co-promisees—English Law.* Payment made to a junior member of a joint Hindu family during the lifetime of its manager in whose favour a bond has been executed, will not discharge the promisor from his liability under the bond. Rule as to co-heirs applied, and the rulings as to co-promisees considered, and cases reviewed. ANKALAMMA *v.* CHENCHAYYA (1917). . **I. L. R. 41 Mad. 637**

3. ———————— *Mitakshara joint family—Power of adult co-parcener to appoint by will a guardian for minor co-parcener's property. Held* by the Full Bench, that the only adult coparcener of a Mitakshara family consisting of himself and his minor co-parceners, is not competent to appoint a testamentary guardian to the co-parcenary properties of the minor co-parceners. *Cases* on the subject reviewed. CHINDAMBARA PILLAI *v.* RANGASWAMI NAICKER (1918) **I. L. R. 41 Mad. 561**

4. ———————— *Sale by a co-parcener of specific lands—Sale by vendee to another, pending suit for partition in vendor's family—Allotment of different lands by the decree to the vendor—Co-parcener—Right of vendee's vendee to get lands of same value out of the lands allotted to vendor—Right to damages—Measure of damages.* Even though a vendee of specific lands from a co-parcener of a Hindu family may be entitled to recover lands of equal value out of the lands allotted to his vendor in a subsequent partition in the family, a vendee from the first vendee has no such right his only remedy being to get damages from his vendor. In assessing damages the vendee is entitled to ask that they should be assessed at the present enhanced value of the lands. DHADHA SAHIB *v.* MUHAMMAD SULTAN SAHIB. (1921) **I. L. R. 44 Mad. 167**

HINDU LAW—CUSTOM.

See HINDU LAW—ADOPTION (AMONG JAINS) . . **I. L. R. 32 All. 247**

1. ———————— **Right to officiate at cremation ceremony**—*Moriporah Brahmin—Right to religious office, suit for, if maintainable in Civil Court—Exclusive right of a priest to officiate at ceremonies, if enforceable at law—Customary exclusive right to officiate at cremation if valid—Bengal Municipal Act (III B. C., of 1884), s. 259—Grant of exclusive license for sale of firewood, if ultra vires.* Suits in which the principal question relates to the right to an office are suits of a civil nature and not the less so because the right claimed may depend upon the decision of questions as to religious rites and ceremonies. *Krishnama* v. *Krishnasami, I. L. R. 2 Mad. 62 : s. c. L. R. 6 I. A. 120 ; Krishnaswami* v. *Krishnamacharyar, I. L. R. 5 Mad. 313,* referred to. Where the plaintiff claimed a hereditary right to officiate exclusively as priest on the occasion of the cremation ceremony of all dead bodies brought for funeral to a particular place, the priest being paid for such service by a gratuity regulated by contract or custom : *Held*, that the suit could not be thrown out as not maintainable in a Civil Court. *Muhammad* v. *Sayad Ahmed, 1 Bom. H. C. R. Appx. 18 ; Mamat Ram* v. *Bapu Ram,*

HINDU LAW—CUSTOM—*contd.*

I. L. R. 15 Calc. 159 ; Kali v. *Gouri, I. L. R. 17 Calc. 906 ; Dinanath* v. *Protap Chandra, 4 C. W. N. 79 : c. s. I. L. R. 27 Calc. 30 ; Tholoppala* v. *Venkata, I. L. R. 19 Mad. 62 ; Subbaraya* v. *Vedantachariar, I. L. R. 28 Mad. 23 ; Limba* v. *Rama, I. L. R. 13 Bom. 548 ; Gursangaya* v. *Tamana, I. L. R. 16 Bom. 281 ; Murari* v. *Suba, I. L. R. 6 Bom. 725 ; Sayad Hashim* v. *Husein Sha, I. L. R. 13 Bom. 429 ; Barsati* v. *Chamru, 4 All. L. J. R. 715 ; Chumma* v. *Babu, 7 All. L. J. R. 529,* discussed. Under Hindu law, the exclusive right claimed by a priest to officiate at ceremonies of a family because his ancestors had before him performed similar ceremonies is not enforceable at law. *Radha Kishen* v. *Sham Kissen, 2 Mac. Sel. Rep. 259 ; Chaurast* v. *Dewan Chand, 6 Mac. Sel. Rep. 182 ; Kali Churn* v. *Hurree Kisto, (1848) Beng. S. D. A. 532 ; Hurgobind* v. *Bhowanee, (1850) Beng. S. D. A. 296 ; Gour Dass* v. *Annund, (1849) Beng. S. D. A. 428 ; Rama Kant* v. *Gobind, (1852) Beng. S. D. A. 398, Roodurmun* v. *Damodar, 1 Hay 365 ; Madhub* v. *Mobeen, 5 W. R. 224 ; Becha Ram* v. *Thakurmani, 10 W. R. 114 ; 8 B. L. R. 58 ; Magju* v. *Ram, 15 W. R. 531, 8 B. L. R. 50 ; Lala* v. *Ganeshi, (1856) ; Agra S.D. A. 509 ; Hur Lall* v. *Jeo Rakhun, (1862) ; Agra S. D. A. 314 ; Beharee* v. *Baboo, 2 Agra H. C. R. 80 ; Chunnu* v. *Babu, 7 All. L. J. R. 529 ; Rama Krishna* v. *Ranga, I. L. R. 7 Mad. 424 ; Mooljee* v. *Nagmy, (1834) Bom. Sel. Rep. 116 ; Muncharam* v. *Amba, (1831) Bom. Sel. Rep. 159 ; Vithal* v. *Babablut, 1 Bom Pr. Jud. 471 ; Sitarambhat* v. *Sitaram, 6 Bom. H. C. R. 257 ; Vithal* v. *Anant, 11 Bom. H. C R. 6 ; Dino Nath* v. *Sadashiv, I. L. R. 3 Bom. 9 ; Waman* v. *Balaji, I. L. R. 14 Bom. 167,* referred to. Where the plaintiff, a degraded Brahmin of the *moriporah* class, claimed the right to officiate at the cremation ceremony of all dead bodies brought to a particular ghat and proved that she and her father had officiated as such : *Held*, that the custom pleaded could not be recognised because, in the first place, it was not immemorial ; in the second place, it was not reasonable inasmuch as it tended to create a monopoly ; in the third place, because it was shown not to have continued without interruption since its origin ; and, fourthly, because it was uncertain in respect of the locality in which it was alleged to obtain and in respect of the persons whom it was alleged to affect. *Tyson* v. *Smith, 9 A. & E. 406 ; 48 R. R. 539 ; Mercer* v. *Denne, (1904) 2 Ch. 534, 557 ; Johnson* v. *Clark, (1908), 1 Ch. 303, 311 ; Salisbury* v. *Gladstone, 9 H. L. C. 692, 701, Darcy* v. *Allen, 11 Coke 84 ; Hammerton* v. *Honey, 24, W. R. (Eng.) 603 ; Fitch* v. *Rawling, 2 H. Bl. 393, 399 ; 3 R. R. 425 ; Gell* v. *Mayor of Birmingham, 10 L. T. N. S. 497 ; Burial Board* v. *Thomson, 19 W. R. (Eng.) 892 ; Wood* v. *Burial Board, (1892) 1 Q. B. 713,* referred to. GOURMANI DEBI *v.* CHAIRMAN OF PANIHATI MUNICIPALITY (1910) . . . . **14 C. W. N. 1057**

2. ———————— **Succession**—*Family custom in derogation of ordinary Mitakshara law governing the parties—Proof of custom—Wajib-ul-arzes—Entries in case in which there was no instance of custom ever having been observed—Entries showing contradictory views and wishes of individuals rather than fact of existence of a custom.* In a family of Ahban Thakurs in Oudh, the respondent took possession on the death of his full brother of a share of an estate called Deokalia. The appellant, step-brother of the respondent and of the deceased,

HINDU LAW—CUSTOM—*contd.*

sued for a moiety of the share of the estate which had belonged to the deceased on the ground that by a custom in the family a step-brother was entitled to succeed equally with the full brother, supporting his case wholly by wajib-ul-arzes made 30 years before suit, the entries in which were admittedly made by the settlement officials after inquiries from the members of the family then living, and were duly attested and signed. The Court of the Judicial Commissioners found that, though there was no rebutting evidence, no instance was adduced in which the alleged custom had ever governed the devolution of the property and that besides the entries as to the custom the wajib-ul-arzes contained other entries in which contradictory views of the parties who attested them were expressed, and which afforded internal evidence against the existence of the alleged custom, and held that the entries in the wajib-ul-arzes were not, although unrebutted, sufficient proof of a custom in derogation of the ordinary Mitakshara law. *Held*, affirming the decision of the Judicial Commissioner, that *no class of evidence was more likely to vary in value than that of wajib-ul-arzes*—*Muhammad Imam Ali Khan* v. *Husain Khan, I. L. R. 26 Calc. 81 : L. R. 25 I. A. 161*, and *Parbati Kunwar* v. *Chandarpal Kunwar, I. L. R. 31 All. 457 ; L. R. 36 I. A. 125*,—and whereas here it seemed probable that the entries recorded connoted the views of individuals as to the practice they would wish to see prevailing, rather than the ascertained fact of a well-established custom, the Judicial Commissioners rightly attached weight to the fact that no evidence at all was forthcoming of any instance in which the alleged custom had been observed. ANANT SINGH *v.* DURGA SINGH (1910)

I. L. R. 32 All. 363

3. ———— **Babuana and Sohag grants**—*Proof of Custom—Custom excluding females from succession in Darbhanga Raj family estate—Custom of exclusion not only from succession to Raj, but extending to succession in collateral branches of family—Custom effective notwithstanding partition had taken place in family branch.* In a suit by one of two brothers in a junior branch of the family of the Darbhanga Raj (an estate governed by the rule of male lineal primogeniture) against the widow of the other brother for possession of her deceased husband's property, on the ground that widows were by the custom of the family wholly excluded from succession, not only to the Raj itself, but also in the collateral branches of the family :—*Held*, that *there was on the evidence* a valid custom established in the junior branch of the family to which the parties belonged that widows did not inherit *babuana* properties, and that the succession in the case of *sohag* grants was governed by the same custom as governed the succession in the case of *babuana* grants. The custom applied in this case notwithstanding a separation and partition of the property which had been effected between the plaintiff and his brother; and consequently on his brother's death the plaintiff became entitled to such of the estate of his deceased brother as consisted of *babuana* and *sohag* properties, together with accretions which had been made to the former property. *Held*, also, that the custom was strongly supported by instances in the family of widows, who would otherwise have been entitled to a Hindu widow's interest, having been excluded from, or not having claimed possession of property on the death of the husbands; and that the custom being proved to be well-established could not, under the circumstances, be defeated by the fact that in one instance as the evidence showed, it was not enforced. Words used in the *babuana* and *sohag* grants, "*auras putra poutradi*," were held *not to* be words of general inheritance which would include female as well as male heirs, but words of limitation consistent with the custom which excluded females from succession under *babuana* and *sohag* grants which could not be made under the ordinary Hindu (in this case the Mithila) law. *Ram Lall Mookerjee* v. *Secretary of State for India, I. L. R. 7 Calc. 304 ; L. R 8 I. A. 46.* EKRADESHWAR SINGH *v.* JANESHWARI BAHUASIN (1914) . . . . **I. L. R. 42 Calc. 582**

4. ———— **Right to perform festival in a temple—Ubayakar**—*Right of married daughter.* ... *of proof.* ... mple is a ... the holder ... *ayakar* or ... ne absence of proof of a special custom excluding females, entitled to exercise such right, although she has been married into another family. *Tangirala Chiranjivi* v. *Raja Manikya Rao, 27 Mad L. J. 179, Raja Rajesuari Ammal* v. *Subramania Archakar, 30 Mad. L. J. 222*, and *Vengamuthu* v. *Pandavesuara, I. L. R. 6 Mad. 151*, referred to. PANKAJAMMAL *v.* THE SECRETARY OF STATE FOR INDIA (1916) . **I. L. R. 40 Mad. 1108**

5. ———— **Forfeiture of maintenance right by widow not residing in the family dwelling-house**—*If applies when absence due to just and reasonable cause.* Where the plea set up in defence to a suit for maintenance by a widow who had ceased to reside in the family dwelling-house was a family custom under which, it was alleged, a widow, unless she resided at the place appointed for her residence, forfeited her right to maintenance : *Held*, that such a custom, even if established, does not deal with the question of an absence from the appointed residence due to just and reasonable causes. BRAJA SUNDAR DEB *v.* SWARNA MANJARI DEI (1917)

22 C. W. N. 433

... properties, the principal Defendant claimed that succession in the family was governed by the rule ...

... the parties belonged were Chohan Rajpoots who had migrated from their original homes into the Nimar District in the Central Provinces : *Held*—That the presumption was that they carried with them to their new homes the customs and institutions to which they were subject in the land of their birth. That the evidence showed that the custom of primogeniture which the family brought with them continued to govern the family under the Mahomedan, the Marhatta and the British rules up to the present time, and that the existence

HINDU LAW—CUSTOM—*concld.*

of the family as an entity through so many centuries was mainly owing to this custom, and the theory favoured in the Judicial Commissioner's Court that after the head of the family ceased to be the holder of a hereditary fiscal office, the junior members must naturally assert themselves as share-holders according to the ordinary Hindu law which in consequence would displace the custom was based on *a priori* reasoning of a speculative character. The mere cessation of services to which *watan* lands are attached which are by custom impartible does not ordinarily destroy that custom. RANA MAHATAB SINGH *v.* BADAN SINGH.

26 C. W. N. 226

6. ———————— *Hindu law, customary law at variance with, if enforceable—Dhusars of Gurgaon, emigrating to the Central Provinces—Adoption of orphan, if valid.* It is beyond question that, according to the law of the Mitakshara, as recognised by the School of Benares, an orphan cannot be adopted. It is also beyond doubt that in some parts of Northern India particularly in Districts now in the Punjab or adjacent to the Punjab, the strict rules of the Mitakshara, as recognised by the School of Benares, have not been followed by some castes, tribes and families of Hindus, and that customs which are at variance with that law have for long been consistently followed and acted upon and that when such customs are established, they, and not the strict rules of the Mitakshara with which they are at variance, are to be applied. They are found principally amongst the agricultural classes, but they are also to be found among classes which are not agricultural. The Dhusars of Gurgaon are governed in matters of adoption not by the orthodox Hidu law but by customary law: and the adoption of orphans by Dhusars being consistent with that customary law is valid. RAM KISHORE *v.* JAINARAYAN . . . **26 C. W. N. 882**

7. ———————— Where a family is governed by the rule under which succession to an impartiable estate does not go to females. So long as the family remains united the burden of proving the family has ceased to be united lies on the person alleging it. RANI JAGADAMBA KUMARI *v.* THAKUR WAZIR N. SINGH. **2 Pat. L. J. 239**

8. ———————— In dealing with the custom of an entire community it is more important to have regard to the history of the main body than to the history of the less important branches. Position of *Baisi Chowrasi Gaddidas* discussed. SHAHDEO NARAIN DAS *v.* KUSUM KUMARI . . . **5 Pat. L. J. 164**

HINDU LAW—DAUGHTER'S ESTATE.

See HINDU LAW—INHERITANCE.

I. L. R. 34 Bom. 510

1. ———————— *Decree for possession of father's estate obtained by daughter—Right of daughter's sons to execute such decree.* The daughter of a separated Hindu obtained a decree for possession of her father's estate against certain trespassers. Before, however, she could obtain possession, she died and her sons applied for execution. *Held,* that the daughter represented her father's estate when she brought her suit for possession and that the persons who succeeded to the estate were entitled to execute the decree which she had obtained. MAHADEO SINGH *v.* SHEO KARAN SINGH (1913)

I. L. R. 35 All. 481

HINDU LAW—DAUGHTER'S ESTATE—*concld.*

2. ———————— *Suit by unmarried daughter for possession of her father's property—Death of plaintiff—Right of married daughters to continue the litigation.* A separated Hindu died leaving him surviving a widow and four daughters, three married and one unmarried. After the death of her mother, the unmarried daughter sued to recover possession of her father's estate, naming her three married sisters as *pro formâ* defendants. The plaintiff, however, died during the pendency of the suit. The three married daughters were then on their application transferred from the array of defendants to that of plaintiffs. Nevertheless the suit was dismissed upon the ground that it had abated by reason of the death of the original plaintiff. *Held,* that the suit should not have been dismissed. The original plaintiff represented the estate, and her sisters were entitled to continue the litigation which she had commenced. *Mahadeo Singh* v. *Sheo Karan Singh, I. L. R. 35 All. 481,* and *Venkata Narayana Pillai* v. *Subbammal, I. L. R. 38 Mad. 406,* referred to. *Balak Puri* v. *Durga, I. L. R. 30 All. 49,* not followed. JADUBANSI KUNWAR *v.* MAHPAL SINGH (1915)

I. L. R. 38 All. 111

HINDU LAW—DEBT.

See HINDU LAW—ALIENATION.

See HINDU LAW—JOINT FAMILY.

See HINDU LAW—MORTGAGE.

See HINDU LAW—SURETY.

1. ———————— Father's debts—*Mitakshara—Son's obligation to pay costs awarded against father in litigation—"Danda"—"Not byavaharika."* Certain persons who had applied for a succession certificate in respect of debts due to a deceased relative were successfully resisted in these proceedings by one *L.* They then sued *L* for a declaration of their right of heirship and the suit was decreed with costs against *L. L* who was living with his son and grandson as members of a joint Mitakshara family having died, the decree-holders sought to recover the amount of the decree from *L*'s son and grandson: *Held,* on a review of the authorities, that *L*'s son and grandson were bound to satisfy this decree. *Per* CHATTERJEE, *J.* Costs awarded by Court against a defeated litigant is not "danda" within the meaning of the text of Yajnavalkya quoted in Mitakshara, Ch. VI, s. 3, verse 47. Nor are they covered by the description "not *vyavaharika*" in the text of Ushanas referred to in *Durbar Khachar* v. *Khachar Harsur, I. L. R. 32 Bom. 348.* PARYAG SAHU *v.* KASI SAHU (1910)

14 C. W. N. 659

2. ———————— Limitation—*Son not liable for Father's debt when barred—Contract Act, ss. 134, 151—Surety not discharged if claim against principal debtor allowed to become barred—Limitation Act, 1877, Sch. II, Art. 98.* Undivided family property devolving on the son by survivorship is not 'the general estate' of the father within the meaning of Art. 98 of Sch. II, Limitation Act.

HINDU LAW—DEBT—*contd.*

1877, and a suit to recover from the son out of such estate the loss occasioned by his father's breach of trust is not governed by Art. 98. A son is not, under the Hindu Law, liable to pay a debt of the father which was barred against him. A debt, the recovery of which is barred *by limitation, is not* extinguished and the debtor is not, by reason of the bar of limitation discharged therefrom. The omission of the creditor *to sue the debtor* within the period of limitation is not an act, the legal consequence of which is the discharge of the debtor and such omission has not the effect of discharging the surety under ss. 134 and 137 of the Indian Contract Act. *Carter* v. *White, 25 Ch. D. 666,* referred to. *Ranjit Singh* v. *Naubat, I. L. R. 24 All. 504,* dissented from. SUBRAMANIA AIYAR *v.* GOPALA AIYAR (1909) . . . . I. L. R. 33 Mad. 308

3. ——— Defamation suit costs—*Debts—Son's liability for father's debt—Money borrowed to defend a suit for defamation not an immoral debt. Held,* that under the Hindu Law money borrowed by the father to defend a suit for defamation is a debt for which a Hindu son and grandson are liable. SUMER SINGH *v.* LILADHAR (1911) I. L. R. 33 All. 472

4. ——— Damages—*Execution of decree—Decree against father for damages—Liability of son—Mitakshara Law—Immoral or illegal debt.* A decree obtained by a person for damages on account of injury done to his crops, by the obstruction of a channel through which he was entitled to irrigate his lands, against one *B*, who was governed by the Mitakshara school of Hindu Law, could be executed on his death against his son, where it could not be said that the decree obtained was due to an act of the judgment-debtor, which was a wanton interference with the rights of the decree-holder, and that the liability imposed thereby on the judgment-debtor was an illegal or immoral debt. CHHAKAURI MAHTON *v.* GANGA PRASAD (1911)

I. L. R. 39 Calc. 862

5. ——— Unsecured debt, contracted by limited owner, when binding on estate——*Will bind if made after due enquiry—Proof of due inquiry—Nature of right liable to be devested by adoption—Transfer of Property Act, s. 38.* Unsecured debts contracted by a limited owner

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to validate a claim against the estate in the hands of a manager applies in the case of all loans whether secured or unsecured. Representations by the borrower are evidence of the existence of such necessity but are not generally in themselves sufficient to discharge the burden which rests upon the creditor of showing a reasonable inquiry as to the binding nature of the purpose for which the loan is contracted. In particular circumstances, however, they may suffice to shift the burden of proof to the person impeaching the debt or alienation. If s. 38 of the Transfer of Property Act is deemed to enact a rule as to reasonable inquiry in excess of what is required by the Privy Council in Hanuman Persad's case.

HINDU LAW—DEBT—*contd.*

it cannot override the Hindu Law settled by the Privy Council. The estate of a person whose right is liable to be devested by an adoption is not analogous to a life estate. It is that of a limited owner who represents the estate. MAHARAJA OF BOBBILI *v.* ZAMINDAR OF CHUNDI (1910) I. L. R. 35 Mad. 108

6. ——— Widow's debts—*Debt contracted by widow for necessary purposes binding, though no formal charge created.* A debt contracted by a widow as representative of the estate, for the purposes of the estate will be binding on the estate in the hands of the reversioners, though no formal charge on the estate is created; when the creditor looks not to the personal credit of the widow but to her as representative of the estate and relies on the credit of such estate. *Ramasamy Mudaliar* v. *Sellattammal, I. L. R. 4 Mad. 375,* referred to. REGELLA JOGAYYA *v.* NIMUSHAKAVI VENKATARATNAMMA (1910)

I. L. R. 33 Mad. 492

7. ——— Buildings—*Debt contracted by widow for constructing buildings not binding on estate—Compromise by widow not binding on reversioners, when advantage is secured at serious risk to estate—Decree on such compromise stands on no higher footing than the compromise—Dealing by*

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the debt will not be binding on the reversion. The question whether the holder of a woman's estate will be justified in building a house so as to bind her reversioners, assuming that she could do so at all, will depend on the income of the estate and her means of repaying the debt so as not to injure the reversion. A compromise by a widow of a valid claim against the estate will not bind the reversioners when a larger amount than is due is agreed to be paid in instalments, the whole of the larger amount however being payable on default of any instalment. An adjudication against a widow after a fair contest with respect to a matter relating to the estate represented by her, will be binding on those who succeed her as owners: but a decree passed on a compromise into which she enters will have no higher effect against her successors than a contract entered into by her. The reversioner, during the life of the female heir, has only a *spes successionis* or chance of succeeding if he survive her. Any transfer by him of such interest, is invalid. The power of a guardian is restricted, to the management of the minor's property and he cannot bind the minor by admissions which have no connection with the present management of the property, especially when made without receipt of any consideration on behalf of the minor. It cannot be assumed that a Court in sanctioning a compromise and passing a decree in pursuance of it, intended to do what was unlawful. Where such a decree directs the sale of a minor's property in which the minor had only a *spes successionis* as reversioner, it must be assumed that it directed the sale only of such interest as the minor then possessed in the pro-

HINDU LAW—DEBT—*concld.*

by father after partition—Son's liability on such note—Pious obligation to discharge father's debts, extent of. A Hindu son is not liable during his father's life-time on a promissory note executed by his father after partition in renewal of a note executed by the father before partition. The recent decision of the Judicial Committee in *Sahu Ram Chandra* v. *Bhup Sing, L. R. 44 I. A. 126,* does not overrule the long line of decisions as to the right of the creditor of a Hindu father to sue the father and the sons for an antecedent debt incurred by the father for purposes neither illegal nor immoral and to attach and to bring to sale the interest of the sons as well as of the father in execution of the decree in such a suit. *Per* KUMARASWAMI SASTRIYAR, *J.* The decision in *Sahu Ram Chandra* v. *Bhup Sing, L. R. 44 I. A. 126,* makes it clear that it is the primary duty of the father to pay debts incurred by him not for any family necessity but for his own purposes and that the pious duty of the son assuming that it arises at all during the life-time of the father, arises only if the father's share or his self-acquisitions are insufficient to meet the debts. PEDA VENKANNA *v.* SREENIVASA DEEKSHATULU (1917) . . . **I. L. R. 41 Mad. 136**

16. ———— Sale of family property—*Under decree against father personally—Validity of such sale where debt not proved to be illegal or immoral—"the Antecedent debt."* Where a Hindu father, in a Mitakshara family, contracted debts

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ing to which a creditor who has obtained a personal decree for money against a Mitakshara father is entitled to irety of the joint Das Mohant v.

I. L. R. 48 Calc. 341

17. ———— *B,* a Hindu ies, he .int mess with his brothers up to the age of 25 when the share of each would fully belong to him in title after vesting absolutely "in *his sons and* grandsons, etc." during the minority of his *I* the eldest son and *B* borrowed, from his brothers represented by the guardian with the permission of the District Judge for purchasing a residence,

I executed a security bond charging his property including his share of Tankhas. *Held, that the* or ligitimate be executed ...ALA MUKTI PROKASH NANDE *v.* SRIMATI ISWARI DEI DEBI. **24 C. W. N. 938**

HINDU LAW—DEBUTTER.

———— *Debutter absolute—Dasnami Gossain—Succession—Custom and usages of the community—Removal and appointment by punch—Punchnama—Stamp Act (II of 1899), Sch. I, Art. 7—Alienation by shebait without legal necessity—Permission of the District Judge obtained under s. 90 of Probate and Administration Act (V of 1881), by fraudulent misrepresentation, effect of—Purchasers no privy to the fraud but purchase with knowledge of such fraudulent misrepresentation.* A, who belonged to the sect of "Giri" Dasnami Gossains, dedicated, by his will, the properties acquired by him to two deities. The will stated that all the properties, moveable and immoveable and the profits of the said properties would be deemed as the *debutter* properties of the two deities. It then provided for the succession to the office of the *shebait* who would carry on the *sheba* and perform other acts according to the customs and usages of the family, that none of the properties left by A would be liable to be sold or be subject to any charge for any debts contracted by the *shebait* or any that if any su be liable to be ing to law and that if any *shebait* became extravagant or were found guilty of any grave offence by the *punch* of the community he would be removed from office After A's death probate was obtained by his *chela* who on his death was succeded by his *chela* B. B made a will by which he appointed defendant No. 1 *shebait* after his death On B's death defendant No. 1 obtained probate of his will, contracted debts and obtained permission under s. 90 of the Probate Act to sell certain properties which B sold to several purchasers. Other Gossains of the same community assembled and having found defendant No. 1 guilty of misconduct excommunicated him and by a *punchanama* removed him from *shebaitship* and appointed the plaintiff as *shebait*. The plaintiff brought this suit for recovery of possession of the properties alleged to be *debutter* after setting aside the alienations thereof: *Held,* that the will of *A* created an absolute *debutter. Ashutosh Dutt* v. *Doorga Charan Chatterji, I. L. R. 5 Calc. 438,* distinguished. *Held,* that the parties belonged to the order of sanyasis governed by the rules of the community to which they belonged. The ordinary rules of inheritance in their entirety could not apply to such persons, for, although the succession was through *chelas,* any question as to preference between *chelas* (when it was not provided for by the *guru*) might be decided by the customs and usages of the community and the representatives of the community were the proper persons to decide such ty of a roperties ... absolute *debutter* and the succession to the office of *shebait* would be governed by the rules laid down by the creator of the endowment and in their absence by the *punch* of the community, who would naturally be the proper persons to decide the question what constituted grave offence or acts contrary to custom or usages of the family. *Held,* that when a member of the *punch* was unable to attend on account of his illness or being on pilgrimage the other members of the *punch* could act. MOHESH CHANDRA ROY *v.* GOSSAIN GANPAT GIR (1916) **23 C. W. N. 401**

———— *Debutter—Transfer of pala apart from debutter; Transfer of pala inter vivos to two persons—Validity.* A custom authori-

HINDU LAW—DEBUTTER—*concld.*

sing the transfer by a *shebait* of his *pala* only and with it the right to the offerings without at the same time transferring the interest in the *debutter* property appertaining to the *pala* is not established by evidence of transfers which passed both the *pala* and the property. A transfer of the *pala* apart from the property is not beneficial to the deity. The severance of a *pala* of worship by transfer by the *shebait inter vivos* to two persons is not beneficial to the trust. NITYA GOPAL BANERJI *v.* NONILAL MUKHERJI

24 C. W. N. 309

HINDU LAW—ENDOWMENT.

See HINDU LAW—RELIGIOUS ENDOWMENT

See LAND ACQUISITION.

I. L. R. 39 Calc. 33

1. ———— **Limitation**—*Adverse possession—Dispute between senior and junior chelas as to succession to Hindu maths—Ekrarnama alloting one math to senior chela in perpetuity and the other to junior chela as adhikari—Suit instituted within twelve years from senior chela's death, but 27 years from date of ekrarnama—Hindu Law—Endowment.* The Mohant of the temple of a Hindu idol who was in possession of two *maths*, one at Bhadrak and the other at Bibisarai, died leaving two *chelas*, or disciples, between whom a controversy arose as to the right of succession to the *maths* and the property annexed to them. The dispute was settled by an arrangement embodied in an *ekrarnama*, dated 3rd of November 1874, executed by the senior *chela* in favour of the junior *chela*, by which the *math* at Bhadrak was allotted in perpetuity to the senior *chela* and his successors, while the *math* at Bibisarai and the properties annexed to it were allotted to the junior *chela* (described therein as an *adhikari*) and his successors for the purposes connected with his *math*, subject to an annual payment of Rs. 15 towards the expenses of the Bhadrak *math*. Less than twelve years after the death of the senior *chela*, but considerably more than that period after the date of the *ekrarnama*, the appellant, the successor of the senior *chela*, brought a suit against the junior *chela* to recover possession of the properties annexed to the Bibisarai *math*, on the allegation that they were *debutter* property dedicated to the worship and service of the plaintiff's idol, and held by the respondent (representing the junior *chela*) as an *adhikari* in charge of the Bibisarai *math* and asserting it to be a *math* subordinate to the Bhadrak *math* :—*Held* (affirming the decision of the High Court) that the property dealt with by the *ekrarnama* was, prior to its date, to be regarded as vested not in the Mohant, but in the idol, the Mohant being only its representative and manager, and consequently that from the date of the *ekrarnama* the possession of the junior *chela*, by virtue of its terms, was adverse to the right of the idol, and of the senior *chela* as representing that idol, and that the suit was barred by limitation. DAMODAR DAS *v.* LAKHAN DAS (1910)

I. L. R. 37 Calc. 885

2. ———— **Alienation of endowed property**—*Power of shebait to grant lease in perpetuity at a fixed rent—Limitation Acts (XV of 1877), Sch. II, Art. 134 and (IX of 1908), Sch. I, Art. 134—Bonâ fide Purchaser—Purchaser of ab-*

HINDU LAW—ENDOWMENT—*contd.*

solute title—Privy Council, practice of—Review of former decision. In a suit brought by the Raja of Panchakote as the shebait of certain Hindu deities to recover possession of *debutter* property, which had been alienated, more than 12 years before the institution of the suit, by the plaintiff's predecessor in title, who had granted a mokurari lease of the property in consideration of a fixed lent, and payment of a fine equal to two years' rent. *Held* (reversing the decision of the High Court), that the suit was not barred by limitation under Art. 134 of Sch. II of Act XV of 1877, the lessees (defendants) not being the purchasers of an absolute title, and therefore not "purchasers" within the meaning of that article. *Abhiram Goswami* v. *Shyama Charan Nandi, I. L. R. 36 Calc. 1003 : L. R. 36 I. A. 148*, followed. The Judicial Committee of the Privy Council are averse from reviewing, on an *ex parte* application, a considered decision in a former case delivered after full argument. ISHWAR SHYAM CHAND JIU *v.* RAM KANAI GHOSE (1911) . . **I. L. R. 38 Calc. 526**

3. ———— **Proof that grant was for bonâ fide public religious purpose**—*Debutter—Dealings with the property and income—Separate collection by persons jointly interested as shebaits—Bequest of properties both endowed and secular—Breaches of trust—Alienation of property and diversion of income—Evidence—Admissibility—Copy of sanad—Decision of revenue authorities in lakheraj resumption proceeding under Reg. II of 1819—Rent decrees recovered on behalf of Thakur—Evidence Act (I of 1872), s. 13—Shebait's line, failure of—Reverter of office to donor.* In order to prove that certain lands form the subject of a valid public endowment it must be established that an absolute grant was made with the intention that the profits should be applied for the services of the idol, and to establish the *bonâ fide* character of the endowment, it must be proved that the profits have since been so applied, and the members of the family of the founder have not treated property as one, the profits of which were mainly intended to be applied for their benefit. *Keshe-shuree Dassee* v. *Krishna Kaminee Debia, 2 Hay's Report 557 ; Gunga Narain Sircar* v. *Brindabun Chandra Kur Chowdhry, 3 W. R. 142 ; Ram Pershad Das Adhikaree* v. *Sri Huree Dass Adhikari 18 W. R. 399 ; Sonatun Bysack* v. *Srimati Jugut Soondari Dassi, 8 Moo. I. A. 66 ; Ashutosh Dutt* v. *Doorga Charan Chatterjee, I. L. R. 5 Calc. 438* referred to. A document which was found to be a copy of a *sanad* of 1775 which itself did not purport to be the deed of grant by which the endowment was constituted, but merely referred to the fact that the grant had been made and was recognised by the executive authorised was properly admitted in evidence on proof of proper custody. The statement in *Budh Singh Dhudhuria* v. *Niradbaran Roy, 2 C. L. J. 431*, that the question whether the lands had been absolutely dedicated for a public charitable purpose was wholly foreign to the enquiry and indeed beyond the jurisdiction of the revenue authorities, in a proceeding under Reg. II of 1819, goes too far. Where the decision in such a proceeding that certain lands are rent-free proceeded on grounds based on allegations that the lands were dedicated as public *debutter*, the decision would not be conclusive evidence of the validity of the grant, but would at all events be evidence to show that a

HINDU LAW—ENDOWMENT—*contd.*

claim to hold the land rent-free on that ground was put forward at that time by the *shebait* and was on that account admitted by the revenue authorities. When the family of the *shebait* appointed by the founder died out, the *shebaitship* would, in the natural course, revert to a member of the family of the original grantor. *Sital Das Babaji* v. *Protap Chandra Sarma, 11 C. L. J. 2,* referred to. The mere fact that two branches of the family of the *shebait* each collected a half

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half shares of the rent from the tenants on behalf of the Thakur were properly admitted in evidence under s. 13 of the Evidence Act. The fact that a *shebait* devised the endowed property along with his secular properties went no further than to indicate that he purported to bequeath his right

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sions of the profits [illegible]

to other purposes in recent years also did not affect the validity of the grant as *debutter*. *Held,* on the entire evidence, that the endowment in this case was not of a private character and that the members of the family of the original grantor had not resumed the property endowed and converted it into secular property. MADHUB CHANDRA BERA *v.* SARAT KUMARI DEBI (1910)

15 C. W. N. 126

4. ———— **Gift in favour of an idol which is to be subsequently consecrated**—*Possession given to manager.* By a deed of gift certain zamindari property was expressed to be given to the idol, which was not at the time of execution in existence, and possession of the property was made over to a certain person as *pujari*. *Held,* that the deed was valid and created a trust in favour of the idol. *Mohar Singh* v. *Het Singh, I. L. R. 32 All. 337,* and *Bhupati Nath Smrititirtha* v. *Ram Lal Moitra, I. L. R. 37 Calc. 128,* referred to. CHATARBHUJ *v.* CHATARJIT (1911)

I. L. R. 33 All. 253

5. ———— **Gift void for uncertainty**—*Gift in favour of "the Thakurji in his Thakurdwara"—No temple built or idol installed.* *Held* that a dedication, not to any particular deity which was subsequently to be installed in a temple, but to "the Thakurji in his Thakurdwara" without mentioning the particular Thakurji to whom the property was dedicated, was void for uncertainty. *Bhupati Nath Smrithitirtha* v. *Ram Lal Moitra, I. L. R. 37 Calc. 128, Mohar Singh* v. *Het Singh, I. L. R. 32 All. 337* and *Chaturbhuj* v. *Chatarjit, I. L. R. 33 All. 253,* distinguished. PHUNDAN LAL *v.* ARYA PRITHI NIDHI SABHA (1911) . **I. L. R. 33 All. 793**

6. ———— **Debutter,—private consensus of co-sharers**—*If may change character of treatment of property as secular, effect of—Partition of property by shebait if converts property into secular—Legal conversion, proof of.* Where a private *debutter* had been partitioned between members of the family for the better enjoyment thereof and there had been sales and mortgages of portions of the property by some members but there was nothing to show that there was a consensus to give the property a different turn: *Held,* that the original *debutter* character of the property being established these facts did not operate to destroy its *debutter* character. *Doorga Nath* v. *Ramo Chandra, I. L. R. 2 Calc. 341,* referred to. *Per* CHATTERJEE, *J.*—A partition of *debutter* property for the purpose of convenience of the user for the *sheba* is not a violation of the trust for the *sheba* of the property. *Per* JENKINS, *C. J.*—Where the original *debutter* character of a property is found in a suit to establish such character against one who claims under an original *shebait,* lies upon the defendants to show the subsequent legal conversion of the land to the ordinary user of the property. *Juggut Mohecnee* v. *Rajendra Nath, 10 B. L. R. 19, 81,* referred to. DHARMA DAS MANDOL *v.* GOSTA BEHARY MANDOL (1911) . . . . . **16 C. W. N. 29**

7. ———— **Shebait, office of**—*Succession*

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ing disciple): *Held,* that upon a proper construction of the document there was nothing to prevent one disciple from succeeding a co-disciple in the line of the original *shebait*. GOPAL CHANDRA CHAKRABARTY *v.* RADHARAMAN DAS BABAJI (1911) . . . . . **16 C. W. N. 108**

8. ———— **Right of succession to shebaitship of temple belonging to Ballavacharya Gossains**—*Evidence of dedication—Claim of persons incompetent to be sebaits (as being Bhats) of Ballav temple disallowed as defeating the purpose for which the founder established the worship—Title—Proof of independent title to succession as shebait.* In a suit for possession and the right of sebaitship of a temple belonging to the Ballavcharya Gossains founded by one Muttuji, the maternal grandfather of the plaintiffs (appellants),

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apart from positive testimony on the point, the performance of the worship of the idol in accordance with the rites of the sect for whose benefit it was held, might be treated as good evidence of dedication, and the ordinary rule of Hindu law relating to the descent of private property was not applicable. *Held,* also, that the rule that the heirs of the founder succeed to the sebaitship laid down in *Gossamee Sree Greedhareejee* v. *Romanlalljee Gossamee, I. L. R. 17 Calc. 3; L. R. 16 I. A. 137,* was, as there implied, subject to the condition that the devolution in the ordinary line of descent is not inconsistent with or opposed to the purpose the founder had in view in establishing the worship. In the present case the appellants being Bhats, and not belonging to the Gossain *kul,* were not competent to be shebaits of a Ballav temple where the rites were performed according to the Ballav ritual, which, it was clearly established, they could not perform. To allow their claim would defeat the purpose for which the worship was established. *Held,* further, that the respondent had established an independent title of his own to the temple as being the nearest male relative of Muttuji, both

being descendants of two full brothers. The idol in the temple was brought from his temple at Nathdwara, and the worship founded by Muttuji was an off-shoot of the worship at Nathdwara. The temple was also built on land belonging to the Tekait respondent with the permission of his ancestor, who held the office of Tekait at the time. He had therefore a clear title according to the customs and usages of the Ballav *kul* to the sebaitship of the temple. MOHAN LALJI *v.* GORDHAN LALJI MAHARAJ (1913)

I. L. R. 35 All. 283

9. ———— **Idol, mutilation of**—*If terminates endowment—Consecration of new idol, effect of—Land given for worship of idol—Grantee if bound to apply proceeds for service of new idol—Statement partly against one's interest and partly self-regarding—Admissibility.* When an image is mutilated or destroyed the religious purpose does not come to an end, and a new image may be established and consecrated in order that it may be worshipped as intended by the original founder. Where the site where an image which was established by an ancester of the plaintiff was forty years before the suit washed away and the image itself was broken to pieces, but continued to be worshipped in that condition out of the profits of some land made over by the ancestor of the plaintiff to an ancestor of the defendant for that purpose, and the plaintiff having now established and consecrated a new image under the same name in a new temple in the same village, called upon the defendant to perform the worship of the image out of the profits of the land, and the defendant having refused, plaintiff brought this suit to compel the defendant to perform the worship and in the alternative for ejectment: *Held*, that upon these facts the plaintiff was entitled to a decree for ejectment. A statement by a predecessor of the defendant that the land had been given in order that the income might be applied for the worship of the grantee's family idols and also of the image established by the plaintiff's ancestor, was admissible against the defendant to prove that the land was given for the purpose of the image, but not in his favour to prove that it was given for the worship of the defendant's family idols. BIJOY CHAND MAHATAP *v.* KALI PADA CHATTERJEE (1913) . **17 C. W. N. 1013**

10. ———— *Endowment for worship of an image—Destruction of image, how it affects endowment.* An endowment of land, the income of which is meant to be applied for the purposes of the service of an image of *Shiva*, is not affected by the destruction or mutilation of the image. The religious purpose survives the destruction or mutilation. A new image may be established and consecrated in order that it may be worshipped as intended by the original founder. *Purna Chandra Bysack* v. *Gopal Lal Sett, 8 C. L. J. 369*, and *Bhupati Nath Smrititirtha* v. *Ram Lal Maitra, I. L. R. 37 Calc. 128*, referred to. A tenure dedicated to the service of an image of an idol comes to an end if the person entrusted with the worship repudiates his obligation in that behalf. *Hurrogobind Raha* v. *Ramratno Dey, I. L. R. 4 Calc. 67*, and *Ansar Ali Jemadar* v. *Grey, 2 L. J. C. 403*, followed in principle. BIJOYCHAND MAHATAB *v.* KALIPADA CHATTERJEE (1913)

I. L. R. 41 Calc. 57

11. ———— **Mahant of a Temple**—*Mahant appointing a married man and father of children to be Mahant—Abdication by Mahant of his functions—Right of his senior chela to succeed him.* In this appeal the question was whether the appellant who claimed to the senior *chela* of the first respondent, the late *mahant* who had retired, or the second respondent who claimed to have been appointed by him, was entitled to succeed him as the *mahant* of the Patepur *asthal* or *muth*. On this question their Lordships of the Judicial Committee *held* (reversing on the evidence the decision of the High Court) in favour of the appellant, mainly on the ground that the second respondent was a married man who had not on initiation renounced his worldly ties and the begetting of children, and was not an ascetic or *bairagi chela*, but was disqualified from holding the office of *mahant*. As to the nature, object, custom, and practice of such a religious institution. *Sammantha Pandara* v. *Sellapa Chetti, I. L. R. 2 Mad. 175*, was referred to. The question as to who had the right to succeed to the office of *mahant* depended according to the well-known rule in India, not on the general customery law, but upon the custom and usage of the particular *muth*. *Mahant Ramanooj Doss* v. *Mahant Debraj Doss, 6 S. D. A. (Beng.) 262*, *Greedharee Doss* v. *Nundkissore Doss, 11 Moo. I. A. 405*, *Muttu Ramalinga Setupati* v. *Perianayagum Pillai, L. R. 1 I. A. 209*, and *Raja Vurmah Valia* v. *Ravi Vurmah Kunhi Kutti, I. L. R. 1 Mad. 235; L. R. 4 I. A. 76*, referred to. On the question as to the second respondent being a married man, on which the Courts below had differed, their Lordships were of opinion that the verdict given by the Subordinate Judge who had the advantage of seeing and hearing the witnesses, could not be lightly set aside, especially as that Judge was also presumably acquainted with the manners and customs of the people among whom such a transaction was alleged to have occurred. There were, moreover, no sufficient grounds stated by the High Court for disturbing that verdict. Having themselves investigated the facts, their Lordships held that the rule—of attaching weight to the opinion of the Judge of first instance —could not safely be departed from in the present case. Though the deeds appointing the second and third respondents to be successively *mahants* were ineffective the former being not competent to hold the office, and the latter having died, the first respondent, could not, in their Lordships' opinion, be considered to be still the *mahant*. He had abdicated all his functions, and had himself retired from the office. A *mahant* was not only a spiritual preceptor, but a trustee in respect of the *asthal*. He had by appointing a married man and father of children to the office consented to a violation of those vows of asceticism and celibacy which it was his duty as a trustee to maintain and protect. His abdication must therefore be accepted as a fact in the case. A vacancy in the office had therefore been created which under the circumstances would devolve upon the appellant who was found to be senior *chela* and was not alleged to be incompetent to be *mahant*. RAM PRAKASH DAS *v.* ANAND DAS (1916)

I. L. R. 43 Calc. 707

12. ———— **Sadhak or disciple of deceased mahant**—*Election by a majority of*

HINDU LAW—ENDOWMENT—*contd.*

the dasnam bhik (ten classes of mendicants) assembled for purpose of such election—Separate election by faction of dasnam bhik. An election of a mahant of
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of the *dasnam bhik* assembled for that purpose. A separate election by a faction of the *dasnam bhik* is not a valid and effectual election. In this case which related to the election of a *mahant* to a temple at Hardwar, called Akhara Baba Sarwan Nath, both the appellant (plaintiff) and respondent (defendant in possession of the math property) claimed to have been duly elected on the same day, the 24th of February, 1905 (being the *terwin*, the 13th day ceremony after the death of the late *mahant*) their Lordships of the Judicial Committee (affirming the decision of the High Court, which had reserved that of the Subordinate Judge), *Held* that on the evidence and under the circumstances of the case, the appellant, who claimed to be the *sadhak* (disciple) of the deceased *mahant*, had failed to prove that he had been duly elected *mahant* of the temple. On the other hand there was large body of evidence in support of the respondent (the *sadhak* of a former *mahant*) whose election and also the bhandara or feast usual on the occasion had taken place within the temple which was customary, whereas the election of, and the feast given by, the appellant took place outside the temple; that a majority of the persons present at the election of the respondent who were qualified to elect a *mahant* voted in favour of the respondent; that in point of numbers and influence the respondent received more support than the appellant; and that there was no attempt on the part of the respondent to conceal (as the appellant alleged he had done) the arrangements he had made for the occasion. As it had not been shown that these points had been wrongly decided by the High Court, their Lordships dismissed the appeal. LAHAR PURI *v.* PURAN NATH (1915) . **I. L. R. 37 All. 298**

13. ——— Shebait—*Nature of debutter grants, where grantee is to enjoy properties from generation to generation on performance of sheba of the goddess—Permanent leases by grantee, validity of—Civil Procedure Code (Act V of 1908), s. 99—Ambiguity—Evidence.* In the construction of ancient grants and deeds, evidence is admissible as to the manner in which the thing granted has always been possessed and used, for so the parties thereto must be supposed to have intended. *Weld* v. *Hornby, 7 East 197; 8 R. R. 608. Rex* v. *Osbourne, 4 East 32,* followed. The Court may call in aid acts under the deed as a clue to the intention. *Doe* v. *Ries, 8 Bing. 181,* followed. This principle does not apply unless there is an ambiguity. *Attorney-General* v. *The Corporation of Rochester, 5 DeG. M. & G, 832,* followed. Consequently, while in a case of ambiguity the Court will uphold that construction of a deed which justifies a long usage as to the application of trust funds, the Court will not, where there is no ambiguity, accept an erroneous interpretation though consistent with usage, so as to sanction a manifest breach of trust. *Drummond* v. *Attorney-General, 2 H. L. C. 837,* followed. If there is a deed which says, according to its true construction, one thing you cannot say that the deed means something else, merely because the parties have gone on for a long time so understanding it. *Sadlier* v. *Biggs, 4 H. L. C. 435,* followed. Where two ancient *debutter* grants by one of the Maharajas of Pachete were held to be ambiguous, the properties having been given to the grantee *who was to enjoy them from generation to generation* on performance of the *sheba* of the goddess, and in 1829 the successors of the grantee gave two permanent leases to the predecessors in interest of the plaintiffs: *Held,* that in those circumstances the Court might determine the true character of the endowment from the manner in which the dedicated properties had been held and enjoyed. That the properties in dispute were not absolute *debutter* properties of the goddess, but were the personal properties of the grantees subject to the charge of the worship of the goddess. *Ganga* v. *Brindaban, 3 W. R. 142, Madan* v. *Kamal, 8 W. R. 42,* referred to. That the permanent leases had become indefeasible by lapse of time. *Jagamba Goswamini* v. *Ram Chandra Goswami, I. L. R. 31 Calc. 314, Damodar Das* v. *Lakhan Das, I. L. R. 37 Calc. 885; L. R. 37 I. A. 147,* as explained in the case of *Madhu Sudan Mandal* v. *Radhika Prosad Das, 16 C. L. J. 349,* followed. KULADA PROSAD DEGHORIA *v.* KALI DAS NAIK (1914) . . . . **I. L. R. 42 Calc. 536**

14. ——— Construction of deed of endowment—*Deed contended to be invalid as being not a real dedication to idol—Appointment of members of donor's family as mutawallis—Deed held valid as creating an endowment.* The question in this appeal was as to the construction of a deed of endowment executed and registered by a Hindu on the 20th of July, 1898. In a suit after his death to set aside the deed, the appellants, as next reversioners, claimed that no valid endowment had been created, or was intended to be created by it. Their Lordships in dismissing the appeal distinguished the cases of *Sonatan Bysack* v. *Juggutsoondree Dossee, 8 Moo. I. A. 66,* and *Ashutosh Dutt* v. *Doorga Churn Chatterji, I. L. R. 5 Calc. 438; L. R. 6 I. A. 182,* cited in support of the appellants' contention, on the ground that, although nominally there was a gift to the idol, that gift was so cut down by subsequent disposition that there was no gift to the idol such as to make the property pass as an absolute and entire interest in his favour. *Held,* that there was no such cutting down in the present case. There was in the beginning a clear expression of an intention to apply the whole estate for the benefit of the idol and the temple, and the rest of the disposition was only a gift to the idol by a direction that of the whole estate which had already been given, one half was to be applied for the upkeep of the idol itself, and the repair of the temple, and the other half was to go for the upkeep of the *mutawallis.* There was no reason why the donor should not nominate the members of his family as the *mutawallis* of the temple, and he had done so. And there was nothing in that which militated against the property of his earmarking a certain part of the money to remunerate them as managers so long as they should so continue. By the registration of the deed the executant showed that it represented an intention which he desired to treat as carried into execution. JADU NATH SINGH *v.* THAKUR SITA RAMJI (1917) . . **I. L. R. 39 All. 553**

15. ——— Debt, contracted by head of adinam—*Onus of proof of necessity—Suit to recover*

HINDU LAW—ENDOWMENT—*contd.*

money, borrowed on mortgage of endowed property—Recognition of debt binding the property by successive heads of institution—Account books not produced. The appellant sued to recover money advanced on a mortgage bond dated 4th November 1897 to the head of an adinam or mutt, and to enforce the mortgage against the property of the mutt which was hypothecated as security for the loan. The deed was for Rs. 20,000, the balance of principal and interest due on a former bond of 24th June 1883, and it stated that "the bond is granted as was the former one over the lands belonging to the adinam." The bond of 1883 had been executed for the sum of Rs. 14,946 for the balance due on a promissory note, and recited that it was "for the expenses of the aforesaid adinam." And the promissory note for the original loan stated that "the sum received by us to-day in cash for the expenses of our adinam is Rs. 14,000." That was taken in December 1881 shortly after the termination of some litigation necessary in the interests of the adinam. The binding nature of the debt was recognized by successive managers of the mutt who paid from time to time interest on the money and other amounts towards the discharge of the debt over a period of 26 years. *Held*, that though the onus was on the lender to show that the loan was made for the purposes of the mutt and was a necessary expense of the institution itself, yet where the debt had been so recognized as binding, and dealt with on that basis, their Lordships were of opinion that there was a sufficient body of evidence that the loan was made for purposes binding on the mutt: and there was no evidence to the contrary. In favour of this view, it was an important fact that the account books of the mutt were not produced in which it is the habit of the head or manager to make entries with much detail and elaboration forming a current record on the financial side of the history of the institution. The parties to a suit should bring before the Court their best evidence; and when it is not produced the Court is justified in concluding that it would, if brought into Court, not support the case of the party omitting to produce it. MURUGESAM PILLAI *v.* MANICKAVASAKA PANDARA SANNADHI (1917)

I. L. R. 40 Mad. 402

16. ——— Power of shebait to grant permanent lease of endowed property—*Necessity—"Benefit to estate"—Lease at fixed rent—Some principles apply to building site in village street as to agricultural lands—Question as to existence of ancient custom—Question of mixed law and fact—Concurrent findings—Privy Council, practice of—Error in form of finding of custom.* In this appeal it was held by their Lordships of the Judicial Committee that the grant, at a fixed rent, and on payment of a premium of a permanent lease by a *shebait* of a portion of the lands dedicated to the worship of the idol of which he is a trustee, was invalid as against his successor in the *shebaitship*, as in their Lordships' opinion, the evidence did not establish that the *shebait* was constrained by any necessity to make such a lease, or that any benefit accrued to the estate from it. *Devosikamony Pandara Sannadhi* v. *Palaniappa Chettiar, I. L. R. 34 Mad. 535*, affirmed. Where, as in this case, there is no deed of endowment forthcoming, the rules, according to which the endowed property and its income are to be dealt with in order to carry out the intention of the original endower, can only be ascertained by inference from the practice proved by evidence to have been followed in the particular case: *Ram Parkash Das* v. *Anand Das, I. L. R. 43 Calc. 707, 716 ; L. R. 43 I. A. 73, 78*, referred to. The rules must not be inconsistent with or repugnant to the very nature and purpose of the endowment. Both the worship of the idol and the preservation and use of the dedicated property to support and maintain that worship must be assumed to have been intended to be perpetual. A rule therefore which authorized the *shebait* arbitrarily at his own wish and pleasure to alienate any of the dedicated property would be so repugnant to the whole purpose and objects of the endowment that it could not be held to embody the original endower's intention. A *debutter* estate may be mortgaged to secure the repayment of money borrowed and applied to prevent its own extinction by sequestration. *Hunooman Persad Panday* v. *Babooee Munraj Koonweree, 6 Moo. I. A. 398, 423, 424, Prosunno Kumari Debya* v. *Golab Chand Baboo, L. R. 2 I. A. 145, 151, 152 ; 14 B. L. R. 450, 469*, and *Konwar Doorganath Roy* v. *Ram Chunder Sen, I. L. R. 2 Calc. 341, 352, 353 ; L. R. 4 I. A. 52, 62, 64*, referred to. In these cases there was to be found no indication as to what was in this connection, the precise nature of the things to be included under the description "benefit to the estate": and no definition of it applicable to all cases can be given. It is a breach of duty on the part of a *shebait, unless constrained by an* unavoidable necessity, to grant a lease in perpetuity of *debutter* lands at a fixed rent however adequate that rent may at the time of granting, by reason of the fact that by this means the *debutter* estate is deprived of the chance it would have, if the rent were variable, of deriving benefit from the enhancement in value, in the future, of the lands leased. *Maharanee Shibessouree Devia* v. *Mothooranath Acharjo, 13 Moo. I. A. 270, 275, Mayandi Chettiar* v. *Chokalingam Pillay, I. L. R. 27 Mad. 291, 299 ; L. R. 31 I. A. 83, 88*, and *Abhiram Gossami* v. *Shyama Charan Nandi, I. L. R. 36 Calc. 1003, 1013 ; L. R. 36 I. A. 148, 165*, referred to. These cases dealt with agricultural lands, but there was no reason why the principles they establish, should not apply to a building site in the street of a village as in the present case. No authority had been cited to show that a *shebait* is entitled to sell *debutter* lands solely for the purpose of investing the price of it so as to bring in an income larger than that derived from the *debutter land itself*. Questions of the existence of an ancient custom are questions of mixed law and fact. Although therefore the two Courts had purported to find that a local custom modifying the law had been proved, there were no such concurrent findings of fact as according to the practice of the Board it was bound to accept. Neither of the Courts below, moreover, had stated its conclusion in a form which amounted to a finding that any ancient custom such as modified the law existed in the locality. PALANIAPPA CHETTY *v.* DEVASIKAMONY PANDARA SANNADHI (1917) . . . . **I. L. R. 40 Mad. 709**

17. ——— Power of head of mutt to grant permanent lease—*Limitation Act (IX of 1908), Art. 134—Permanent lease, a transfer within the article.* Although the head of a *mutt* is entitled

HINDU LAW—ENDOWMENT—*contd.*

to appropriate part of the income of the properties of the *mutt* to his own maintenance, he is only a trustee in respect of those properties, and he is ordinarily incompetent to grant a permanent lease of the *mutt* properties. A permanent lease for an annual rent is a transfer for a valuable consideration within Art. 134 of the Limitation Act (IX of 1908) and the transferee acquires an indefeasible title to the permanent lease by possession for 12 years as provided by the article. Knowledge that the title of the transferor is only a limited one cannot by itself disentitle the transferee to the benefits of Art. 134. *Ram Parkash Das* v. *Anand Das, I. L. R. 43 Calc. 707, Subbaiya Pandaram* v. *Mahammad Musthapa Maracayar, Appeal No. 13 of 1916*, and *Ram Kani Ghose* v. *Raja Sri Hari Narayan Singh Deo Bahadur, 2 C. L. J. 546*, followed. BALASWAMY AYYAR *v.* VENKATASWAMY NAICKEN (1916) . . **I. L. R. 40 Mad. 745**

18. ———— **Guardian of minor Mahant of Math**—*Power of disposition over Asthal property and acquisitions thereout and income thereof—Debts of Mahant when binds Math—Suit to set aside sale by successor.* The whole assets of an *Asthal* or *Math* are vested in the *Mohant* as the owner in trust for the institution; and although large administrative powers are undoubtedly vested in the reigning *Mahant*, the trust does exist and must be respected. *Held*, that in this case a village L, attached to the *Asthal*, was endowed property subject to the trust set out in the grant, and all acquisitions with the income thereof were subject to the same trust A guardian of a minor *Mahant* has no larger powers of disposition over endowed property than the actual *Mahant*. In the absence of a necessity which would make the debts contracted by him binding on the institution, the *Mahant* has no power to alienate its properties for the purpose of discharging those debts, and if the *Asthal* was not liable for such debts his successor would be clearly entitled to have the sales set aside. *A fortiori* the same considerations apply to the dealings of the guardian of a minor *Mahant*, and the latter can sue to have the guardians' sales set aside on the same grounds. BASUDEO ROY *v.* MAHANT JUGAL KISHWAR DAS (1918) **22 C. W. N. 841**

19. ———— **Dedication for worship of God without naming the deity**—*Uncertainty.* Under the Hindu system of law, a general endowment for the worship of God without giving the name of the deity for whose benefit the endowment is to take effect, is void for uncertainty. *Phundan Lal* v. *Arya Prithinidhi Sabha, I. L. R 33 All. 793*, followed. *Bhupati Nath Smritiirtha* v. *Ram Lal Maitra, I. L. R. 37 Calc. 128, Mohar Singh* v. *Het Singh, I. L. R. 3 All. 337*, and *Chatarbhuj* v. *Chatarjit, I. L. R. 33 All. 253*, distinguished. CHANDI CHARAN MITRA *v.* HARIBOLA DAS (1919) . . . **I. L. R. 46 Calc. 951**

gious institution may by the usage and custom of the institution vest in trustees other than its spiritual head. In any case the property is held solely in trust for the purposes of the institution; surplus income must be added to the endowment and not applied for the personal enjoyment of the trustee or trustees. The respondent, the head of a math, sued the appellants for possession of a village forming part of its endowment. The evidence showed that for a period of eighty years trustees, represented by the appellants had had possession and management of the village and had applied the income to the purposes of the institution: they were recorded as trustees in an Inam Register of 1864, which mentioned the assent of the zamindar, for whose predecessors the original title to the land had flowed:—*Held*, that the respondent had no title to the village, further, that the appellants' possession was adverse to him and that the suit was barred by limitation. In the absence of actual and authentic evidence asto the history of a math, the utmost importance attaches to information set forth in an Inam Register. ARUNACHELLAM CHETTY *v.* VENKATACHALAPATHI GURUSWAMIGAL (1919)

L. R. 46 I. A. 204

21. ———— **Custom and usage of mutt**—*Adverse possession—Limitation.* This appeal arose from a suit brought by the respondent "to declare that the defendants" (appellants) "have no right to the village of Patharakudi, and that the plaintiff as head of the mutt is entitled to the possession of the village, and to receive the income of the same from the hands of the receiver." The village was part of the property of the mutt, and had been for a long time in the possession of, and under administration by, the defendants, who were Nagara Chetties, as hukdars, trustees and managers, though the head of the mutt appointed in 1867 was the plaintiff, who made his claim by virtue of that office, and alleged that the defendants held the position of trustees as his agents. The defence was that the defendants and their predecessors, who had held the village for about 80 years, not for their own advantage but for the benefit of the mutt, were entitled to be continued in possession and management of it; and that the suit was barred by limitation. The respondent proved no management by the defendants as his agents. On the contrary, there was documentary evidence strongly in favour of the defendants which the Judicial Committee accepted as proof of their long possession and proper management. *Held*, that the plaintiff was not entitled to the village in suit On the evidence he had entirely failed to prove his right to possession either by himself or the defendants as his agents; nor was his right to possession supported by the history of the land. The general state of the law with regard to religious institutions in India is that the nature of the ownership is an ownership in trust for the institution itself. The settled rule of administration is that it must be not for personal use but entirely for and on behalf of the interests of the mutt; and that while the ownership is generally with the spiritual head of the institution, such property may be held by the usage and custom of the mutt by the trustees and managers, and that by the usage and custom in this case as disclosed by the evidence the ownership of the village was in the defendants. *Ram Parkash Das* v. *Anand Das (1916) I. L. R. 43 Calc. 707 (P. C.); L. R. 45 I. A. 73; Sethuramaswamiar* v. *Meruswamiar (1918) I. L. R. 41 Mad. 296 (P. C.), L. 45 I. A. 1:* and *Sammantha Pandara* v. *Sellappa Chetti (1879) I. L. R. 2 Mad 175*, approved. *Held*, further, that the possession of the defendants therefore in their own right was adverse to the plaintiff, and the suit was consequently barred by limitation. *Balwant*

HINDU LAW—ENDOWMENT—*concld.*

Rao v. *Puran Mal* (*1883*) *I. L. R. 6 All. 1; L. R. 10 I. A. 20*, referred to. As to the surplus income it is the duty of a trustee to refrain from personal enjoyment of it, and to add it to the capital of the estate administered and this law applies also to the property of a mutt or asthal, whether the title is in the gurukkal as spiritual head, or in the trustees according to the custom and usage of the institution. ARUNACHELLAM CHETTY *v.* VENKATA-CHALAPATHI GURUSWAMIGAL (1920)

I. L. R. 43 Mad. 253

22. ———— **Right of Trustee of Hindu Religious endowment to possession**—*Of endowed property—Madras Regulation VII of 1817, s. 12—Religious Endowments Act* (*XX of 1863*), *ss. 3 and 4—Limitation Act* (*IX of 1908*), *Sch. I, Art. 141—Possession adverse to Trustee.* The property of an endowment may consist partly or wholly in the right to enjoy the revenues of property which is in the possession of persons who have the right and the duty to manage the property, collect the revenue and hand it over when collected to be used in the proper manner for the purposes of the endowment. Such persons may even have certain rights of apportionment of the revenue so handed over by them among the several purposes of the endowment. All this is compatible with there being a general trustee of the whole endowment including the revenues when so collected and handed over. But in such a case the general trustee would not be entitled to the possession of the properties out of which this portion of the refenue comes. His rights do not commence until after the collection of the revenues by and under the management of those who hold possession. Possession would be in the hands of those entitled to manage these special properties and their pospossession would be adverse to his. The appellant in this case claimed to be *hukdar* or trustee of the Thanappa Mudali Kattalai, an endowment for the performance of certain ceremonies in a temple at Madura, and to be entitled to the possession of four villages forming part of the endowment. The villages came into the possession of the East India Company in 1801 and remained in their possession until 1849, when the general manager of the temple, was placed by the Company in possession. Since 1849 the villages were in the hands of the said manager and his successors, the respondents, the whole of the revenue had been used for the purposes of the endowment (including the expenses of the temple) according to the directions of the temple manager, and the temple committee. *Held,* in a suit brought in 1908 by the appellant for possession of the villages, that the possession of those who had held the villages from 1849 was possession adverse to the appellant and his predecessors in title and that the suit was barred by limitation. AMBALAVANA PANDARA SANNIDHI *v.* MEENAKSHI SUNDARESWARAL DEVASTANAM OF MADURA (1920

I. L. R. 43 Mad. 665

HINDU LAW—EXECUTION OF DECREE.

—————————— *Daughters in possession of their father's estate—Payment made by one daughter out of income of property—Decree obtained for recovery of money so paid—Death of decree-holder before execution—Who entitled to execute the decree.* Whilst two sisters, daughters of a separated Hindu, were in possession of their father's property, one of them made certain payments out of the income of that property in order to save from sale for arrears of Government revenue other property, which belonged to the sons of the other sister and to certain cousins of theirs. Subsequently she obtained a decree against the persons on whose behalf she had made by payments above-mentioned, but died before she executed it : *Held*, that the person entitled to execute this decree was not the surviving sitster, but the legal representative (or representatives) of the decree-holder. *Isri Dut Koer* v. *Hansbutti Koerain, I. L. R. 10 Calc. 324*, referred to. SITA RAM *v.* DULAM KUNWAR (1918) **I. L. R. 41 All. 350**

HINDU LAW—FAMILY SETTLEMENTS.

See FAMILY SETTLEMENT.

——————————One *D. R.* on the death of his wife laid claim to certain property formerly the property of his wife's father and which had been given to the wife by her mother. The mother and surviving sister in order to avoid litigation relinquished a substantial portion of the property to *D. R. Held*, on a suit by the Reversioners entitled to succeed on the death of the survivor of the two ladies that there had been no valid family settlement. HIMMAT BAHADUR *v.* DHANPAT RAI.

I. L. R. 38 All. 335

HINDU LAW—GIFT.

See HINDU LAW—ALIENATION.

1. ———— **Gift by Hindu widow to daughter**—*Gift of immoveable property to daughter at "gowna" or "dwiragaman" ceremony—Post-nuptial gifts—Reversionary heirs.* It is competent to a Hindu widow governed by the Mitakshara law to make a valid gift of a reasonable portion of the immoveable property of her husband to her daughter on the occasion of the daughter's *gowna* ceremony : and such a gift is binding upon the reversionary heirs of her husband. CHURAMAN SAHU *v.* GOPI SAHU(1909) **I. L. R. 37 Calc. 1**

2. —————————— *Gift made by Hindu widow with consent of next reversioners—Suit by more remote reversioners to set aside the gift*—A gift by Hindu widow, who succeeded to the separate estate of her deceased husband, of such estate is not valid and does not create a title which cannot be impeached by the remoter reversioner because it has been made with the consent of the next reversioner. *Ramphal* v. *Tula Kuari, I. L. R 6 All. 116*, followed. *Bajrangi* v. *Manokarnika Bakhsh Singh, I. L. R. 30 All. 1*, distinguished. *Rani Anund Koeri* v. *The Court of Wards, L. R. 8 I. A. 14*, referred to. BAKHTAWAR *v.* BHAGAWANA (1910) **I. L. R. 32 All. 176**

3. —————————— *Widows' estate—Gift by a female to her daughter—Right of daughter's heir—Acceleration of estate.* The widow of a sonless separated Hindu, in possession as such of her husband's property made a gift thereof in favour of her daughter. The donee predeceased the donor, and the donor remained in possession of the property the subject of the gift. *Held*, that no action by the donee's heir to recover possession would lie during the donor's life-time. *Bhupal Ram* v. *Lachma Kuar, I. L. R. 11 All. 253*, referred to. RUP RAM *v.* REWATI (1910)

I. L. R. 32 All. 582

4. ———— **Gift of land by daughter for deceased father's spiritual benefit**—*When valid*

HINDU LAW—GIFT—*contd.*

Held, that the gift was in accordance with Hindu ideas as regards the daughter's duty in connection with the performance of a father's sraddha on such an occasion and cannot be impeached by the reversioners. It cannot be laid down as a rule that to justify the alienation the expenditure should be for a spiritual necessity. It is sufficient if the gift or expenditure have reference to the spiritual needs of the father or husband whose property is taken. VUPPULURI TATAYYA *v.* GARI MILLA RAMAKRISHNAMMA (1910)

I. L. R. 34 Mad. 288

5. ———— **Gift to daughter by father**—*Gift valid whether made at or after marriage.* There is a moral obligation on a Hindu father to make a gift to his daughter on the occasion of her marriage. A gift by a father to his daughter of a small portion of ancestral immoveable property is binding on the undivided family, whether such gift is made at or after the daughter's marriage. SUNDARARAMAYYA *v.* SITAMMA (1912)

I. L. R. 35 Mad. 628

[illegible] *sister's son. Held*, that a gift of her deceased husband's estate made by a Hindu widow in poss[illegible] sister's son [illegible] opera-tive [illegible] *Baj-rang.* [illegible] *I. L. R. 30 All. 1*, discussed. ABDULLA *v.* RAM LAL (1911) . . . . **I. L. R. 34 All. 129**

7. ———— **Gift to the illegitimate son of an undivided collateral co-parcener**—*Not ancestral property as between the donee and his son.* Property given for maintenance to the illegitimate son of an undivided deceased collateral co-parcener is not "ancestral property" of the illegitimate son in which the son of that illegitimate son gets a right by birth. *Nagalinga Pillai* v. *Ramachendra Teven, I. L. R. 24 Mad. 429*, and *Hazarimal Babu* v. *Abaninath, 17 C. L. J. 38*, distinguished. KRISHNASWAMI NAIDU *v.* SEETHALAKSHMI AMMAL

I. L. R. 39 Mad. 1029

8. ———— **Gift to unborn person**—*Validity of—Settlement deed in 1889—Gift to daughter for life, then to her unborn children, effect of—Alienation by daughter—Suit by adopted son of settlor—Right of reversioner to sue—Hindu Transfers and Bequests Act (Mad. Act I of 1914)—Suit decided before the Act—Act passed pending appeal—Act, if applicable to the appeal—Power of Appellate Court in passing decrees on appeal—Civil Procedure Code (Act V of 1908), O. XLI, r. 33—Declaratory decree, nature of—Discretion of the Court in such cases.* A Hindu executed a deed of settlement in 1889 by which he demised some properties to his daughter, "in order that she may enjoy them during her lifetime and that after her they should be enjoyed *with all rights* by her sons and daughters who may be alive"; the daughter alienated some of the properties in 1907; the plaintiff, the adopted son of the settlor, claiming to be the nearest reversioner filed a suit in 1912 for a declaration that the alienations were without necessity and not binding on the reversioners. He impleaded the settlor's daughter as the first defendant, and her daughter, born in 1889, as the second defendant, and the alienees as the other defendants. The Hindu Transfers and Bequests Act (Madras Act I of 1914) came into operation during the pendency of the appeal in the lower Appellate Court. Both the Lower Courts dismissed the suit. *Held*, on second appeal, (i) that the Hindu Transfers and Bequests Act (I of 1914) was retrospective in its operation and was applicable to this case; (ii) that the gift in favour of unborn children of the daughter of the settlor was valid; (iii) that consequently the plaintiff was not the nearest reversioner entitled to maintain the suit; (iv) that the rule that a remote reversioner can sue if the nearest reversioner is a female is inapplicable when the latter is entitled to an absolute estate; (v) that there was no collusion between the first and the second defendant by reason of the fact that the latter's guardian put forward an alternative contention on a point of law setting up an absolute title in favour of the first defendant; (vi) that the authority of an Appellate Court is not limited to determining the question whether the original Court was right according to the law in force at the date of its judgment, but was entitled to pass such decree or order as was in accordance with any later enactment which came into operation subsequent to such date. *Kanakayya* v. *Janardhana Padhi, I. L. R. 36 Mad. 439*, and *Govinda Parama Guruvu* v. *Dandusi Prudhanu, 20 Mad. L. J. 528*, referred to; and (vii) that a declaratory decree is a matter of discretion and when there was already one and there might be more than one preferential heir before the plaintiff, the discretionary relief could be properly refused. MUTHUSWAMI AYYAR *v.* KALYANI AMMAL (1916)

I. L. R. 40 Mad. 818

9. ———— **Gift for religious purposes by Hindu widow**—*Civil Procedure Code (Act V of 1908), O. XXVI, r. 1—Commission to examine witnesses.* It is not competent to a Hindu widow to make a religious gift of the whole or practically the whole of her husband's property for the religious benefit of her husband. The Courts should not allow witnesses to be examined on commission without adequate reasons. *Per* SHAH J.—In view of the accepted doctrine that the widow's powers to disposition are restricted as regards the property particularly immoveable property inherited from the husband in cases governed by the Mitakshara, I do not think that Vijnaneshvara's silence on this point can be properly used as an argument in favour of the unlimited powers of the widow to make a gift of the immoveable property of her husband for a religious or a spiritual purpose. The rule of this point is not a special rule of any particular school of Hindu Law, but is one of general application, and must be accepted as applicable to cases under the Vijavahara Mayukha.

PANACHAND CHHOTALAL *v.* MANOHARLAL NANDLAL (1917) . . . . *I. L. R. 42 Bom. 136*

10. ———— **Gift to Hindu female**—*Construction of document—"Malik mustaqil."* A Hindu being the full owner of certain property, made a gift thereof to his widowed daughter-in-law, describing the donee in the deed as *malik mustaqil.* There was no circumstance to counter-indicate that the donor intended that the donee should

HINDU LAW—GIFT—*contd.*

take less than the full estate in the property comprised in the deed. *Held,* that the donee took all the estate of the donor. *Surajmani* v. *Rabi Nath Ojha, I. L. R. 30 All. 84,* referred to. NAULAKHI KUNWAR *v.* JAI KISHAN SINGH

I. L. R. 40 All. 575

11. ———— **Gift of lands to an idol**—*By a Hindu for 'pious purposes' without a deed, validity of—Binding nature of the gift on members of a joint Hindu family.* A dedication of a small portion of the joint Hindu family lands to an idol of a temple by the father or manager of the family on the occasion of the funeral of a deceased member, is not by the law of India required to be in writing and is valid and binding on the other members of the family as a gift ordained 'for pious purposes.' RAMALINGA CHETTY *v.* SIVACHIDAMBARA CHETTY (1918)

I. L. R. 42 Mad. 440

12. ———— **Gift to Agradani Brahmins**—*position of—Gift to—Title to offerings to the dead at a sradh when vests in Agradani Brahmin—Acceptor of such gifts if liable for damages.* Agradanis are a class of degraded Brahmins who accept gifts of certain prohibited things at *sradh* ceremonies. *Held,* on a consideration of the texts, that Agradani Brahmins have no vested interest in things given away at a *sradh* ceremony. Before they acquire any title, the things must be given and accepted. Where an Agradani Brahmin was invited to a *sradh* and accepted the offerings of food meant for disembodied spirits, but at the time of the distribution of valuable offerings a third party interfered and under his advice the things were made over to the defendants who were other Agradani Brahmins who had not officiated as such at the *sradh* but who were not themselves alleged to have interfered in the distribution: *Held,* that the defendants acquired a valid title in the things by the gifts of the person performing the *sradh* and the plaintiff had no legally enforcible claim against him. Assuming that the plaintiff had any claim for remuneration on account of the religious services performed by him as against the person inviting him, they had no cause of action against defendants. HARI CHURN AGRADANI *v.* SASTI CHURN AGRADANI (1910)

14 C. W. N. 1005

13. ———— **Agrahar gift**—*Private religious gift to Brahmins—Condition necessitating residence treated as recommendatory and not enforceable at law—Alienation by a donee not residing in the village—Validity of the alienation—Transfer of Property Act (IV of 1882), ss. 10 and 11.* An Agrahar gift of certain lands and a house was made to a donee and his descendants entitling him to enjoy the lands, reside in the house, and perform the six-fold religious duties. It was further enjoined that the donee should not abandon his house and go to another place and enjoy his Vritti given to him in connection with the Agrahar from that place. If the donee acted in contravention of the above provision, his conduct should be considered an act of irreligiousness; and the gift should be revoked and granted to another fit person. The donee complied with the above conditions for some years but eventually went to another village to live and sold the lands, and the house. In a suit by the alienee to recover arrears of rent for the lands, a question having arisen whether the alienation was valid. *Held,* that the Agrahar gift was a private gift to the

HINDU LAW—GIFT—*contd.*

donee and an absolute gift according to law; that the further provision as regards residence in the same village was only a recommendation and an appeal to the religious conscience of the donee and his descendants; and that as a condition it was not valid and enforceable in law. *Held,* accordingly, that the alienation was valid. *Anantha Tirtha Chariar* v. *Nagamuthu Ambalagaren* (*1881*) *4 Mad. 200,* referred to. RUKHMINIBAI *v.* LAXMIBAI (1919) . . . . **I. L. R. 44 Bom. 304**

14. ———— **Deed of gift by widow and next reversioner**—*Transfer of a* spes successionis—*Gift challenged by the reversioner after widow's death—Invalidity of gift so far as reversioner's interest concerned—Transfer of Property Act (IV of 1882), s. 6.* One K died leaving a widow G, a son B and two daughters P and J. On B's death G became his heir. In 1891 G and one of the daughters P gifted away two properties to defendants Nos. 1 to 4, sons of the deceased daughter J, purporting to convey these properties by G as the life tenant and by P as the next reversioner. In 1911 G having died, P filed a suit to recover the property from the donees under the gift of 1891, on the ground that the deed against her was invalid as it conveyed her chance of surviving G and succeeding to the property as reversioner. Both the lower Courts dismissed the suit. On appeal to the High Court. *Held,* that the deed of gift to defendants Nos. 1 to 4 was good only as regards the life interest of G and was bad as regards the transfer of P's chance of succession, under s. 6 of the Transfer of Property Act, 1882. BAI PARVATI *v.* DAYABHAI MANCHHARAM (1919).

I. L. R. 44 Bom. 488

15. ———— **"Appointed daughter"**—*Description of daughter as putrika in deed of gift by father, whether amounts to appointment—Liability of appointed daughter for father's debts.* Where, by a deed of gift *inter vivos,* a sonless Hindu father conveyed an absolute interest in his property to one of his daughters and the donee was described in the deed as *putrika* and her descendants as *putrika putra, held,* that the deed did not operate as an appointment of the donee as a son to the donor. *Held, also,* that even if the *Mitakshara* Law did apply to the donee as *putrika* she would only become joint with the farher during his lifetime if the property was ancestral and then only would the joint property be available to discharge his debts. The custom of appointing a daughter to raise issue to a sonless father is obsolete. Even though such a custom should be established it is doubtful whether all the duties and obligations imposed on a Hindu son, under the *Mitakshara* Law to discharge the debts of his father would apply or attach to a daughter appointed as *putrika.* *Quære:* whether she would have been liable, has she acquired othe property from her father. BABUI RITA KUAR *v.* BABU PURAN . **1 Pat. L. J. 581**

16. ———— **Joint ancestral property**—*Mitakshara, ch. 1, ss. 27, 28 and 29—Gift of portion by one member for pious purposes—Circumstances in which such gift is valid.* The second and third of the circumstances stated in para. 28 of Ch.1 of the Mitakshara as justifying a transfer of joint ancestral property by one member of the family are not governed by the preceding words "in a time of distress"; but there are three separate and distinct exceptions. Thus the gift of a portion of the joint ancestral property made by one member of the family for pious purposes is valid, though

HINDU LAW—GIFT——*contd.*

not made in a time of distress. The term "pious purposes" as used in para. 28 does not necessarily mean indispensable duties, such as the obsequies of the father, etc., mentioned in para. 29. *Gopal Chund Pande* v. *Babu Kunwar Singh, 5 S. D. A., L. P., 24,* and *Raghunath Prasad* v. *Govind Prasad, I. L. R. 8 All., 76,* referred to. SRI THAKURJI v. NANDA AHIR . . **I. L. R. 43 All. 560**

HINDU LAW—GRANT.

———————— *Property granted to owner of office when partible—Conduct of parties in determining nature of property—Acquisition of property by holder of office—Charities, devolution of*

holder, the grant will be deemed to be a personal grant and will be ordinary partible property. The conduct of a person who deals with property as if it belonged to himself and his undivided co-parceners will be strong and cogent evidence that the property belongs to the co-parcenary. The recognition by Government and public officers of such property as ordinary partible property will be strong evidence of its partibility. It is competent to holders of offices to acquire properties for the benefit of themselves and their descendants and there is no presumption that such acquisitions are for the benefit of the office, where it is not shown that such properties were treated as attached to the office. The right of management of family properties devoted to charities ordinarily descends to the heirs of the donor except in the few cases where the office is descendible to a single heir. According to well-established usage and custom, the enjoyment of the office of manager is divided between the different mebmers or branches of the divided family. *Ramanathan Chetty* v. *Murugappa Chetty. I. L. R. 27 Mad. 192,* referred to. SETHURAMASWAMIAR v. MERUSWAMIAR (1909) **I. L. R. 34 Mad. 470**

———————— *Grants made of properties for non-religious and for religious and charitable*

liable to partition—Charities not liable.—Grants of the property in suit had been made by the Raja of Tanjore from time to time to the ancestor of the parties a holy man whom the Raja brought to Tanjore as his *guru.* Some of the grants were for non-religious purposes and others for religious and charitable purposes in connexion with a trust founded when the *guru* came to Tanjore; and the propert

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to have partition of the non-religious properties, and as to the religious and charitable properties

Courts in India), that there was nothing in the

HINDU LAW—GRANT—*contd.*

documentary evidence (the original grants, and confirmatory inam grants made by the Government after the escheat of the Tanjore Raj) or in any of the other circumstances of the case to take the descent of the properties out of the ordinary rule of inheritance, and they were therefore liable to partition. The objects for which the religious and charitable properties were given were described in the grants as being for the purpose "of perpetually conducting a food chatram near the tomb of a holy man, and in one case of making an agrahar by building houses round the holy place." *Held* (reversing the decision appealed from), *that there was sufficient indication in the grants and in the surrounding circumstances of the case that a devolution of the management to the heirs of the original donee was inconsistent*

the subject of partition, but being indivisible *among the members of the family, and the principles to be applied being those laid down in Jafar* v. *Aji, 2 Mad. H. C. R. 19* and *Trimbak* v.

in question. SETHURAMA-
MIAR (1917) . . . **I. L. R. 41 Mad. 296**

HINDU LAW—GUARDIAN.

See PENAL CODE, s. 361 **I. L. R. 42 All. 146**

———— **Right of Hindu Mother to select daughter's Bridegroom—**

See GUARDIANSHIP. **I. L. R. 1 Lah. 164**

1. ———————— *Guardian of a minor's person and property—Natural guardians, who are —Rights of parents, elder brother and direct male and female ancestors—Paternal aunt, not a natural guardian—King's rights, paramount—Recourse to Court, necessary, if no natural guardian alive—Alienation by de facto guardian—Setting aside, if necessary—Suit or possession—Limitation Act (IX of 1908), Art. 44 or 144, applicability of.* Under the Hindu law, nobody else than the father and the mother of a minor (with probable exceptions in favour of the elder brother and the direct male and female ancestors) is entitled as a matter of natural right to be and to act as a guardian of a minor's person and property; consequently a paternal aunt is not a natural guardian of a minor. Where there is no natural guardian alive, recourse must be had to the Court as representing the rights of the King which are paramount to even the rights of the parents, for the appointment of a guardian. Alienations without necessity, made by a *de facto* guardian, need not be set aside. Art. 44 of the Limitation Act (IX of 1908) does not apply to alienations by unauthorised guardians. THAYAMMAL v. KUPPANNA KOUNDAN (1914) . . . **I. L. R. 38 Mad. 1125**

2. ———————— *Mother of infants intending to become and make her boys Christian—Fitness to be Guardian—Bad character not proved—Undertaking not to baptise children—Associating Hindu uncle in guardianship.*—D, the uncle of two fatherless Hindu boys aged 7 and 5 years respectively, applied to be appointed their guar-

HINDU LAW—GUARDIAN—*contd.*

dian, alleging that their Mother S, was a woman of bad moral character and had made up her mind to adopt the Christian religion and to get her sons baptised. The first allegation was not established. *Held*, that he charge of immorality though not proved, made it impossible for S, to live with the family who made the charge must be taken into consideration in passing orders on the petition. That S's expressing a desire to become a Christian or even becoming one would in itself be no ground for removing her from the guardianship, provided she was in a position to satisfy the Court that she was able to carry out the obligations which the law imposed upon her of bringing up her children in the faith of her husband, whatever the faith she herself might adopt. It was proved that she had expressed her intention to convert her sons to Christianity, but her counsel having given an undertaking that she would not baptise her children, the Court passed order appointing her guardian of the minors' person and property, associating in the guardianship the uncle D, who would as such guardian be in a position to set that S's undertaking to bring up the children in the Hindu faith was properly carried out. The older boy was ordered to be placed at once as a boarder in a Hindu hostel which, though attached to the Church Missionary Society, was conducted in conformity with Hindu religious views, the younger boy being also ordered to be similarly placed when he should attain the age of 7 years until which time he was to live with S, liberty being given to D to apply to the District Judge whenever a breach of the undertaking was apprehended. DWIJAPADA KARMAKAR *v.* MISS BAILEAU (1915)

20 C. W. N. 608

3. ———————— *Guardian and minor—Alienation by guardian not compelled by necessity but dictated by prudence, if binding.* The guardian of a minor is not limited only to making such disposition of the latter's property as he is compelled to make by necessity. Whether what he did was or was not for the benefit of the minor and as such binding on the latter was determined in this case by asking what would have been the probable result if the guardian had not taken the steps he did take; and as it appeared that bigger sacrifices would have become inevitable if the steps in question had not been taken, the transaction was upheld as that of a prudent administrator. ISHANI DASI *v.* GANESH CHANDRA RAKSHIT (1918) . . . **23 C. W. N. 858**

4. ———————— *Person to be appointed.* No person other than the father or mother has an absolute right to the guardianship of a Hindu minor. In the absence of father and mother the relation who is nearer in the view of the Hindu Law should be preferred. LACHMI NARAIN *v.* BALARAM SAHAI . . . **2 Pat. L. J. 190**

5. ———————— *Will—Father's power to appoint guardian by will.* A Hindu father can by word or writing nominate a guardian for his children, the nomination taking effect after his death. He is unrestricted in the choice of a guardian, and may exclude even the mother from the guardianship. *Soobah Doorgah Lal Jha* v. *Raja Neelanund Singh, 7 W. R., C. R., 74,* and *Albrecht* v. *Bathee Jellamma, 22 M. L. J., 247,* referred to. DEBA NAND *v.* ANANDMANI.

I. L. R. 43 All. 213

HINDU LAW—HEREDITARY PRIEST.

———————— *Office of hereditary priest—Yajman vritti—Nibandha—Caste can appoint a priest—Grant from King not necessary—Removal of priest not allowed except on valid ground—Caste—Caste question—Bombay Regulation II of 1827—Civil Court—Jurisdiction.* Under Hindu Law, the office of hereditary priest (*yajman vritti*) is a *nibandha* and is ranked among the hereditary rights of immoveable property. The office of hereditary priest, where it is held in relation to a family, owes its origin, continuance, and binding character to custom and not to a grant from the King or agreement between the parties. Where the office is one of hereditary family priest, the mere fact that in any individual case it has been created originally by the caste for the purposes of families belonging to it cannot affect it, because the office carries with it a hereditary right in the nature of property, and the incumbent cannot be deprived of it by anyone, unless he has becom e a *patita* (outcaste) or has declined to officiate. The caste in such a case makes the selection for the families of its members; and when any family accepts the officiator as its hereditary family priest, custom annexes to the office certain incidents in the nature of civil rights as against the family, which neither the family nor the caste has power to annul except on the ground of some offence under the Hindu Law, committed by the officiator, or of refusal by the officiator to discharge his duty as family priest. Where a caste has appointed a man to a mere priestly office, there is doubtless no right of property conferred. His continuance or removal is exclusively within the competence of the caste and it is a caste question. But it is difficult where the office of hereditary priest is created for the performance of religious ceremonies in certain familes, provided, according to Hindu Law, either the caste or the families have power to create such an office and give it the character of immoveable property. GHELABHAI GAVRISHANKAR *v.* HARGOWAN RAMJI (1911) . . . . **I. L. R. 36 Bom. 94**

HINDU LAW—HUSBAND AND WIFE.

———————— *Acquisition of property by husband and wife—Joint-trade—Property, joint—Wife's interest—Stridhanam—Power of disposition—Death of wife—No survivorship to husband—Devolution on her heirs—Suit in ejectment—Decree for joint possession, if, can be given.* Where certain properties were acquired with the profits earned by a husband and his wife (who were Hindus) in a trade which was carried on by both of them: *Held*, that the properties were under the Hindu law the joint properties of the husband and the wife, and her interest therein was her stridhanam which on her death did not survive to her husband but devolved on the heirs to her stridhanam property. Property acquired by a woman by her own exertions during converture is her own property which she is entitled to hold independently of her husband and it devolves on her heirs on her death. Though the suit be one in ejectment, a decree for joint possession may be passed in favour of the plaintiff. MUTHU RAMAKRISHNA NAICKEN *v.* MARIMUTHU GOUNDAN (1914)

I. L. R. 38 Mad. 1036

HINDU LAW—ILLEGITIMACY.

See HINDU LAW—INHERITANCE.

———————— *Illegitimate son, Mitak-*

HINDU LAW—ILLEGITIMACY—*contd.*

shara, Chap. I, s. 12—Dasi-putra, meaning of—Illegitimate son of a Sudra, share taken by him in father's property. The word *dasi-putra as used* in Mitakshara, Chap. I, s. 12, which provides for the illegitimate son of a *Sudra* getting half of the share of a legitimate son in father's property, has a much wider meaning than a son begotten on a female slave, and if a *Sudra* governed by the Mitakshara law has a permanent, continuous and exclusive concubine who lives as a member of his family, she is a *dasi* and his illegitimate son by her who is himself brought up as a member of the family is a *dasi-putra* within the meaning of the rule laid down in the Mitakshara. *Jogendra Bhupati* v. *Nityananda Man Singh, I. L. R. 17 A. 128 : I. L. R. 18 Calc. 151, Rahi* v. *Gavinda, I. L. R. 1 Bom. 97, Sadu* v. *Baiza, I. L. R. 4 Bom. 37, Krishnayyan* v. *Muttuswami, I. L. R. 7 Mad. 407, Har Govinda* v. *Dharam, I. L. R. 6 All. 329, Karuppannan* v. *Bulokan, I. L. R. 23 Mad. 16, Seshgiri* v. *Girewa, I. L. R. 14 Bom. 282, Ramkali* v. *Jamba, I. L. R. 30 All. 508, Sarasuti* v. *Mannu, I. L. R. 2 All. 134, Inderan* v. *Ramswami, 3 B. L. R. P. C. 1 ; 13 Moo. I. A. 141, Meenakshi* v. *Appakuti, I. L. R. 33 Mad. 226, Annaayyan* v. *Chinnan, I. L. R. 33 Mad. 366,* referred to. *Ram Saran* v. *Tek Chand, I. L. R. 28 Calc. 194,* distinguished. CHATTURBHUJ PATNAIK *v.* KRISHNA CHANDRA PATNAIK (1912) . . . **17 C. W. N. 442**

———————— The illegitimate son of a Kshatriya by a Sudra woman is not a Sudra but a higher caste called *Ugra* Brindarana v. *Radhamani I. L. R. 12, Mad. 72,* followed. JWALA SINGH *v.* SARDAR . **I. L. R. 41 All. 631**

———————— Among Sudras illegitimate sons divide the property with ligitimate sons and the mother is entitled to a share. MANOHARAM BHIKU PATIL *v.* DATTU.

I. L. R. 44 Bom. 166

HINDU LAW—IMPARTIBLE ESTATE.

See CUSTOM. . . **1 Pat. L. J. 109**

See IMPARTIBLE ZAMINDARI.

See HINDU LAW—INHERITANCE.

1. ———————— *Hindu Law—Impartible estate—Question whether an estate alleged to be a raj was partible or impartible—Question of fact whether estate was a raj—Concurrent decisions of Courts in India—Privy Council, practice of—adoption—joint power to two widows to adopt—Power exercised by surviving widow—Construction of will—No provision for the death of one or two joint donees—No power in Court construing will to make by its interpretation any addition to testamentary dispositions.* In the absence of a sanad under Madras Regulation XXV of 1802, the regulations of that year do not affect the title to any land. *Collector of Trichinopoly* v. *Lekkamani, L. R. 1 I. A. 282, 306,* followed. The acceptance

Case, I. L. R. 28 Mad. 508, 515 : s. c. L. R. 32 I. A. 261, 266, followed. Unless there be an existing estate with other incidents which a sanad in common form under Madras Regulation XXV of 1802 can operate to confirm, such sanad will confer on or confirm in the grantee an estate descendible according to the ordinary rules of inheritance of the Hindu Law. *Raja Venkata*

HINDU LAW—IMPARTIBLE ESTATE—*contd.*

Rao v. *Court of Wards, I. L. R. 2 Mad. 128 : s. c. L. R. 7 I. A. 38,* followed. In order to establish that any estate is descendible otherwise than in accordance with the ordinary rules of inheritance of the Hindu Law, it must be proved either that it is from its nature impartible and descendible to a single heir, or that it is so impartible and descendible by virtue of a special family custom. *Baboo Ganesh Dutt Singh* v. *Maharajah Moheshur Singh, 6 Moo. I. A. 164, 187,* followed. The nature of the estate, and existence or otherwise of a special family custom are questions of fact to be determined on the evidence in each case, *Mallikarajuna* v. *Durga, I. L. R. 13 Mad. 406 : s. c. L. R. 17 I. A. 134,* followed. In a case in which the question was whether the estate of Nidadavole in the Kistna district of the Madras Presidency, which was the subject of a sanad in common form under Madras Regulation XXV of 1802, was partible or impartible, the appellant contended that the grantee had, at and prior to the date of the sanad, an estate of the nature of a raj or principality, and therefore impartible, but he did not rely on any special family custom, *Held* (on the above principles), that the question whether the prior estate was of the nature of a raj or not was a question of fact to be determined on the evidence, and that where both Courts in India had concurrently found it was not a raj but was partible, those findings ought not, according to the practice of the Board, to be disturbed unless they were shown to be not justified by the evidence. *Allen* v. *Quebec Warehouse Company, L. R. 12 A. C. 101, 104,* followed. Their Lordships, after considering the evidence, so far from being so satisfied, were not prepared to say that they should not have come to the same conclusion on that point. The appeal was therefore dismissed A Hindu of the Sudra caste by his will made the day before his death in 1864, after bequeathing his estates to his two widows gave them the following power of adoption ; "You should adopt a boy who is our sannihita (one closely related) whenever it strikes that our samastanam (family) should continue." This power was not exercised whilst both widows were alive, but by the survivor of the two widows in 1890. *Held,* without deciding the question of the validity or otherwise, under the Hindu law, of a joint power of adoption (for the proper determination of which their Lordships were of opinion that the materials in this case were insufficient) that the will gave to the widows jointly the power to adopt a son should occasion arise which in their opinion made it desirable to do so : but only one of the widows could receive the boy in adoption so as to step into the position of being his adoptive mother. On a conside [illegible]

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of the will with regard to the adoption in any special way arising from the fact that the testator was a Hindu ; [illegible] ain meaning of th[illegible] of the power was [illegible] joint donees, and it was clearly the law that in such a case the death of one of the donees put an end to the joint power ; not by virtue of any peculiar doctrine of English law, or series of English decisions, but flowing from the nature of a joint power. The case was different when the power vested not in specific persons, but in the occupants for the time being of a specified office, such as executors.

HINDU LAW—IMPARTIBLE ESTATE—*contd.*

The words of the will, when properly construed, related to choice and adoption by the two widows acting jointly. Hence the words referred only to the period of time when both widows were living. To hold that one of the widows could adopt a son after the death of the other widow, would be providing for a period of time which the testator left unprovided for, and would be making an addition to his testamentary dispositions which no Court construing a will was entitled to do. NARASIMHA *v.* PARTHASARATHY (1914)

I. L. R. 37 Mad. 199

2. ——————— *Impartible estate—Succession—Primogeniture—Estate once in the possession of a family regranted after loss of possession to one member of the same family—Construction of grant.* The question whether a certain estate is impartible or not is one of fact in each case. Where an impartible estate is lost to a certain family and on the representation of a member of that family the Government puts him into possession making a grant in his favour without any special term or condition in the grant, the property so restored would be joint family property in the hands of the member of the family to whom the grant is made. When the Government makes a grant of an estate it can determine the nature of the grant; but in the absence of specific terms in the grant the surrounding circumstances must not be ignored. The normal constitution of Hindu family is union. And it is the very essence of an impartible estate that there is no legal right to insist on partition. The estate is enjoyed by the whole family through the occupant of the *gaddi*. *Held*, that, when an impartible estate passes by survivorship from one line of descent to another, it devolves not on the co-parcener nearest in blood, but on the nearest co-parcener of the senior line. *Held*, further, that if the descendants of a junior member of an impartible estate partition the property given to their ancestor for maintenance, it is not conclusive on the point as to whether the estate has ceased to be joint for the purpose of finding out a successor to the *gaddi*. *Kachi Yuva Rangappa Kalakka Thola Udayar* v. *Kachi Kalayana Rangappa Kalakka Thola Udayar, I. L. R. 28 Mad 508, Katama Natchiar* v. *The Raja of Shivagunga, 9 Moo. I. A. 543, Doorga Persad Singh* v. *Doorga Konwari, I. L. R. 4 Calc. 190, Stree Rajah Yanumula Venkayamah* v. *Stree Rajah Yanumula Boochia, Venkondora, 13 Moo. I. A. 333, Sartaj Kuari* v. *Deoraj Kuari, I. L. R. 10 All. 272, Tara Kumari,* v. *Chaturbhuj Narayan Singh, I. L. R. 42 Calc. 1179, Bachoo Harkisondas* v. *Mankorebai, I. L. R. 29 Bom. 51, Raja Rup Singh* v. *Rani Baisni, I. L. R. 7 All. 1,* and *Nayaganti Achammagaru* v. *Venkatachalapati Nayanivaru, I. L. R. 4 Mad. 250,* referred to. *Sri Raja Satrucharla Jagannadha Raju* v. *Sri Raja Satrucharla Ramabhadra Razu, I. L. R. 14 Mad. 237, Venkatarayadu* v. *Venkataramayya, I. L. R. 15 Mad. 284, Venkata Narasimha Appa Row* v. *Parthasarathy Appa Row, L. R. 41 I. A. 51,* and *Brij Indar Bahadur Singh* v. *Ranee Jankee Koer, L. R. 5 I. A. 1,* distinguished. BAIJNATH PRASAD SINGH *v.* TEJ BALI SINGH (1916)

I. L. R. 38 All. 590

3. ——————— The interest of the holder of an impartible estate is liable for his debts in the hands of his heir. For the purposes of ascertaining the person entitled to succeed resource must be had to the rule which would have governed the succession if the estate had remained partible. SHYAM LAL SINGH *v.* RAJA BIJOY N. KUNDA BAHADUR . **2 Pat. L. J. 136**

4. ——————— Where a family is governed by the rule under which succession to an impartible estate does not go to the females so long as the family remains united, the burden of proving that the family has ceased to be united lies on the person who alleges separation. *Per Chapman, J.*—The departure of a member of such a family to reside in a village which has been granted to him for maintenance is not sufficient to indicate separation. *Per Roe, J.*—Where the plaintiff had asserted and was acknowledged to have a right to take part, as a member of the family in the family worship and during visits which were frequent and of long duration had conducted himself as subservient, to the elder branch of the family and received from the elder branch assistance for himself, for his son and for his wife consistent with such subservience, *held,* that he must be taken to be joint with the elder branch. RANI JAGADAMBA KUMARI *v.* THAKUR WAZIR N. SINGH . **2 Pat. L. J. 239**

HINDU LAW—INHERITANCE.

See HINDU LAW—SUCCESSION.

1. ——————— **Illegitimate son**—*Sudras—Mitakshara—Legitimate son—Vatan—Collateal succession—Suit by reversioner for declaration as nearest heir—Widow of the last male holder—Vested right—Limitation Act (XV of 1877), Art. 120.* Amongst Sudras governed by the Mitakshara, an illegitimate son cannot inherit a vatan collaterally in preference to legitimate heirs. The right to sue for a declaration of heirship to a vatan does not accrue until the heath of the widow of the last male holder of the vatan, the widow having a vested interest in it as the nearest heir. RAVJI VALAD MAHADU *v.* SAKUJI VALAD KALOJI (1909)

I. L. R. 34 Bom. 321

2. ——————— **Daughters**—*Mitakshara—Daughters inheriting property from their father—Shares separate and absolute—Tenants-in-common.* In the Bombay Presidency a daughter taking property from her father inherits it as *stridhan* and daughters take their shares separately and absolutely. When the property so inherited is not physically divided, it is held by the daughters as tenents-in-common and not as joint tenants and there is no survivorship between them. In cases affecting inheritance the rule is to adhere to the decisions of the Court to which the district from which the case arose is subject. VITHAPPA *v.* SAVITRI (1910)

I. L. R. 34 Bom. 510

3. ——————— **Kamathis**—*Mitakshara—Mayukha—Law governing Kamathis who live in Bombay—Succession—Anvadheya Stridhan—Preference between husband and son born of adulterous intercourse—Shudras—Forms of marriage—Presumption as to form.* The Kamathis, settled in Bombay, are governed for the purposes of inheritance by the law of the Mitakshara and the Mayukha, where they agree: but where they differ, the Mayukha law must prevail. The *stridhan* of a female devolves on her death upon her husband in preference to the son born of her by adulterous intercourse. The law will, even among Shudras, presume the marriage to have been according to the approved forms if the parties belonged to a respectable family. JAGGANNATH RAGHUNATH *v.* NARAYAN (1910) . **I. L. R. 34 Bom. 553**

HINDU LAW—INHERITANCE—*contd.*

4. ——— **Jains**—*Inheritance—Competition amongst heirs—Mother's sister's son preferred to maternal uncle's son.* Under Hindu Law a mother's sister's son is entitled to succeed to the estate of a deceased Hindu in preference to a maternal uncle's son. APPANDAI VAITHIYAR *v.* BAGUBALI MUDALIAR (1910) . **I. L. R. 33 Mad. 439**

5. ——— **Scheme of devolution contrary to Hindu Law**——*Inheritance—Document attempting to alter the mode of succession—Instrument laying down rules to secure succession in direct male line for an indefinite period, and without gift to any person—Succession on failure of direct male issue—Exclusion of female heirs—Dayabhaga Law.* Two brothers *K* and *N*, subject to the Dayabhaga School of Hindu Law, executed, on 28th March 1866, a document whereby after reciting that "Whereas body is mortal it is impossible to say what may befall at what time, and as ruin may ensue from disputes relating to the shares arising in future among son, daughter, daughter's son and childless widow unless some rules are regularly framed, and it has accordingly become necessary to prescribe a set of rules in that behalf, and hence the rules mentioned below are laid down: these shall become operative and come into force on our death," they purported to provide for the permanent devolution of their respective properties in the direct male line, including adopted sons, with the condition that in case of failure of lineal male heirs in one branch the properties belonging to that branch should go to the other, subject to the same rule, and only in the absence of male descendants in the direct line in either branch were the properties to go to female heirs and their descendants. *K* died in 1868 leaving a son *A*, a daughter *D*, his brother *N* and their mother *C*. *A* died in 1872 without any issue, and *C* in March 1901. The plaintiffs (appellants), who were the sons of *D*, instituted this suit on 29th July 1901, against *N*, claiming as next reversioners to *A* their maternal uncle, the properties which originally belonged to *K* and which had since come into the possession of *N* the defendant. *N* died shortly after the suit was brought, his sons (the repondents) being substituted for him on the record. Their contention was that under the instrument of 1866 the properties in dispute [illegible] on his death [illegible] the decision [illegible] nion, that in [illegible] happened, *A* [illegible] the properties in suit, an absolute estate defeasible in case of death without male issue, and as he died without male issue the heirs of *K* (the respondents) would succeed. *Held* (reversing that decision), that the clear intention of the instrument of 1866 was to vary the rules of Hindu Law and to control the devolution of the properties until the indefinite failure at some remote period of the male line of *K* and *N*; and that such an attempt to alter the mode of succession was, on the principles laid down in the case of *Jatindra Mohan Tagore* v. *Ganendra Mohan Tagore, 9 B. L. R. 377; L. R. I. A. Sup. Vol. 47*, illegal and void. Throughout the instrument there was no indication of an intention to make a gift to any person: and there was no warrant for the contention that there was a devise in favour of *A* with a gift over to *N*, his uncle. The question was not whether the gift over was good in the event which happened, but whether it was good in its creation. PURNA SHASHI BHATTACHARJI *v.* KALIDHAN RAI CHOWDHURY (1911) . . **I. L. R. 38 Calc. 603**

[illegible] 's **grandson**— [illegible] *uncle's widow.* [illegible] sidency govern- [illegible], paternal uncle's grandson is to be preferred as an heir to a paternal uncle's widow. KASHIBAI *v.* MORESHVAR RAGHUNATH (1911) . . **I. L. R. 35 Bom. 389**

7. ——— **Impartible estate governed by rule of primogeniture**—*Inheritance—Estate devised to widow of owner—Suit by reversioner—Compromise of suit by widow and reversioner—Descent of estate governed by the compromise and not by will.* The owner of an impartible estate governed by the rule of primogeniture died leaving a will by which he gave an absolute estate *to his widow, against whom S, the next reversioner,* brought a suit on the ground that the will was invalid and that he was entitled to possession of the estate. In that suit the parties came to a [illegible] and that after her death *S* or "any representative of his who may be living at that time will be the absolute owner of all the moveable and immoveable properties and will occupy the *gaddi*." *S* predeceased the widow leaving no male issue and without having made any disposition by will or *otherwise of his interest in the estate.* On the death of the widow in possession, the widow of *S* sued to recover the estate from members of her husband's family who had possession of it. *Held*, by the Judicial Committee (affirming the decision of the High Court), that the rights of the parties depended not on the will but on the compromise, the terms of which gave *S* a vested interest in the estate, which retained its character of impartibility, and on the death of *S* descended not to his widow (the appellant) but to the respondent, *his heir, according to the rule of primogeniture.* LEKHRAJ KUNWAR *v.* HARPAL SINGH (1911)
I. L. R. 34 All. 65

8. ——— **Maintenance**—*Mitakshara—Joint Hindu family—Mother's share on partition of joint family property between her and her sons after father's death—Stridhan.* According to the Mitakshara there is no substantial difference in principle between a woman's property acquired by inheritance and that acquired by partition. *Held*, [illegible] ourts in [illegible] a joint [illegible] *e father* on partition of the joint family property between the mother and the sons, is not her *stridhan*, but is given for her maintenance, and on her death it devolves upon the heirs of her husband and not upon her own heirs. *Debi Mangal Prasad Singh* v. *Mahadeo Prasad Singh, I. L. R. 32 All. 253*, and *Chhiddu* v. *Naubat, I. L. R. 24 All. 67*, overruled. DEBI MANGAL PRASAD SINGH *v.* MAHADEO PRASAD SINGH (1912) . **I. L. R. 34 All. 234**

9. ——— **Unchastity**—*Inheritance—Wife—Unchastity during coverture —Condonation by husband—Husband and wife.* Under Hindu Law, a widow is not disqualified from inheriting to her husband on the ground of her unchastity during coverture, if it is condoned by her husband.

HINDU LAW—INHERITANCE—*contd.*

Where the husband and wife have lived together without any open breach of marital relations up to the husband's death, it would be a dangerous principle to allow mere outsiders to come in and impute acts of unchastity to the wife during the period of her coverture. GANGADHAR PARAPPA *v.* YELLU (1911) . . I. L. R. 36 Bom. 138

10. ———— Paternal grandmother—*Inheritance—Estate taken by her is limited estate—Women entering family by marriage take limited estate.* Under Hindu Law the paternal grandmother, inheriting to her grandson, takes a limited estate for life. All the women who belong to a family by marriage, not by birth, take a limited estate in the property which they inherit from any male member of that family. DHONDI *v.* RADHABAI (1912) . . I. L. R. 36 Bom. 546

11. ———— Widow's right to inherit—*Inheritance—"Malignant hostility" to husband, if disqualifies a widow from inheriting —Hostility, meaning of.* The only qualification necessary for a widow to entitle her to succeed to her husband in physical chastity. Where a wife refused to come to her husband's house when sent for after he had married for a second time: *Held,* that such conduct was not evidence of such hostility to her husband as dis-entitled her to her inheritance where there was no evidence of any misconduct. KHETTERMONI DASSI *v.* KADAMBINI DASSI (1912) . . . 16 C. W. N. 964

12. ———— Ascetics—Sudras—*Rules relating to ascetic persons of the Sudra caste.* A *Sudra* cannot enter the order of *yati* or *sannyasi,* and therefore a *Sudra* who becomes an ascetic is not excluded from inheritance to his family estate unless some usage is proved to the contrary: *Dharampuram* v. *Virapandiyam, I. L. R. 22 Mad. 302,* followed. HARISH CHANDRA ROY *v.* ATIR MAHMUD (1913) . . I. L. R. 40 Calc. 545

13. ———— Succession to stridhanam—*Preference of co-wife's daughter to sapindas of husband.* Under the Mitakshara law of inheritance, the daughter of a co-wife of a deceased woman, married in one of the approved forms, is entitled to succeed to her stridhanam property in preference to the sapindas of her husband, such as his father's brother's son. *Placitum 11* of s. XI of Chap. II, Mitakshara, applied. Colebrooke's translation of 'sapinda' in that *placitum* as 'kinsmen allied by funeral oblations' is incorrect; the correct meaning being 'kinsmen allied by affinity' or 'persons allied to each other by possession of particles of the same body.' According to the above text the stridhanam property of a woman married according to an orthodox form, who has left no issue, will devolve on her husband, and on failure of the husband the property will go to his sapindas in the order laid down in the Mitakshara with reference the succession to the property of a male. *Venkatasubramaniam Chetti* v. *Thayaramma, I. L. R. 21 Mad. 263, Gojabai* v. *Shrimant Shahajirao moloji Raje Bhosle, I. L. R. 17 Bom. 114, 117, Jagannath Prasad Gupta* v. *Runjit Singh, I. L. R. 25 Calc. 354, 367, Krishnai* v. *Sripati, I. L. R. 30 Bom. 333, Bai Kesserbai* v. *Hunsraj Moraji, I. L. R. 30 Bom. 431 Mussamat Thakor Deyhee* v. *Rai Bauk Ram, 11 Moo. I. A. 139, 175,* and *Champat* v. *Shiba, I. L. R. 8 All. 393,* applied. West and Buhler, p. 518, T. Krishnasami Aiyar's Translation of Smriti Chandrika Chap. IX, s. III, verse 83, Golab Chandra Sircar Sastri's Hindu Law, 4th edition p. 461 and Bhattacharya's Hindu Law, p. 580, referred to. NANJA PILLAI *v.* SIVABAGYATHACHI (1913) I. L. R. 36 Mad. 116

14. ———— Exclusion from Dayabhaga—Murder—*Transportation—Partition suit by heir of excluded co-parcener—Claim for maintenance not put forward—Claim for maintenance after sentence served out—Claim by his wife and after-born son—Res judicata—Separate causes of action—Multifariousness—Civil Procedure Code (Act V of 1908), O. I, r. 1.* Where a son who was excluded from inheritance by reason of his murdering his father has served out the punishment inflicted upon him and claims maintenance from his son the person who has excluded him from inheritance: *Held,* that under the Hindu Law he is entitled to maintenance on the principle that property in the hands of the co-parcener who has executed another from inheritance, is liable to a claim or charge for the maintenance of the disqualified co-parcener. His wife also, if chaste, is similarly entitled to maintenance out of the property. An after-born son of the disqualified co-parcener is also entitled to maintenance as a dependent member of the family. A single suit by all three is maintainable under O. I, r. 1, Civil Procedure Code. NILMADHAB MITTER *v.* JOTINDRA NATH MITTER (1913) 17 C. W. N. 341

15. ———— Dayabhaga — Great-grandfather's great-grandson and father's brother's daughter's son—*Preferential heir who is—Stare decisis, doctrine of.* As between the great-grandson of the great-grandfather of a deceased owner and the latter's father's brother's daughter's son, the latter is, upon the authority of the Full Bench decisions in *Gooroo Gobind* v. *Anund Lal, 5 B. L. R. 15; 13 W. R. (F. B.) 49, Digumbar Ray* v. *Moti Lal, I. L. R. 9 Calc. 563,* the preferential heir. To re-open the question of succession settled by these decisions would not be proper. *Young* v. *Robertson, 4 Macqueen H. L. 314, 345,* and *Sri Raja Rao Venkata* v. *Court of Wards, L. R. 26 I. A. 83; 3 C. W. N. 715,* referred to. KEDAR NATH RAY *v.* AMRITA LAL MUKERJEE (1911) 17 C. W. N. 492

16. ———— Babuana and sohag grants—*Kulachar—Exclusion of widows—Application of custom after partition.* In an impartible raj, descending according to primogeniture, *babuana* and *sohag* grants were by custom made to younger sons and to their wives respectively. These grants were subject to a *kulachar* by which they enured for the benefit of the grantees and their heirs-male in the male line, with reversion to the *Raj reasat.* The evidence established that the *kulachar* excluded widows from succession to properties so granted, but there was no evidence of the exclusion of a widow after a partition between members of the family jointly holding properties originally the subject of *babuana* and *sohag* grants. *Held,* (i) that the custom excluding widows applied notwithstanding a partition; (ii) that the words "*auras putra poutradik*" in sanads for *babuana* grants must be construed as subject to the custom excluding widows and not as general words of inheritance. *Durgadut Singh* v. *Rameshwar Singh, L. R. 36 I. A. 176,* explained. *Ram Lal Mookerji* v. *Secretary of State for India, L. R. 8 I. A. 46,* distinguished. EKRADESHWAR SINGH *v.* JANESHWARI BAHUASIN (1914) I. L. R. 42 Calc. 582 . L. R. 41 I. A. 275

HINDU LAW—INHERITANCE—*contd.*

17. ———— Mitakshara—Bandhus—*Limit of Heritable Bandhus—Bhinna gotra sapindas.*

das with the fifth degree from the common ancestor; further, in order to entitle a *bandhu* to inherit he must be so related to the deceased person that they are mutually *sapindas* of one another. The right of inheritance, consequently, does not extend to a deceased person's paternal grandfather's son's son's daughter's daughter's sons, since they are *bhinna-gotras* beyond the fifth degree and the element of mutuality of *sapindaship* is wanting. RAM CHANDRA MARTAND WAIKAR *v.* VINAYAK VENKATESH KOTHEKAR (1914)

I. L. R. 42 Calc. 384
L. R. 41 I. A. 290

18. ———— Illegitimate children—*Right of, to—Prostitution, not destroying kinship by blood—Mitakshara—"Daughter's," meaning legitimate daughters.* Except in the case of Sudras, among whom illegitimate sons have a right of succession, illegitimate children are not heirs under the Hindu law, especially under the Mitakshara system, to succeed to the property of any kind left by either of their parents. Hence, a legitimate son of a Sudra woman, born in lawful wedlock, succeeds to the property acquired by his mother by prostitution after the death of his father and her illegitimate daughter born in prostitution is not an heir to such property. Prostitution does not sever the tie of kinship by blood and does not bring the prostitute within the category of "dancing girls" whose children are allowed by custom and pre-

property in certain cases, means only legitimate daughters. MEENAKSHI *v.* MUNIANDI PANIKKAN (1914) . . . I. L. R. 38 Mad. 1144

19. ———— Leprosy—*Anæsthetic, not a ground of exclusion from—Incurability, not a safe test—Grounds of exclusion in texts, some obsolete.* Under the Hindu Law a person suffering from the anæsthetic form of leprosy though considered incurable by medical men, is not disentitled to inherit. *Obiter*:—Both the tests of Hindu Law texts and the decided cases fully establish that it is only the agonizing, sanious or ulcerous type of leprosy that is a disqualification to disinherit. Deformity and unfitness for social intercourse arising from the virulent and disgusting nature of the disease would appear to be what has been accepted in both the texts and the decisions as the most satisfactory test. Most of the decisions which have excluded lepers deal only with right

and *Helan Dasi* v. *Durga Das Mandal, 4 C. L. J. 323,* distinguished. *Ranchod* v. *Ajoobai, 9 Bom. L. R. 1149,* referred to. Many of the grounds of exclusion referred to in the texts would not now be enforced by the Courts and are practically obsolete. KAYAROHANA PATHAN *v.* SUBBARAYA THEVAN (1913) . . I. L. R. 38 Mad. 250

HINDU LAW—INHERITANCE—*contd.*

20. ———— Benares school of law—*Great-grandson of grandfather of deceased male owner—Grandson of great-grandfather of deceased—"Putra," interpretation of—Lineal and collateral descendants—Blood relationship or propinquity among gotrajas—Test is capacity to offer oblations—Introducing into the decision the opinion of another Judge not a party to the judgment—Practice not approved.* On this appeal, in which the question for decision related

parental stock as the last male owner, who died

deceased's great-grandfather. The word "*putra,*" which when used in relation to the last owner signifies and includes, "son, grandson and great-grandson," thus including three degrees in the direct line of descent, is not to be construed in a literal and restricted sense when used in connexion with collateral relatives such as brother, uncle or grand-uncle. The following cases were referred to and discussed:—*Rutcheputty Dutt Jha* v. *Rajunder Narain Rae, 2 Moo. I. A. 132, 153, Bhyah Ram Singh* v. *Bhyah Ugur Singh, 13 Moo. I. A. 373, Kureem Chand Gurain* v. *Oodung Gurain, 6 W. R. 158, Kalian Rai* v. *Ram Chandar, I. L. R. 24 All. 128, Rachava* v. *Kalingapa, I. L. R. 16 Bom. 716, Parasara Bhattar* v. *Rangaraja Bhattar, I. L. R. 2 Mad. 202, Suraya Bhukta* v. *Lakshminarasammo, I. L. R. 5 Mad. 291,* and *Chinnasami Pillai* v. *Kunju Pillai, I. L. R. 35 Mad. 152,* and the last two cases were dissented from the respondent was also entitled to succeed on the ground that he ... on the de... ...le of making ... In judging of the nearness of blood relationship or propinquity among the *gotrajas*, the test to discover the preferential heir is the capacity to offer the oblations. *Bhayah Ram Singh* v. *Bhyah Ugur Singh* and the principle laid down in the *Viramitrodaya,*

duce the opinion of another Judge not a party to the judgment, for the purpose of enforcing the conclusion arrived at. BUDDHA SINGH *v.* LALTU SINGH (1915) . . . I. L. R. 37 All. 604

21. ———— Impartible Estate governed by rule of primogeniture—*Where no custom excluding females existed—Widow of holder who died without male issue—Evidence of separation in joint family—Junior members leaving family-house and living in separate residence after obtaining grant for maintenance.* The succession, on the death of a holder without male issue, to an impartible estate which descended by the rule of primogeniture, the junior members of the family being entitled to grant for maintenance, and where no custom excluding females existed, depended on whether there had been a separation between two brothers, the father and predecessors in title of the deceased holder and the father of the next contingent reversioner. On that question the Courts in India

HINDU LAW—INHERITANCE—*contd.*

differed, the Subordinate Judge finding that a separation had taken place, and the High Court being of opinion that what had occurred did not in intention and fact, amount to a complete separation. *Held* (reversing the decision of the High Court), that the evidence clearly proved that there had been a complete separation, and that the widow of the last holder was therefore entitled to succeed to the estate for a Hindu widow's interest in priority to the next male reversioner. TARA KUMARI *v.* CHATURBHUJ NARAYAN SINGH (1915)

I. L. R. 42 Calc. 1179

22. ———— **Bandhus**—*Atma bandhus—Preferential heir—Atma bandhus* ex parte paterna *preferential to Atma bandhus* ex parte materna—*Father's sister's son's son preferable to mother's brother.* Under the Mitaksara Law among Atma bandhus of a deceased male owner those that are related to him *ex parte paterna* are preferential heirs to those that are related to him *ex parte materna.* The son of the father's sister's son of the deceased male owner is a preferential heir to his mother's brother, *Sundrammal* v. *Rangasami Mudaliar, (1895) I. L. R., 18 Mad., 193; Balusami Pandithar* v. *Narayana Rau, (1897) I. L R., 20 Mad., 349,* followed. SUBRAMANIA MUDALIAR *v.* RANGA-NATHAN CHETTIAR (1921).

I. L. R. 44 Mad. 114

22(a). ———— *Inheritance—Sudra ascetic—Right of sishya (disciple) to inherit—Texts of Hindu Law, whether obsolute—Yajnavalkya—Mitakshara—Escheat to Government—Religious instruction to Sudras—Disciple, meaning of—Spiritual relationship, proof of.* The disciple of a *Sudra* ascetic who dies without leaving any blood relations is an heir of the latter under the Hindu Law and succeeds to his estate so as to prevent its escheat to the Government. The texts relating to succession by preceptors, disciples and fellow-students, enunciated in Yajnavalkya Smriti, Chapter II, verse 137, and in the Mitakshara, section VII, are not obsolete. In determining who is a preceptor, a pupil or a fellow-student under the above texts, we have only to consider the imparting of purely religious instruction. Religious instruction and training are not confined to Brahmans. *Gi yana Sambandha Pandara Sannadhi* v. *Kandasami Tambiran, (1887) I. L. R., 10 Mad., 375, Dharmapuram Pandara Sannadhi* v. *Virapandiyam Pillai, (1899) I. L. R., 22 Mad., 302,* distinguished. Strict proof is required to be given by the claimant regarding his alleged spiritual relationship to the deceased. SAMBASIVAM PILLAI *v.* SECRETARY OF STATE FOR INDIA (1921)

I. L. R. 44 Mad. 704

22(b). ———— **Illegitimate son of a Sudra** by a dancing woman kept in continuous and exclusive concubinage is entitled to get his appropriate share in the joint family property after his father's death provided his parents' connection was not incestuous or adulterous. SOUNDARARAJAN, *v* ARUNACHALAM CHETTY.

I. L. R. 39 Mad. 136

23. ———— **Succession of sapindas of same and different degrees**—*Uncle of half blood opposed as heir to son of uncle of whole blood—Civil Procedure Code (1882), ss. 317 and 231—Execution of mortgage decree by one of several decree-holder—Suit by heirs of the other decree-holders against decree-holder who, after a sale subject to rights of heirs of the others, claimed and obtained sole possession.* *Held* (affirming the decision of the High Court), that under the Mitakshara law the preference of heirs of the whole blood to those of the half blood confined to "sapindas of the same degrees of descent from the common ancestor." Where therefore, the choice of heirs lay between sapindas of different degrees, an uncle of the half blood as being less remote from the common ancestor, is a preferential heir to the sons of an uncle of the whole blood. *Suba Singh* v. *Sarfaraz Kunwar, I. L. R. 19 All. 215,* distinguished. The provisions of s. 317 of the Code of Civil Procedure, 1882, were designed to create some check on the practice of making so-called benami purchases at execution sales for the benefit of judgment-debtors and in no way affect the title of persons otherwise beneficially interested in the purchase. One of three joint decree-holders of a mortgage decree alone took out execution under s. 231 of the Code, stating that the other decree-holders had died, and praying that execution might be subject to the rights of their heirs and representatives. He obtained leave to bid at the sale, purchased the property in his own name, and, furnished with a certificate of sale, got possession of the property. *Held,* in a suit by the heirs of the other decree-holders for the shares they were entitled to under the decree, that s. 317 of the Code was not applicable as a defence to the suit, and that the plaintiffs were entitled to recover their shares of the mortgaged property. *Bodh Singh Doodhoria* v. *Gunesh Chunder Sen, 12 B. L. R. 317,* followed. GANGA SAHAI *v.* KESHRI (1915) . **I. L. R. 37 All. 545**

24. ———— **Sudras**—*Extent of share.* Among Sudras an illegitimate son of a concubine stands on the same level as to inheritance as the *dasi putra*, and the extent of his share in competition with a legitimate daughter would be one-half of the share taken by the daughter, that is, one-third of the whole estate. GANGABAI PEERAPPA *v.* BANDHU (1915) . **I. L. R. 40 Bom. 369**

25. ———— **"Samanodaka,"**—*Meaning of—Reversioner, claim by—Onus of proof.* According to Mitakshara and the view prevalent in Southern India, *samanodaka* relationship is confined to such of the *gottrajas* as are within fourteen degrees from the common ancestor. It is incumbent on a plaintiff seeking to succeed to property as an heir, affirmatively to establish the particular relationship which he puts forward. He is also bound to satisfy the Court that, to the best of his knowledge, there are no nearer heirs. It is for those who claim that their kinship is nearer than that of the plaintiff, to prove that relationship *Secretary of State for India* v. *Subraya Karantha, (1915) Mad. W. N. 962,* followed. A *gottraja* who is unable to trace his descent from a common ancestor, cannot be preferred to a *bandhu.* RAMA ROW *v.* KUTTIYA GOUNDAN (1916)

I. L. R. 40 Mad. 654

26. ———— **Blindness**—*Not a disqualification unless congenital.* The appellant, as his only child and heir, sued for the property of her father a Hindu who had become blind in the early years of his life, and remained so until his death, and had taken his separate share of the family property under a decree made on a compromise of a suit for partition brought against him by his younger brother, they having lived together as members of a joint family governed by the law of the Mitakshara. The defence by his brother,

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against whom the suit was brought, was that there had been no partition and that on his brother's death he became entitled to the whole family property by
brother's
him from
was not born blind but became so after birth he was, according to the Mitakshara law of the Benares school, excluded from participation of a share, inasmuch as the blindness occurred before the alleged partition. *Held,* that blindness to cause exclusion from inheritance must be congenital. Mere loss of sight which has supervened after birth is not a ground for disqualification. Incurable blindness, if not congenital, is not such an affiction as under the Hindu Law excludes a person from inheriting. Sarvadhicari's Hindu Law of Inheritance, page 956, referred to. *Mohesh Chunder Roy* v. *Chunder Mohan Roy, 14 B. L. R. 273 ; 23 Suth. W. R. 78,* and *Murarji Gokuldas* v. *Parvatibai, I. L. R. 1 Bom. 177,* approved and followed. GUNJESWAR KUNWAR *v.* DURGA PRASHAD SINGH (1917) . . . . **I. L. R. 45 Calc. 17**

27. ———— **Taluqa in Oudh**—*Oudh Estates Act (I of 1869), ss. 7, 8, 10, 22—Sanad granting descent by primogeniture—Properties subsequently acquired—'Accretions' and 'properties appurtenant to taluqa'—Property purchased by taluqdar—Intention to vary descent—Substitution of villages by Government—Crown Grants Act (XV of 1895), s. 2—Power of Crown to alter or limit descent—No such power in subject.* In British India the Crown has power to grant or transfer lands, and by its grant or on the transfer, to limit in any way the descent of such lands. But a subject has no right to impose upon lands or other property any limitation of descent which is at variance with the ordinary law of descent applicable to the particular lands or property so dealt with. The present appeal related to a taluqa granted in 1861 by the Crown to a Hindu, the grant containing a condition that "in the event of your dying intestate or of your successor dying intestate, the estate should descend to the nearest male heir according to the rule of primogeniture" On the death of one of the holders of the taluqa a suit was brought, which in 1905 came on appeal to the Privy Council for decision as to the succession to the deceased taluqdar's estate, and an Order in Council was made which declared that "the taluqa as constituted at the date of the sanad with accretions (if any) or properties (if any) appurtenant to the taluqa" passed to the appellant as the next male heir according to the rule of primogeniture; but that the residue of the property passed to the respondent, and the suit was remitted to India for determination under the Order in Council. There
custom of primo-
inal decrees of the
, that under the
Order in Council villages substituted by the Government for some of those held under the sanad, and a house granted by the Government after 1861 to the taluqdar, for his use as taluqdar, passed to the appellant as taluqdari property; but that villages purchased after 1861 by the deceased taluqdar passed to the respondent as non-taluqdari property, and it was immaterial whether it was or was not the intention of the deceased taluqdar to incorporate them with the taluqa. RAJINDRA BAHADUR SINGH *v.* RAGHUBANS KUNWAR (1918) . . . . **I. L. R. 40 All. 470**

HINDU LAW—INHERITANCE—*contd.*

28.
by a
Dayal
'*Apar*
tiente) that, under the Bengal School of Hindu law correctly interpreted, an illegitimate son of a Sudra is entitled as a *dási-pútra* to a share of the inheritance, provided that

is not subject either to the condition that his mother was a slave woman in the technical sense of the term or to the condition that a marriage

cable to a female slave, but includes a Sudra woman kept as a concubine. According to the correct interpretation of para. 29, Chap. IX of the

or wife) of
aparineeta
married (to
Per CHATTERJEA J. Having regard to the fact that, for more than a century, the right of an illegitimate son of a Sudra by a kept woman has not been recognised in Bengal, and having regard to the opinion of writers of Hindu law in Bengal,

hana or any other authority. Cases on the subject reviewed. RAJANI NATH DAS *v.* NITAI CHANDRA DEY (1920). . . **I. L. R. 48 Calc. 643**

28a. ———— **Unchaste female**—The rule as it obtains in the Bengal School of Hindu Law is that any female who was unchaste before the succession opened out is excluded from the inheritance. RAJABALA DASI *v.* SHAYAMA CHARAN BANERJEE (1917) **22 C. W. N. 566**

29.———— **Illegitimate son**—*Right of putative to succeed as heir. Held* by the Full Bench: —Where an illegitimate son, who if he had survived his putative father, would have inherited his estate either alone or a long with others, dies leaving no issue, widow or mother, his putative father is entitled to succeed as his heir. *Jogendro Bhupati Hurrochundra Mahapatru* v. *Nityanand Man Sing, I. L. R. 18 Calc. 151,* and *Sadu* v. *Baiza and Genu, I. L. R. 4 Bom. 37,* applied. SUBRAMANIA AYYAR *v.* RATHNAVELU CHETTY (1917) . . . . **I. L. R. 41 Mad. 44**

29a. ———— **Unchastity, effect of**—*Dayabhaga—Application to Assam Koches—Unchaste daughter marrying paramour after succession opened out, if may inherit.* The daughter of a Koch (in Assam) eloped in her father's lifetime with a Koch and lived with the latter as man and wife, but later, on the father's death, married her paramour and sued to recover her father's properties from the illegitimate daughters of her father who were in possession: *Held* (in the absence of evidence of local custom and the Dayabhaga law applying)—That the Plaintiff was disqualified when the succession opened out, from

HINDU LAW—INHERITANCE—*contd.*

inheriting her father's properties by reason of her unchastity and the disability was not removed by subsequent marriage. That failing to prove her title, the Plaintiff could not recover the property even though the Defendants were in possession without title. *Quære* :—Whether Plaintiff could have inherited her father's estate, if she had married her paramour before the succession opened out. AITA KOCHUNI *v.* AIDEW KOCHUNI

24 C. W. N. 173

30. ———— **Persons born blind**—*Exclusion from inheritance and joint ownership—Rule of exclusion whether obsolete—Texts—Competency of Courts to declare rule obsolete—Reversioners—Right of suit for declaration—Widow setting up absolute title to husband's properties under a will of another —Right of reversioner to sue for mere declaration—Specific Relief Act (I of 1877), s. 42, ills. (e) and (f), whether exhaustive.* The rule of Hindu Law which prevents a person *born blind* from claiming an interest along with his brothers as a co-owner in ancestral properties, has become obsolete. A reversioner under the Hindu Law is entitled to sue for a mere declaration as to the limited nature of the title of a widow to certain properties, alleged by him to belong to her husband, but to which she sets up an absolute title under the will of another person. Illustrations (*e*) and (*f*) to s. 42 of the Specific Relief Act are not exhaustive of the classes of cases in which a reversioner can sue for a declaration under the section. SURAYYA *v.* SUBBAMMA (1920) . . . **I. L. R. 43 Mad. 4**

31. ———— **By daughter**——*Benares School, claim of daughter of deceased Hindu to inherit against person who claimed and proved his title as next agnate in Settlement Court, if* res judicata *Settlement Court, proceedings in, in which claim of the daughter of deceased Hindu to inherit was established as against person who claimed and proved his title as next agnate—Alienation of estate by daughter—Suit by same agnate to declare alienation invalid*—Res judicata—*Court's discretion to grant declaratory decree—Specific Relief Act (I of 1877), s. 42.* In certain proceedings before the Settlement Court which took place in 1867-1868, concerning the right to succession to the estate of *J* who had died in 1862, questions were raised amongst the several claimants to the estate *inter alia* as to whether *I*, the daughter of *J*, was not excluded from inheritance under a family custom and whether *B*, who clamied to be the agnatic heir of *J*, was in fact what he alleged to be, *viz.*, the son of the adopted son of *Z*, the father's brother of *J*. The Settlement Court decided that *I* was entitled to hold the estate in the limited interest of a Hindu daughter as provided by the Benares School of Hindu law, and that *B*, at the date of the decision, was the reversioner expectant, his relationship to *J* as alleged by him being established. In 1909, *I* entered into a compromise with her deceased son's widow under which it was agreed that *I* should hold the estate for her life and that on her death her son's widow was to be the owner. *B* then brought the present suit as reversionary heir to *J* on *I*'s death for a declaration that the agreement between *I* and her son's widow was invalid : *Held*, that the status of *B* as reversionary heir having been established in the Settlement Court proceedings, that question was *res judicata* as also was the question of the title under which (*e.g.*, in the limited interest of a Hindu daughter) *I* was to

HINDU LAW—INHERITANCE—*contd.*

hold the estate and that in the circumstances it was a fit case for the grant of a declaratory decree as prayed for in the plaint. RANI INDAR KUAR *v.* THAKUR BALDEO BAKSH SINGH (P. C.)

25 C. W. N. 170

32. ———— **Impartible zamindari**—*Rule of succession—Heirs of the same degree but of different branches—Preference of senior line—Right of zamindar to incorporate self-acqusitions and income from zamin with zamin—Rule of descent thereto, when not incorporated.* The devolution of an impartible estate held by a single person depends upon whether the last holder was undivided or divided from the other members of the family. If he was undivided, then for the purposes of succession, the property must be treated as if it had been partible, and the successor found among those who would have been in that event his coparceners. If he was separated, the estate devolves, in the absence of any special custom, on the next-of-kin who is nearest in blood to the deceased, as, for instance, his mother, and if there be several collaterals of the same degree but of different branches, the senior representative of the senior line takes. *Tara Kumari* v. *Chathurbhuj Narayan Singh (1915) I. L. R., 42 Calc., 1179 (P. C.)*, and *Bhai Narindar Bahadur Singh* v. *Achal Ram (1893) I. L. R., 20 Calc., 649 (P. C.)*, followed. It is open to the holder of an impartible zamindari to incorporate with his zamin, his self-acquisitions such as those made from the income of the zamin or to keep them distinct. If incorporated, the devolution thereof follows that of the zamin; if not, his own heirs succeed to them : *Murtaza Husain Khan* v. *Muhammad Yasin Ali Khan (1916) I. L. R., 38 All., 552 (P. C.) at 567* and *Janki Prasad Singh* v. *Dwarka Prasad Singh (1913) I. L. R., 35 All., 391 (P. C.) at 401*, followed; *Rajindra Bahadur Singh* v. *Raghubans Kunwar (1918) I. L. R., 40 All., 470 (P. C.)*, distinguished. GURUSAMI PANDIYAN *v.* PANDIA CHINNA THAMBIAR (1921) . . . **I. L. R. 44 Mad. 1**

33. ———— **Bandhus**—*Heritability, test of—Sapinda relationship—Mutuality—Paternal grandfather's sister's great-grandson, whether heritable bandhu.* Under the Mitakshara Law, the great-grandson of the paternal grand-aunt of the last male owner is not a heritable bandhu of the latter. *Umaid Bahadur* v. *Udoi Chand, (1881) I. L. R., 6 Calc., 119 (F. B.)* and *Babu Lal* v. *Noulla Ram, (1895) I. L. R., 22 Calc., 339*, followed; *Budda Singh* v. *Laltu Singh, (1915) I. L. R., 37 All. 604 (P. C.)*, distinguished; *Subramania Mudalia* v. *Ranganathan Chettiar (1921) I. L. R., 44 Mad. 114*, referred to. CHINNA PICHU IYENGAR *v* PADMANABHA IYENGAR (1921)

I. L. R. 44 Mad. 121

34. ———— **Non-congenital insanity**—*Whether a ground of deprivation of right of survivorship.* Insanity, as a ground of exclusion from inheritance under Hindu Law, need not be congenital. *De Kishen* v. *Budh Prakash, (1883) I. L. R. 5 All. 509 (F. B.)*, and *Murarji Gokuldas* v. *Parvatibai, (1876) I. L. R. 1 Bom. 177*, followed. *Sanku* v. *Puttamma, (1891) I. L. R. 14 Mad. 289*, dissented from. The right of a member of a Hindu joint family to share in ancestral property comes into existence at birth, and is not lost but is only in abeyance by reason of a disqualification. It subsists all through, although it is incapable of enforcement at the time of partition, if the disqualification

HINDU LAW—INHERITANCE—*contd.*

then exists. Hence, if on the death of all the other members the disqualified member becomes the *sole surviving* member of the family, he takes the whole property by survivorship. MUTHUSWAMI GURUKKAL *v.* MEENAMMAL (1920)

I. L. R. 43 Mad. 464

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takes an absolute right; in other parts of India the Courts have held that she takes only a limited interest such as is taken by a Hindu widow. see *Pranjivandas Tulsidas v. Devkuarbhai, 1 Bom. H C. 130; 9 Moo. I. A. 533 (note)* and *Bhan v. Raghunath, I. L. R. 30 Bom. 229,* and the cases and authorities there cited. It is established that the law of *succession is, in any given case, to be determined* according to the personal law of the individual whose succession is in question. *Primâ facie* any

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which is governed by it: consequently, where any *such family migrates to another province governed* by another law, it carries its own law with it: Mayne's Hindu Law, 8th Ed. para. 48. On migration there may be renunciation of the law of the province migrated from in favour of that of the province migrated to; but unless such renunciation is proved (and the mere change of domicile is not of itself sufficient to prove it), original law continues to govern the migrating *family. But the law must be the family* law as it was when they left. A judgment declaratory of law as having always been would be binding on the migrated family; but subsequent customs introduced into the law would not affect them. *Surendra Nath Roy* v. *Heeramonee Burmoneah, 12 Moo. I. A. 81,* and *Parbati Kumari Debi* v. *Jagadis Chunder Dhabal, I. L. R. 29 Calc. 433; L. R. 29 I. A. 82,* followed. A Maharashtra Brahmin whose ancestors and afterwards himself were domiciled in the Bombay Presidency died in 1868 while on a pilgrimage, leaving immovable property in the Wardha District of the Central Provinces. On his death his daughter succeeded to that property. She died in 1889 leaving three sons who on her death sued to set *aside alienation of portions of the* property made by her during her possession of it. The question arose whether she took an absolute or a limited estate in the property, which depended on what was the law of succession by which her father and his ancestors were governed. The Judicial Commissioner (reversing the decision of the first Court to the effect that he and his ancestors were originally domiciled at Berar in the Bombay Presidency

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of the latter where the property was situated

HINDU LAW—INHERITANCE—*concld.*

and the daughter had taken only a limited estate. *Held,* that the family of her father and his ancestors were domiciled in Berar and there was no renunciation of the law of that province when they or he migrated from it and that the daughter took an absolute estate under the law of the Bombay Presidency. BALWANT RAO *v.* BAJI RAO (1920).

I. L. R. 48 Calc. 30

36. ——— Division amongst sons by Patnibhag—*A provable as custom—Custom proved as prevailing amongst Chettis of certain villages*

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may be proved to exist as a territorial, family or caste custom, specially in Southern India, where it is possible that the matriarchal theories of the earlier inhabitants may have led to the [illegible] custom and caused difficulties

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tom of patnibhag proved in the case was one of the particular class of Chettis who happened to dwell in, and probably were at the moment the only dwellers in, an area of seven villages; and such a custom could not rightly be described as a local custom, which it would be unreasonable to impose upon all persons dwelling in the area. PAHANIAPPA CHETTIAR *v.* ALAYN CHETTI

26 C. W. N. 417

HINDU LAW—JOINT FAMILY—

See BENGAL TENANCY ACT, 1885, s. 48.
3 Pat. L. J. 578

See CENTRAL PROVINCES GOVERNMENT WARDS ACT, *s.* 18.
I. L. R. 40 Calc. 784

See CIVIL PROCEDURE CODE (ACT V OF 1908), O. I, R. 3. **I. L. R. 40 Mad. 365**

See HINDU LAW—ALIENATION.

See HINDU LAW—JOINT FAMILY.

See HINDU LAW—LEGAL NECESSITY.

See HINDU LAW—MINOR.

See HINDU LAW—MITAKSHARA.

See HINDU LAW—PARTITION.

See MORTGAGE . . **23 C. W. N. 634**

See SPECIFIC RELIEF ACT, 1887, s. 42.
2 Pat. L. J. 221

——— Elder brother selling as Manager—

See LIMITATION ACT, 1908, s. 7.
I. L. R. 45 Bom 446

——— Status of Females in—

See CIVIL PROCEDURE CODE, 1908, s. 66.
I. L. R. 43 All. 711

——— Joint acts of Insolvency—

See INSOLVENCY ACT, 1907, s. 5.
I. L. R. 44 Mad. 810

HINDU LAW—JOINT FAMILY—*contd.*

1. ——— Effect of partition—*Profits from investment of joint family property if joint family property—Suit against* karta *for partition and accounts—Limitation—Limitation Act (XV of 1877), Sch. II, Arts. 62, 127.* A family may be joint with reference to certain properties though divided in respect of others. *Gauri Shankar Parabhuram v. Atmaram Rajaram, I. L. R. 18 Bom. 611 ; Purushottam v. Atmaram, I. L. R. 23 Bom. 597, 601,* referred to. Where plaintiff sued for partition and account of profits of joint family property in the hands of the *karta*, Art. 127 and not Art. 62 of Sch. II of the Limitation Act (XV of 1877) applied. *Muthusami Mudaliar v. Nallakulantha Mudaliar, I. L. R. 18 Mad. 418,* followed. *Banoo Tewary v. Dooma Tewary, I. L. R. 24 Calc. 309 ; Thakur Prasad v. Partab, I. L. R. 6 All. 442,* distinguished. Profits derived from the investment of joint family capital in business or from immoveable properties belonging to the joint family, are joint family property. A suit for account in respect of such money, being incidental to the suit for ascertainment of share on partition, comes under Art. 127 of the Limitation Act. *Pirthi Pal v. Jowahir Singh, I. L. R. 14 Calc. 483,* referred to. AJODHYA PURSHAD *v.* MAHADEO PURSHAD (1909)
14 C. W. N. 221

2. ——— Order Restoring Member—*Mitakshara joint family—Civil Procedure Code (Act V of 1908), O. XXI, r. 101—Order restoring member of joint Mitakshara family to a share—Validity—Suit brought after claim-case dismissed for default—Decision if binding—Civil Procedure Code (Act XIV of 1882), ss. 278, 102, 103—Dismissal of suit for default—Effect—*Res judicata or not—*Mitakshara son's right to resist execution against family property of decree against father and after suit for injunction dismissed for non-prosecution.* A member of a joint Mitakshara family has no definable share in the joint property previous to partition. An order under O. XXI, r. 101, Civil Procedure Code, 1908, restoring such member to a specific share of such property on the ground that he is in possession of such property is therefore bad. Where a suit for injunction to restrain the sale of joint Mitakshara family property in execution of a decree against the father on the ground that the debts of the father did not bind the son's interest in the property was dismissed for non-prosecution: *Held*, that the son was no longer entitled to contend in execution proceedings that the entire property was not liable to be sold. *Cooverjee* v. *Dewsey, I. L. R. 17 Bom. 718,* followed. A decree-holder against Mitakshara father can proceed against the entire joint property. *Muddun Thakur* v. *Kantoolall, L. R. 1 I. A. 321 ; Nanomi Babasin* v. *Modan Mahan, L. R. 13 I. A. 1 : s. c. I. L. R. 13 Calc. 21, Juhur Mal* v. *Eknath, I. L. R. 24, Bom. 843 : s.c. 5 Bom. : L. R. 322,* followed. *Kallapa* v. *Venkatesh Vinayak, I. L. R. 25 Bom. 676 ; Duguppa* v. *Venkatramnaya, I. L. R. Bom. 493 ; Patil Hari* v. *Hakam Chand, I. L. R. 18 Bom. 363,* distinguished. SANKAR NATH PUNDIT *v.* MADAN MOHAN DAS (1909) **14 C. W. N. 298**

3. ——— Mortgage—*Joint family property, mortgage of share in, by co-parcener—Procedure for enforcement.* Where a member of a joint Mitakshara family represented to mortgagees of a portion of that property, that he had the power to charge the property, he was bound to make good his representation by exercising such proprietary right over it as he possessed, *viz.*, by partition. *Mohabeer Pershad* v. *Ramyad Singh, 20 W. R. 192 : 12 B. L. R. 90,* followed. *Madho Pershad* v. *Mehrban Singh, I. L. R. 18 Calc. 157 ; Jamuna Prasad* v. *Ganga Prasad, I. L. R. 19 Calc. 401 ; Bunwari Lal* v. *Daya Sankar, 13 C. W. N. 815,* referred to. Such mortgage, so far as the specific shares of the mortgagors were concerned, was void, but the Court may direct that the joint property be held in specified shares and in such case the lien of the mortgage will be fixed to the share of the mortgagors thus specified. MAHANATH RAM SUNDAR DAS *v.* NATHUNI SINGH (1909)
14 C. W. N. 552

4. ——— Joint family business—*Mitakshara—Agreement entered into with one member of the family—Such member competent to sue without joining other members.* Where a contract is entered into on behalf of a joint family business by a member of the family in his own name, it is not necessary that any members of the joint family other than those who entered into the contract should be parties to the suit brought thereon. *Gopal Das* v. *Badri Nath, I. L. R. 27 All. 361,* followed. *Agucio* v. *Forbes, 14 Moo. P. C. 160 ; Bungsee Singh* v. *Soodist Lall, I. L. R. 7 Calc. 739,* and *Hari Vasudeo Kamat* v. *Mahadu Dad Gavda, I. L. R. 20 Bom. 435,* referred to. *Shamrathi Singh* v. *Kishan Prasad, I. L. R. 29 All. 311,* distinguished. DURGA PRASAD *v.* DAMODAR DAS (1909)
I. L. R. 37 All. 183

5. ——— Mother's share on partition—*Mitakshara—Joint Hindu family—Stridhan—Succession. Held*, that according to the Mitakshara, the share which the mother in a joint Hindu family obtains after the death of the father, on partition of the joint family property between the mother and the sons, becomes the mother's *stridhan*, which devolves on her death upon her own heirs and not upon the heirs of her husband. *Chhiddu* v. *Naubat, I. L. R. 24 All. 67,* and *Gambhir Singh* v. *Makraddhuj, All. L. J. 673,* followed. *Sheo Shankar* v. *Devi Sahai, I. L. R. 25 All. 468,* distinguished. DEBI MANGAL PRASAD SINGH *v.* MAHADEO PRASAD SINGH (1909)
I. L. R. 32 All. 253

6. ——— Grant by Government—*Family joint before annexation of Oudh—Confiscation of and grant by Government to person who had been a member of joint family—Whether subject of grant is self-acquired or joint—Separation by one member, effect of—Burden of proof.* Before the annexation of Oudh, two estates Bohra and Sherpur (the latter being about one-third of the two together) belonged to an undivided Hindu family consisting of three brothers. The estates were confiscated on the annexation of the province, but shortly afterwards the Sherpur estate was granted by the Government to the eldest of the three brothers (the other two being minors) who was the head and manager of the family, the grant being expressed to be " by way of favour and award and not in consideration of proprietary right." In this appeal, the appellant's (plaintiffs') case in a suit for a half share of the self-acquired property held by the eldest brother at his death, whether it was two-thirds or one-third of Sherpur, depended on whether the estate granted was the self-acquired property of the grantee, or the joint property of the three brothers. The appellants represented the second of the three brothers (who had separated himself in 1865 after a quarrel with his elder bro-

HINDU LAW—JOINT FAMILY—*contd.*

brother, taking a third share of the property), and the respondent was the third brother. The Court

in making the grant and from its terms and the conduct of the parties, that the estate granted was the joint property of the three brothers up to the time when the second brother separated; that the other two brothers remained joint until the death of the eldest brother in 1869, when the respondent became entitled by survivorship to two-thirds of the property; and that the appellants had altogether failed to prove that the eldest brother died entitled to either two-thirds or one-third of the Sherpur estate as separate property. That court consequently dismissed the suit, and the Judicial Committee on appeal affirmed that decision. KEDAR NATH *v.* RATAN SINGH (1910)
I. L. R. 32 All. 415

7. ———— **Son's liabilities for father's debts**—*Mortgage—Suit for sale—Transfer of Property Act (IV of 1882), s. 85—Property sold in execution of decree for sale—Purchase by mortgagee decree-holder.* In execution of a decree for sale upon a mortgage of joint family property executed by the head of a Hindu joint family certain property was brought to sale and purchased by the mortgagees. A member of the family (great grands
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ground
by the fact that the mortgagee had himself purchased the mortgaged property. *Devi Singh* v. *Jia Ram, I. L. R. 25 All. 214*, followed. *Ram Prasad* v. *Mon Mohan, I. L. R. 30 All. 256*, dissented from. *Lal Singh* v. *Pulandar Singh, I. L. R. 28 All. 182*, referred to. BALWANT SINGH *v.* AMAN SINGH (1910) . . **I. L. R. 33 All. 7**

8. ———— **Joint family, manager of**——*For what purposes managing, member may contract debts binding on co-parceners—Family necessity—Marri-*

manager to borrow money for such purpose, the transaction will bind the co-parceners whether they

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is the penalty. KAMESWARA SASTRI *v.* VEERACHARLU (1910) . . **I. L. R. 34 Mad. 422**

9. ———— **Joint family property—Mortgage by father alone**—*Subsequent sale by father to a third party—Suit by mortgagees for sale—Competence of purchaser to rely on invalidity of mortgage* The head of a joint Hindu family mortgaged in 1886 property belonging to the joint family, but neither for legal necessity not to pay an antecedent debt. In 1888 the mortgagor sold the same property to a third person. The purchaser remained in possession for more than twelve years, when the mortgagees instituted a suit for sale on their mortgage. *Held*, by RICHARDS, *C.J*, and BANERJI, *J.*, that in view of the fact that the purchaser had acquired a title to the property by adverse possession as against all the members of the family, it was open to him, notwithstanding that his title was originally acquired from the mortgagor alone, to set up as a defence the invalidity of the mortgage. *Per* CHAMIER, *J.*, that according to the ruling of the majority of the Full Bench in *Chandradeo* v. *Mata Prasad, I. L. R. 31 All. 176*, the mortgage made by the father alone was void, and, this being so, it was open to the purchaser, who was in possession of the property to rely upon its invalidity, whatever, the weaknes of his own title might be. *Chandradeo* v. *Mata Prasad, I. L R. 31 All. 176; Balgobind Das* v. *Narain Lal, I. L R. 15 All 339; Brijbasi Lal* v. *Gopal Das, All. Weekly Notes (1908) 200; Kali Shankar* v *Nawab Singh, I. L. R. 31 All. 507*, and *Bhagirathi Misr* v. *Sheobhik, I. L. R. 20 All. 325*, referred to. MUHAMMAD MUZAMIL-ULLAH *v.* MITHU LAL (1911) . **I. L. R. 33 All. 783**

10. ———— **Mortgage by managing member**—*Suit by other members for redemption—Transfer of Property Act (IV of 1882), s. 85—Parties—Representative capacity of managing member.* Although the manager of a Joint Hindu family is not as a rule entitled to sue or liable to be sued on behalf of the family—*Padmakar Vinayak Joshi* v. *Mahadev Krishna Joshi, I. L. R 10 Bom. 21* and *Kashi Nath Chimnaji* v. *Chimnaji Sadashiv, I. L. R. 30 Bom. 477*—nevertheless in certain circumstances the whole family may be bound by the result of suits brought by or against the manager, notwithstanding that some members of the family were not made parties thereto. *Balwant Singh* v. *Aman Singh, I. L. R. 33 All. 71; Debi Singh* v. *Jia Ram, I. L. R. 25 All. 214; Sundar Lal* v. *Chhitar Mal, 3 All. L. J. 644: 4 All. L. J. 17; Dhurm Dass Pandey* v. *Mussamat Shama Soondri Dibiah, 3 Moo. I. A. 229; Hari Saran Moitra* v. *Bhubaneswari Debi, I. L. R. 16 Calc. 40; Narayan Gop Habbu* v. *Pandurang Ganu, I. L. R. 5 Bom. 685; Jogendro Deb Roy Kut* v. *Funindro Deb Roy Kut, 14 Moo. I. A. 367; Bissessur Lal Sahoo* v. *Maharajah Luchmessur Singh, L. R. 6 I. A. 233: 5 C. L. R. 477; Ram Krishna Narayan* v. *Vinayak Narayan, 12 Bom. L. R. 219*, and *Gan Savant Ba Savant* v. *Narayan Dhond Savant, I. L. R. 7 Bom. 467*, referred to. JADDO KUNWAR *v.* SHEO SHANKAR RAM (1910) . . **I. L. R. 33 All. 71**

11. ———— **Mortgage by father**—*Sons not made parties to suit for sale on mortgage—Sale under decree—Suit by sons to redeem their interests.* Where ancestral property belonging to a joint Hindu family has been sold in execution of a decree for sale on a mortgage executed by the father, the sons cannot maintain a suit for redemption of their interests in the property sold upon the ground solely that they had not been made parties to the suit of the mortgagee, nor is their position affected by the fact that the auction-purchaser is the mortgagee. *Debi Singh* v. *Jia Ram, I. L. R. 25 All. 214; Lal Singh* v. *Pulandar Singh, I. L. R.*

HINDU LAW—JOINT FAMILY—*contd.*

28 All. 182, and *Balwant Singh* v. *Aman Singh, I. L. R. 33 All. 7*, followed. *Ram Prasad* v. *Man Mohan, I. L. R. 30 All. 256*, dissented from. *Ram Nath Rai* v. *Lachman Rai, All. Weekly Notes (1899) 27*, referred to. KEHRI SINGH *v.* CHUNNI LAL (1911) . . . . **I. L. R. 33 All. 436**

12. ——— **Alienation of family property—Right of subsequently born member of family to object**—*Held*, that a member of a joint Hindu family who was born after the alienation of the family property by another member of that family cannot question the validity of that alienation. *Chattarpal Singh* v. *Natha, All. Weekly Notes (1906), 26*, followed. *Hurodoot Narain Singh* v. *Beer Narain Singh, 11 W. R. 480*, and *Bunwari Lal* v. *Daya Shunkar, 13 C. W. N. 815*, distinguished. CHUTTAN LAL *v.* KALLU (1910)

I. L. R. 33 All. 283

13. ——— **Burden of proof**—*Nucleus—Presumption*. It is necessary to establish the existence of a nucleus of joint family property before the property in the possession of any one member can be presumed to be joint family property. There is no presumption that a Hindu family has any joint property. *Taruck Chunder Totaddar* v. *Joodhesteer Chunder Koondoo, 19 W. R. C. R. 178*, dissented from. *Moolji Lila* v. *Gokuldas Vulla, I. L. R. 8 Bom. 154*, *Toolseydas Ludha* v. *Premji Tricumdas, I. L. R. 13 Bom. 61*, *Dwarka Prasad* v. *Jamna Das, 13 Bom. L. R. 133*, followed. *Lal Bahadur* v. *Kanhaiya Lal, I. L. R. 29 All. 244*, referred to. RAM KISHAN DAS *v.* TUNDA MAL (1911) . . . **I. L. R. 33 All. 677**

14. ——— **Legal necessity**—*Mitakshara—Joint Hindu family—Father committed to the Court of Session—Loan taken for his defence*. *Held*, that the necessity of raising money to pay for the defence of the head of a joint Hindu family committed to the Court of Session on a serious criminal charge was a valid legal necessity such as would support a mortgage of the family property executed by the father and one of his sons for such purpose. *Thandradeo* v. *Mata Prasad, I. L. R. 31 All. 176*; *Luchmun Koour* v. *Mudaree Lall, 5 S. D. A. N.-W. P. 327*, and *Duleep Singh* v. *Sree Kishoon Panday, 4 N.-W. P. H. C. Rep. 83*, referred to. BENI RAM *v.* MAN SINGH (1911) . **I. L. R. 34 All. 4**

15. ——— *Money borrowed by father at a high rate of interest—Legal necessity—Burden of proof*. When money is borrowed by the father of a joint Hindu family on the security of the family property at a very high rate of interest, it is for the lender seeking to enforce his claim to prove not only that there was necessity for borrowing the money, but also that there was necessity for borrowing it at an exorbitant rate of interest. *Chandradeo* v. *Mata Prasad, I. L. R. 31 All. 176*; *Hurro Nath Rai Chaudhuri* v. *Randhar Singh, I. L. R. 18 Calc. 311*, and *Kameswar Pershad* v. *Run Bahadur Singh, I. L. R. 6 Calc. 843*, referred to. NAND RAM *v.* BHUPAL SINGH (1911)

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16. ——— *Debt incurred by managing member of family—Presumption as to family benefit—Burden of proof*. There is no presumption that a debt contracted by the manager of a Hindu firm or family is contracted for the benefit of the firm or family, and the plaintiff who seeks to bind the other members of the joint family will have to prove that it was a debt contracted for their benefit or with their consent, or that there was an urgent family necessity therefor. *Soiru Padmanabh Rangappa* v. *Naryanrao bin Vithalrao, I. L. R. 18 Bom. 520*; *Sunkar Pershad* v. *Goury Pershad, I. L. R. 5 Calc. 321*; *Nagendra Chandra Dey* v. *Amar Chandra Kundu, 7 C. W. N. 725*, and *Krishna Ramaya Naik* v. *Vasudeo Venkatesh Pai, I. L. R. 21 Bom. 1808*, referred to. *Sheo Pershad Singh* v. *Saheb Lal, I. L. R. 20 Calc. 453*, distinguished. GANPAT RAI *v.* MUNNI LAL (1911) **I. L. R. 34 All. 135**

17. ——— **Purchase of mortgaged property by managing members**—*Suit for sale against managing members only—Civil Procedure Code (1908), O. XXXIV, r. 1*. Where in a suit for sale on a mortgage the defendants mortgagors were the managing members of a joint Hindu family who in that capacity had purchased the mortgaged property, it was *held* that the family was sufficiently represented by the managing members and that the suit would not fail by reason of the non-joinder of the other members of the family. HORI LAL *v.* MUNMAN KUNWAR (1912) . . . **I. L. R. 34 All. 549**

18. ——— **Mortgage for the benefit of joint family**—*Suit for sale by managing member alone—Parties—Civil Procedure Code, 1908, Order XXXIV, r. 1*. Where in a suit for sale on a mortgage executed in favour of the manager of a joint Hindu family the plaintiff was the then managing member of the family, it was *held* that he was entitled in that capacity to maintain the suit and that it would not fail by reason of the non-joinder of the plaintiff's son, who was joint with him. *Hori Lal* v. *Munman Kunwar, I. L. R. 34 All. 549*, referred to. MADAN LAL *v.* KISHAN SINGH (1912) . . **I. L. R. 34 All. 572**

19. ——— **Mortgage of property given to father and son**—*Subsequent purchase of portion of property by grandson who was separate in mess and business out of his self-acquisition—Adverse possession—Purchase as of remaining share by mortgagee at execution sale had by another creditor—Extinction of mortgagor's title*. Some time after a mortgage had been executed of immoveable properties in favour of *R* and *S*, father and son, members of a joint Hindu family governed by the Mitakshara, a widow of the mortgagor sold such right and title, if any, as she had in half of the property of the mortgagor to *B*, son of *S*, who was joint with *R* and *S* at the time of the mortgage, but who prior to his purchase had ceased to be joint in food and business with *S* though there was no partition, and having received a present of a considerable sum of money from his grandmother, had been carrying on money-lending business on his own account and had found the purchase-money out of his separate self-acquired property. *B* got possession after his purchase and continued in possession for considerably over 12 years. *Held*, that the possession of the property by *B* was not that of a mortgagee but adverse to that of the mortgagee and the title of the mortgagor's representatives to redeem was lost by adverse possession. The remaining half share was sold in execution of a decree obtained by another creditor of the mortgagor in a suit brought against his representatives and purchased by *S* and passed by succession to *B*'s heirs. *Held*, that the plaintiffs who claimed through the mortgagee had failed to establish any title by way of redemption or otherwise to any interest in the mortgaged property and

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his suit should be dismissed. PARBATI *v.* SAIYID MUHAMMAD MUZAFFAR ALI KHAN (1912)
16 C. W. N. 913

20. ———— **Payment to one member of joint family, effect of**—*Joint family—Right of manager of undivided family to sue on behalf of the family.* Payment to one member of an undivided Hindu family or to one of several joint creditors will not operate as a payment to all the members or creditors if the payment is fraudulently made to one and not for the benefit of all. The manager of a joint family has, as such manager the right to represent the family in suits. A suit by him as such manager on behalf of the joint family will be maintainable without making the other members parties to the suits. *Kishen Prasad* v. *Har Narain Singh, 15 C. W. N. 321,* followed. SHEIK IBRAHIM THARAGAN *v.* RAMA AIYAR (1912)
I. L. R. 35 Mad. 685

21. ———— **Partition**—*Mitakshara—Joint family property—Acquisition by joint labour of co-parceners—Exclusion of a member —Suit for partition—Limitation.* Where plaintiff sued as a co-parcener for partition of his share in joint family property and the defence was that the plaintiff's father was expelled from the family for misconduct, and that his share in the family property was given to him in 1874, and it was proved that the plaintiff who in 1874 was a child and left the family with his father and mother, re-appeared in the village in 1889 on his father's death and was then recognised as a member of the family and was not excluded till within five or six years of the suit when there was exclusion from commensality but no partition of the family property: *Held,* that the defence failed and the plaintiff's suit should succeed. JEOLAL MAHTON *v.* LOKE NARAYAN MAHTON (1912) . **16 C. W. N. 466**

22. ———— **Rights to well and water**—*Indivisible rights—Presumption—Partition of property which is joint.* Under Hindu Law, rights to water and wells belonging to a joint family are indivisible, if they are numerically unequal; and after partition, these must be enjoyed by the separated co-parceners by turns. GOVIND ANNAJI *v.* TRIMBAK GOVIND (1910)
I. L. R. 36 Bom. 275

23. ———— **Co-partnership**—*Presumption as to law governing family settling in province other than that of its origin—Transfer of the ancestral property—Liability of sons to pay the debts of their father—Conversion of some of the sons to Christianity, effect of—Status—Limitation—Removal of Caste Disabilities Act (XXI of 1850).* The plaintiffs and the defendants Nos. 5 to 7 and the husbands of

properties and continued to live jointly with his family. The defendants Nos. 1 to 4 were the transferees of the ancestral property which formed the subject-matter of this suit. On the 19th March 1900, Amrita Lal Pandey executed a deed of conveyance, whereby he transferred his ancestral property to the defendants Nos. 1 to 4, in satisfaction of certain debts incurred by him in 1892 and 1895. He was joined in this conveyance by the defendants Nos. 5 to 7. On the 26th December 1900, Amrita Lal Pandey died, leaving him surviving six sons, *viz.*, the plaintiffs and the defendants Nos. 5 to 7, as also the widows of his two sons who had predeceased him in 1880 and 1883, respectively. Of the six sons, the plaintiffs Nos. 1 and 2 had been converted to Christianity in 1890 and 1896 respectively, the defendant No. 5 became a convert to the same faith in 1904, and the plaintiff No. 3 attained his majority in 1902. On the 19th March 1907, the plaintiffs filed their suit against the defendants Nos. 1 to 4 for a declaration of the plaintiffs' title to a three-seventh share of the ancestral property and for recovery of *khas* possession and mesne profits, and made the defendants Nos. 5 to 9 *pro formâ* defendants: *Held,* that when the grandfather of the plaintiffs migrated from Oudh to Bengal, the presumption was that he carried with him the laws and customs as to succession and family relations prevailing in the province from which he came. Such a presump- by proof ad usages *Held,* also, to Christianity, the first plaintiff ceased to be a member of the joint Hindu family, but that thenceforward he continued to hold the ancestral property as joint owner, and was entitled to recover possession of one-seventh share of the property on the basis that in 1890, upon the dissolution of the family, he became entitled to such share: *Jalbhai Ardeshir Shet* v. *Louis Manoel, I. L. R 19 Bom. 680,* and *Lastings* v. *Gonasalves, I. L. R. 23 Bom. 539,* distinguished. *Held,* further, that the second plaintiff, upon his conversion to Christianity in 1896, ceased to be a member of the joint family, and was not bound by the conveyance of the 19th March 1900, but that he was liable to satisfy the debts of his father incurred and charged upon the ancestral property prior to the date of his conversion: *Ram Prasad Singh* v. *Lakhpati Koer, I. L. R. 30 Calc. 231, Balabux* v. *Rukhmabai, I. L. R. 30 Calc. 725,* and *Balkishen Das* v. *Ram Narain Sahu, I. L. R. 30 Calc. 738,* distinguished. *Held,* further, that Amrita Lal Pandey was competent in 1900 to alienate the ancestral property in his hands, not merely in respect of his own interest, but also that of the third plaintiff. KULADA PRASAD PANDEY *v.* HARIPADA CHATTERJEE (1912)
I. L. R. 40 Calc. 407

24. ———— **Allegation of separation in suit by some members for separate share**—*Expression of intention to hold share separately not proved—Right to mesne profits on separation—Exclusion from joint family, allegation—of Non-receipt of share of profits of joint property—Voluntary residence not* [illegible] *allowance as being* [illegible] member of a joint [illegible] a suit in 1905 against the respondents, the other members of the family, alleging a separation by him in 1901, when he had expressed his intention to hold his share separately, and claiming possession of his share, with mesne profits. *Held,* that what may amount to a separation, or what conduct on the part of some of the members may lead to separation of a joint undivided Hindu family, and convert a joint tenancy into a tenancy-in-common, must depend on the facts of each case. A definite and unambiguous indication by one member of intention to separate himself and to enjoy his share in severalty may amount to separation but to have effect the intention must be unequivocal

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and clearly expressed. Separation from commensality does not as a necessary consequence effect a division (*Rewun Persad* v. *Radha Beeby, 4 Moo. I. A. 137*). A separation in mess and worship may be due to various casuses, and yet the family may continue joint in estate. In this appeal it was *held* (affirming the decision of the Court of the Judicial Commissioner), that on the evidence in, and under the circumstances of, the case and the conduct of the party alleging division of the family there had been no separation in 1901, and the appellant was consequently not entitled to mesne profits on that ground. He also claimed mesne profits on the ground of exclusion from the joint family, as he had not since 1901 received any share of the profits of the joint property. *Held*, that, although he had not received any of the profits of the joint estate, the evidence was clear that the appellant was offered an allowance from the profits of the joint property which he refused to accept as being inadequate, and that would not amount to exclusion. SURAJ NARAIN *v.* IQBAL NARAIN (1912) . . **I. L. R. 35 All. 80**

25. ———— **Father, no power to revive time-barred debt.** *Held*, that the father and manager of a joint Hindu family cannot legally revive a time-barred debt and bind the family property to secure its payment. *Chandra Deo* v. *Mata Prasad, I. L. R. 31 All. 176*, and *Indar Singh* v. *Surja Singh, 8 All. L. J. 1009*, followed. DALIP SINGH *v.* KUNDAN LAL (1913)
I. L. R. 35 All. 207

26. ———— **Liability of sons in respect of a mortgage executed by father**—*Exemption of son's interests—Subsequent suit against the sons —What plaintiff's are entitled to recover.* In 1892, a decree was passed on appeal for sale on a mortgage of joint family property against the father of the family. In 1896, the sons, who were not made parties to the original suit, obtained a decree exempting their shares in the family property. In 1897, the share of the father was sold and realized less than half the amount of the decree. In 1910, the mortgagees brought a suit against the sons to recover the balance of the mortgage debt after giving credit for the amount realized by sale in execution of the decree of 1892. *Held*, that the suit was not barred, but that the plaintiffs could only recover the unsatisfied portion of the decree of 1892 together with future interest as allowed by that decree. They could not treat the suit as an ordinary mortgage suit, merely giving credit for the amount realized under the decree of 1892, nor could they claim interest at the contractual rate on the unpaid amount of the decree. *Lachman Das* v. *Dalu, All. Weekly Notes (1900), 125*, followed. *Dharam Singh* v. *Angan Lal, I. L. R. 21 All. 301 and Ran Singh* v. *Sobha Ram, I. L. R. 29 All. 544*, referred to. JALESHAR RAI *v.* ANRUT RAI (1913) **I. L. R. 35 All. 302**

27. ———— **Execution of decree**—*Power of managing member to enter up satisfaction of decree on behalf of the family. Held*, that the managing member of a joint Hindu family can execute decrees on behalf of the family, and can receive payment and give good receipts on behalf of the family, which will be binding on the family. *Hori Lal* v. *Munman Kunwar, I. L. R. 34 All. 549*, followed. *Ganga Dayal* v. *Mani Ram, I. L. R. 31 All. 156*, distinguished. ACHHAIBAR SINGH *v.* RAM SARUP SAHU (1913) **I. L. R. 35 All. 380**

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28. ———— **Compromise, Mortgage**—*Suit for cancellation of mortgage executed by managing member—Compromise—Liability of sons.* One *K*, as head of a joint Hindu family, executed in 1905 a usufructuary mortgage of the family property, in which the widow of his deceased brother joined as a co-mortgagor. In 1907 the mortgagors sued for cancellation of this deed, but entered into a compromise with the mortgagee, upon which a decree was passed maintaining the mortgage, but in a modified form. The mortgagee thereafter instituted a suit for enforcement of the mortgage as settled by the compromise decree. *Held*, that, in view of the fact that the courts below found that the compromise was genuine and for the benefit of the family, it was not open to the defendants to raise the question of the genuineness of the original mortgage, and that, whether or not the original mortgage was a genuine transaction, the compromise decree gave rise to a debt which was binding on the descendants of the original mortgagor *K*. *Madan Lal* v. *Kishen Singh, I. L. R. 34 All. 572*, referred to. RAM KUBER PANDE *v.* RAM DASI (1913) . . **I. L. R. 35 All. 428**

29. ———— **Mortgage by two brothers of undivided shares, each assenting—Partition**—*Entire mortgaged property falling to the share of one brother—Effect of partition on rights of mortgagee.* Two brothers constituting a joint Hindu family jointly mortgaged in *1819* a ten hiswa share in village Chauwar. In 1881, in substitution for this mortgage, each brother mortgaged to the same mortgagee a five hiswa undivided share in Chauwar, and each brother also signed the mortgage executed by the other. In 1888, the family property was partitioned and the whole ten hiswa of Chauwar fell to the share of one brother. *Held*, on suit by the son of the mortgagee for sale, that the plaintiff was entitled to bring to sale a five hiswa share in Chauwar under the mortgage executed by the brother who had lost possession of the village, and not merely to have recourse against such portion of the family property as he had taken in exchange therefor. *Byjnath Lall* v. *Ramoodeen Chowdry, L. R. 1 I. A. 106*, distinguished. SUNDAR LAL *v.* BRIJ LALL (1913)
I. L. R. 35 All. 543

30. ———— **Presumptions as to property in the possession of.** Property in the possession of a joint Hindu family should be presumed to be joint family property until the contrary is shown, even though it may have been acquired in the name of a particular member of the family. The fact that property stands in the individual name of one or other member of a joint Hindu family does not of itself give rise to the presumption that it is the separate property of that member. *Gurumurthi Reddi* v. *Gurummal, I. L. R. 32 Mad. 88, Shiv Gulam Singh* v. *Baran Singh, 1 B. L. R. 164*, and *Taruck Chandra Totadar* v. *Joodheshteer Chunder Koondoo 19 W. R. 178*, referred to. *Ram Kishen Das* v. *Tunda Mal, I. L. R. 33 All. 677*, discussed. KUNDAN LAL *v.* SHANKAR LAL (1913)
I. L. R. 35 All. 564

31. ———— **Mortgage—Guardian** ad litem —*Suit on mortgage executed by father prior to birth of son—Father appointed son's guardian* ad litem. *Held*, that, inasmuch as an after-born son cannot in a suit on a mortgage made by his father set up the defence of the immoral nature of the debt on account of which mortgage was executed, it cannot be said that the appointment of the father

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as guardian *ad litem* in such suit would be necessarily prejudicial to the interests of the son. NARAIN DAS *v.* HAR DAYAL (1913) **I. L. R. 35 All. 571**

32. ———— **Position of an infant member with regard to business contracts**—*Joinder of parties—Necessary parties to a suit on a business contract entered into by certain members of a joint Hindu family carrying on an ancestral business on*

who by birth or inheritance, becomes entitled to an interest in a joint family business, becomes at the same time a member of the trading corporation which carries on the business. Accordingly, it is not necessary in the case of a Hindu family to join in a suit upon a business contract minor members of the family who in fact take no share in the business which is carried on on behalf of the family. Those who actually were the contracting parties with the defendant must in the case of a suit by members of a Hindu family all be joined, but minor members of the family who take no part in the family business should not be joined in suing for business debts. LALJI NENSEY *v.* KESHOWJI PUNJA (1912) **I. L. R. 37 Bom. 340**

33. ———— **Co-owners treating near relations as joint owners of property**—*Title if*

tered deed. Where, therefore, upon the death of a Hindu widow, the actual reversionary heirs of her husband treated two other relations, one degree

entitled by their purchase to the share which he had been enjoying jointly with the actual reversioners. GIRIJI RANI MISRANI *v.* CHANDRA LAL KANTH (1912) . . . **17 C. W. N. 62**

34. ———— **Father's debt**—*Son's liability to pay, Mitakshara—Proof of immoral habits if enough.* A sale of joint family property for a father's debt cannot, under the Mitakshara school of Hindu Law, be avoided by the sons merely proving that the father was a man of immoral habits. They must prove that the particular debt was incurred for an immoral purpose. SRI NARAIN *v.* LALA RAGHUBANS RAI (1912) **17 C. W. N. 124**

35. ———— **Fathers alienation**—*After-born son if precluded from questioning alienation—Mortgage if distinguishable from sale.* It is well-settled that where a Mitakshara father has made an alienation without necessity and without the consent of sons then living, it would not only be invalid against them but also against any son born before they had ratified the transaction, and no consent given by them after his birth would render it binding upon him. *Hrodoot* v. *Beer Narayan, 11 W. R. 48, Bunwari Lal* v. *Daya Sunkar, 13 C. W. N. 815,* relied on. The rule applies with greater force in the case of a mortgage than in the case of an absolute alienation. *Kissen Prasad* v. *Tippan Prasad, I. L. R. 34 Calc. 735,* referred to. HAZARI MALL BABU *v.* ADANINATH ADHURJYA (1912) . . **17 C. W. N. 280**

36. ———— **Joint or self-acquired property**—*Self-acquisition of co-parcener thrown into common stock, if may be disposed of by will—Consent of other co-parceners, if necessary.* Where the head of a joint Mitakshara Hindu family kept one account of the income of his ancestral and self-acquired property and used to treat the income of both kinds of property as one amalgamated fund: *Held,* that the property which had been acquired by him as his self-acquired property became the property of the joint family, which he was not competent to dispose of by will without the consent of his co-parceners. INDAR SAHAI *v.* SHIAM BAHADUR *(1912)* **17 C. W. N. 509**

37. ———— **Father's mortgage** *of immoveable property by—Mitakshara—Suit against sons—Limitation—Limitation Act (XV of 1877), Sch. I, Art. 132.* A suit to enforce a mortgage of ancestral property executed by a Mitakshara father against his sons, is a suit to enforce payment of money charged upon immoveable property and is governed by Art. 132 of Sch. II of the Limitation Act of 1877. *Maheshur Dutt* v. *Kishen Singh, I. L. R. 31 Calc. 184; 11 C. W. N. 294, followed Lachmun* v. *Giridhar, I. L. R. 5 Calc. 855* and *Surja Prasad* v. *Golab Chand, I. L. R. 27 Calc. 762,* not followed. *Bhagabat Prasad* v. *Suba Lal, 7 C. L. J. 195,* referred to. SHEO NARAIN RAY *v.* MOKSHODA DAS MITTRA (1913) **17 C. W. N. 1022 & 1025**

perty nevertheless remaining with the purchaser. An auction-purchaser of immoveable property paid in the amount required by law as a preliminary deposit, but, being unable to find the remainder of the auction price, borrowed it on the security of a mortgage comprising the property purchased at the auction sale and also some property of the joint family of which the auction purchaser was the head. This mortgage was, however, executed after the expiry of the time fixed by law for payment of the balance of the auction price. The executing Court refused to accept payment of the balance, but the property remained with the purchaser, apparently in virtue of some arrangements with the judgment-debtor by whom ostensibly the decree was satisfied. *Held,* in the circum- ... mortgagee was ... and that the ... heard to plead that the mortgage money was not borrowed to pay an antecedent debt, within the meaning of the Hindu law. KAPILDEO *v.* THAKUR PRASAD (1913) . . . . **I. L. R. 36 All. 17**

39. ———— **Sale of family property by managing member**—*For the benefit of the family—Sale binding on minor members of the family.* The managing member of a joint Hindu family sold certain joint family property for the purpose

members of the family, although the vendor was

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not in the circumstances of the case their natural guardian. *Hunoomanpersaud Panday* v. *Munraj Koonweree, 6 Moo. I. A. 393, 412,* and *Mohanund Mondul* v. *Nafur Mondul, I. L. R. 26 Calc. 820,* referred to. RAM CHARAN *v.* MIHIN LAL (1914)
I. L. R. 36 All. 158

40. ———— **Parties to suits on mortgages** —*Members of Joint Hindu family represented by managing members of the family—Suit by members not made parties to suit to redeem property sold in execution of mortgage executed by managing members—Transfer of Property Act (IV of 1882), s. 85.* In this appeal their Lordships of the Judicial Committee affirmed the decision of the High Court in *Jaddo Kunwar* v. *Sheo Shankar Ram, I. L. R. 33 All. 71,* on the ground that the plaintiffs (appellants) who sued to redeem a mortgage after foreclosure on the plea that they had not been parties to the mortgage suit, were properly and effectively represented in the suit by the managing members of the Hindu joint family of which the plaintiffs were also members, and that in such a case the Court was not bound to set aside the execution proceedings where substantial Justice had been done merely because every existing member of the family was not formally a party to the suit. Their Lordships saw no reason to dissent from the Indian decisions which showed that there were occasions, including foreclosure actions, when the managers of a Hindu joint family so effectively represented all the other members that the family as whole was bound and were of opinion that it was clear on the facts of this case, and on the findings of the Court upon them, that it was a case where that principle ought to be applied. There was not the slightest ground for suggesting that the managers of the joint family did not act in every way in the interests of the family itself, and no question arose under s. 85 of the Transfer of Property Act (IV of 1882), because the mortgagee had no notice of the plaintiff's interests. SHEO SHANKAR RAM *v.* JADDO KUNWAR (1914)
I. L. R. 36 All. 383

41. ———— **Twice-born caste—Debt—Marriage expenses of male member**—*Binding on the family.* Marriage is obligatory on Hindus who do not desire to adopt the life of a perpetual Brahmachari or of a Sanayasi and debt reasonably incurred for the marriage of a twice-born Hindu male are binding on the joint family properties. *Govindarazulu Narasimham* v. *Devarabhotla Venkatanarasayya, I. L. R. 27 Mad. 206,* overruled. *Kameswara Sastri Veeracharlu, I. L. R. 34 Mad. 422,* approved. GOPALAKRISHNAM *v.* VENKATANARASA (1914) . **I. L. R. 37 Mad. 273**

42. ———— *Alienation by managing member in part for necessity—Co-parcener's suit to set it aside—Form of decree—Practice.* Where the managing member of a joint Hindu family consisting of himself and his nephew sold family property for a consideration of which part was found to be binding on the family, and the nephew sued to recover his share of the property from the alienee: *Held,* that according to equitable principles, in the absence of anything appearing to the contrary, the whole of the consideration for the sale, the valid as well as the invalid portion thereof, must be distributed over the whole of the property sold in proportion to the value of each part. *Marappa Gaundan* v. *Rangasami Gaundan, I. L. R. 23 Mad. 80,* dissented from. The proper decree in such a case is to decree to the plaintiff his share of the property sold after division by metes and bounds, on condition that he pays to the defendant a proportionate share of the consideration found binding, together with mesne profits from the day that he deposits the amount into Court, and gives notice thereof, to the defendant. VADIVELAM *v.* NATESAM (1914)
I. L. R. 37 Mad. 435

43. ———— **Purchase from a co-parcener** *Its effect on family co-parcenary—Alienee, not a tenant-in-common —One member becoming out-caste excluded from the family—Limitation Act (IX of 1908), Art. 142.* When a co-parcener alienates his share in certain specific family property, the alienee does not acquire any interest in that property but only an equity to enforce his rights in a suit for partition and to have the property alienated set apart for the alienor's share if possible. *Hem Chunder Ghose* v. *Thako Moni Debi, I. L. R. 20 Calc. 533, Amolak Ram* v. *Chandan Singh, I. L. R. 24 All. 483, Narayan bin Babaji* v. *Nathaji Durgaji, I. L. R. 28 Bom. 201, Pandurang* v. *Bhasker, 11 Bom. H. C. R. 72* and *Udaram* v. *Ranu, 11 Bom. H. C. R. 76,* approved. The alienee cannot therefore sue for partition and allotment to him of his share of the property alienated. *Venkatarama* v. *Meera Labai, I. L. R. 13 Mad. 275, Palani Konan* v. *Masakonan, I. L. R. 201 Mad. 243,* and *Ramkishore Kedarnath* v. *Jainarayan Ramrachhpal, 14 Mad. L. T. 163,* referred to. Such an alienee has no right to possession and no status as a tenant-in-common, although he might have obtained possession of the property in execution of the decree against one of the co-parceners. *Deendyal Lal* v. *Jugdeep Narain Singh, L. R. 4 I. A. 247, Suraj Bunsi Koer* v. *Sheo Persad Singh, I. L. R. 5 Calc. 148, Hardi Narain Sahu* v. *Ruder Perkash Misser, I. L. R. 10 Calc. 626,* followed. When a co-parcenor became an out-caste and was driven out of the family, and did not enjoy family property for over 12 years, it amounted to exclusion and the right to recover his share is barred. *Per* BAKEWELL, *J.*—The transferee only acquires an equity and it is only a right *in personam* and not a right *in rem* and the transferor remains a member of the co-parcenary until partition is effected. The question whether a general or partial partition will lie is not one relating to the law of procedure but must be decided according to the principles of Hindu Law. *Subba Row* v. *Ananthanarayana Aiyar, 23 Mad. L. J. 64, 70,* and *Iburamsa Rowthan* v. *Theruvangadasami Naick, I. L. R. 34 Mad. 269* at p. 270, dissented from. A purchaser of the interest of a co-parcener must sue for a general partition of the entire family property. *Iburamsa Rowthan* v. *Theruvengadasami Naick, I. L. R. 34 Mad. 269, 274,* applied. When such purchaser fails to apply for amendment of his plaint, after an issue is raised questioning the frame of the suit, his suit is liable to be dismissed. *Subba Row* v. *Ananthanarayana Aiyar, 23 Mad. L. J. 64, 70*; referred to. MANJAYA *v.* SHANMUGA (1913) . . **I. L. R. 38 Mad. 684**

44. ———— **Father's alienation**—*Son conceived but not born at the date of the alienation, Held,* that a Hindu son is competent to contest an alienation made by the father at a time when the son was in his mother's womb. *Sabapathi* v. *Somasundram, I. L. R. 16 Mad. 76,* followed. *Mussamut Goura Chowdhrain* v. *Chummun Chowdry, W. R. Gap. No. 340,* not followed. *Kalidas*

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Das v. *Krishan Chandra Das, 2 B. L. R. 103, F. B., Hanmant Ramchandra* v. *Bhimacharya, I. L. R. 12 Bom. 105, Minakshi* v. *Virappa, I. L. R. 8 Mad. 89,* referred to. DEO NARAIN SINGH *v.* GANGA SINGH (1914) . . . **I. L. R. 37 All. 162**

45. ———— **Suit against father**—*Son's position and rights in execution proceedings.* A creditor who has obtained a decree against the father of a joint Hindu family is entitled to put to sale the family property. The son whose interests are threatened is entitled to an opportunity of contesting both the factum and the nature of the debt, and there is nothing in law to prevent him from coming into court in the execution department and preventing, if possible on those two grounds the passing of his interest to the auction purchaser. If the points are decided against him, the Court in execution can put the property to sale. *Shiam Lal* v. *Goneshi Lal, I. L. R. 28 All. 288,* and *Channu Tewari* v. *Dwarka, 3 All. L J. 423,* followed. *Nanomi Babuasin* v. *Modhun Mohun, I. L. R. 13 Calc. 21,* referred to. *Per* PIGGOTT, *J.*—A creditor who at first made the sons of his debtor parties to a suit against the latter, but subsequently withdrew the suit as against them, would be in no worse position as regards the execution of his decree than he would have occupied if the sons had been impleaded. INDAR PAL *v.* THE IMPERIAL BANK (1915)
I. L. R. 37 All. 114

46. ———— **Liability of the joint family for contracts entered into by managing members.** A joint Hindu family firm must be regarded like any other joint family asset if it in fact, belongs of the family who do not actively participate in the conduct of the business, particularly if such business has been originally established to the detriment of the family property and handed down hereditarily, then the resultant liability of all the members of the family would be referable to the notion of managership by one or more members for the benefit of the rest in the usual sense in which the relations of the manager and other members of the family have often been accepted and defined in all the Courts and the liability of those members of the family not actively engaged in the conduct of the business would probably be restricted to the share of each such member in the joint Hindu family property. In a case where one or more members of a joint Hindu family start a business of their own not at the expense of the joint Hindu family nor with the intention of sharing its profits, and losses with the other members, the position of the members so carrying on a joint family business and their liabilities to the other members have to be regulated to the extent to which the conduct of such a firm and the resulting profits fall within the legal notion of self-acquisition. JOHARMAL LADHOORAM *v.* CHETRAM HARSING (1914) . **I. L. R. 39 Bom. 715**

47. ———— **Alienation of a share of a member of a joint Hindu family**—*No right to alienee for mesne profits from the date of alienation till suit for partition.* A purchaser of the undivided share of a member of a joint Hindu family does not thereby become a tenant-in-common with the other members and hence he is not entitled to any mesne profits in respect of his share for the period between the date of his purchase and the date of his suit for partition. *Nanjaya Mudali* v. *Shanmug Mudali, 26 Mad. L. J. 576,* followed The *obiter dicta* in *Aiyyagiri Venkataramayya* v. *Aiyyagiri Ramayya, I. L. R. 25 Mad. 690, Chinnu Pillai* v. *Kalimuthu Chetti, I. L. R. 35 Mad. 47,* and *Subba Row* v. *Ananthanarayana Ayyar, 23 Mad. L. J. 64,* disapproved and not followed. MAHARAJA OF BOBBILI *v.* VENKATARAMANJULU NAIDU (1914) . . **I. L. R. 39 Mad. 265**

48. ———— **Father's debts**—*Liability of son to pay—Mortgage by father, not proved immoral—Decree against father and sons, form of—Consideration proved—Lender if bound to prove application of money as stated in bond.* If the consideration for the mortgage was received by the mortgagor, the mortgage cannot be held inoperative merely be- *I. L. R. 34 Calc. 735 : s. c. 11 C. W. N. 613,* followed. The mortgage being one executed by a Mitakshara father, and the sons having failed to show that the loan was taken for immoral purposes, a decree was passed in the form it was made in *Kishun Pershad* v. *Tipan Pershad, I. L. R. 34 Calc. 735 : s. c. 11 C. W. N. 613, e g.,* mortgage decree against the share of the father, and if the sale of that share was insufficient to satisfy the debt, interest and costs, balance to be realised by sale of the son's shares and interest in the ancestral property so far as necessary—six months' time being allowed for redemption. KRISHNA PRASAD *v.* RAMPERSHAD SING (1916) **20 C. W. N. 508**

49. ———— **Partition suit for, by one member**—*Whether effects separation.* A member of a joint Hindu family becomes separated from the other members by the fact of suing them for partition. *Suraj Narain* v *Iqbal Narain, I. L. R. 35 All. 80, 87,* followed. SOUNDARARAJAN *v.* ARUNACHALAM CHETTY (1915) . **I. L. R. 39 Mad. 159**

50. ———— **Father's debt**—*Son's liability to pay—Mortgage by Mitakshara father—Son, though of age, not a party to the deed—His liability—Moral obligation to pay father's debts, unless incurred for immoral purposes—Legal proof of immoral purposes.* Liability on the part of a son to pay a father's debt arises from moral and religious duty and obligation and this is so even though the debt is not incurred for the benefit of the individual or for the estate. A son can only exempt himself from liability if he can establish that the father was guilty of applying the money for some immoral purpose. Although there need not be any direct proof that the money was raised to be spent on any particular person, yet one must be reasonably satisfied that the father was a man of vicious, extravagant and lustful habits and that he raised the money for the purpose of applying it for the immoral purpose. In some way by reasonable legal proof it must be shewn that there is a connection with the debt and the immoral purpose. *Chintamanrav Mehendale* v. *Kashinath, I. L. R. 14 Bom, 320,* and *Dattatrayo Vishnu* v. *Vishnu Narayan, I. L. R. 36 Bom. 68,* referred to. To be liable on a mortgage executed by the father for a purpose not proved to be immoral, it is not necessary for the adults sons to be parties to the bond. The case of *Upooroop Tewary* v. *Lalla Bandhjee Sahay, I. L. R. 6 Calc. 749,* seems to have been overruled if not distinctly qualified by the latter case, *Baso*

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Kooer v. *Hurry Das, I. L. R. 9 Calc. 495.* BHAGAT MAL SAHU *v.* ABDUL KARIM (1916)
20 C. W. N. 797

51. ——— **Separation**—*By one member of joint family—Expression of intention to hold share separately followed by suit for partition—Unequivocal and clearly expressed intention—"Separation" as distinct from "division of shares of property."* In this case their Lordships of the Judicial Committee *held*, on the facts, that the conduct of the plaintiff, a member of a joint Hindu family governed by the Mitakshara law, in indicating by a notice in a registered letter his intention to separate himself and enjoy his share in severalty, coupled with a suit for partition was as "unequivocal" and "clearly expressed" an intention as could be made, and that it amounted to a separation with all its legal consequences. The rule of law applicable to cases of separation from the joint undivided family laid down in *Suraj Narain* v. *Iqbal Narain, I. L. R. 35 All. 80 ; L. R. 40 I. A. 40,* followed. Nowhere in the Mitakshara is it stated that agreement between all the coparceners is essential to the disruption of the joint status, or that the severance of rights can only be brought about by the actual division and distribution of the property held jointly. On the other hand, numerous authorities on the subject leave no room for doubt that "separation," which means the severance of the status of jointness, is a matter of individual volition. Separation from the joint family involving the severance of the joint status so far as the separating member is concerned with all the legal consequences resulting therefrom, is quite distinct from the *de facto* division into specific shares of the property held until then jointly. One is a matter of individual decision, the desire on the part of any one member to sever himself from the joint family and to enjoy the hitherto undefined or unspecified share separately from the others without being subject to the obligations which arise from the joint status; whilst the other is the natural resultant from his decision, the division and separation of his share, which may be arrived at either by private agreement among the parties, or on failure of that by the intervention of the Court. Once the decision has been unequivocally expressed and clearly intimated to his co-sharers, his right to obtain and possess the share to which he admittedly has a title is unimpeachable: neither the co-sharers can question it, nor can the Court examine his conscience to find out whether his reasons for separation were well founded or sufficient: the Court has simply to give effect to his right to have his share allocated separately from the others. *Madho Parshad v. Mehrban Singh, I. L. R. 18 Calc. 157 ; L. R. 17 I. A. 194, Deo Bunsee Koer* v. *Dwarkonath, 10 W. R. 273, Appovier* v. *Rama Subba Aiyan, 11 Moo. I. A. 75, Joy Narayan Giri* v. *Girish Chunder Myti, I. L. R. 4 Calc. 434, L. R. 5 I. A. 223,* and *Vato Koer* v. *Rawshun Singh. 8 W. R. 82,* referred to. GIRIJA BAI *v.* SADASHIV DHUNDIRAJ (1916) . **I. L. R. 43 Calc. 1031**

52. ——— *Separate entries in revenue record in the name of brothers and brother's widow—Separate mortgages by some brothers of respective shares—Presumption as to separation or joint possession—Plaintiffs not giving evidence, effect of—Onus and rebutting of inference from documentary evidence.* Separate entries in the revenue records of names of members of a Mitakshara Hindu family in regard to specified areas standing by themselves, may be inconclusive to rebut the presumption of Hindu law relating to jointness or to prove separate possession when in its inception the family was admittedly joint, but where half-brothers claimed a deceased brother's share in certain villages and lands against his widow whose name as also those of the half, brothers had been separately recorded in the revenue records and it was in evidence that the half-brothers had executed separate mortgages in respect of their respective shares, and they did not come into the witness box to show that these transactions, although separate, were consistent with jointness: *Held,* that the acts of the brothers were only consistent with the hypothesis of separation. RAM SINGH *v.* TURSA KUNWAR (1913)
17 C. W. N. 1085

53. ——— **Will by father**—*Bequeathing some lands to his daughter with consent of major son and of relations interested in his minor son—Validity of disposition.* A father in a joint Hindu family can with the consent of his adult son and with the consent of his relations who are interested in a minor son of his, bequeath a portion of his property to his daughter provided the portion is reasonable in extent. *Brijraj Singh* v. *Sheodan Singh, I. L. R. 35 All. 337, Kudutamma* v. *Narasimhacharyulu, 17 Mad. L. J. 528, Anivillah Sundara Ramayya* v. *Cherla Seethamma, 21 Mad. L. J. 695,* and *Arunachela Pillai* v. *Sampurnathachi, 27 Mad. L. J. 485,* applied. PATRA CHARUAR *v.* SRINIVASA CHARIAR (1917)
I. L. R. 40 Mad. 1122

54. ——— **Alienation by father**—*Suit by sons to set aside alienation—One of the sons born after alienation—Whether his interest bound—Time-barred debt acknowledged by registered deed—Undue influence—Father's interest bound by the deed—Time when the share is ascertained.* The plaintiffs *A* and *B* and defendant No. 2, their father, constituted a joint Hindu family. On September 19th, 1901, defendant No. 2 sold certain family land to defendant No. 1. Plaintiff *B* was born subsequently to the date of the alienation and was a minor when the suit was filed. The plaintiffs sued to set aside the sale deed on the ground that it was taken from defendant No. 2 by undue influence and for no consideration. The Subordinate Judge dismissed the plaintiffs' suit holding that the consideration for the deed was an antecedent debt which though barred by time was acknowledged by defendant No. 2 by a registered deed which was binding on the plaintiffs. The lower appellate Court reversed the decree and directed that plaintiffs and defendant No. 2 be restored to possession. On appeal to the High Court by defendant No. 1, the question was raised whether the time-barred debt acknowledged by the registered deed was not good consideration for the alienation of the defendant No. 2's interest in the property. *Held,* that defendant No. 2's interest was bound by the deed. *Held,* also, that defendant No. 1 acquired the half share in the alienated property to which defendant No. 2 was entitled at the date of the alienation owing to the fact that the minor plaintiff was not then born. NARO GOPAL *v.* PARAGAUDA (1916)
I. L. R. 41 Bom. 347

55. ——— **Mortgage**—*Mitakshara—Joint Hindu family—Mortgage of joint Hindu family property by father—Mortgage executed at*

FAMILY—*contd.*

of sons in suit to enforce ...*—Burden of proof.* The antecedent debts which ...ge or sale by the father ... by the Mitakshara law, ... a general and sound ...contracted by the father ...e joint family estate he ...der of mortgage or sale of ...ebt, is one which should ... be very carefully guar... ...ther on the occasion of a ...e on the family estate ...; to hold otherwise ...nly and improperly the ...ption provided by the ...on of the majority of ...of *Chandradeo Singh* v. ... *All. 176,* approved. ...in *Nanomi Babuasin* v. ...*13 Calc. 21, 35; L. R.* ...as to the estab... India of "the principle ...up their rights against an antecedent debt, or ...les for their debts if ...," does not give any ...the joint family estate ...ed in such manner ...for except where the ...n order to discharge ...tly incurred, but ...ownership of the ...ed or supposed ... The exception ...father's debts ...e credit ob... ...h did not ...t family ...

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February, 1880, when *K* came of age. ... book was thereafter kept by or for *D* ... the property which had come to ... one ...

which had been acquired from the ... or any other sort of revenue, and ... his expenditure of whatsoever kind. ... "a deorh" partition, that is, an ... of the several properties const... mutual exchanges were made ... his share in some ancestral family ... share of *K* in the property ... brother's estate. In a suit by *D's* sons (the appellants) after the ... aside deeds of gift made by *D* ... respondents, on the ground th... made out of the joint ancestral ... therefore invalid. *Held* (rever... the High Court), that the pro... the brother's estate to the ... as collateral heirs was ... by blending that property w... in the accounts, and by the ... made on the partition, *D* ... common stock, and the ... ancestral family estate, ... porting to be conveyed to ... deeds of gift were joint ... which *D* had no power ... appellants were entitled ... *Narain* v. *Ratan Lal,* ... *11, I. A. 201,* f... NAZMA BEGUM (...

57. ... individual ... Mitakshara ... personally, ... by a ... ordinary ... men...

HINDU LAW—JOINT FAMILY—*contd.*

entitled to maintenance out of the impartible estate in the hands of his successor. This follows from the fact that in an impartible zemindari there is no co-parcenary. *Sartaj Kuari* v. *Deoraj Kuari, I. L. R. 10 All. 272 ; L. R. 15 I. A. 15 ;* and *Venkata Surya Mahipati Rama Krishna Rao* v. *Court of Wards, I. L. R. 22 Mad. 393 ; L. R. 26 I. A. 83,* followed. *Bachoo* v. *Mankorebai, I. L. R. 29 Bom. 51, 58,* approved. The view taken in the Madras Courts prior to the cases above cited that there was joint property in an impartible zemindari which only fell short of co-parcenary because by custom there was no right to partition is no longer tenable. The right of sons to maintenance in an impartible zemindari had been so often recognized that it is not necessary in each case to prove a custom. There are other persons entitled to maintenance either by reason of their exclusion from the succession owing to personal disqualification or by reason of personal relationship to one of the line of zemindars, but the latter class does not include grandsons. *Yarlagadda Malikarjuna Prasada Nayudu* v. *Yarlagadda Durga Prasada Nayudu, I. L. R. 24 Mad. 147, (155) ; L. R. 27 I. A. 151, 157* and *Nilmony Singh Deo* v. *Hingoo Lall Singh Deo, I. L. R. 5 Calc. 256, 259,* approved. In the present case no special custom had been proved or even alleged; and the claim was not based on personal relationship. Rama Rao *v.* Rajah of Pittapur (1918)

I. L. R. 41 Mad. 778

59. ———— **Partition in ignorance of rights by the widows** *of the family—Gift by one widow with the consent of the widow of the last male holder—Suit by the latter to recall gift for breach of conditions—Subsequent suit by reversioner to recover possession of the property gifted away—Whether the suit barred by res judicata —Widow's power of representation, extent of—Adverse possession—The Indian Limitation Act (IX of 1908), Sch. I, Arts. 141, 142, 144.* Three brothers *S*, *P* and *M* constituted a joint Hindu family. *M* survived *S* and *P* and died in the year 1878. Each of the brothers left a widow. T... widows of *S* and *P* persuaded *V*, the widow ... make a partition of the entire propert... each widow were entitled of her own ... This having been done, in th... widow of *S* acting as the agent ... con- sent made a gift of the p... defendants. The widow of ... that gift. In 1904, *V* broug... property gifted away alleging ... sented to and approved of th... conditions which were not com... donees. The defendants resiste... ground that they were not done... had received the property from ... and held it adversely to *V* and to ... represented. The suit was dismiss... limitation. In 1911 *V* died and a ... stituted by the plaintiff, her daughter, ... reversioner of the estate of her father ... tion having arisen whether the suit was ... *res judicata.* *Held,* that the suit was n... by *res judicata* as *V* did not fully repr... estate in her suit of 1904. The decision ... suit was not *inter partes* nor was it a deci... ... and moreover the ground of *V*'s claim in ... suit had nothing in common with the plain... suit. The plaintiff also claimed not throug... but in her own right as the reversioner of

father *M. Katama Natchiar* v. *The Rajah of Shivagunga, 9 Moo. I. A. 539,* discussed. During the continuance of a widow's life estate, adverse possession which begins in and runs its course before that life estate terminates, will be no bar to reversioners. Nor will litigation by the widow in the enjoyment of such a life estate, whether she be plaintiff or defendant, represent the estate fully so as to give rise to a bar of *res judicata* against reversioners if such litigation is qualified and personal to the widow or has arisen out of acts of her own affecting the estate during her own life estate therein. Subbi *v.* Ramkrishnabhatta (1917) . . **I. L. R. 42 Bom. 69**

60. ———— **Blending accounts by managing member, joint funds and of his own self-acquired property** *in same account book—Entries in such book evidence of intention to make self-acquired property joint—Purchases made in name of son-in-law out of funds so blended to provide for son-in-law—Statement to that effect made by manager admissible as being against his own interest—Benami deeds—Civil Procedure Code (1882), s. 317.* With respect to a Hindu joint family the law is that while it is possible that a member of the joint family can make separate acquisitions, and keep moneys and property so acquired as his separate property, yet the question whether he has done so is to be judged by all the circumstances of the case. Where a member of a joint Hindu family at Lucknow, who had made considerable savings from his earnings as a pleader at Hardoi, where he was entrusted with the management of the joint family property at that place, eventually became ... member of the joint family at Luckno... accounts of the joint property and of ... ear... in one account book an... pr... the name of his so... the ... in the account ... his private ... on joint acc... ke them join... to be join... chases ent... family. A of his son- made to p... ment agains... admissible i... ther with th... cient to give of such purc... ...ily. Su...

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payment of the sum of ... with interest. But they were not liable to refund that part of the consideration which was paid in cash, inasmuch as, so long as their fathers were alive, the pious duty to pay the debts of their grandfather did not devolve upon them. RAM SINGH *v.* CHET RAM (1919) **I. L. R. 41 All. 529**

62. ———— **Father debts**—*Father debts—Execution against joint property—Whether son's interest pass... joint family ... partition of ... not including all the family properties, whether bad in law.* The plaintiff was the son of defendant No. 5. They constituted an undivided Hindu family. Defendants Nos. 6 and 7 obtained a money decree against the 5th defendant and in execution of the decree, the defendants Nos. 1 to 4 became purchasers at the Court-sale of two of the properties belonging to the joint family. The plaintiff, a minor, thereupon, brought a suit against his father (defendant No. 5) and the decree-holders as well as the auction-purchasers for a declaration that the plaintiff's half share in the two properties did not pass to the auction-purchasers and for possession of his half share on equitable partition. The lower Court decreed the plaintiff's claim. On appeal to the High Court it was contended: (i) that the son's interest in the property did pass at the Court-sale, and (ii) that the suit for a partial partition of the family properties was bad: *Held*, that the son's interest did not pass to the purchasers at the Court-sale. *Timmappa* v. *Narsinha Timaya, I. L. R. 37 Bom. 631*, followed. *Held*, also, that when a coparcener was suing an auction-purchaser it was not a valid objection to the suit that the co parcener claimed only a partial partition. *Subramanya Chettyar* v. *Padmanabha Chettyar, I. L. R. 19 Mad. 267*, and *Ram Charan* v. *Ajudhia Prasad, I. L. R. 28 All. 50*, followed. *Held*, further, that the auction-purchasers should be allowed to file a suit against the plaintiff for a general partition of the entire family properties. *Deendyal Lal* v. *Jugdeep Narain Singh, L. R. 4 I. A. 247*, and *Baboo Hurdey Narain Sahu* v. *Pundit Baboo Rooder Perkash Misser, L. R. 11 I. A. 26*, followed. HANMANDAS RAMDAYAL *v.* VALABHDAS (1918) . **I. L. R. 43 Bom. 17**

62(*a*) ———— **Sale**—To pay off an antecedent debt of her father a daughter of a separate Hindu sold a house which had been the property of her father in his life-time and had been previously mortgaged by her and her mother jointly as security for the same debt. The debt at the time of the sale amounted to Rs. 7,775 and the house was sold for Rs. 10,500. It was found that the house was not one that had been divided and sold piecemeal. *Held* that the reversioner of the last male owner was not in the circumstances entitled to recover the house from the vendees. BAL KRISHNA DASS *v.* HIRA LAL.

I. L. R. 41 All. 338

... of mem- ... *some portion of ... in law as to other portions.* Where a member of a Hindu family who is divided in status from other is in enjoyment of some portion of the family properties, while others enjoy other portions, he is not in law excluded or ousted from those other portions, so as to disentitle him to his share of those portions, however long their enjoyment by others. *Vishnu Ramachandra* v. *Ganesh, I. L. R. 21 Bom. 325*, not followed. *Lakshman Dada Naik* v. *Ramachandra Dada Naik, I. L. R. 5 Bom. 48*, followed. KUMARAPPA CHETTIAR *v.* SAMINATHA CHETTIAR (1918) **I. L. R. 42 Mad. 431**

64. ———— **Trading family, Loan by manager**—*Onus as to binding nature of loan—Account books not produced—Presumption against party—Onus of proof in cases of joint family business.* Where the members of a devastanam committee sued the members of a Hindu joint trading family to recover a debt borrowed from the plaintiffs by the managing member of the family, and the defendants failed to produce their account books though summoned by the plaintiffs. *Held*, that, assuming that the onus of proving the binding nature of the debt lay on the plaintiffs even in the case of a trade carried on as joint family business it was shifted to the defendants on account of the presumption arising against them by their omission to produce their accounts called for by the plaintiffs, a presumption which arises against them whether the plaintiffs have any evidence or not. *Murugesam Pillai* v. *Manickavasaka Desika Gnana Sambanda Pandara Sannadhi, I. L. R. 40 Mad. 402*, applied. *Quære:* Whether, in a joint trading family, the onus of proof as to the nature of the debt is not on the family. *Raghunathji Tarachand* v. *The Bank of Bombay, I. L. R. 34 Bom. 72*, referred to. GURUSWAMI NADAR *v.* GOPALASAMI ODAYAR (1919)

I. L. R. 42 Mad. 629

65. ———— **Karta—If can start new business so as to make minor member liable**—*Karta as certificated guardian, powers of—Minor receiving benefit of such business and not repudiating on being major, liability of—Guardians and Wards Act (VIII of 1890), s. 27—Contract Act (IX of 1872), ss. 247, 248.* The powers of the *karta* of a joint Hindu family in respect of a trade started after the death of the ancestor are not the same as those in respect of a trade started by the ancestor and carried on after his death by the *karta*, and the minor members of the family are not liable for the debts incurred by the *karta* in respect of such business.

... under the control of the Court and can no longer exercise the powers of a *karta*. A certificated guardian cannot start a new trade for the benefit of his ward, at any rate, without the sanction of the Court. S. 27 of the Act deals with the power of a guardian with respect to the property of a minor of which he assumes charge and it cannot be said that the starting of a new trade is reasonable and proper for the benefit of the property with... liabil... qure... tion ... not repudiate the act of the guardian on being major: *Held*, that s. 247 of the Contract Act provides that a minor may be admitted to the benefit of a partnership and though he cannot be made personally liable for any obligation of the

HINDU LAW—JOINT FAMILY—*contd.*

firm the share of such minor in the property of the firm is liable for the obligations of the firm. The liability under s. 247 does not depend on the powers of the *karta* or guardian but on the question whether the minor was admitted to the benefits of the partnership and his liability is limited to his share of the properties. The liability under s. 248 depends upon the fact of his not having repudiated the partnership on attaining the age of majority. The question of the minor's personal responsibility depends on his having retained the properties with the knowledge that it was on account of the new business and not the ancestral one and in the absence of a finding on this point it was inequitable to hold that the minor made himself personally liable for all the obligations of the firm merely because on attaining majority he retained some property acquired out of it. KRISHNADHAN BANERJI *v.* SANYASI CHARAN MANDAL (1919) . . . . **23 C. W. N. 500**

66. ——————Separation of one member only —*The rest of the family remaining joint—Reunion.* The filing of a suit by a member of a joint Hindu family in which the plaintiff declares that he wishes for partition and specifies his share amounts to a separation. But from this it does not follow that where, without any suit, one member of a family separates himself from the others and relinquishes his rights in the family estate taking either no share in the family estate or perhaps a less share of a greater share, the surviving members cannot remain united. Where such a separation of one member of a joint family takes place, it is not the necessary result in law that the other members must be taken to have separated *inter se* and then to have reunited. *Balabux* v. *Rukhmabai, I. L. R. 30 Calc. 725,* and *Kawal Nain* v. *Parbhu Lal, L. R. 44 I. A. 159 ; I. L. R. 39 All. 496,* distinguished. PARSOTAM DAS *v.* JAGAN NATH (1919) **I. L. R. 41 All. 361**

67. —————— Father's debt—*Mitakshara—Joint Hindu family—Money borrowed by father at high rate of interest—Legal necessity—Burden of proof—Indian Contract Act (IX of 1872), s. 16.* When money is borrowed by the father of a joint Hindu family on the security of the family property at a very high rate of interest, it is for the lender seeking to enforce his claim to prove not only that there was necessity for borrowing the money, but that there was necessity for borrowing it at an exorbitant rate of interest. *Nand Ram* v. *Bhupal Singh I. L. R. 34 All. 126 Gaya Prosad Tewari* v. *Ram Phal, Misir, 13 A. L. J. 246,* and *Rao Raghunath Singh* v. *Nazar Begam, 19 Indian Cases 639,* followed. The argument that a Court has no power to reduce the contract rate of interest otherwise than in cases which fall within the provisions of s. 16 of the Contract Act applies to cases where the parties to the suit are the parties to the contract. BHIKHI SAHU *v.* KODAI PANDE (1919) . . . . **I. L. R. 41 All. 523**

68. —————— Legal necessity—*Mitakshara —Joint Hindu family—Money borrowed by manager at high rate of interest—Burden of proof.* When money is borrowed by the manager of a joint Hindu family on the security of the family property at a very high rate of interest, it is for the lender seeking to enforce his claim to prove not only that there was necessity for borrowing the money, but also that there was necessity for borrowing it at an exorbitant rate of interest.

HINDU LAW—JOINT FAMILY—*contd.*

Failing such proof as regards the rate of interest. it is competent to the Court to reduce the rate, *Nazir Begam* v. *Rao Raghunath Singh, I. L. R. 41 All. 571, Hurro Nath Rai Chowdhri* v. *Randhi Singh, I. L. R. 18 Calc. 311, L. R. 18, I. A. 1,* and *Nand Ram* v. *Bhupat Singh, I. L. R. 34 All. 126,* referred to. RAM KHELAWAN KASAUNDHAN *v.* RAM NARESH SINGH (1919) **I. L. R. 41 All. 609**

69. —————— Antecedent debt—*Mortgage of joint family property—Liability of sons—Family necessity—Burden of proof—Disputed mortgage executed to pay off earlier mortgages.* The joint ancestral estate of a Hindu family cannot be effectively sold or charged in such a manner as to bind the issue of the father, except where the sale or charge has been made in order to discharge an obligation not only antecedently incurred, but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate. Hence where it was sought by the sons to invalidate a decree for sale obtained by the mortgagee upon a mortgage of joint family property executed by the father, and it appeared that the mortgage in question had been executed to pay off two earlier mortgages of joint family property also executed by the father, it was *held* that it was for the defendant mortgagee to show that these earlier mortgages fell within the exception recognized by the Judicial Committee of the Privy Council in the case of *Sahu Ram Chandra* v. *Bhup Singh, I. L. R. 39 All. 437.* BRIJ NARAIN RAI *v* MANGAL PRASAD (1918)
I. L. R. 41 All. 235

70. ——————Legal necessity.—The father of a joint family mortgaged some of the joint property. He then died having two sons. Then one of the sons died leaving 2 sons. Their uncle then sold the property as managing member. The purchasers brought a suit for redemption. *Held* that it was not open to mortgagee in that suit to set up a defence that there was no legal necessity for the sale. DURGA PRASAD *v.* BHAJAN.
I. L. R. 43 All. 50

70(a)———— Father's Simple Money debt— [*Sons not liable during father's life-time.*] The pious obligation of a Hindu son to pay his father's debts can only be enforced after the death of the father.

Hence, where on a promissory note executed by the father a simple money decree was obtained against him and in execution thereof a part of the family property was attached, and the sons brought a suit for a declaration that their shares in the property were not liable to satisfy the decree against their father, who was alive, it was *held,* that the sons were entitled to the declaration sought. *Sahu Ram Chandra* v. *Bhup Singh,* I. L. R., 39 All., 437 ; L. R., 44 I. A., 126 and *Bharath Singh,* v. *Prag Singh,* 43 Indian Cases, 291, referred to. SHEODAN SINGH *v* BHAGWAN SINGH, **I. L. R. 43 All. 496**

71. —————— Mortgage by Father—Representation in proceedings—When a Hindu father the head of a joint family consisting of himself or minor son executed a mortgage of the entire ancestral estate in order to secure a loan for the purpose of preventing the property being sold for arrears of Government Revenue and the mortgagees obtained a decree on the mortgage without making the son (who was still a minor) a party to the suit and purchased the property in execution of that decree. *Held* that the son

HINDU LAW—JOINT FAMILY—*contd.*

was not entitled to redeem whether the mortgagees had notice of his interest or not. In such a suit the interest of the son is sufficiently represented by the father unless it can be shewn

age suit for the redeem. RAGHU-
. DAYAL SINGH.
2 Pat. L. J. 306

71. . . . *en-*
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bers of a joint Hindu family must not be treated as necessarily or *ipso facto* partners in any partnership into which a member of the family, or even the manager of the joint family, may see fit to enter. *Gangayya* v. *Venkataramiah* I. L. R., 41 Mad., 454, and *Ramanathan Chetty* v. *Yegappa Chetty* 30 M. L. J., 241, referred to. *Narain Das* v. *Ralli Brothers* 31 Indian Cases, 45, doubted. KHARIDAR KAPRA COMPANY, LIMITED *v.* DAYA KISHAN **I. L. R. 43 All. 116**

72. ———— **Will by a father bequeathing**

and inoperative as against the son, although it would have been a proper provision if made by the father during his lifetime. *Patra Chariar* v. *Srinivasa Chariar*, (1917), *I. L. R. 40 Mad. 1122*, and *Kudutamma* v. *Narasimha Charyulu* (1908), *17 M. L. J. 528*, distinguished. SUBBARAMI REDDI *v.* RAMAMMA (1920)
I. L. R. 43 Mad. 824

73.
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charge, is bound. A member of a joint Hindu family governed by the *Mitakshara*, cannot deal with his share in the property of the joint family so as to create a charge which will survive him. *Held, further*, that a suit by the holder of the bond to enforce his security against the sons of the surety (he having died and the principal debtor having defaulted) was governed by Art. 120 of the Limitation Act, 1908, and not by Art. 132. JWALA PRASAD *v.* MAHARAJAH PROTAP UDAINATH SAHI DEO . . . . . **1 Pat. L. J. 497**

74. ———— **Money borrowed by manager**—*Duty of lender.* A person who lends money to the manager of a joint Hindu family is bound to satisfy himself, by enquiry, honestly made, that the advance is required by the manager as *borrower, for a valid family necessity* and for the benefit of the estate. It is for him to show that the borrowing was the act of a prudent manager or that enquiry into the prudence of the act was made. It is not enough merely to show that the manager stated that the money was required for certain specified purposes MANDIL DAS *v.* MEGH NARAIN DUBEY
1 Pat. L. J. 39

75. ———— **Primogeniture**—*Partition suit by younger sons compromised, presumption from.* The fact that the younger sons have in various contested suits, invariably failed to establish that they were entitled to a share by partition and that in each case they compromised their claim by accepting a mere grant by way of maintenance, is some evidence of the right of the eldest son to take the entire property by primogeniture. CHOUDHARY BALVADRU SAMANT SINGH *v.* BIMBADHAR ROY . . . . **1 Pat. L. J. 509**

75(a) ———— **Manager's contract.**—A contract entered into by the manager of a *Hindu joint* family can be specifically enforced even, though some of the members of the joint family were minors. HARI CHARAN KUAR *v.* KAMLA RAI
2 Pat. L. J. 513

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. BENARES
BANK *v* JAGDIP NARAYAN PANDEY
6 Pat. L. J. 198

77. ———— **Separation, though property**
ounds—*Profits*
one Member
specific share.
Although a member of a joint Hindu family may not, so long as the family remains joint, be able to say what his share in the joint family property is, the situation is altered as soon as the family separates, though the property is not actually

defined from suing the other members for joint possession of it. SHEODAN KURMI *v.* BALKARAN KURMI . . . **I. L. R. 43 All. 193**

78. ———— **Suit by son for a declara-**

of the purchase money to the vendees. Plaintiff, the son of a Hindu, sued for a declaration that three sales of joint family property effected by his father should not affect his (plaintiff's) rights as a co-parcener. The lower Courts decreed plaintiff's claim. The defendants vendees presented a second appeal to the High Court and urged that the decree should be made conditional on plaintiff refunding to the vendees his share of the purchase money. *Held*, that it would be opposed to principles to observe in the majority of the rulings cited to make the decree conditional

I. L. R. 2 Lah. 333

79. ———— **Kasta-position of it that of Trustee in strict sense**—*Misapplication*
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manager
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received had the money been profitably dealt with. The rule of Dattaka Chandrika that on a partition of joint family property of a Sudra family an adopted son is entitled to share equally with the legitimate son born to the adopted father subsequently is applicable in Madras. *Karuturi Gopalam* v. *Karuturi Venkataraghavalu. I. L. R. 40 Mad., 632 over ruled.* ARUMILLI PERRAZU & ORS. *v.* ARUMILLI SUBBARAYADU & ORS.
26 C. W. N. 1

HINDU LAW—JOINT FAMILY—*concld.*

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it may become available for the mortgage debt. A horoscope drawn up by a person since deceased is admissible to prove the age of the person therein mentioned but is not conclusive proof. AMAR DAYAL SINGH *v.* HAR PARSHAD SAHU

5 Pat. L. J. 605

85. ——— **Partition**—A suit for partition under Hindu law was filed in 1909. At the actual division of the property, the lower court allowed the plaintiffs their share of the mesne profits of certain family lands cultivated by the defendant manager personally for the years 1905 to 1909. The defendant having raised objection to this part of the decree *Held* upholding the defendant's objection,
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to keep accounts while the family remains joint, and when a partition is asked for, partition takes place of the property as it exists in the hands of the manager. Under Hindu Law, as far as the joint family is concerned, it is considered as one entity until the moment comes for division, and then each party gets his actual share. *In the meantime if there are any expenses which should properly be incurred by the joint family purse, those expenses are taken out of the family property, and they cannot be debited to a particular* co-parcener. CHATURAM *v.* GOTURAM RADHAKISAM (1920) **I. L. R. 44 Bom. 179**

HINDU LAW—JOINT FAMILY PROPERTY.

See, HINDU LAW JOINT FAMILY.

1.

Art. 126. A Hindu who at the time had a minor son, sold certain joint property in 1887. The sale was pre-empted and part of the property was subsequently transferred by one of the pre-emptors. The vendor's son attained majority in 1895. More than three years after 1895 three sons were born to him and in 1913 the father and the sons sued for cancellation of the sale-deed of 1881. *Held*, that the suit was barred by limitation, inasmuch as the title of the son of the original vendor became barred in 1898. The property ceased to be joint family property and the subsequently born grandsons were not in a position to dispute the sale. LACHMI NARAIN *v.* KISHAN KISHORE CHAND (1915) . . . . **I. L. R. 38 All. 126**

2. ——— **Self-acquisition property**—*In name of co-parcener when—Test, source of purchase-money.* Where there is a dispute whether a property standing in the name of a junior member of a Hindu family is his self-acquisition, the criterion is from what source the money comes with which the purchase-money is paid. *Dhurm Das Pandey* v. *Shama Soondri Dibiah, 3 Moo. I. A. 299, Gopi Krist Gosain* v. *Gungapersaud Gosain, 6 Moo. I. A. 53,* followed. Where there was no evidence that the son in whose name the property was purchased had any separate fund or that the properties in dispute were purchased with money belonging to him: *Held*, that the presumption was clear and decisive that the property was acquired by the father in the name of the son and it was not the latter's self-acquired property.

HINDU LAW—JOINT FAMILY PROPERTY—*contd.*

PARBATI DASI *v.* RAJA BAIKUNTHA NATH DEY (1913) . . . . . **18 C. W. N. 428**

3. ——— **Gift by Karta**—*Statement against interest—Evidence Act (I of 1872), s. 32, sub-s. (3)—Civil Procedure Code (XIV of 1882), s. 317.* Where the *Karta* of a Mitakshara joint family has habitually mixed his professional earnings in account with receipts from the joint property, and the circumstances are such that purchases by him in the name of himself or his brother, are to be regarded as joint family property, *it is still* competent to him to make a gift out of his earnings, though they have been brought into the account. A statement made by the *Karta*, since deceased, in a former suit that he bought properties as a provision for his son-in-law is admissible in

the joint family.
at sales in execution, and as to which the son-in-law was the certified purchaser, the claim by the joint family was *held* to be barred by s. 317 of the Code of Civil Procedure, 1882. SURAJ NARAIN *v.* RATAN LAL (1917) . . **L. R. 44 I. A. 201**
I. L. R. 40 All. 159

4. ——— **Mortgage by Karta**—*No rights against Karta.* A mortgage of the joint family property of a Mitakshara family by its *karta*, unless necessity or an antecedent debt is proved, is void; the transaction itself gives to the mortgagee no rights against the *karta's* interest in the joint family property. *Madho Parshad* v. *Mehrban Singh, L. R. 17 I. A. 194,* applied. *Mahabeer Persad* v. *Ramyad Singh, 12 B. L. R. 90,* discussed. NARAIN PRASAD *v.* SARNAM SINGH (1917)
L. R. 44 I. A. 163
I. L. R. 39 All. 500

5. ——— **Sale of entire property by one co-parcener**—*Sale operates only upon the co-parcener's share in the property—Purchaser cannot get joint possession of the share but is only entitled to declaration of his rights.* Under the Mitakshara as interpreted in the Bombay Presidency, a co-parcener can sell his own interest in joint family property provided there is valuable consideration for the sale. The sale is valid, even though the sale deed takes the form, not of a sale of his interest but of a sale of the whole property. In such a case, joint possession cannot be given to the purchaser, but merely a declaration that he has acquired the interest of the vendor, whatever that may be in the particular property, and a direction that he be left to recover that interest by separate suit for partition in which all necessary parties and properties should be joined. PANDU VITHOJI *v.* GOMA RAMJI (1918)
I. L. R. 43 Bom. 472

6. ——— **Co-sharers—Minor reversioner**—*Suit for recovery of possession by, on attaining majority—Limitation—Limitation Act (IX of 1908), Sch. I, Art. 141.* Where a Hindu plaintiff within 3 years of attaining majority sued to recover possession of a two annas share in an alleged joint-family property claiming through his mother and grandfather: *Held*, that the first thing the Court had to decide was whether the properties were joint and whether the plaintiff's grandfather or

HINDU LAW—JOINT FAMILY PROPERTY —*contd.*

mother had been in possession as a co-sharer. Art. 141 of the Limitation Act would apply only if the plaintiff's mother was dispossessed; in that case the plaintiff as the reversioner would have, 12 years from the date of the death of his mother and the question whether the suit was brought within 3 years of his attaining majority would then arise. If the property, as stated, was a joint property, it would be a case between co-sharers and in such a case it must be shown that there was exclusion or ouster of the plaintiff's grandfather or mother more than 12 years before the suit. "In order to establish adverse possession by one tenant-in-common against his co-tenants there must be exclusion or ouster and the possession subsequent to that must be for the statutory period. . . . . What is sufficient evidence of exclusion must depend upon the circumstances of each case. Mere non-participation in rents and profits would not necessarily of itself amount to an adverse possession; but such non-participation or non-possession may, in the circumstances of a particular case, amount to an adverse possession. Regard must be had to all the circumstances and a most important element is the length of time." *Ayeenunnisa Bibi v. Sheikh Isaj, 16 C. W. N. 819*, followed. GOBINDA CHANDRA BHATTACHARJEE *v.* UPENDRA CHANDRA BHATTACHARJEE (1919) . . . **I. L. R. 47 Calc. 274**

7. ———— **Antecedent debts binding on the sons**—*Debts must be antecedent to the transaction—Joint family property—Alienation of his share for consideration by a co-parcener.* The defendant's father passed a mortgage of ancestral property to plaintiffs' father for Rs. 1,499, out of which Rs. 700 were due by the mortgagor to the mortgagee, and the sum of Rs. 799 was received in cash by the former to pay off debts which he owed to others. The mortgagee having sued to recover the mortgage amount, the defendants contended that the debt not having been an antecedent debt of their father they were not bound under Hindu law to pay it: *Held*, that the defendants were liable to pay the mortgage debt contracted by their father, inasmuch as the object of the mortgage was to pay off the antecedent debts created by him prior to the mortgage. There is nothing in the judgment of *Sahu Ramchandra v. Bhup Singh (1917), L. R. 44 I. A. 126*, which supports the contention that the antecedent debts must be due to the mortgagee himself, and that the object of the alienation must be to satisfy the antecedent debts due to the alienee. In the Bombay Presidency the rule is well established that a co-parcener can alienate his share in the joint family property for consideration. PANDURANG NARAYAN *v.* BHAGWANDAS ATMARAMSHET (1919) **I. L. R. 44 Bom. 341**

8. ———— **Contract for sale of his interest by a co-parcener—Death of, before completion** *of the sale—Suit for specific performance against sons—Specific Relief Act (I of 1877), s. 27, cl. (c) and illustration.* One *B* and his three sons jointly owned one anna share in a Khoti village. *B* agreed to sell his three pies share to the plaintiff. Before the sale could be completed *B* died and a suit for specific performance was brought against his sons. *Held*, that the plaintiff could enforce the contract for sale of *B*'s interest by a suit for specific performance against *B*'s sons. The second illustration to cl. (c) of s. 27 of the Specific Relief Act applies to the case of all joint tenants, whether members of a joint Hindu family or not. BHAGWAN BHAU *v.* KRISHNAJI JANOJI (1920) **I. L. R. 44 Bom. 967**

9. ———— **Sale by managing member**—*Of family of property subject to a mortgage executed by his father since deceased—Suit by purchaser for redemption—Mortgagee not competent to set up manager's alleged incapacity to sell.* The father of a joint Hindu family mortgaged some of the joint family property. He then died, leaving two sons. Subsequently one of the sons died and the family then consisted of the surviving brother and his nephews, sons of the deceased brother. The uncle then, as managing member, sold the mortgaged property, and the purchasers of it brought a suit for redemption of the mortgage. *Held*, that it was not open to the mortgagee in that suit to set up as a defence that there was no legal necessity for the sale and therefore the uncle was not competent to convey a good title to the plaintiff. DURGA PRASAD *v* BHAJAN . . . **I. L. R. 42 All. 50**

10. ———— **Sale of ancestral property under decree on promissory note executed by father**—*Sale of ancestral property by Civil Court instead of by Collector.* The holder of a decree in a suit on a promissory note executed by the father of a joint Hindu family caused the ancestral property of the family to be sold. The sons sued to have the sale set aside as to two-thirds of the property upon the ground that the debt in respect of which the note in suit had been given was tainted with immorality. This, however, they failed to prove. *Held*, that the sale was valid. *Sripat Singh Dugar v. Prodyot Kumar Tagore, I. L. R. 44 Calc. 524*, followed. *Held*, also, that the fact that a sale of ancestral property has been conducted by a Civil Court when it ought to have been conducted by the Collector, does not render the sale invalid. *Behari Singh v. Mukat Singh, I. L. R. 21 All. 273*, referred to. *Fatmat-ul-Kubra v. Achchi-Begam, I. L. R. 36 All. 33*, distinguished. DALIP NARAIN SINGH *v.* PARMAOTI BIBI **I. L. R. 42 All. 58**

11. ———— **Right of residence—Unmarried sister's right**—*Decree against mother of last male owner on her personal debt—Sale of house in execution—Auction purchasers' right to oust unmarried sisters in possession—Right of residence of other females against purchasers.* An auction purchaser of an ancestral house, sold in execution of a money-decree passed on a personal debt of the mother who inherited the property as heir to her son, is not entitled to oust the unmarried sisters of the latter, who reside in the house. P. SURIYANARAYANA RAO NAIDU *v.* P. BALASUBRAMANIA MUDALI (1920) . . . . **I. L. R. 43 Mad. 635**

12. ———— **Loan by Manager to meet expenses of criminal charge**—*Liability of family property hypothecated for.* The Manager of a Hindu joint family is not entitled to spend the family funds in his own defence to a criminal charge, nor is he entitled to hypothecate the family property in order to raise money to meet the expenses of such a defence, except upon the ground of consent of the members of the joint family or upon the ground that from the circumstances it could be inferred that the other members of the family had consented. NATHU RAI *v.* DINDAYAL RAI **2 Pat. L. J. 166**

13. ———— **Mortgage by father**—*Right of minor son to redeem.* Where a Hindu father, the

HINDU LAW—JOINT FAMILY PROPERTY— *contd.*

head of a joint family consisting of himself and his minor son, executed a mortgage of the entire ancestral property in order to secure a loan for the purpose of preventing the property from being sold *for arrears of Government revenue*, and the mortgages obtained a decree on the mortgage without making the son (who was still a minor when the suit was instituted) a party to the suit, and purchased the property in execution of that decree, *held*, that the son was not entitled to redeem whether the mortgagees had notice of his interest or not. In such a case the interest of the son is sufficiently represented by his father unless it can be shown that he was omitted from the mortgage suit for the purpose of defeating his right to redeem. RAGHUNANDAN SINGH *v.* PARMESHWAR DAYAL SINGH . . . 2 Pat. L. J. 306

14. ———— **Agreement to sell family property—Specific performance,** *whether can be granted when some of the members of the family are minors.* A contract entered into by the manager of a Hindu joint family can be specifically enforced even though some of the members of the joint family were minors at the time when the contract was entered into. Where a person entered into an agreement for the purchase of certain land, of a part of which he was in actual possession as mortgagee, *held*, in the circumstances of the case, that possession did not amount to constructive notice to a subsequent purchasers of the contract for sale between the vendor and the mortgagee. HARI CHARAN KUAR *v.* RAULA RAI . 2 Pat. L. J. 513

15. ———————— *Mitakshara father's*

—Security bond executed to get stay of execution of such decree if enforceable against entire property—Self-acquired property of Mitakshara father devised by will if ancestral property in the hands of the son —Permission of District Judge sanctioning loan for family purp [illegible] *protection to creditor —"Tankha* [illegible] *dwan of assignabl* [illegible] *Mitak-shara law,* [illegible] *self-acquired by* [illegible] *each of his sons was to live in joint mess with his* [illegible] *to the age of twenty-five when the*

[illegible]

obtained against *J* for the money and in order to get a stay of the execution of the decree in terms of the order of the High Court *J* executed a security bond *charging his properties including his share of* Tankhas [illegible] *Held (per* [illegible] *dubitante).* [illegible] for a legitimate family purpose and the decree could be executed against the entire co-parcenary interest in the property. *Held* (*per* CURIAM) :— [illegible] was not required [illegible] entitled [illegible] *bona fide* creditors. They were not affected directly or indirectly by the antecedent or subsequent mismanagement of his estate by *J*. That when the creditor lends his money on a representation made by the father that the course which he proposes to take, a course not unreasonable or irrational in itself, is calculated in the circumstances to promote the interests of his family, the creditor ought not to suffer because owing to the subsequent misconduct of the father things in fact turn out badly. That the decision of the Judicial Committee in *Sahu Ram Chandra's* case, *L. R. 44 I. A. 126 : s. c. 21 C. W. N. 698 (1917)*, does not prevent a creditor levying execution on the family property to satisfy a decree for money against the father personally. That the decree against *J.* being for an antecedent debt not incurred for an illegal or immoral purpose, there was nothing to prevent the security bond from being enforced against the whole co-parcenary interest. That it is open to a Mitakshara father to devise self-acquired property to a son so that it will be ancestral in the hands of the son. That the testator intended each of his sons to take his share as ancestral property and the properties in the present case must be regarded as ancestral properties in the hands of *J*. That "Tankhas" are heritable allowances in the nature of property and therefore assignable LALA MUKTI PROKASH NANDE *v.* SRIMATI ISWARI DEI DEBI . . . I. L. R. 33 All. 64

16. ———— **Money-decree against father. if can be executed against the entire joint property—**"*Antecedent debt,*" *meaning of.* The decision of the Privy Council in *Sahu Ram Chandra's* case, *L. R. 44 I. A. 126 : s. c. 21 C. W. N. 698 (1917)*, has not overruled the long line of cases according to which a creditor who has obtained a personal decree for money against a Mitakshara father is entitled to levy execution against the entirety of the joint family property. "Antecedent debt" does not mean a debt incurred by the father before the birth of a son. MADHUSUDAN DAS MOHANT *v.* ISWARI DAYI DEBI . . . . . . 24 C. W. N. 949

17. ———— **Family arrangement.** *Arrangement between widow and daughters and daughters' sons to divide the property, widow claiming absolute title—Rights in doubt—Sole surviving daughter on death of her sisters if can recover property alienated by another daughter. N*, a Hindu, died leaving a widow and three daughters, some of whom had sons. The widow claiming absolute title to certain properties, which the evidence pointed to as belonging to *N*, entered into an arrangement with her daughters and grandsons for dividing up the properties between them in absolute right, and one of the daughters *M*, conveyed one item of property which fell to her share to a predecessor of the Defendant. The Plaintiff, another daughter, after the death of her other sisters sued to recover this property: *Held*, that the Plaintiff who was a party to the arrangement made to divide the property at a time when the rights of the widow and the daughters were in doubt could not be allowed to repudiate the same and to impeach a sale made on the faith of it. MUSAMMAT HARDEI *v.* BHAGWAN SINGH 24 C. W. N. 105

18. ———— **Mortgage to meet criminal charge—***Whether binding on sons.* The sons of a Hindu are liable on a mortgage executed by their father, the *karta* of the family, to meet the expenses of defending himself against a charge-

HINDU LAW—JOINT FAMILY PROPERTY— *contd.*

under the Cattle Trespass Act, 1871. HANUMAT MAHTON *v.* SONADHARI SINGH **4 Pat. L. J. 653**

19. ———— **Suretyship debt**— *Mitakshara—joint family—liability of sons for Suretyship debts of father.* It is unlawful for the father of a joint family governed by the *Mitakshara* to stand surety against embezzlement, and a debt incurred by him in so standing surety is an illegal debt for which his sons are not liable. SATYA CHARAN CHANDRA *v.* SATPIR MAHANTY. **4 Pat. L. J. 309**

20. ————*Earninges* of I. C. S. member of joint family—*Held,* that personal earnings may remain partible throughout the life of an unseparated member of a joint family if originally equipped for the career from which the gains were made by special training at the expense of the patrimony. AMAR NATH *v.* The Firm of HUKAM CHAND NATHU MAL **25 C.W.N. 534**

21. ———— **Property acquired by karta in the benami of a third party,** character of the property—Suit for accounts, son if liable for the period of his father's management—Lim itation Act (IX of 1908), s. 10 and Art. 120, period of limitation for such a suit. Property acquired in the *benami* of a third person by the *karta* of a joint Hindu family with the income of *ijmali* properties. partakes of the nature of a joint family estate. In a suit for accounts, the son is not liable for the period of his father's management. S. 18, of the Limitation Act does not govern suits for accounts against a *karta.* The section requires that the property must be vested in the trustee for a specific purpose but in no sense can it be said that a *karta* of a Hindu family is vested with the property belonging to a joint family. Art. 120 of the Limitation Act which provides six years' limitation applies to such suits. *Annamalal Chetty* v. *Murugasa Chetty, 7 C. W.N. 754 (P. C.) (1903).* distinguished. BISWAMBAR HALDAR *v.* GIRIBALA DASI **25 C. W. N. 356**

22. ———— **Antecedent debt**—*Liability of collaterals.* The principle relating to the liability for payment of antecedent debts applies only to sons and grandsons. Where a mortgage is executed in order to raise money to pay off an antecedent debt hypothicating family property the debt not having been incurred for necessity it is not binding on collateral relations and if only executed by some members of a joint family the mortgage not being binding on the whole estate is now even as against the undivided shares of the executant MATHURA MISRA *v.* RAJKUMAR MISRA. **6 Pat. L. J. 526**

23. ———— **Joint business**—*Powers of a manager to bind other co-parceners—extent of their liability. Held,* that the manager of a joint family business has an implied authority to contract debts for the ordinary purposes of the family business . Where such debts have been incurred the other co-parceners, whether they be adults or minors, are liable to the extent only of their interest in the joint family property. They are not liable personally unless, in the case of adult co-parceners, the contract sued upon, through purporting to have been entered into by the manager alone is in reality one to which they are actual contracting parties, or one to which they can be treated as being contracting parties by reason of their conduct or one which they have subsequently ratified; and in the case of minor co-parceners, unless the contract has been ratified by them on attaining majority. *Bishambhar Nath,* v. *Sheo Narain (I.L. R. 29, All. 166)* and Mulla on Hindu Law, 3rd Edition, pages 219 and 211, referred to BISHAN SINGH *v.* KIDAR NATH. **I. L. R. 2 Lah. 159**

24. ———— **Cost of Education met out of Joint Family Property**—Mitakshara—*Indian Civil servant—Gains of Science—Special Training —Detriment to Patrimony—Onus of Proof.* The appellant, who held a salaried appointment in the Indian Civil Service, was an unseparated member of a joint Hindu family governed by the *Mitakshara.* The family carried on a joint ancestral business as money-lenders in the course of which they gave *hundis* to the respondents in respect of a debt. The appellant was not privy to the business. The respondents sued upon the *hundies* making the appellant a defendant. It appeared that the appellant had passed by examination into the Indian Civil Service after seven year's special educational training in England no evidence was given as to the source of the funds used for that training. *Held* (1) that the appellant's official salary was partible property of the joint family, since it resulted from a special educational training, and the appellant had not discharged the onus, which was upon him, of proving that that training was not at the expense of the joint family; (2) that the appellant was liable upon the *hundis* to the extent of his share in the joint family property, including his official earnings, and that questions which might arise with regard to property, not partible on any ground, and also as to statutory rules restricting the alienability of an official's emoluments should be dealt with in execution proceedings. In considering whether gains are partible there is no valid distinction between a direct use of the joint family funds and a use which qualified the member to make the gains by his own efforts. GOKAL CHAND *v.* HUKAM CHAND NATH MAL . . **I. L. R. 2 Lah. 40**

25. ———— **Sale by father**—*without legal necessity—Suit by son to set aside sale—Purchaser not entitled to a lien on the father's share for return of the purchase money.* The father in a joint Hindu family, consisting of himself and one son, sold some of the joint ancestral property. The son sued to have the sale set aside. It was found that there existed legal necessity to support the sale only in respect of Rs. 350 out of a total consideration of Rs. 1,500, and the plaintiff was given a decree for possession of the property subject to the payment of that sum. *Held* that, whatever relief the defendants vendees might be entitled to against the father, they were not entitled to any charge against the undivided share of the father in the joint family property in respect of the balance of the purchase money. *Kali Shankar* v. *Nawab Singh, I. L. R., 31 All., 507, Suraj Bunsi Koer* v. *Sheo Pershad Singh, I. L. R., 5 Calc., 148, Bulgobind Das* v. *Narain Lal, I. L. R. 15 All., 339, Anant Ram* v. *Collector of Etah, I. L. R., 40 All., 171, Madho Parshad v. Mehrban Singh, I. L. R., 18 Calc., 157, and Lachhman Prasad* v. *Sarnam Singh, I. L. R., 39 All., 500, referred to.* RAM SAHAI *v.* PARBHU DAYAL **I. L. R. 43 All. 655**

26. ———— **Pious obligation**—*Unascertained debt of father— Money collected by father as an agent and subsequently misappropriated by him—*

HINDU LAW—JOINT FAMILY—PROPERTY *contd.*

Liability of sons for such sums—Principal and *ho died pending* *inst his sons as*

in their hands, although the amount of his indebtedness had not been ascertained; that it was no answer to a claim based on an antecedent civil liability to plead a subsequent criminal act, and that consequently, the sons were liable, under the Hindu Law, to pay moneys collected by their father as an agent and subsequently misappropriated by him. *Held,* also, that the

LU *v.* MOHANA PANDA (1921) **I. L. R. 44 Mad. 214**

27. ———— Losses in management—*Agreement providing for surrender of share——Subsequent letter affirming agreement, not registered—Registration Act (XVI of 1908), ss. 17 (b) and 49—Mere attestation, if operates as estoppel—Indian Evidence Act (I of 1872), s. 115.* Where the manager of a Hindu joint family estate entered into an agreement with his co-sharers that on proof of losses in the management of the estate they should pay their share of such losses and in case the losses be not paid when demanded, their shares in the estate would pass to the former: *Held,* that the agreement by itself was sufficient to transfer the shares upon the event happening as contemplated, and that a subsequent letter to the manager admitting the loss and surrender was not an operative conveyance which required registration. *Held* also, that the fact that the manager had been an attesting witness to a conveyance by which his co-sharers subsequently purported to transfer the property did not estop him from denying their title. Attestation of a deed by itself estops a man from denying nothing whatever excepting that he has witnessed the execution of the deed. It conveys, neither directly nor by implication, any knowledge of the contents of the documents. To operate as estoppel, the signature must be shown by independent evidence to have been meant to involve consent to the transaction. PANDURANG KRISHANAJI *v.* MARKANDEYA TUKARAM (P. C.) **26 C. W. N. 201**

the managing member of a joint Hindu family, for himself and as guardian of his minor son G, after obtaining a decree for money against T, by compromise surrendered all his rights and those of G, the consideration mentioned being that T would not prosecute an appeal he had preferred against that decree. Two more sons were born to R subsequently to the compromise. G on *attaining majority having sued to set aside the*

HINDU LAW—JOINT FAMILY PROPERTY— *concld.*

compromise, it was held that the compromise did not bind G. *Held,* that as the decree was a portion of the joint family property R could deal with it only with the consent of G or as manager for a *justifying necessity; and therefore the compromise* failed as a whole and did not bind even the then existing share of R in the undivided property. That the compromise having been set aside T. was entitled to proceed with his appeal. T. R. VENKATA ROW *v.* T. V. TULJARAM ROW (P. C.) **26 C. W. N. 646**

HINDU LAW—LEGAL NECESSITY.

See HINDU LAW—WIDOW ALIENATION AND JOINT FAMILY.

———————— *Widow—Alienation—Legal necessity—Performance of pilgrimage—Betrothal of daughter.* Under Hindu Law, the expenses incurred by a Hindu widow in performing pilgrimage or in the betrothal of her daughter constitute legal necessity. As regards pilgrimage the question in every case must be whether it was for the spiritual benefit of her husband, in the performance of her duty to his soul, and whether the expenses incurred are reasonable or were made honestly having regard to the estate, the status of the family, and other considerations which it is customary for Hindus to take into account in *accordance with their religious beliefs and usages.* GANPAT VALAD DHAKU *v.* TULSIRAM (1911) **I. L. R. 36 Bom. 88**

————————A property known as

to succeed *D* then brought a suit claiming the ...nation by ... in favour ... *eld* finally ... *rejudicata*

the alienations on the allegation that T. C. was the eldest male member in the eldest line, and as such, was entitled to the property by virtue of the rule of lineal primogeniture governing succession in the family. The plaintiffs prayed therein for a decree in favour of T. C or, in the alternative, in favour of one or more of the plaintiffs. The first court decreed the claim of T. C. On appeal, to the High Court by the defendant. *Held,* that, if one or other of the plaintiffs was entitled to succeed, the suit should not be dismissed simply, because the first of the plaintiffs alone had failed to make out a title, particularly when, by so dismissing the suit, the right of the co-plaintiffs (who, if the first plaintiff were not joint with the last male holder would, on failure of the first plaintiff's case, be entitled) would be thereby barred; and that in such a case the Appellate Court could exercise the power provided *for in* the Code of Civil Procedure, OXLI, r. 33. *Held,* also, that lapse of time did not affect the question of onus of proof regarding legal necessity, except in so far as it might give rise to a presumption of acquire acquiescence or save the alienee from adverse inferences arising from the scanty proof

HINDU LAW—LEGAL NECESSITY—*contd.*

which might be offered. *Held*, further, that in order to justify legal necessity, it must be shown that the expenses could not have been met from the income of the property in the widow's hands, and that they were reasonable. *Held*, lastly, that payment of full value for the property did not of itself justify a sale by a Hindu widow in the absence of legal necessity. RAVANESHWAR PRASAD SINGH *v.* CHANDI PRASAD SINGH

I. L. R. 38 Calc. 721

———— Duty of lender to make inquiries. Where a mortgagee advanced money on a mortgage of joint Hindu family property the ostensible reason for the loan being to pay for certain zamindari property which the family was purchasing, and it was found that the purchase of the zamindari was beneficial to the family and that the mortgagee, when he advanced the money, had made such inquiries as he could and believed that the money was in fact required for the purpose aforesaid, it was *held* that the fact that, unknown to the mortgagee, the purchase money for the zamindari property had already been paid from some other source would not invalidate the mortgage. *Hunoomanpersaud Panday* v. *Mussumat Babooee Moonraj Koonweree, 6 Moo. I. A. 393,* referred to. TULA RAM *v.* TULSI RAM

I. L. R. 42 All. 559

———— *Joint family—loan by member of one branch, whether binding in the whole family.* Where a Hindu joint family, consisted of two branches, and a member of one of such branches borrowed money on a mortgage for the purposes of the family, *held*, that the presumption was that such member had authority to borrow the money for the joint family necessity and that the mortgage was, therefore, binding on the joint family. INDER CHAND *v.* BIDYADHAR PANDEY

5 Pat. L. J. 745

———— *liability of son and grandsons—agreement to maintain son-in-law, whether binds ancestral property.* Where a Hindu agrees to make an allowance to his son-in-law for the latter's maintenance the sons and grandsons of the grantor are liable to discharge the debt out of the ancestral property which devolves on them. MADHUSUDAN PRASAD SINGH *v.* RAMJI DAS . . . . . . **5 Pat. L. J. 516**

———— Under Hindu Law the illegitimate daughter of a Sudra succeeds to her mother in the absence of a nearer heir. DUNDAPPA *v.* BHIMAWA **I. L. R. 45 Bom. 559**

———— *Held*, that there is a presumption in favour of marriage and against concubinage but such presumption may be rebutted. INDAR SINGH *v.* THAKAR SINGH

I. L. R. 2 Lah. 207

HINDU LAW—LEPROSY.

See HINDU LAW—INHERITANCE.

I. L. R. 38 Mad. 250

———— *Development of leprosy not a disqualification as regards capacity to deal with property.* There is no principle of Hindu Law under which a person who contracts the disease of leprosy is thereby disqualified from dealing with his own property or from dealing with joint family property so as to bind his sons, provided the alienation is made for legal necessity. MAN SINGH *v.* MUSAMMAT GAINI (1917 . **I. L. R. 40 All. 77**

HINDU LAW—LIMITED OWNER.

See HINDU LAW—WIDOW.

———— An alienation by way of compromise entered into between a limited owner and persons who had no *bondfide* claim to the property at the time of the compromise is not binding on Reversioners. ANUP NARAYAN SINGH *v.* MAHABIR PRASAD SINGH

3 Pat. L. J. 83.

HINDU LAW MAINTENANCE.

1. ———— Wife's maintenance—*Maintenance allowed by will of husband to wife—Unchastity of wife after husband's death—Maintenance not affected—Widow—Unchastity—Starving maintenance.* A Hindu widow was entitled to maintenance at the rate of Rs. 24 a year under her husband's will. After the husband's death, the widow led for some time an unchaste life and gave birth to a child; but since then she remained chaste. She sued to recover maintenance allowed to her under her husband's will. It was contended in reply that the plaintiff, on account of the unchaste life which she had led for some time after her husband's death, had forfeited her right even to bare or starving maintenance. *Held*, negativing the contentions, that though the annuity was granted by the will as "maintenance" that word could not be understood as imposing any condition or restriction so as to cut down or extinguish the right to Rs. 24 a year given by the will. The rule that the will of a Hindu must be construed with due regard to Hindu habits and notions applies only where there is ambiguity. Caution must be used in applying that rule and it must be adopted only where a suggested construction of doubtful language leads to manifest absurdity or hardship. The general rule to be gathered from the texts is that a Hindu wife cannot be absolutely abandoned by her husband. If she is living an unchaste life, he is bound to keep her in the house under restraint and provide her with food and raiment just sufficient to support life; she is not entitled to any other right. If, however, she repents, returns to purity and performs expiratory rights, she becomes entitled to all conjugal and social rights, unless her adultery was with a man of a lower caste, in which case, after expiation, she can claim no more than bare maintenance and residence. *Honamma* v. *Timannabhat, I. L. R. 1 Bom. 559 ; Valu* v. *Ganga, I. L. R. 7 Bom. 84;* and *Vishnu Shambhog* v. *Manjamma, I. L. R. 9 Bom. 108,* discussed. PARAMI *v.* MAHADEVI (1909) **I. L. R. 34 Bom. 278**

2. ———— Gharjamai, if may claim maintenance—*Separate maintenance, when may be allowed—Implied agreement to maintain son-in-law—Pleadings and proof difference between, if fatal—Express contract set up and circumstances stated and only implied contract proved—Cross-objections, if may be received out of time—Civil Procedure Code (Act V of 1908), O. XLI, r. 2.—Limitation Act (IX of 1908), s. 5.* Where a plaintiff claimed maintenance as a *gharjamai* stating the circumstances under which the claim arose and also set up an express contract, the Court below, while disbelieving the story of express contract, gave a decree on the ground of implied contract inferred from facts proved :—*Held*, that there was no such variance between pleading and proof as to contravene the rule that the plaintiff shall not succeed on a case not made in his plaint. The institution of

HINDU LAW MAINTENANCE—*contd.*

gharjamai is of recent origin and may have owed its origin to the system of Putrika-putra, and the mere fact that there is no provision in the texts of Hindu Law relating thereto does not imply that the *gharjamai* is not entitled to maintenance. *Although an ante-nuptial agreement on the part of the husband not to remove his wife from her father's house may not be enforceable as opposed to the rules of Hindu Law and to public policy, if the son-in-law is willing to abide by the arrangement, there is nothing in* Hindu Law or in public policy to render an agreement on the part of the father-in-law to maintain him unenforceable, *Semble:* A *gharjamai* may be included in the term "poor dependent" declared by Manu to be entitled to maintenance. *Held,* that in the circumstances of the case where it was evident that an order directing the son-in-law to reside as a member of the mother-in-law's family might lead to constant disputes and prove a source of unhappiness to all parties, the Court properly decreed separate maintenance to the son-in-law. Govind Rani Dasi *v.* Radha Ballabh Das (1910)

15 C. W. N. 205

3. ———— **Of widow in undivided family** —*Enforceable against the whole family and not only against the branch to which the husband belonged.* Where a member of an undivided family comprising several branches dies, his widow's rights to maintenance is enforceable against the whole family and not only against the branch to which her husband belonged and which took by survivorship his undivided share. A suit for partition, subsequent to the widow's suit for maintenance will not affect her right as aforesaid. Subbarayalu Chetti *v* Kamalavallithayaramma (1911)

I. L. R. 35 Mad. 147

[illegible]

that a Hindu widow is able to maintain herself out of other property is no ground for not giving her some maintenance out of her husband's estate, but it is a factor to be taken into account in determining the quantum of maintenance to be decreed her. The right of a widow of a co-parcener in a Hindu family to maintenance is an absolute right due to her membership in the family and does not depend on any necessity arising from her want of other means to support herself. *Ramawati Koer* v. *Manjhari Koer, 4 C. L. J. 74,* dissented from Lingayya *v* Kanakamma (1913)

I. L. R. 38 Mad. 153

5. ———— **Of Daughter-in-law**—*Whether entitled to be maintained, in the absence of ancestral property—Rules of Hindu Law, when binding on Courts—Rule of equity, justice and good conscience.* A Hindu is under no legal obligation to maintain [illegible] when he has no [illegible] he rules on Hindu [illegible] only where it is [illegible] regarding succession, inheritance, marriage or caste or any religious *usage or institution.* Where maintenance is claimed against a person not on the ground that the property coming by inheritance to him is burdened with the maintenance of the person claiming it, but on the ground that the Hindu Law-givers have placed such a duty on him, the Hindu Law, as such, has no obligatory force, and the Court would have to decide the question in

HINDU LAW MAINTENANCE—*contd.*

accordance with equity, justice and good conscience. Though the rules and precepts of Hindu Law-givers might often be entitled to great respect in deciding the rule of justice in such cases, the weight du[illegible] cumstance[illegible] of modern [illegible] and justic[illegible] give effec[illegible] circumstar[illegible] just in a [illegible] maintenan[illegible] *Khetramani Dasi* v. *Kashinath Das, 2 B. L. R. (A. C. J.) 15,* applied. *Rangammal* v. *Echammal, I. L. R. 22 Mad. 304,* explained. Meenakshi Ammal *v.* Rama Aiyar (1914)

I. L. R. 37 Mad. 396

6. ———— **Impartible zamindari—Maintenance of junior members**—*Basis of the right—Coparcenary right or community of interest by birth not the basis—Relationship to holder of the zamindari, necessary—Provision for maintenance—Agreement with junior member, construction of—Adoption by zamindar—Subsequent bequest of* [illegible] *against legatee*— [illegible] *—Suit, not main-* [illegible] was adopted by [illegible] ed in 1890 leaving a will bequeathing all his properties including the zamindari which is an impartible estate, to the defendant who claimed also to be the natural son of the testator. The late zamindar had entered into an agreement with the plaintiff's father in 1882 whereby he agreed to pay him Rs. 1,500 a month and a lump sum of Rs. 6,000 a year. The [illegible]

1902 when he ceased to be maintained by his father. The plaintiff did not admit that the defendant was the natural son of the late zamindar or that he and the defendant were members of an undivided family. The defendant contended that a junior member of the family of the holder of an impartible zamrindari was not entitled to claim maintenance from the holder, and that the suit was not maintainable by reason of the agreement with plaintiff's father and the will of the late zamindar and on the ground that the plaintiff did not claim any maintenance as a member of the defendant's family. *Held,* that the arrangement made by the late zamindar with the plaintiff's *father was not a provision for the maintenance of* the latter and all his descendants, and did not operate to bar the plaintiff's claim. A junior [illegible] n impar- [illegible] only on [illegible] and not [illegible] the pro- [illegible] acquired by birth. *Held* (on the facts of the case), that as the plaintiff did not advance any claim based on relationship but refused to admit any relationship with the defendant, his claim for maintenance could not be sustained. That, as there was no community of interest in the property, it was not burdened with his claims in the hands of the

HINDU LAW MAINTENANCE—*contd.*

defendant who was the legatee under the will SRI RAJAH RAMA ROW *v.* RAJAH OF PITTAPUR (1915) . . **I. L. R. 39 Mad. 396**

7. ———— **Wife's right forfeited by unchastity**—Under the Hindu law a wife is not entitled to maintenance from her husband, if at the time of the suit she is living in adultery and persists in her vicious course of life. *Subhayya,* v. *Bhavani, 24 Ind. Cas 370,* followed. DEBI SARAN SHUKUL *v.* DAULATA SHUKLAIN (1916) **I. L. R. 39 All. 234**

8. ———— **Custom impartible estate**—*Claim of maintenance by grandson of last holder as of right—Claim as inherent in co-parcenary right inadmissible—Right not allowed by special texts—Right may be established by proof of special custom —Custom repeatedly recognised assuming the character of a legal right in the case of son, but not in case of grandson.* In an ordinary joint Hindu family ruled by the Mitakshara law, the junior members down to three generations from the head of the family have a co-parcenary interest accruing by birth in the ancestral property; and this co-parcenary interest carries with it the inchoate right to raise an action of partition and until partition is *de facto* accomplished these same persons have a right to maintenance. This right which is an inherent quality of the right of co-parcenary (that is, of common property) cannot however attach to impartible properties in which it is settled law that there is no co-parcenary. Apart from the right to maintenance which is inherent in the right of co-parcenary, certain persons can claim maintenance under express texts, *e.g.*, (i) persons who are not allowed to inherit by reason of personal disqualification and (ii) others whose right lies in personal relationship not depending on the fact of there being ancestral or joint family property and which is limited to the widow, the parent and the infant child, the grandson not coming within such relationship. Further, impartibility being itself the creation of custom, custom may affirm the right of maintenance in certain members of the family, and failure to prove such a special custom is not necessarily fatal to their claim; for when a custom or usuage, whether in regard to a tenure or a contract or a family right is repeatedly brought to the notice of the Courts of a country, the Courts may hold that custom or usage to be introduced into the law without the necessity of proof in each individual case. Thus the right of sons to maintenance in an impartible zemindari has been so often recognised that it would not be necessary to prove the custom in each case. But no such invariable or certain custom has been established that any below the first generation from the last holder can claim maintenance as of right. GANGADHARA RAMA RAO *v.* SURYA RAO BAHADUR GARU (1919) **23 C. W. N. 173**

9. ———— **Decree for creating a charge on family properties**—*Subsequent purchaser of such properties under money decree binding on family—Priority of charge.* A charge on joint family properties created by a decree for maintenance payable to the widow of a member of a joint Hindu family takes precedence over the right of a subsequent purchaser of the same properties in execution of a money decree binding on the family. SOMASUNDARAM CHETTY *v.* UNNAMALAI AMMAL (1920) . . . **I. L. R. 43 Mad. 800**

HINDU LAW MAINTENANCE—*concld.*

10. ———— **Junior member of family**—*right of, to maintenance—Onus on Plaintiff to prove custom in support of claim and no ton Zamindar to prove custom taking away right—Change in the law.* In a suit for maintenance by a brother's son of the late Maharajah of Jeypore out of impartible estate of which the latter was and the present Maharaja is now the holder, the defence assumed that the Plaintiff had *primâ facie* the right to be maintained but pleaded a special custom taking away such right. The Courts below being of opinion that the defence had failed to prove the alleged custom decreed the suit: *Held,* that in view of the decision of the Privy Council in *Raja Rama Rao* v. *Raja of Pittapur, L. R. 45 I. A. 148 : s. c. 23 C. W. N. 173 (1918),* the burden was on the Plaintiff to prove a custom entitling him to maintenance and not upon the Defendants to prove a custom negativing the ordinary law. Apart from custom and from certain near relationships to the holder the junior members of the family of the Zamindars entitled to an impatrible Zamindari have no right of maintenance out of it, and there is no invariable custom by which any member of the family beyond the first generation from the last holder can claim maintenance as of right. VIKARAMA DEO MAHARAJULUM GARU, MAHARAJAH OF JEYPORE *v.* VIKRAMA DEO GARU **24 C. W. N. 226**

———— **Arrears—Description of Court**—A Court dealing with claims for arrears of maintenance has a very large discretion to grant or withhold those arrears with special reference to the necessities of the widow. KARBASAPPA *v.* KALLAVA **I. L. R. 43 Bom. 66**

HINDU LAW—MANAGER.

See HINDU LAW—JOINT FAMILY.
See HINDU LAW—MINOR.
26 C. W. N. 954

See LIMITATION ACT, 1908, s. 7, SCH. ART. 44 . **I. L. R. 38 Bom. 9**

———— **Accountability of**—

See HINDU LAW—JOINT FAMILY.
26 C. W. N. 1

———— **Suit by on behalf of Joint Family**—

See CIVIL PROCEDURE CODE, 1908. O 1, R. 9 and 34. **1 Pat. L. J. 463**

———— *Manager, suit by, for trespass.* The head of a joint Hindu family governed by the *Mitakshara* is competent to sue as managing member of the family, a person who has trespassed on the lands of the family. *Query* :—Whether such a manager can sue, as representing the whole f amily, in a suit under the Bengal Tenancy Act, 1885 ? MUHAMMAD SADIK *v.* KHEDAN LALL . . . **1 Pat. L. J. 154**

————*Held,* not to be in the position of a Trustee in strict sense. ARUMILLI PERRAZU *v.* ARUMILLI SUBBARAYADAU **26 C. W. N. 1**

HINDU LAW—MARRIAGE.

See HINDU LAW . PARTITION.
I. L. R. 39 Mad. 587

See PENAL CODE (ACT XLV OF 1860) s. 498 . . **I. L. R. 34 All. 589**

HINDU LAW—MARRIAGE—*contd.*

——— Hindu with Christian Woman—

See MADRAS CIVIL COURTS ACT, 1873, s. 16. I. L. R. 33 Mad. 342

——— In Kanti Form—

See MARRIAGE . . 24 C. W. N. 958

——— Whether void of without consent of Legal Guardian—

See PENAL CODE, s. 494. I. L. R. 2 Lah. 288

1. ——— *Validity of marriage—Evidence and recognition of marriage—Marriage of insane person whether valid—Presumption as to performance of alleged marriage—Degrees of Insanity—Rites and ceremonies of marriage.* The respondent's claim (as opposed to that of the appellants who were distant agnates) to letters of administration depended upon whether the deceased was her father, and whether he was legally married to her mother. The Courts in

mother had been recognised by all persons concerned as man and wife, and so described in important documents, and on important occasions.

its validity was attacked), afforded an extremely strong presumption in favour of the validity of the marriage, and the legitimacy of its offspring. *Held,* also, that the objection to a marriage on the ground of the mental incapacity of one of the parties must depend (as held by the High Court) on a question of decree; and that in this case the evidence of mental infirmity was wholly insufficient to establish such a degree of that defect as to rebut the very strong presumption in favour of the validity of the marriage. The established presumption in favour of the marriage applied to the forms and ceremonies necessary to constitute it a valid marriage; and such forms and ceremonies had been rightly held by the High Court to have been presumably properly performed. MOUJI LAL *v.* CHANDRABATI KUMARI (1911) I. L. R. 38 Calc. 700 L. R. 38 I. A. 122

2. ——— *Marriage of a daughter of deceased Hindu may be performed by his widow—Reasonable marriage expenses recoverable from joint family property.* The widow of a deceased member of an undivided Hindu family is entitled to perform the marriage of a daughter of the deceased even when the father of the deceased and the other male members of the family have not wrongly or improperly refused to perform such marriage, and she is entitled to recover the reasonable expenses of such marriage out of the joint family property. RANGANAIKI AMMAL *v.* RAMANUJA AIYANGAR (1912) .. I. L. R. 35 Mad. 728

3. ——— *Marriage of a Hindu girl without force or fraud but without consent of legal guardians—Maxim "factum valet."* The marriage of a Hindu girl of some 16 years of age was effected by the maternal uncle of the girl. There was no evidence of force or fraud; but the marriage was against the wishes of the paternal relatives of the girl, who desired to make a profit

marriage was declared to be valid. *Ghazi* v. *Sukru, I. L. R. 19 All. 515, Venkatacharyulu* v. *Rangacharyulu, I. L. R. 14 Mad. 316, Surjyamoni Dasi* v. *Kali Kanta Das, I. L. R. 28 Calc. 37, Mulchand* v. *Budhia, I. L. R. 22 Bom. 812,* and *Khushalchand Lalchand* v. *Bai Mani, I. L. R. 11 Bom. 247,* referred to. KASTURI *v.* CHIRANJI LAL (1913) .. . . . I. L. R. 35 All. 265

4. ——— *Koli caste—Marriage between a divorced woman and a man—Approved form of marriage—Asura form of marriage—Test of asura form.* A marriage between a man and a divorced woman belonging to the Koli

gives away the bride in consideration of the marriage. HIRA *v.* HANSJI PEMA (1912) I. L. R. 37 Bom. 295

5. ——— *Dissolution of marriage—Custom of caste—custom authorising either spouse to divorce the other on payment of a sum of money fixed by the caste—Custom immoral and cannot be recognised by the Court—Indian Contract Act (IX of 1872), s. 23.* A custom, stated to exist among Hindus of the Pakhali caste by which the marriage tie can be dissolved by either husband or wife against the wish of the divorced party, the sole condition attached being the payment of a sum of money fixed by the caste, cannot be recognised by the Court. It must be regarded as immoral or opposed to public policy within the meaning of s. 23 of the Indian Contract Act (IX of 1872) and is equally repugnant to Hindu Law, which regards the marriage tie as so sacred that the possibility of divorce on the best of grounds is permitted only as a reluctant concession *Reg.* v. *Karsan Goja* and *Reg.* v. *Bai Rupa, 2 Bom. H. C. R. 124,* followed. KESHAV HARGOVAN *v.* BAI GANDI (1915) . . I. L. R. 39 Bom. 538

6. ——— *Marriage of Hindu girl contracted by maternal uncle in the presence of paternal relatives—Injunction obtained*

but in cases where the paternal relative refuse to act or have disqualified themselves from acting, the maternal relatives acquire authority to contract marriage on behalf of the girl. A Hindu girl who was living with her paternal aunt and paternal uncle was made over to her maternal uncle as the result of an agreement come to between the parties. Subsequently the paternal aunt applied to be appointed guardian of the person of the minor, which application was dismissed. After this the maternal uncle of the ... rl with a ... obtained ... lding put off. The marriage, however, was accomplished with the person selected by the maternal uncle. The maternal uncle brought a ... to rec... damages for the loss caused to ...

HINDU LAW—MARRIAGE—*contd.*

ful issue of the injunction and the postponement of the wedding. *Held,* that under the circumstances of the case the maternal uncle was competent to enter into a contract of marriage on behalf of the girl, and a suit for damages lay. *Kasturi* v. *Chiranji Lal, I. L. R. 35 All. 265,* referred to. KASTURI v. PANNA LAL (1916)

I. L. R. 38 All. 520

7. ———————— *Marriage between a Telugu Sudra and his wife's sister's daughter, legality of.* The marriage of a Hindu with his wife's sister's daughter is valid, as well among Sudras as among Brâhmans, and among the Telugus of the north as among the Tamils of the south. RAMAKRISHNA ROW *v.* SUBBAMMA ROW (1920)

I. L. R. 43 Mad. 830

8. ———— Kanets, Sudras—*legitimacy of son by wife of another man who is alive at the time*—Res Judicata—*previous decision by Mandi Court not dealing with the question of legitimacy of plaintiff or his claim of succession under Hindu Law—whether conclusive adjudication on the matter of plaintiff's legitimacy under Hindu Law.* Plaimtiff claimed his half share in property left by his father U. S. in British India. He had previously made a similar claim in regard to his father's property in the Mandi State and this was decreed in his favour, but the question of plaintiff's legitimacy, although raised, was not decided by the Mandi Court nor was his title of succession under Hindu Law. The facts found by the High Court on appeal were that when plaintiffs' father U. S. took *Mst.* M. (plaintiff's mother) into his house her husband was alive and was still alive when the plaintiff was born, and that it had not been shown that her husband divorced her or turned her out or acquiesced in her leaving him. *Held,* that there is in law a presumption in favour of marriage and against concubinage when a man and woman have cohabited continuously for a number of years and this presumption of law can be repelled only by strong, distinct and conclusive evidence. The mere fact that the direct evidence of the marriage which took place many years ago is unsatisfactory cannot displace this presumption. *Imambandi* v. *Matasaddi 13 Indian Cases 678, Bepin Behari* v. *Atul Krishna 15 Indian Cases 328, Ibrahim Ali* v. *Mst. Mubarak Begum, 20 P. W. R. 1920, Sastry Valaidar* v. *Sembecutty, L. R. 6 Ap. C. 364, Piers* v. *Piers 81 R. R. 180 ; De Thoren* v. *Attorney-General, 1 A. C. 676, Mouji Lal* v. *Chandarbati Kumari, I. L. R. 38 Calc. 700 P. C., Dularey Singh* v. *Suraj Bali Singh, 43 Indian Cases 478,* and *Har Dial* v. *Kali Ram, 65 P. R. 1911,* followed. *Held, however,* that marriage is not constituted, but evidenced, by habit and repute. Though the presumption in cases of cohabitation is in favour of marriage, it is otherwise if the connection is known to have been in its origin illicit. *Campbell* v. *Campbell* (The Breadalbane case) *L. R. 1 H. L. Scotch and Divorce A. C. 182,* followed. *Held, consequently,* that J, the husband of *Mst.* M, being alive, when she was enticed away by U. S., the connection between U. S. and *Mst.* M, the plaintiff's parents, was adulterous, not only in its origin but continued to be so up to the time of J's death, when alone a valid marriage was possible, and that plaintiff was therefore not a legitimate son of U. S. *Campbell* v. *Campbell* (The Breadalbane case) *L. R. 1 H. L. Scotch and Divorce A. C. 182,* followed.

HINDU LAW—MARRIAGE—*concld.*

Virasangappa v. *Rudrappa, I. L. R. 8. Mad. 440* distinguished. Gour's Hindu Code, page 246, and West and Bühler's Hindu Law, pages 394-403, referred to. *Held, further,* that the question, which was raised in this Court, *i.e.,* that the plaintiff was illegitimate because he was the issue of an adulterous connection, was never considered and never adjudicated upon in the Mandi Court although it was raised by the defendant's pleas. The decision, moreover, proceeded on the ground of custom and no adjudication as to the plaintiff's right to succeed to the property of his father under Hindu Law was come to. A marriage may be valid in one country and at the same time void in another. Similarly a man may be entitled to inherit land in one country and yet not be entitled to inherit land in another. The judgment of the Mandi Court was therefore not a conclusive adjudication on the matter of plaintiff's legitimacy or on his title to succeed to his father's property under Hindu Law. Halsbury's Laws of England, Volume 6, page 297, *Ballentyne* v. *Mackinnon, 2 Q. B. 455 C. A., Hay* v. *Northcote, L. R. 2 Ch.* 52, Dicey's Conflict of Laws, page 486, and *Birtwhistle* v. *Vardill, 2 Cl. and F. 571,* followed. *Sinaraman Chetti* v. *Iburam, 19 L. R. 18 Mad. 327, Viswandha* v. *Keymer, I. L. R. 39 Mad. 95, Keymer* v. *Visvanatham, I. L. R. 40 Mad. 112, P. C., Srechurce Bukshe* v. *Gopal Chunde, 15 W. R. 500, Pirthi Singh* v. *Bhola, 29 P. R. 1883, Inder* v. *Jiwa, 49 P. R. 1890, Dina* v. *Karam Chand, 52 P. R. 1899, Rahi* v. *Gavinda, I. L. R. 1 Bom. 97,* and *Narayan* v. *Laving, I. L. R. 2 Bom. 140,* referred to. INDRA SINGH *v.* THAKAR SINGH

I. L. R. 2 Lah. 207

9. ———————— *Breach of contract of marriage—Out-of-pocket expenses incurred during betrothal, liability to pay* Plaintiffs who were father and son sued to recover a certain amount as damages for a breach of contract of betrothal. Defendants contended that the retraction was necessitated on account of ill-health of the bridegroom. Both the plaintiffs having died during the pendency of the proceedings, their representatives in interest sought to recover from the defendants the out-of-pocket expenses which the plaintiffs had incurred while the betrothal was in existence. The Subordinate Judge held that there being a sufficient reason for retracting the engagement the out-of-pocket expenses could not be recovered from the defendants. On appeal to the High Court. *Held,* that though the defendants could not be fined if there was a good cause for retraction, yet they were liable to pay expenses incurred by the bridegroom or his father during the betrothal. BALUBHAI HIRALAL *v.* NANABHAI BHAGUBHAI (1919) . . **I. L. R. 44 Bom. 446**

10. ————————*Legitimacy—Castes—Inter-marriage between sub-castes.* J, a *Kayestha* married C, a *Tanti.* B, a son of that marriage sued, *inter alia,* for a declaration that he was entitled to his father's property. *Held,* that the marriage between J and C was valid under the Hindu Law and B was entitled to the declaration. BISWANATH DAS GHOSE *v.* SHO—RASHIBALA DASI (1921.) . . . . **I. L. R. 48 Calc. 926**

See HINDU LAW—CUSTOM.

See HINDU LAW—JOINT FAMILY.

I. L. R. 40 Calc. 407

HINDU LAW—MIGRATION.

——————— *Mitakshara or Mithila law, presumption as to applicability of.* Where a person governed by the Mitakshara law removed to a district governed by the Mithila law the presumption was that he took his personal law with him, and where he inherited property from his maternal grandfather who was governed by the Mithila law, this property equally with his paternal property would be governed by the Mitakshara law and not by Mithila law. BHAGABATI KOER *v.* SAHUDRA KOER (1911) . . **16 C. W. N. 834**

——————— *From one province to another—Onus to prove adherence to law of place of origin—Proof of adherence to religious and social rites of the place of origin, effect of.* In the matter of succession, the contest was between the sister's son (plaintiff) and the great-great grandfather's great-great grandson (defendant.) the former alleging that the family was governed by the Dayabhaga School and the latter, that it migrated from Behar and adhered to the Mitakshara law prevailing there: *Held,* that it is well settled that a Hindu family residing in a particular province of India is presumed to be governed by the law of the place where it resides but where a Hindu family is shown to have migrated from one place to another the presumption is that it carried with it the laws, and customs as to succession and family relation prevailing in the province from which it came. This presumption however, is rebuttable by proof that the family has adopted the law and usages of the place to which it has migrated. That it is a historical fact that the Brahmins and Kayasthas of Bengal migrated from Kanauj; and originally brought with them the Mithila law; it was after their settlement in this province that the Dayabhaga School of Hindu Law was founded by Jimutavahana about the 14th century and that is the law which now governs the Hindu population of this Presidency even though they may have originally migrated from North Behar, and the defendant would have to establish not merely that the family migrated from Behar but that the migration took place after the foundation of the Bengal School of Hindu Law by the author of the Dayabhaga. This fundamental fact which if proved, would have shifted the burden of proof from the defendant, remained unestablished and the burden consequently lay upon the defendant to prove that the family was governed in matters of succession by the Mitakshara law. This burden might be discharged by proof of instances of succession consistent with the Mitakshara and inconsistent with the Dayabhaga law and to that end evidence might also be given that the family had conformed to religious and social rites and usages consistent with the Mitakshara and inconsistent with the Dayabhaga law. A Hindu family which has migrated into Bengal and has retained some of its former religious rites and ceremonies may yet be shown to have acquired a course of devolution of property in accordance with the Dayabhaga law. PITTAMBAR CHANDRA SAHA *v.* NISHIKANTO SAHA . . **24 C. W. N. 215**

——————— *Succession to immovable property from father—Different law in different Provinces of India—Quality of estate taken, whether absolute or limited—Mahratta Brahmin in Central Provinces—Bombay school of law—Family*

HINDU LAW—MIGRATION—*contd.*

emigrating taking law of original domicile with it. The quality of the right which is taken by a daughter who inherits immovable property from her father has been differently determined in different parts of India. In accordance with the view of the High Court of Bombay, the Courts of Western India have decided that she takes an absolute right; in other parts of India the Courts have held that she takes only a limited interest such as is taken by a Hindu widow; see *Pranjivandas Tulsidas* v. *Devkuarbhai,* 1, Bom. H. C. 130; 9 Moo. I. A. 533 (note) and *Bhan* v. *Raghunath,* I. L. R. 30 Bom. 229, and the cases and authorities there cited. It is established that the law of succession is, in any given case to [illegible] determined according to the personal law of [illegible] *Pr*[illegible] [illegible] of every family which is governed by it; consequently, where any such family migrates to another *province governed by another law,* it carries its own law with it: Mayne's Hindu Law, 8th Ed. para. 48. On migration there may be renunciation of the law of the province migrated from in favour of that of the province migrated to; but unless such renunciation is proved (and the mere change of domicile is not of itself sufficient to prove it), original law continues to govern the migrating family. But the law must be the family law as it was when they left. A judgment declaratory of law as having always been would be binding on the migrated family; but subsequent customs introduced into the law would not affect them. *Surendra Nath Roy* v. *Heeramonee Burmoneah, 12 Moo. I A. 81,* and *Purbati* *K*[illegible] *R.* 29 [illegible] A [illegible] wards himself were domiciled in the Bombay Presidency died in 1868 while on a pilgrimage, leaving immovable property in the Wardha District of the [illegible] Provinces. On his death his daughter [illegible] died in 1889 le[illegible] sued to set as[illegible] property made [illegible] The question a[illegible] [illegible] which depended [illegible] by which her [illegible] verned. The [illegible] decision of [illegible] and his an[illegible] [illegible] Berar in the Bombay Presidency and therefore the law gave the daughter an absolute estate), *held* that the father had no exclusive domicile either in Berar or in the Central Provinces and that the succession was governed by the law of the latter where the property was situated and the daughter had taken only a limited estate. *Held,* that the family of her father and his ancestors were domiciled in Berar and there was *no renunciation of the law* of that province when they or he migrated from it and that the daughter took an absolute estate under the law of the Bombay Presidency. BALWANT RAO *v.* BAJI RAO (1920)

I. L. R. 48 Calc. 30

HINDU LAW—MINOR.

See CONTRACT (9).

I. L. R. 39 Mad. 390

See HINDU LAW—GUARDIANSHIPS.

2 Pat. L. J. 190

See HINDU LAW—JOINT FAMILY.

2 Pat. L. J. 300 & 513

1. ———— Hindu family-firm—*Trade—Manager passing promissory notes in the firm's name without any advantage to the firm—Minor co-parcener—Liability of minor co-parcener in suit on promissory notes.* One *H* persuaded *N* who was the only adult male member of a joint Hindu firm carrying on an ancestral trade to sign certain promissory notes in the name of his ancestral firm. *N* signed the notes without the knowledge of the other member of the firm and without any advantage to the firm. The notes were subsequently endorsed by *H* to *B* who advanced monies on them to *H*. On a suit by *B* to recover the amounts due on the notes from *N*'s firm, *K*, a minor co-parcener, pleaded that he was not liable. *Held*, varying the decree of HEATON, *J.*, that the minor's share in the firm was liable. *Per* CHANDAVARKAR, *J.*—Under Hindu law a joint family, which carries on a trade handed down from its ancestors becomes a trading family; trade being one of its *kulacharas* (duty or practice) it attracts to itself all the necessary incidents of trade. The rule of Hindu law that debts contracted by a managing member of a joint family are binding on the other members only when they are for a family purpose, is subject to at least one important exception. Where a family carries on a business or profession, and maintains itself by means of it, the member who manages it for the family has an implied authority to contract debts for its purposes, and the creditor is not bound to inquire into the purpose of the debt in order to bind the whole family thereby, because that power is necessary for the very existence of the family. Where a minor is a co-parcener in a joint family his *share* in the family property is liable for debts contracted by his managing co-parcener for any *family purpose* or any purpose incidental to it. If the family is a trading firm, the same rule must apply with this difference that the terms *family purpose* or *purposes incidental to it* must have given way for the expression *trading purpose* or *purpose incidental to it* having regard to the nature and objects of the family business. The circulating of a negotiable instrument is in the case of a joint family, trading as a firm, necessary for its existence and its purposes. The minor's share is therefore bound by it since it constitutes an obligation of the firm. *Per* BATCHELOR, *J.*—In establishing the legal relations of a joint firm the Courts treat it as a kind of partnership and apply the principles of that law. The test to be applied in cases of this kind is rather the apparent authority of the manager than the actual necessity of the family, for while there is no absolute necessity for the family to trade at all, when once the family trade is admitted, all usual acts done in the normal course of carrying it on may be considered necessary to the trade. RAGHUNATHJI TARACHAND *v.* THE BANK OF BOMBAY (1919)

I. L. R. 34 Bom. 72

2. ———— Will—*Minor—Capacity to make will—Indian Majority Act (IX of 1875), s. 3.* A Hindu minor, who has not attained majority as provided in the Indian Majority Act, 1875, is not competent to make a will of his or her property. BAI GULAB *v.* THAKORELAL (1912)

I. L. R. 36 Bom. 622

3. ———— Liability of minor for debts contracted by agent of guardian—*Guardian of minor who is sole owner of trading firm.* A minor member of a joint Hindu trading family is liable on a bill drawn by the manager, his liability being limited to his share in the business on the analogy of s. 247 of the Contract Act (IX of 1872). This rule, however, is applicable to minors who are sole owners of a business only subject to the general principles regulating the relationship between guardian and ward. In India, a guardian has no power to bind his ward by a personal covenant. Although a widow and natural guardian may, in India, carry on a family business belonging to a minor son by a manager, such guardian and not the minor is the person personally liable on contracts entered in the course of business. Creditors of the business have no right of direct recourse against the minor; but as the guardian will be entitled to indemnity for liabilities properly incurred out of the assets of such business, creditors of the business can proceed directly against such assets for liabilities properly incurred by the guardian. A guardian cannot invest an agent with powers larger than are reasonably proper for carrying on the business; and where as a consequence of giving such powers the guardian has become involved in liability for the fraud of the agent, the guardian has no right of indemnity against the assets of the minor nor are the creditors entitled to claim such right through the guardian. SANKA KRISHNAMURTHI *v.* THE BANK OF BURMA (1912)

I. L. R. 35 Mad. 692

4. ———— Will—*Incapacity to make—Contract, incapacity to make—Majority, age of, for making a will—Indian Majority Act (IX of 1875), s. 3, effect of—Onus of proving minority, on propounder of a will—Onus of proof, immaterial, where whole evidence recorded—Indian Evidence Act (I of 1872), s. 32 (5) and (6)—Recital in a father's will as to son's age, admissibility of—Indian Evidence Act (I of 1872), ss. 35 and 82—Register of births and deaths, admissibility of, under—Indian Evidence Act (I of 1872), s. 145—Document, intended to contradict witness, not put to witness, inadmissibility of—Horoscope, when admissible.* A Hindu minor though not governed by the Hindu Wills Act or the Indian Succession Act cannot make a will and the age of majority for the purposes of making a will is determined by the Indian Majority Act. *Subbayya* v. *Kondayya, 16 Mad. L. J. 135, Deheram Bulliya* v. *Somanchi, Seetharamayya, 2 Mad. W. N. 383, Bhagirathi Bai* v. *Vishwanath 7 Bom. L. R. 92, Baigulalb* v. *Thakorelal, I. L. R. 36 Bom. 622,* and *Hardwari Lal* v. *Gomi, I. L. R. 33 All. 525,* followed. *Per* TYABJI, J. (WHITE, C. J. *Obiter*). When the defence of minority of the testator is raised to invalidate a will, the onus is on the party setting up the will to show that the testator was of full age when he made it and in the matter of onus, minority and testamentary incapacity, stand on the same footing; *Smee* v. *Smee, 5 P. D. 84,* and *Bhagirathi Bai* v. *Vishwanath, 7 Bom. L. R. 92,* followed. A horoscope which is not spoken to either by its writer or by one who had special means of knowledge as to its correctness is inadmissible in evidence. *Per* WHITE, *C.J.* —The question on whom the onus of proof lies is not of much importance when the whole evidence

HINDU LAW—MINOR—*contd.*

has been recorded. *Chaudhry Mohammad Mehdi Hasan Khan* v. *Sri Mandir Das, 17 C. W. N. 49,* followed. A recital in a testator's father's will mentioning the
to prove the age
(5) and (6) of the
to that section.
Assurance Company, Limited v. *Narasimha Chari, I. L. R. 25 Mad. 183,* at p. 207, *Ram Chandra Dutt* v. *Jogeswar Narain Deo, I. L. R. 20 Calc. 758, Deheram Bulleyya* v. *Somanchi Seetharamayya, 2 Mad. W. N. 383,* and *Subramanian Chetti* v. *Doraisinga, 24 Mad. L J. 49,* followed. A register of births and deaths kept under Madras Act III of 1899 is a public document and a certified copy thereof is admissible under ss. 35 and 82 of the Evidence Act. A document by which it is intended to contradict a witness will not be admissible in evidence under s. 145, Evidence Act, unless it is put to the witness or unless it is otherwise admissible under the Act. *Per* CURIAM: Under the Hindu Common Law a minor cannot make any disposition of property during his lifetime, *e.g.*, a gift; and consequently he cannot make any disposition of his property to take effect after his death. KRISHNAMACHARIAR *v.* KRISHNAMACHARIAR (1913) . . . **I. L. R. 38 Mad. 166**

5. ———— **Liability of minor son for father's debts**—*Whether separate property liable.* The minor sons of a Hindu may be liable for the debts of their father even though the debts were not

effect to a contract merely because the rate of interest is hard and unconscionable. In order to obtain relief in such a case the debtor must show that he comes within the terms of s. 16 of the *Contract Act, 1872.* NATHUNI SAHU *v.* BAIJNATH PRASAD . . . . . **2 Pat. L. J. 212**

6. ———— **Dayabhaga family with a minor co-parcener—Loan by Karta**—*for new business started after father's death—Liability of minor—Adult brothers adjudicated insolvent and Receiver appointed of their share—Partition between Receiver and minor and share of all properties including*
minor
ceiver
of 187
directi
appeal against—Order, if "final"—Civil Procedure Code (Act V of 1908), ss. 109, 97. The defendant a minor and his brothers were members of a Dayabhaga family. The ancestral businesses which their father had were carried on after the father's death by the

ties. A partition took place between the Receiver and the infant's guardian and the infant was given his proportionate share in all properties ancestral and after-acquired. The dividend received by the plaintiffs in the insolvency falling short

HINDU LAW—MINOR—*concld.*

of the amount due they sued to recover from the share of the defendant, the minor, who disclaimed all interest in the new business. *Held,* that the suits to which the Receiver was not a party were

any part of it got improperly into the possession of the minor the right to recover it was in the Receiver. The distinction between an ancestral business and one started after the death of the ancestor as a source of partnership relations is patent. In the one case these relations result by operation of law from a succession on the death of an ancestor to an established business with its benefits and obligations. In the other they rest ultimately on contractual arrangement between the parties. Under s. 247 of the Contract Act a minor may be admitted to the benefits of partnership but cannot be made personally liable for any obligations if the firm, but the share of such minor in the property of the firm is liable for the obligations of the firm. This share is no more than right to participate in the property of the firm after its obligations have been satisfied. The High Court in reversing a decree dismissing the suits against the minor defendant directed certain accounts against the defendant, not because his liability was established but for the purpose of determining whether or not he was liable. On appeal to the Judicial Committee a preliminary objection that the order was not "final" and therefore not appealable was overruled. SANYASI CHARAN MANDAL *v.* KRISHNANDAN
26 C. W. N. 954

HINDU LAW—MITAKSHARA.

See HINDU LAW—ADOPTION, ALIENATION AND JOINT FAMILY.

———— **Vyavahara Mayukha**—*Hindus in Mahad governed by Mitakshara.* In the town of Mahad in the Kolaba District Hindus are governed by the Mitakshara and not by the Vyavahara Mayukha. NARHAR DAMODAR *v.* BHAU MORESHWAR (1916) . . **I. L. R. 40 Bom. 621**

———— **Ancestral property**——*Whether property inherited from maternal grandfather is—Liability of such property in execution of a decree*
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of the father the property so inherited is part of his assets in the hands of the sons and can be proceeded against in execution of a decree obtained against him on a mortgage. In such a case it is not open to the sons to oppose execution on the ground that the debt for which the mortgage was executed was illegal and illusory or tainted with immorality. *Query*—Whether a member of a joint family can impugn a mortgage made before he was born by the managing member? A daughter's son, being the equivalent of a son according to the *Mitakshara,* he is, therefore, a member of

HINDU LAW—MITAKSHARA—*contd.*

his mother's father's family, but a daughter's son's son is not a member of any family but his own. BISHWANATH PRASAD SAHU *v.* GANJADHAR PRASAD **3 Pat. L. J. 168**

——— **Liability of sons**—*and grandsons for father's and grandfather's debts—liability for contracts of surety and indemnity—Contract Act (IX of 1872), ss. 124, 126 and 132—Code of Civil Procedure (Act V of 1918), s. 53.* A Hindu son or grandson governed by the *Mitakshara* law is liable for the debt of his father or grandfather due on account of a contract of suretyship for the payment of money, but they are not liable for money due on a contract of indemnity unless the transaction comes within the meaning of the term *Vyavarika, i.e.,* lawful, useful or customary. MAHABIR PRASAD *v.* SIRI NARAYUN **3 Pat. L. J. 396.**

——— **Joint family**—*liability of sons for father's debts—distinction between criminal and civil liability of father.* *Mitakshara* sons are bound by a sale of their property held in execution of a decree against their father even where it is not shown that the debt was not incurred for legal necessity, unless they succeed in proving that the debt was an immoral debt. But every civil liability does not necessarily involve a moral stigma. Where a Hindu father, who had acted as an agent, failed to deliver accounts to his principal, and by reason of his failure a decree was obtained against him and the ancestral property was sold in execution of that decree: *held,* that there being nothing in the circumstances of the case to show a criminal misappropriation on his part, or to show that there was any dishonesty which could constitute an immoral act within the meaning of the Hindu Law, the sons were bound by the sale. MAHANTA GADADHAR RAMANUJ DAS *v.* GHANA SYAM DAS . . **3 Pat. L. J. 533**

——— **Chapter I,** *ss. 27, 28 and 29—Joint ancestral property—Gift of portion by one member or pious purposes—circumstances in which such gift is valid.* The second and third of the circumstances stated in paragraph 28 of Chapter 1 of the Mitakshara as justifying a transfer of joint ancestral property by one member of the family are not governed by the preceding words " in a time of distress"; but there are three separate and distinct exceptions. Thus the gift of a portion of the joint ancestral property made by one member of the family for pious purposes is valid, though not made in a time of distress. The term " pious purposes " as used in paragraph 28 does not necessarily mean indispensable duties, such as the obsequies of the father, etc., mentioned in paragraph 29. *Gopal Chund Pande* v. *Babu Kunwar Singh, 5 S. D. A., L. P., 24, and Raghunath Prasad* v. *Govind Prasad, I. L. R., 8 All. 76,* referred to. SRI THAKURJI *v.* NANDA AHIR **I. L. R. 43 All. 560.**

——— **Joint ancestral property**—*Sale by father without legal necessity—Suit by son to set aside sale—Purchaser not entitled to a lien on the father's share for return of the purchase money.* The father in a joint Hindu family, consisting of himself and one son, sold some of the joint ancestral property. The son sued to have the sale set aside. It was found that there existed legal necessity to support the sale only in respect of Rs. 350 out of a total consideration of Rs. 1,500,

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and the plaintiff was given a decree for possession of the property subject to the payment of that sum. *Held* that, whatever relief the defendants vendees might be entitled to against the father, they were not entitled to any charge against the undivided share of the father in the joint family property in respect of the balance of the purchase money. *Kali Shankar* v. *Nawab Singh, I. L. R. 31 All. 507, Suraj Bunsikoer* v. *Sheo Pershad Singh, I. L. R., 5 Calc., 148, Balgobind Das* v. *Narain Lal, I. L. R., 15 All., 339, Anant Ram* v. *Collector of Etah, I. L. R., 40 All. 171. Madho Parshad* v. *Mehrban Singh, I. L. R. 18 Calc. 157,* and *Lachman Prasad* v. *Sarnam Singh, I. L. R. 39 All. 590,* referred to. RAM SAHAI *v.* PARBHU DAYAL **I. L. R. 43 All. 655.**

HINDU LAW—MORTGAGE.

See HINDU LAW (ALIENATION—JOINT FAMILY AND WIDOW).

See MORTGAGE . **I. L. R. 41 Calc. 722**

——— *Mortgage—Mitakshara—Mortgage by father to secure personal debt—Neither antecedent, nor for family purposes, nor immoral—Suit brought after his death—Limitation—Limitation Act (XV of 1877), Sch. II, Arts. 120, 132—Transfer of Property Act (IV of 1882), s. 85, Civil Procedure Code (Act V of 1908), O. XXXIV, r. 1.* The Full Bench decision in the case of *Luchmun Dass* v. *Giridhur Chowdhry, I. L. R. 5 Calc. 855,* is still binding on this Court as no contrary rule has yet been laid down by the Judicial Committee of the Privy Council [either in *Nanomi Babuasin* v. *Modhun Mohun, I. L. R. 13 Calc. 21 ; L. R. 13 I. A. 1,* or *Bhagbut Pershad* v. *Girja Kœr, I. L. R. 15 Calc. 717 ; L. R. 15 I. A. 99*] nor has it been superseded by subsequent legislation as s. 85 of the Transfer of Property Act (now replaced by O. XXXIV, r. 1 of the Civil Procedure Code, 1808) cannot touch the question. Where a suit upon a mortgage effected by a father governed by the Mitakshara Law for a debt, which is neither antecedent nor for family purposes and not proved to be immoral, had been brought (more than six years) after the death of the father against the sons, some of whom were adult and some minors at the time of the mortgage :—*Held* (without deciding when the right to sue accrues), that Art. 132 of the Schedule to the Indian Limitation Act had no application as there was no charge on immoveable property enforceable against the sons : consequently, Art. 120 governed the case. *Luchmun Dass* v. *Giridhur Chowdhry, I. L. R. 5 Calc. 855,* affirmed. *Kishun Pershad Chowdhry* v. *Tipan Pershad Singh, I. L. R. 34 Calc. 735,* approved. *Mahsewar Dutt Tewari* v. *Kishun Singh, I. L. R. 34 Calc. 184, Biswanath Pershad Mahata* v. *Jagdip Narain Singh, I. L. R. 40 Calc. 342 ; 17 C. W. N. 1025, Sheo Narain Ray* v. *Mokshoda Das Mittra, 17 C. W. N. 1022,* overruled. BRIJNANDAN SINGH *v.* BIDYA PRASAD SINGH (1915) **I. L. R. 42 Calc. 1068**

——— *Mortgage by Hindu widow and then next reversioner and decree against both, if binds actual reversioner—Right of latter to attack decree on ground of fraud.* Per MOOKERJEE, J.—When a mortgagee from a Hindu widow seeks to obtain a decree which would bind not merely the qualified interest of the widow, but the entire inheritance itself, the then next reversioner is a

HINDU LAW—MORTGAGE—*contd.*

proper party to the suit. A remote reversioner is not a necessary party in such a suit. A reversioner so impleaded may *well be deemed a party* in a representative capacity and a decree fairly made in his presence, so long as it stands, binds the inheritance, whether he or some one else ultimately becomes the actual reversioner when the succession opens out on the death of the widow. But the fact only that the parties to the mortgage-deed (where it included the presumptive reversioner) had gone through the form of a suit and a decree cannot preclude the actual reversioner from attacking the decree on the ground of fraud; though the title of the purchaser in such a case can *be defeated by the actual reversioner* only after the decree has been successfully impeached for fraud, collusion or other like reason. *Held, per* CURIAM, that the decree in this case in which both the widow and then next reversioner were defendants must be taken to bind the whole estate GANGA NARAIN DUTT *v.* INDRA NARAIN SHAHA (1916) . . . **22 C. W. N. 350**

———————— *Mortgage of joint family property by manager—Proof of legal necessit —Exorbitant rate of interest—Onus of showing it was a reasonable rate—Power of High Court to reduce rate.* It is incumbent on those who support a mortgage made by the manager of a joint Hindu family to show not only that there was necessity to borrow but that it was not unreasonable to borrow at some such high rate, and upon some such terms; and if it is not shown that there was necessity to borrow at the rate and upon the terms contained in the mortgage, that rate and those terms cannot stand A plea taken in written statement filed on behalf of the defendants that the property mortgaged was ancestral property, and that there was no legal necessity to execute the document sued on was *held* to make it open to the defendants to contend that, though the necessity for borrowing the principal sum was accepted, there was no necessity to borrow on the very onerous terms of this mortgage. *Hurro Nath Rai Chowdhri* v *Randhir Singh, I. L. R. 18 Calc. 311 : L. R. 18 I. A. 1,* and *Nand Ram* v. *Bhupat Ram, I. L. R. 34 All. 126,* referred to. *Held,* also, that on the above principle the High Court was justified in finding that a mortgage upon such terms as those contained in the document sued on, the lands being of such value as to make the security ample, was an unnecessary extravagance. NAZIR BEGUM *v.* RAO RAGHUNATH SINGH (1919) . . . **I. L. R. 41 All. 571**

———————— *Mortgage suit—Reversioner made party to the mortgage suit not precluded from questioning surrender by Hindu widow in favour of Mortgagor—Manager appointed by mortgagor on the nomination of mortgagee whether agent of the mortgagee—Rate of interest liable to reduction in case of punctual payment whether penal—Purdanashin lady, deed executed by— —Circumstances to be carefully examined.* A Hindu mother inheriting the one-fifth share on

subsequently mortgaged. In a suit to enforce the mortgages instituted against the mother who had inherited the shares of the mortgagors, in which *M*, the sole surviving son, was joined as a party as reversioner, the mother dying during the pendency of the suits: *Held*—That the fact that M the sole reversionary heir to *S*, was a party

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of *S* as he might have as a reversioner entitled to possession. Where in an English mortgage it was agreed between the mortgagor and the mortgagees that certain nominees of the mortgagees should be appointed managers and be liable to furnish accounts to the mortgagees and a separate deed of management was contemporaneously executed by the mortgagor in favour of *the nominees to which the mortgagees were not* parties and by which such nominees were appointed managers: *Held*—That the managers

of interest the mortgagees *shall accept the same* in lieu of and in satisfaction for interest at nine and a half per cent *Held*—That the stipulation for payment of interest at the rate of nine and a half per cent. was not penal The circumstances under which a *purdanashin* woman agrees to sell or mortgage property in which she is interested must be carefully examined in order to ascertain that she had independent advice, that she had sufficient intelligence to understand the relevant and important matters, that she did understand them as they were explained to her, that nothing was *concealed and that there was no undue influence* or misrepresentation *Sunitabala* v. *Dhara Sundari, L. R. 46 I A. 272 : s c I. L. R. 47 Calc. 175 ; 24 C. W. N. 297 (1919),* referred to. MOTILAL DAS *v.* THE EASTERN MORTGAGE AND AGENCY COY, LTD. (P C.) **25 C. W. N. 265**

———————— *Mortgage by widow with sanction of Court which granted her letters of administration—Lender, if under any obligation to enquire as to necessity for loan and the truth of the allegations on which sanction obtained—Grant of administration, if can be collaterally attacked in reversioner's suit challenging the mortgage—Fraud, necessity for specific allegations in plaint.* A Hindu widow who was granted letters of administration to the estate of her husband mortgaged certain properties with the sanction of the Probate Court: *Held,* in a suit by the reversioner challenging the transaction on the ground, amongst others, of non-existence of legal necessity, that this was not a case of advancing money having regard to the legal necessity of a Hindu widow but merely upon the leave granted by the Court which permitted her to mortgage the property. It is incorrect to suppose *that having regard to the sanction granted* by a Probate Court a person has still to enquire as regards the necessity for such advance. If he *bonâ fide* relied upon the order and made the advance, there is no onus on him to go and make *enquiries about the truth of the allegations on* which sanction was given. To challenge such a transaction it has to be shown that the person who got the sanction knew that the facts were false or that he was instrumental in *getting* the

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order from the Court upon false representation: *Held*, as to the contention that the letters of administration were granted improperly and on insufficient materials, that the Civil Court had no jurisdiction to declare the order granting the letters of administration null and void The only proper Court to set it aside was the Probate Court: *Held*, further, that allegations of fraud have to be particularised in the plaint and unless this is done the question of fraud cannot be dealt with. ANNADA CHARAN MONDAL *v.* ATUL CHANDRA MALIK (1919) . . . **23 C. W. N. 1045**

——— *Mortgage by father, not for necessary purpose—Conditional decree—Personal decree against father and against ancestral properties of father and sons—Civil Procedure Code (V of 1908), O. XXXIV, r. 6.* A suit was instituted against a Hindu father and his sons on a mortgage bond executed by the father alone. The Courts found that it was not for any purpose binding upon the sons; *held*, that the mortgage was entitled to a conditional decree, under O. XXXIV, r. 6, Civil Procedure Code, against the father personally, and against the joint family property of himself and his undivided sons, for the recovery of the balance, in case the sale-proceeds of the father's share of the mortgaged property was insufficient. KANDASAMI GOUNDAN *v.* KUPPU MOOPPAN (1920) **I. L. R. 43 Mad. 421**

HINDU LAW—PARTITION.

See CIVIL PROCEDURE CODE, 1882, s. 244. **I. L. R. 1 Lah. 134**

——— **By Manager—**
See LIMITATION ACT, 1908, ACT. 62. **I. L. R. 45 Bom. 313**

——— **Oral Evidence Admissible to prove—**
See EVIDENCE ACT, s. 91. **I. L. R. 41 Bom. 466**

——— **Representation of Minors, regarding—**
See HINDU LAW, JOINT FAMILY. **I. L. R. 44 Bom. 166, 179**
See U. P. LAND REVENUE ACT, 1901, s. 111. . . **I. L. R. 35 All. 126**

1. ——— **Reunion after partition**—*Whether, after separation in estate, a minor member continuing to live jointly with an adult member, becomes a reunited member of the family—Survivorship.* When after partition in district shares amongst Hindu brothers, some of whom were minors, the minor brothers continued to live jointly with one of the adult brothers, that fact alone did not constitute a reunion with him after partition. In order to constitute a reunion there must be a junction of estate with an intention to reunite. RUSI MENDLI *v.* SUNDAR MENDLI (1910) **I. L. R. 37 Calc. 703**

2. ——— **Self-acquisition**—*Certain family property allotted to one branch of the family—Subsequent purchase of the allotted property by a member of another branch with his own money—Exclusion by the purchaser of the other member of his branch.* Certain family property was allotted to a member of one branch of the family in virtue of a compromise. It was subsequently purchased by a member of the other branch with his own money which was not part of the joint family money. The purchaser did not intend by the purchase to merge the property in the joint family property, and excluded his brother from it. Subsequently, the brother having brought a suit for partition claimed a share in the property purchased by the defendant along with a share in the other joint property: *Held*, that the plaintiff was not entitled to claim a partition subject to the right of the defendant to retain an additional quarter share for himself, but that the property purchased by the defendant became his self-acquisition. BAJABA *v.* TRIMBAK VISHVANATH (1909) **I. L. R. 32 All. 106**

2 (*a*) ——— In a joint Hindu family governed by Mitakshara one of the sons obtained certain elementary education in astrology from his father but no family money was expended. He ceased to live with the family and later made a lot of money at astrology. *Held* that the money was self acquired. DURGA DUT JOSHI *v.* GANESH DUT JOSHI **I. L. R. 34 Bom. 305**

3. ——— **Temporary partition**—*Temporary partition, to be followed by final partition, does not destroy the tenancy-in-common—Purchaser of part from one parcener entitled to enforce his right by partition—Alienee of portion—Necessary party to such suit.* An award, which purported to effect a division between several individual co-parceners, allotted each co-parcener a share and provided that each should enjoy the share allotted to him for a time and that at the end of such period, a re-partition according to profit and loss should be effected of all the properties. One of the co-parceners sold a portion of the share allotted to him to *A* and a portion was sold in execution of a decree for rent obtained by the landlord against all the co-parceners and purchased by *B*. *A* brought a suit for partition against all the co-parceners without making *B* a party. *B* was subsequently added more than twelve years after the date when the re-partition was directed by the award: *Held*, (i) that the partition was not final and the co-parceners, till the final partition, continued to be joint-tenants or tenants-in-common, subject to the separate enjoyment of the portions allotted to each. (ii) That the proper remedy of *A* was by a suit for partition of the whole under the terms of the award. (iii) That *B* was a necessary party and as he was joined after the suit as against him was barred, the suit ought to be dismissed. DURI BHAGAVANLU *v.* TADEPATRI VEERAVADHANULU (1909) . . **I. L. R. 33 Mad. 246**

4. ——— **Alienee's share**—*Alienee from co-parcener may sue for partition of that co-parcener's share only.* When certain items of family properties are conveyed by one of two co-parceners of an Hindu family to a stranger for purposes not binding on the family, the alienee from the other co-parcener of his share in the said properties may, without instituting a general suit for partition of the entire family property, maintain an action for the partition of his share in the said items. IBURAMSA ROWTHAN *v.* THIRUMALAI MUTHUVEERA THERUVENKATASAMI NAICK (1910) **I. L. R. 34 Mad. 269**

5. ——— **Mother's share**—*Mitakshara—Partition—Mother's share, son partition between sons—Mother's right to share where merely legal severance of interest between sons without partition by metes and bounds.* Under the Mitakshara law upon

HINDU LAW—PARTITION—*contd.*

a partition being made by sons, after the death of their father the mother is entitled to a share equal to that of a son; but she would obtain such a share only if an actual partition took place between the sons. A mere severance of interest where no actual division of the property takes place does not confer on the mother a right to a share. *Ganesh Dutt* v. *Jewach, I. L. R. 31 Calc. 262,* distinguished. BETI KUNWAR *v.* JANKI KUNWAR . . . . I. L. R. 33 All. 118

6. ———— Illegitimate son, share of—*Partition with legitimate sons after death of father—Illegitimate son takes one-half of the share of the legitimate son—Marriage, proof necessary to establish.* The fact that a woman was living under the control and protection of a man, who generally lived with her and acknowledged her children as his will raise a strong presumption that she is the wife of that man. This presumption will however, be rebutted by proof of facts which show that no marriage could have taken place. Where relations and castemen who would have been present at the marriage if it had taken place are not called as witnesses, and persons who would have been invited have received no invitation the presumption will be that no marriage has taken place. When after a man's death, a partition of his property is effected between his legitimate and illegitimate sons, the illegitimate son takes one-half of what the legitimate son actually takes and not one-half of what a legitimate son in his place will get. *Kasaree* v. *Samardhan, 5 N. W. P. H. C., 94,* followed. CHELLAMMAL *v.* RANGANATHAM PILLAI (1910) . . . I. L. R. 34 Mad. 277

7. ———— Partial partition—*Re-union.* Out of six co-parceners in a joint Hindu family, three separated under a deed of partition from the rest who continued joint as before. The Court found on these facts that the last three persons either continued as before to be co-parceners or they must be held as having immediately re-united with each other after executing the deed of parti-

was that the co-parceners agreed to effect not a complete but partial disruption of the co-parcenery, that, in other words, three of them separated from the rest and also *inter se* and that the latter agreed to continue joint. ANANDIBAI *v.* HARI SUBA PAI (1911) . . . . I. L. R. 35 Bom. 293

8. ———— Grandmother—*Mitakshara—Whether grandmother entitled to share in the case of a partition between father and sons. Held,* that upon a partition between a father and his sons, the grandmother, that is, the father's mother, does not get a share in the case of a family governed by the Benares school of the Mitakshara law. *Radha Kishen Man* v. *Bachchaman, I. L. R. 3 All. 118,* followed. *Sheo Dayal Tewaree* v. *Judoo Nath Tewaree, 9 W. R. 61; Badri Ray* v. *Bhagwat Narain Dobey, I. L. R. 8 Calc. 649,* and *Shibbosoondery Dabia* v. *Bussomutty Dabia, I. L. R. 7 Calc. 191* distinguished. SHEO NARAIN *v.* JANKI PRASAD (1912) . . . . I. L. R. 34 All. 505

9. ———— Father's debts—*Suit for partition—Decree for father's personal debt not illegal or immoral—Decree to be enforced by sale in execution of the entire family estate during father's lifetime—Debt antecedent to the institution of the suit.* A son brought a suit against his father and the father's creditors for partition of his half share in certain ancestral properties and for a declaration tha
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to enforce their mortgages. *Held,* that a decree
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execution in
Meenakshi Naidu v. *Immudi Kanaka, L. R. 16 I. A. 1,* followed. DATTATRAYA VISHNU *v.* VISHNU NARAYAN (1911) . . . . I. L. R. 36 Bom. 68

10. ———— Right of way—*Impartible property—Presumption of law—Implied reservation of right of way on partition of estate—Mitakshara—Mayukha.* Under Hindu Law in the absence of anything to show that at the partition the passage was allotted to either one party or the other exclusively, the presumption is that it continued joint and undivided even after the partition. That presumption must be rebutted by clear proof by the party who alleges that the passage was not reserved as joint but was divided and allotted to him exclusively as his share. According to the Mitakshara and the Vyavahara Mayukha, rights of way and rights to wells and water belonging to a joint family are indivisible: and if there is no evidence that at the partition of the family estate they were divided, the law will hold that they continued to retain the character of indivisibility attached to them by law having regard to the nature of the rights in question. NATHUBHAI DHIRAJRAM *v.* BAI HANSGAVRI, (1912) . . . . I. L. R. 36 Bom. 379

11. ———— Decree for partition, preliminary—*Effect of appeal against such decree—Decree effects severance, which is not affected by the subsequent appeal.* A preliminary decree directing a partition effects severance of the joint family and the divided status is not affected by filing an appeal against such decree. Subsequent births or deaths cannot deprive any of the parties or their representatives of their shares allotted to them by such decree. *Subraya Mudali* v. *Manicka Mudali, I. L. R. 19 Mad. 345,* followed. *Sakharam Mahadev Dange* v. *Hari Krishna Dange, I. L. R. 6 Bom. 113,* dissented from. *Joy Narain Giri* v. *Girish Chunder Myti, I. L. R. 4 Calc. 434,* referred to. Such a decree, like other decrees, if right at the time it was passed, cannot be varied by reason of events subsequently happening. THANDAYUTHAPANI KANGIAR *v.* RAGUNATHA KANGIAR (1911) I. L. R. 35 Mad. 239

12. ———— Requisites for—*Partition—Agreement to hold property in certain specific and defined shares, effect of—Re-union, failure to prove as alleged.* The members of a joint Hindu family came to the following agreement:—"Now we have already come to terms, and according to the shares given below we have been in possession and enjoyment of our respective shares. As regards it we have with our mutual consent entered into an agreement according to the terms given below. The same share in the property which is in the possession of a particular person as given below shall be considered to be the property of that very person who is in possession thereof. If any of us brings any suit in the Civil or Revenue Court to the effect that his share is less or he is a loser

HINDU LAW—PARTITION—*contd.*

it shall be considered to be false in every Court. By virtue of this agreement no person shall be competent to bring any claim in any Court in respect of any portion of the property other than the property detailed below." Then followed a specification of the villages belonging to the family and the shares in which those villages were thereafter to be held. From that time the property had been entered in the register in accordance with the arrangement contained in the agreement, and the agreement had been acted upon up to the time of suit. *Held* by the Judicial Committee (affirming the decision of the High Court), that on the evidence and circumstances of the case, the agreement was one which operated as a partition of shares, and the family thenceforth ceased to be joint in accordance with the principle laid down in *Appovier* v. *Rama Subba Aiyan, 11 Moo. I. A. 75, Balkishen Das* v. *Ram Narain Sahu, I. L. R. 30 Calc. 738; L. R. 30 I. A. 139*, and *Parbati* v. *Naunihal Singh, I. L. R. 31 All. 412; L. R. 36 I. A. 71.* There was no re-union. That was a question of fact, and there was no evidence to show that any of the members of the family re-united, or even contemplated re-union. RAGHUBIR SINGH *v.* MOTI KUNWAR (1912)

I. L. R. 35 All. 41

13. ——————————— *Requisites for partition—Partition created by so-called will in life-time of father dividing family property among his sons and taking no share himself—Double share to eldest son—Unequal partition under alleged custom—Provision for forfeiture on mismanagement or bad behaviour—Conduct of parties after execution of document of partition.* By a document called a "Will" dated the 26th of November, 1895, the father and head of a Hindu joint family governed by the Mitakshara law recorded a division of the ancestral family property amongst his three sons (giving himself no share but allotting a double share to his eldest son). The document recited that, "my three sons are at present fully qualified to conduct the business. Therefore in order to avoid a dispute after my death I have at present, while in a sound state of body and mind and of my own free will and accord, divided the property among my sons, heirs, as follows." Then followed the details of the division. There was provision that, "If I at any time come back from pilgrimage and find mismanagement or character of any one bad, then I shall have power to cancel this will which shall be enforced from the date of its execution" and the document concluded as follows:—"All the three sons were put in separate possession of the estate in the beginning of the year 1303 Fasli" (September 1885) "I have no other heir having a right besides those mentioned in this will. I have therefore executed this will in order that it may serve as evidence." Mutations of the various shares were subsequently made into the names of those to whom they were separately allotted, and the evidence showed that the division had been assented to, acquiesced in, and acted upon by the sons up to 1905. In a suit brought in September 1905, four years after the father's death, by the two younger sons for partition of the property which they alleged to be joint and undivided, and of which they claimed to be entitled to two one-third shares. *Held* (reversing the decision of the High Court), that the document of the 26th of November, 1895, was not a will but was intended to operate from its date and was in fact, a family arrangement contemporaneously made and acted upon by all parties, the effect of which was, under the circumstances of the case, to create a partition of the joint ancestral property. There was nothing in the fact that the document was called a will doubtedly made in fact, and which was acted upon for ten years without any dispute or misunderstanding as to the respective rights of the parties under it. *Held*, also, that the provision in the will giving the father power to cancel it in certain events, evidenced a contractual condition which the sons accepted in order to obtain the partition, which gave them immediate possession of the property, and viewed thus, the contractual acceptance of a power of forfeiture in case of bad behaviour would not be sufficient to prevent the partition operating *in praesenti.* BRIJRAJ SINGH *v.* SHEODAN SINGH (1913)

I. L. R. 35 All. 337

14. ——————— Res judicata—*Estoppel—Civil Procedure Code (Act XIV of 1882), s. 13.* A decree for partition made in a suit instituted by a member of a joint Hindu family is *res judicata* as between all co-sharers who are parties to the suit. Where, therefore, in a series of suits all the co-sharers except one have obtained decrees partitioning to them their respective shares by metes and bounds, a co-sharer, who was a party to the suits, is estopped from alleging that the property left unpartitioned is less than the share to which he is entitled. NALINI KANTA LAHIRI *v.* SARNAMOYI DEBYA (1914) **I. L. R. 41 I. A. 247**

15. ——————— Partition by grandsons—*Paternal step-grand-mother entitled to a share.* According to the Mitakshara, the paternal step-grandmother is entitled to a share in the family estate when it is partitioned among her grandsons. VITHAL RAMKRISHNA *v.* PRAHLAD RAMKRISHNA (1915). **I. L. R. 39 Bom. 373**

16. ———————Property to be partitioned should be taken as existing at the date of the suit—*Shares taken away by some of the co-parceners before the suit not to be taken into account.* The plaintiff, as representing one branch of the family sued the defendants who represented other two branches, to recover by partition his share in the property which he alleged was one-third. The plaintiff had two brothers, one of whom had separated from the family by receiving his share (which then was 1-12th) some years before the suit. The defendants contended that the 1-12th share should go in reduction of the plaintiff's share at the partition, that is, he was entitled to 1-3rd minus 1-12th-¼th share. The lower Court having awarded a ⅓rd share to the plaintiff, some of the defendants appealed :—*Held*, that the share to which the plaintiff was entitled in the family property was ⅓rd and not ¼th, for partition should be made *rebus sic stantibus* as on the date of the suit. PRANJIVANDAS SHIVLAL *v.* ICHHARAM (1915)

I. L. R. 39 Bom. 734

17. ——————— By a minor co-parcener—*Right to mesne profits—No exclusion—Separate living of minor co-parcener—Same rule as in the case of major co-parceners suit for account—Principle different—Provision for expenses of Upanayanam and marriage of co-parceners in a partition suit—Setting apart of funds—Whether Upanayana and marriage of male co-parceners are obligatory ceremonies—Provision for marriage of unmarried sisters*

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whether obligatory—Whether expenses of marriage of a male co-parcener is a reasonable expense—Right to maintenance of mother—Whether only son's share liable or share of step-sons also liable—Doctrine of Mitakshara as to right by birth examined—Civil Procedure Code (Act V of 1908), O. XLI, r. 3. In a suit for partition by a minor co-parcener against his step-brother who was a major, the plaintiff is not entitled to recover mesne profits in the absence of proof of exclusion by the manager. The question of the right of a minor co-parcener to an

v. *Subbanna, I. L. R. 7 Mad. 564,* and *Abhayachandra Roy Choudhury* v. *Pyari Mohan Guho, 5 B. L. R. 364,* referred to and explained. Where the mother of the plaintiff was joined as a defendant in the suit for partition, but a separate provision for maintenance was refused by the Court of First Instance on the ground that her maintenance should come out of the plaintiff's own share only, and she had appealed to the lower

it was held that the plaintiff who was a respondent in the Second Appeal was competent to prefer a memorandum of objections in the High Court objecting to the lower court's refusal to make a provision for her maintenance, as he is

with the rights of all parties before it. *Per* SUNDARA AYAR, *J.*—In a suit for partitions provision must be made in the decree for expenses of the Upanayanam and marriage of male coparceners as well as for the expenses of the marriage of the unmarried sisters out of the family property whether it is ancestral or separate or self-acquired property of the father of the parties. Marriage is a proper ceremony for a Brahmin and an obligatory ceremony for all Hindus with extremely few exceptions. Modern custom is undoubtedly in favour of allowing the provision. In deciding what ceremonies are regarded as pro-

Ammal, 5 Mad. H. C. R. 377, Kumaravelu v. *Virana Goundan, I. L. R. 5 Mad. 29, Subbarayalu Chitti* v. *Kamalavalli Thayramma, I. L. R. 35 Mad. 147,* referred to and followed. *Hemangini Dasi* v. *Kedarnath Kundu Chowdhury, I. L. R. 16 Calc. 758,* distinguished. *Per* SADASIVA AYYAR, *J.*—Initiated brothers must set apart from the paternal estate the expenses of the initiation of the uninitiated brothers and sisters before dividing the paternal property whether it is ancestral or self-acquired property of the father. Upanayana or the ceremony of investiture of thread, in the case of a male member of a co-parcenary, and marriage in the case of a female are obligatory *samskaras* which the initiated brothers are bound to perform for their uninitiated brothers and sisters, and the initiated brothers are bound to make a provision for the expenses of performing the same out of the paternal estate before it is divided. Marriage in the case of a male member of a coparcenary is not an obligatory *samskara* for the performance of which the initiated brother is bound to make a provision out of the paternal property at the partition. *Kameswarasastri* v. *Veeracharlu, I. L. R. 34 Mad. 433,* referred to. *Per* SPENCER, *J.*, on reference—Marriage is an obligatory ceremony on Hindus who do not desire to adopt the life of a Sanyasi, and a fund for the expenses of the marriage of unmarried co-sharers should be set apart at the partition of the paternal estate. SRINIVASA IYENGAR *v.* THIRUVENGADATHA AIYANGAR (1914)

I. L. R. 38 Mad. 556

in the absence of fraud or other improper conduct, the only account the *karta* is liable for is as to the existing state of the property divisible, and the enquiry directed by the Court must be in the manner usually adopted to discover what in fact, the property now consists of. *Chuckun Lall Singh* v. *Pooran Chunder Singh, 9 W. R. 483, Konerrav* v. *Gurrav, I. L. R. 5 Bom. 589, Raja Setrucherla Ramabhadra* v. *Raja Setrucherla Virabhadra Suryanarayana, I. L. R. 22 Mad. 470, L. R. 26 I. A. 167, Narayan bin Babaji* v. *Nathaji Durgaji Marwadi, I. L. R. 28 Bom. 201, Balakrishna Iyer* v. *Muthusami Iyer, I. L. R. 32 Mad. 271, and Shookmoy Chandra Das* v. *Monoharri Dassi, I. L. R. 11 Calc. 684; L. R. 12 I. A. 103,* referred to. *Obhoy Chundra Roy Choudhury* v. *Pearce Mohun Gooho, 13 W. R. (F. B.) 75; 5 B. L. R. 347,* and *Damodardas Maneklal* v. *Uttamram Maneklal, I. L. R. 17 Bom. 271,* explained. PARMESHWAR DUBE *v.* GOBIND DUBE (1915)

I. L. R. 43 Calc. 459

18 (a) ———— **Separation**—*Suit by one member.*—A member of a joint family become separated from the others by the fact of suing them for partition. SOUNDARARAJAN *v.* ARUNACHALAM CHETTY **I. L. R. 39 Mad. 159**

sion of certain property with the defendants as co-sharers under leases which purported to be permanent leases granted to them under an arrangement sanctioned by the Court, and where the only person at the time of the suit interested in challenging the plaintiffs' right was a party to the suit and did not contest the suit:—*Held,* that the plaintiffs were entitled to partition and the fact that the partition would have to be set aside if the reversioner on coming into possession of the property succeeded in a suit for setting aside the leases, was not sufficient ground for refusing the plaintiffs the right to partition. *Sundar* v. *Parbati, I. L. R. 12 All. 51; L. R. 16 I. A. 186,* and *Bhagwat Sahai* v. *Bipin Behari Mitter, I. L. R. 37 Calc.*

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913; L. R. 37, I. A. 198, followed. SAIMIULLAH *v.* PROBHAT CHANDRA SEN (1916)

I. L. R. 43 Calc. 1118

20. ——— Share of step-mother. Under the Mitakshara law a step-mother is entitled, upon partition of the joint family property, to share equal to that of a son. *Hemangini Dassi* v. *Kedarnath Kundu Chowdhry, I. L. R. 16 Calc. 758*, distinguished, *Mathura Prasad* v. *Dooka, (1890) All. Weekly Notes, 124*, followed. HAR NARAIN *v.* BISHAMBHAR NATH (1915)

I. L. R. 38 All. 83

21. ——— Marriage of co-parcener—*Provision for expenses of Marriage at partition—Expenses incurred subsequent to suit but before decree—Anticipatory provision for future marriage, right for—Decree in partition suit—Gift by co-parcener of lands, less than his share—Validity of—Estoppel.* An unmarried co-parcener is not entitled to have an anticipatory provision made for the expenses of his future marriage at partition *Srinivasa* v. *Thiruvengathiengar, I. L. R. 38 Mad. 556*, dissented from. Where the expenses of marriage of a co-parcener were incurred subsequent to the institution of a suit for partition but prior to the decree of the Court of first instance: *Held*, that the severance of the joint family was effected only by the decree, and that the expenses should be credited to him in the account to be taken in the suit. Where a member of a joint Hindu family made a gift of some immoveable property, which was not unreasonable regard being had to the extent of his share in all the joint family properties, and his undivided son did not impeach the gift during his father's lifetime: *Held*, that neither the son nor the grandson could question the validity of the same after the donor's death. NARAYANA *v.* RAMALINGA (1915)

I. L. R. 39 Mad. 587

22. ——— Shares of adopted son and natural born son of another father—*Construction of Dattaka Chandrika, s. 5, paragraphs 24 and 25—Position of adopted son in joint Hindu family.* A Hindu joint family in Bombay governed by the Mitakshara law as altered or interpreted by the Vyavahara Mayukha, consisted of two sons *H* and *B*. *H* died in September 1900 leaving a widow who was then pregnant. *B* died on 17th December of the same year leaving a widow to whom he gave authority to adopt. On 18th December the widow of *H* gave birth to a son, the respondent; and in February 1901 the widow of *B* adopted the appellant as a son to her husband. In a suit for partition by the appellant against the respondent. *Held* (reversing the decision of the Appellate High Court, and restoring that of the Trial Judge of the same Court), that, on the construction of paragraphs 24 and 25 of s. 5 of the Dattaka Chandrika, the adopted son was entitled to a share equal to the share of the natural born son. The doctrine according to which an adopted son on partition takes only a reduced share in the family property applies only to cases in which the competition is between an adopted son and a subsequently born natural son of the same father. *Raghubanund Doss* v. *Sadhu Churn Doss, I. L. R. 4 Calc. 425*, dissented from. *Tara Mohun Bhuttacharjee* v. *Kripa Moyee Dabia, 9 W. R. 423*, and *Dinonath Mukerji* v. *Gopal Churn Mukerji, 8 C. L. R. 57*, followed. As so construed, paragraphs 24 and 25 of s. 5 of the Dattaka Chandrika are not in conflict with any principle of the Mitakshara or of the Vyavahara Mayukha, and they are consistent with the reference to the text of Vasistha in paragraph 1, s. 10 of the Dattaka Mimansa. An adopted son occupies the same position in the family of the adopter as a natural born son, except in a few instances which are accurately defined in the Dattaka Chandrika and the Dattaka Mimansa and relate to marriage and to competition between an adopted son and a subsequently born legitimate son to the same father. *Sumboo Chunder Chowdry* v. *Naraini Dibeh, 3 Knapp 55*, *Padma Coomari Debi* v. *Court of Wards, L. R. 8 I. A. 229*, and *Kali Komul Mozumdar* v. *Uma Sunker Moitra, L. R. 10 I. A. 138*, followed. The position of an adopted son in the family cannot now be decided by reference to the place which was assigned by Manu to the twelve then possible sons of a Hindu, who, whatever their rights may have been then, are long since obsolete. GAGINDAS BHAGWANDAS *v.* BACHU HURKISSONDAS (1915) . I. L. R. 40 Bom. 270

23. ——— Blindness—*Compromise by Pardanishin Guardian—Dishonest claim—Invalidity.* An incurably blind man, unless he was born blind, is not excluded by Hindu law from inheriting nor from participating upon a partition *Mohesh Chunder Ray* v. *Chunder Mohun Ray, 14 B. L. R. 273*, and *Murarji Gokuldas* v. *Parvatibai, I. L. R. 1 Bom. 177*, approved. A plaintiff having instituted against a *pardanishin* woman and her infant daughter a suit based in substance upon an allegation which was untrue and in which he had no honest belief, induced the mother to enter into a compromise on behalf of herself and her daughter. The compromise was assented to by the Court and a decree made in pursuance of it. *Held*, that the daughter was entitled in a subsequent suit to have the compromise and decree set aside. GUNJESHWAR KUNWAR *v.* DURGA PRASAD SINGH (1917) . . . L. R. 44 I. A. 229

24. ——— Between an adopted son and a subsequently born aurasa son of a Sudra—*Share of adopted son—Marriage expenses of unmarried members—Provision for, in partition-decree.* Among Sudras, on a division of the family properties between an adopted son and a subsequently born *aurasa* son, the adopted son is only entitled to one-fifth of the estate. The *obiter dictum* to the contrary in *Raja* v. *Subbaraya, I. L. R. 7 Mad. 253, 263*, not followed. The Dattaka Chandrika is not an authority on Inheritance or Partition. In partition-decrees, provision should be made for the marriage expenses of the unmarried members of the family. But such a provision should be made only for persons who are of the same degree of relationship as those who have been married at the expense of the family. The decision of the majority in *Srinivasa Ayengar* v. *Thiruvengadathaiyangar, I. L. R. 38 Mad. 556*, followed. *Narayana* v. *Ramalinga, I. L. R. 39 Mad. 587*, not followed. GOPALAM *v.* VENKATARAGHAVULU (1915) . . . . I. L. R. 40 Mad. 632

25. ——— Evidence of separation—*Institution of suit for partition by members of joint family—Unequivocal expression of intention to separate—Dismissal of suit for partition on technical grounds.* *Held*, that the institution of a suit for partition by one of the members of a Hindu joint family governed by the Mitakshara law amounted to an unequivocal desire of the plaintiff

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for separation, and effected his separation from the joint family. It was immaterial in such a case whether the co-sharers assented. *Girja Bai* v. *Sadashiv Dhundhiraj, I. L. R. 43 Calc. 1031; L. R. 43 I. A. 151.* Their Lordships said:—"A decree may be necessary for working out the result of the severance, and for allotting definite shares, but the status of the plaintiff as separate in estate is brought about by his assertion of his right to separate whether he obtains a consequential judgment or not." KAWAL NAIN v. BUDH SINGH (1917) . **I. L. R. 39 All. 496**

26. ——— **On behalf of minor**—*Death of minor before the filing of written statement—Severance of the joint status, if effected—Legal representative of minor, right of, to continue the suit.* The rule that the institution of a suit for partition of joint family property effects a severance of the joint status is not applicable to a suit instituted on behalf of a minor; for in such a suit it is for the Court to determine whether a decree for partition will be beneficial to the minor. Where a minor plaintiff dies during the pendency of the suit his legal representatives are not entitled to continue the suit. *Girja Bai* v. *Sadashiv Dhundiraj, I. L. R. 43 Calc. 1031; Sundara Rajan* v. *Arunachalam Chetti, I. L. R. 39 Mad. 159,* referred to. CHELIMI CHETTY v. SUBBAMMA (1917)

I. L. R. 41 Mad. 442

27. ——— **Agreement for partition of property of their husbands executed by two Hindu widows**—*Circumstances invalidating such agreement.* Two brothers, constituting a joint Hindu family, died within a year of each other, each leaving a widow surviving him. The two widows executed a deed of partition of the property of their husbands, in which it was recited that the husbands had died on certain dates; that they had been joint "in food, business and everything," but also, nevertheless, that the executants "became the owners of the property left by their husbands in equal shares." The pro- [illegible]

[illegible] last) for possession of the whole estate: *Held,* that the latter was entitled to succeed. Either the gratuitous alienation by her of one half of the property to which she was entitled was the result of deception practised upon her by some one better acquainted with the facts, or else both parties to the deed of partition were under a common mistake regarding their respective rights. LACHMI KUNWAR v. DURGA KUNWAR (1918)

I. L. R. 40 All. 619

28. ——— **Preliminary decree—Mother's share determined**—*Decree for plaintiff for his share—Mother's death before the final decree—No* [illegible]

[illegible] joining *Y* and *R* as defendants. A preliminary decree was passed holding that *Y* was entitled to one-third share and decreeing to the plaintiff a third share in the estate. Before any final

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decree could be passed, however, *Y* died and an application was made by *A* praying that owing to the removal of *Y* by death, his share should be held to have increased to one moiety and the decree should be amended accordingly. The Subordinate Judge granted the application. On appeal to the High Court, it was contended: (1) that the [illegible] rate suit and [illegible] suit. *Held,* (i) [illegible] effected no share [illegible] ship of *Y* and therefore the share assigned to her remained an integral part of the estate available for division among the heirs of her husband. *Sheo Dayal Tewaree* v. *Judoonath Tewaree, 9 W. R. 61, Debi Mangal Prasad Singh* v. *Mahadeo Prasad Singh, I. L. R. 34 All. 231,* followed. (ii) That there was no necessity to bring a separate suit as when *Y* died the cause of action survived and her heirs had to be brought on the record; the Court was bound under O. XXII, r. 5 of the Civil Procedure Code, 1908, to make inquiry as to who those heirs were in case any dispute arose upon the subject. RAOJI BHIKAJI v. ANANTA LAXMAN (1918) . . . . **I. L. R. 42 Bom. 535**

29. ——— **Right of a third party to**—*Half of the property partitioned subsequently established by suit—Right of original parties to reparti-* [illegible] ed the other for [illegible] to be the joint [illegible] compromised, and [illegible] was embodied in a decree. Subsequently, however, a cousin of the parties established by suit his title to one half of the family property which had been already divided between the two brothers. *Held,* that it was open to the two brothers—if not *eo nomine* to re-open the partition already effected—at any rate to ask the Court to adjust as between them the loss occasioned by the success of their cousin's suit. *Marauti* v. *Rama, I. L. R. 21 Bom. 333* referred to. GANESHI LAL v. BABU LAL (1918)

I. L. R. 40 All. 374

30. ——— **Birth of natural son after adoption**—*Suit for partition by adoptive father and natural son against adopted son—Shares.* In a suit for partition during the lifetime of a Hindu father, the father and a natural born son are entitled to eight shares of the property and the adopted son to one share. *Narasimhappa* v. *Chinna Kenchappa, (1917) 38 I. C., 241 (Mad.)* and *Subbarayudu* v. *Perarazu, Appeal No. 101 of 1914* (unreported) followed. BALAKRISHNAYYA v. VENKATA TRIAMBAKAM (1920)

I. L. R. 43 Mad. 398

[illegible] **and bounds**— [illegible] *to account for* [illegible] *suit for partition but before the date of actual division to be taken out of joint family property.* A suit for partition under Hindu law was filed in 1909. At the actual divi- [illegible] wed the [illegible] certain [illegible] manager personally for the years 1905 to 1909. The defendant having raised objection to this part of the decree. *Held,* upholding the defendants' objection, that he was not liable to account for the mesne profits of the joint family lands. A mana-

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ger of a joint Hindu family is not obliged to keep accounts while the family remains joint, and when a partition is asked for, partition takes place of the property as it exists in the hands of the manager. Under Hindu law, as far as the joint family is concerned, it is considered as one entity until the moment comes for division, and then each party gets his actual share. In the meantime if there are any expenses which should properly be incurred by the joint family purse, those expenses are taken out of the family property, and they cannot be debited to a particular co-parcener. RAMNATH CHHOTURAM *v.* GOTURAM RADHAKISAN (1919) . . . **I. L. R. 44 Bom. 179**

32. ———— **Sale of his share by a co-parcener —Suit by purchaser for partition**—*and for past mesne profits—Past profits cannot be allowed.* In a joint Hindu family consisting of five brothers, two of the brothers sold their shares to the plaintiff. The plaintiff sued for partition of his two-fifths share in the family property and for three years' mesne profits. Both the lower Courts decreed partition and allowed the plaintiff Rs. 63 for past profits. The defendants having objected to the part of the decree awarding past mesne profits. *Held*, that the past mesne profits were wrongly awarded. TRIMBAK GANESH *v.* PANDURANG GHAROJEE (1919) . . **I. L. R. 44 Bom. 621**

33. ———— **By a brother against mother and seven brothers referred to arbitrator.** Ganesh died in 1885 leaving his widow and eight sons, in 1885 his second son Gour brought a suit for partition. It was referred to arbitration and in 1887 award was given by which estate was divided into nine equal parts and allotted to the mother and eight sons. As the five infant sons desired to live with their mother jointly the arbitrator declared their shares to be Rs. 9,890 each but did not divide by metes and bounds. On the mother's death the question having arisen as to the nature of the right of persons to take her share among them at her decease: *Held*, that the share in question was an interest in lieu of the mother's right to maintenance which upon partition amongst the sons was carried out of the sons' shares and at the death of the mother went back to and became part of the shares out of which it came. SASHI BHUSAN SHAW *v.* HARI NARAYAN SHAW. **25 C. W. N. 993.**

33a. ———— **Evidence of—Revenue and village records**—*Decree made at Regular Settlement—Decree for widows of "superior proprietary right" —Rights subjects to those of the other share-holders.* In this case the plaintiffs (respondents) sued for possession of a village by cancellation of a sale-deed of it executed on the 30th of December, 1871, in favour of the predecessor in title of the defendant appellant, by three Hindu *pardanashin* ladies whose husbands had been lineal descendants of the proprietor. The main question raised by the defendant was whether the property (joint, ancestral and undivided property) was or was not joint and undivided at the date of the sale. The appellant alleged that a partition of it had been made; there was no evidence of any deed for the purpose, but he founded his contention chiefly on the terms of the khewat and wajib-ul-arz and of a settlement decree of the 6th of December, 1869, which was for superior rights in favour of the widows, "subject to the rights of the other share-holders." *Held*, that "a definition of shares in revenue and village papers affords by itself but a very slight indication of an actual separation in a Hindu family, and certainly in no case that has come before us could we have regarded such a definition of shares standing alone, as sufficient evidence on which to find, contrary to the presumption of Hindu law, that the family to which such definition referred had separated." Their Lordships adopted with approval the above citation from the decision of EDGE, C. G., in *Gajendar Singh* v. *Sardar Singh*, *I. L. R. 18 All. 176*, as being a correct decision of the law. *Held* as to the decree when on the one hand it declared for superior proprietary rights in favour of the widows, and on the other that these are to be given subject to the rights of the other share-holders, it completely conserved such reversioners' and other ownership rights as are inherent in the succession to a joint family property, and negatived the idea that partition or separation had been effectuated by law in such a manner as to extinguish other proprietary rights. The decree was not equivalent to an affirmation of a partition or separation having taken place, but was entirely consistent with the existence of the property as joint and, undivided, and therefore with no prejudice being effected to the right of the reversioner therein, in this case represented by the respondent (plaintiff). The presumption, therefore, against partition of this ancestral property had not been overcome, and the property remained joint. NAGESHAR BAKHSH SINGH *v.* GANESHA **I. L. R. 42 All. 368**

34. ———— **Competence of member of a joint family to bind himself not to claim partition.** The members of a joint undivided Hindu family can bind themselves for their own life-time not to claim partition of the joint family property. *A fortiori* a similar agreement can be entered into by the remaining members of the family after one member has demanded a partition and separated his share, whether such remaining members be considered as still joint or as tenants in common. And what may be effected by an agreement may be effected equally by means of a submission to arbitration followed by an award. RUP SINGH *v.* BHABHUTI SINGH . . **I. L. R. 42 All. 30**

35. ———— **Suit instituted by minor member of family**— *Difference in effect of, as compared with suit instituted by adult members—Power of manager to dedicate family property for religious purposes. Held*, that the institution of a suit by a minor member through his next friend for partition of joint family property has not the same effect as the institution of a similar suit by an adult member of the family, that is to say, the mere institution of the suit does not effect a separation of the family, but separation only takes place when the suit is decreed. *Girja Bai* v. *Sadashiv Dhundiraj, I. L. R. 43 Calc. 1031*, distinguished. *Chelimi Chetty* v. *Subbamma, I. L. R. 41 Mad. 442*, followed. *Held*, also, that, although the managing member of a joint Hindu family may be competent to dedicate some portion of the family property to religious uses during his life-time, he cannot make such a dedication by will. *Vitla Butten* v. *Yamenamma, 8 Mad. H. C. Rep. 6, Suraj Bunsi Koer* v. *Sheo Persad Singh, I. L. R. 5 Calc. 148, Rathnam* v. *Sivasubramania, I. L. R. 16 Mad. 353*, and *Lakshman Dada Naik* v. *Ramchandra Dada Naik, I. L. R. 5 Bom. 48*, followed. LALTA PRASAD *v.* SRI MAHADEOJI BIRAJMAN TEMPLE **I. L. R. 42 All. 461**

HINDU LAW—PARTITION—*contd.*

36.———— Part of property omitted from plaint—*Amendment of plaint.* In a suit for partition of the property of a joint Hindu family all the properties which are known, at the time of the institution of the suit, to be joint family properties, must be included in the suit. If, however, by inadvertence or mistake or by fraud of any of the parties, some of the joint family properties are not included in the suit, further proceedings may be taken to obtain a partition of them. But it is the duty of the Court to allow an amendment ... longing ... Under ... either ... such amendments as are necessary for the purpose of determining the real question or issues raised in the suit. MUKUNDA LAL CHAKERBARTY *v.* JOGESH CHANDRA CHAKERBARTY . **1 Pat. L. J. 398**

37.———— *Mithila—joint family—Suit for partition between father and son, whether father's mother, son's mother and son's step-mother entitled to share.* Under the *Mithila* school of Hindu law, in a partition between a father and son at the instance of the son, both the latter's mother and his paternal grandmother are entitled to share equally with him and his father. The share taken by the grandmother is not her *stridhan* and on her death does not devolve upon the heirs to her *stridhan* but goes back to the estate from which it came. Such a share is in lieu of maintenance and does not cease to be ancestral property. The institution of a suit for partition is an unequivocal declaration on the part of the plaintiff (even though he be a minor) of his intention to separate himself from the defendants and his share cannot be diminished by the birth of another member of the family subsequent to such date (in this case subsequent to the date of the preliminary decree) KRISHNA LAL JHA *v.* NANDESHWAR JHA . . . **4 Pat. L. J. 38**

37a. ———— Clear expression of intention to separate, if effects—*After notice expressing intention to separate, joint family if liable for marriage expenses of members—Father's right to give money to daughter.* Under the Hindu law, it is open to the members of a joint family to make a division and a severance of interest in respect of a part of the joint estate whilst retaining their status as a joint family and holding the rest as ... member of the family to separate himself and to enjoy his share in severalty has the effect of creating a division of the interest which until then he had held in jointness. No obligation therefore lay on the joint family to provide for the expenses of the marriage of some of the Plaintiffs which took place after the latter had given to their co-parceners a notice clearly expressing such an intention but before a decree for partition was made in their suit in the Court of first instance. The father has undoubtedly the power under the Hindu law of making, within reasonable limits, gifts of moveable property to a daughter and in one case the Judicial Committee upheld the gift of a small share of immoveable property on the ground that it was not shown to be unreasonable. K. KAMALINGA ANNARI *v.* NARAYANA, ANARI P. C) . . . **26 C. W. N. 929**

HINDU LAW—PARTITION—*contd.*

38. ———— Bengal ... Award—... record order— ... of 1908), *O. XXIII, r. 2.—Registration Act (XVI of 1908), s. 17 (1)—Estoppel—Res Judicata—Widow's share, right to release—Succession at death.* In an award in a partition suit brought by an adult son, the minor sons' shares were declared and allotted collectively with the widowed mother's share. Subsequently on one of the minors attaining age and instituting a partition suit for dividing his share, from the others and the mother's share, there was a consent decree incorporating ... minor sons) in favour of the minor sons whose shares had been declared and allotted collectively as aforesaid. This was supported by a petition and an affidavit in the suit, which was signed by the adult brothers agreeing to the arrangement but they had not been made parties to the suit. In the present partition suit by an adult brother claiming a right to the mother's share on her death, the question arose (i) whether the consent order operated as an estoppel by record or *res judicata*, and (ii) as to the nature of the sons' rights to take their mother's share during her lifetime: *Held*, that the decree was outside the scope of O. XXXIII, r. 2 of the Civil Procedure Code and was beyond jurisdiction The adult brothers were not estopped from claiming their share on the death of their widowed mother. The decree did not operate as *res judicata*, inasmuch as the second partition suit was for purposes of dividing up a given collective share left undivided by the award in the first partition On her death, the widow's share which was in lieu of maintenance, went back to the shares out of which it was carved out and the adult sons were entitled to a share. The mother's share as heiress of the deceased minor son went back to the heirs of the last male owner. *Bindesri Naik* v. *Ganga Ram Shahu*, *I. L. R. 20 All. 171*, *Pranal Anni* v *Lakshmi Anni*, *I. L. R. 22 Mad 508*, *Birbhadra Rath* v. *Kalpataru Panda*, *1 C. L. J. 388*, *Gurdeo Singh* v. *Chandrikah Singh*, *I L. R. 36 Calc. 193*, *Gobinda Chandra Pal* v. *Dwarka Nath Pal*, *I. L. R. 35 Calc. 837*, *Sorolah Dasee* v. *Bhooban Mohan Neogi*, *I. L. R. 15 Calc. 292*, and *Balabux* v. *Rrukhmabai*, *I. L. R. 30 Calc. 725*, referred to SHASHI BHUSAN SHAW *v.* HARI NARAIN SHAW (1921) **I. L. R. 48 Calc. 1059**

39. ———— Property left undivided—*At the time of partition—Presumption that there has been a complete partition both as to parties and property—Members hold the family property as tenants-in-common—Fact that a portion of family property is held by them as joint tenants must be proved like any other fact.* When once anything has occurred which effects a separation of the members of a joint Hindu family, they are to be considered as holding the joint family property ... and not tenants-in-common that fact must be proved like any other fact. *Gavrishankar Parabhuram* v. *Atmaram Rajaram (1893) 18 Bom. 611*, discussed. *Anandibai* v. *Hari Suba P... (1911) 35 Bom. 293*; *Balabux Ladhuram* v.

HINDU LAW—PARTITION—*contd.*

(*1903*) *L. R 30 I. A. 130*, relied on. RAMCHANDRA *v.* TUKARAM I. L. R. 45 Bom. 914

40. ———— **Service-inam lands**—*Enfranchisement subsequent to partition in name of a member—Right of a divided member to share in enfranchised lands—Onus of proof.* If a divided member of a Hindu family claims to share in service-inam lands, which belonged to the family but were subsequent to a partition in the family, enfranchised in the name of a member who was the office-holder at the time of the enfranchisement, the onus lies on the claimant of proving not only that he is a member of the original service family but also that the inam was excluded from the partition as undivided property in which the sharers retained their joint rights. *Pyrappa* v. *Syama Rao*, (*1918*) *M. W. N.*, *819*, considered. VENKATASUBBA RAO v. SATYANARAYANAMURTI (1921) . . . I. L. R. 44 Mad. 179

41. ———— **Customs—Patnibhaga—Moopu** A custom was found to exist among the Nattukottai Chetties inhabiting seven villages in the Madura district of the Madras Presidency, whereby when a Chetti during the life of his wife married another wife he appropriated out of his property a portion, called moopu, for the first wife's maintenance, that portion descending to her son if she had one, and the rest of the property was notionally divided, one moiety going to the son or sons by the first wife and the other moiety to the son or sons by the second wife. In a suit for partition brought by the only son of a first wife against his father and the sons by the second wife, the Judicial Committee applied the custom, without, however, determining what the father's share would be in the circumstances, as the question did not arise before their Lordships. The authorities as to the custom of patnibhaga, or the division according to wives, considered. [*Judgment of the High Court reversed.*] PALANIAPPA CHETTIAR *v.* ALAGAN CHETTI (1921)

I. L. R. 44M ad., (P. C.) 740

42. ———————— *Suit by son for partition against father and father's alienee—Alienation held not binding on son—Form of decree to be given to the son.* If in a suit for partition by a son against his father and an alienee from the father, the Court holds the alienation not to be binding on the son, the son is entitled to get a decree for his share in the family properties without any condition being imposed on him to refund the consideration paid by the alienee to the father. *Sahu Ram Chandar* v. *Bhup Singh*, (*1917*) *I. L. R.*, *39 All. 37* (*P. C.*); *L. R.*, *44 I. A*, *126*, applied. The dictum of MITTER, J., in *Koer Hasmat Bai* v. *Sunder Das*, (*1885*) *I. L. 11 Calc.*, *396*, not followed. *Held*, further by SESHAGIRI AYYAR, J. a son is bound to pay only such debts of his father as exist while they are joint; and a son getting a decree for partition becomes divided from his father as from the date of suit for partition. Any liability of the father to refund the consideration to the alienee arising as the result of the decree for partition is a liability for unliquidated damages and not *debt* and even if it becomes a judgment-debt it is not a *debt* existing on the date of suit for partition. SRINIVASA AIYANGAR *v.* KUPPUSWAMI AIYANGAR (1921)

I. L. R. 44 Mad. 801

HINDU LAW—PROSTITUTE'S PROPERTY.

———————— *Stridhan—Prostitute's property, succession to.* The mere fact that a Hindu woman has adopted the life of a prostitute does not sever the tie which connects her to her kindred by blood, and, consequently, her *stridhan* property passes upon her death, in the absence of nearer heirs, to her brother's son as an heir under the Bengal school of Hindu law. *Tara Munnee Dossea* v. *Motee Buneanee*, *7 Mac. Sel. Rep. 325*; *8 I. D.* (*O. S.*) *217*, *Ramnath Tolapattro* v. *Durga Sundri Debi*, *I. L. R. 4 Calc. 550*, *In the goods of Kaminymoney Bewah*, *I. L. R. 21 Calc. 697*, *Ramananda* v. *Raikishori Barmani*, *I. L. R. 22 Calc. 347*, *Sarna Moyee Bewa* v. *Secretary of State for India*, *I. L. R. 25 Calc. 254*, and *Sundari Letani* v. *Pitambari Letani*, *I. L. R. 32 Calc. 871*, overruled so far as they hold that tie of blood is destroyed by unchastity or, in the case of a Hindu woman, by her adopting the life of a prostitute. *Bisheshur* v. *Mata Gholam*, *2 All. H. C. 300*, *Musammat Ganga Jati* v. *Ghasita*, *I. L. R. 1 All. 46*, *Advyapa* v. *Rudrava*, *I. L. R. 4 Bom. 104*, *Kojiyadu* v. *Lakkshmi*, *I. L. R. 5 Mad. 149*, *Subbaraya Pillai* v. *Ramasami Pillai*, *I. L. R. 23 Mad. 171*, *Bhutnath Mondol* v. *Secretary of State for India*, *10 C. W. N. 1085*, *Sundari Dosee* v. *Nemye Charan Daw*, *6 C. L. J. 372*, and *Tripura Charan Bannerjee* v. *Harimati Dassi*, *I. L. R. 38 Calc. 493*, approved. *Sivasangu* v. *Minal*, *I. L. R. 12 Mad. 277*, and *Narasanna* v. *Gangu*, *I. L. R. 13 Mad. 133*, distinguished and dissented from. HIRALAL SINGHA *v.* TRIPURA CHARAN RAY (1913)

I. L. R. 40 Calc. 650

HINDU LAW—RELIGIOUS ENDOWMENT.

See HINDU LAW—ENDOWMENT.

1. ———————— *Mourashi Muth, succession to—Onus of proof—Indian Succession Act* (*X of 1865*), *s. 187—Will not probated, if can be used in evidence and for what purpose—Indian Evidence Act* (*I of 1872*), *s. 32*, (*5*)—*Relationship between Mohunt and Chela, if relationship by adoption—Existence of relationship, statement relating to.* One *R* was the Mohunt of a *muth* known as the Khumbakul Muth. He was succeeded by his *chela S*. After the death of *S* the plaintiff claimed to be his lawful successor as his *gurubhai*. The defendant resisted the claim on the allegation that he had been adopted by *S* as a *chela*. The *muth* in question was admittedly a *maurasi muth*, and the Court found that in *maurasi muth* the *chela* succeeds and in default of a *chela* the *gurubhai* succeeds and when there are more *chelas* than one the eldest generally succeeds but a junior *chela* may succeed if he be found more capable and if he be selected by the last Mohunt as his successor. *Held*, that it was for the plaintiff to prove that he was the *chela* of *R* and that the defendant was not the *chela* of *S*, as he must succeed on the strength of his own title and not on the infirmity, if any, in the title of the defendant. In the course of the evidence in the case two wills alleged to have been executed by *R* and *S* respectively neither of which was proved in the Probate Court were produced, the former of which only was found to be genuine. *Held*, that notwithstanding s. 187 of the Indian Succession Act which is incorporated in the Hindu Wills Act, a will not proved in the Probate Court may be used in evidence for a purpose other than the establishment of a right as executor or legatee and in the present case the recital in the will of *R*

HINDU LAW—RELIGIOUS ENDOWMENT— *contd.*

which was found to be genuine, that he had no one else as his *chela* except *S* was admissible in evidence under s. 32 cl. (5) of the Evidence Act inasmuch as the [illegible] and his *chela* is a [illegible] statement that *A* [illegible] *chela* is a statement relating to the existence of a relationship. ACHYUTANANDA DAS *v.* JAGANNATH DAS (1914) . . . . **20 C. W. N. 122**

2. ——————— *Proof that property has been endowed as debutter—Permanent image if essential to valid dedication.* A permanent image is not absolutely essential for dedication to a Thakur. Where the intention of the donor appeared to have been to dedicate the property absolutely to *deva sheva*, the fact that the income of the property exceeded the expenses of the *sheba* and the *shebaits* frequently dealt with the property or the income as personal property would not make the property secular subject to a charge for the *deva sheva.* ASITA MOHON GHOSE MOULIK *v.* NIRODE MOHON GHOSE MOULIK (1916) . . . . . **20 C. W. N. 901**

3. ——————— *Shebaitship, devolution of, to heirs in the absence of directions by founder on the death of last shebait duly appointed by him—Will giving estate to idol and appointing successive executors—De facto appointment of shebait—Vested interest, principle of—Shebait's office and rights, nature of.* A Hindu testator had two sons by his first wife and four sons by his second wife. In his will he provided that all his properties would devolve on his family Deity and his second wife and two of her sons *J* and *B* would successively be executrix and executors and that his two sons by his first wife would not be appointed executors. After the death of the second wife and her sons *J* and *B*, her other two sons died, one leaving a widow defendant No 1. Of the two sons of the testator by his first wife one (defendant No. 2) was living and the other had died [illegible] ought the pre- [illegible] he had a four [illegible] Deity. *Held,* that the effect of the will was to constitute the second wife and her sons *J* and *B* successive *shebaits* of the endowments though they were described as executors in respect of the endowed property That the testator did not prescribe how the *shebaitship* would devolve after the death of his son *B.* In the circumstances the devolution of the office of *shebait* follows the line of inheritance from the founder, in other words, it passes to his heirs unless there has been some usage or course of dealing which points to a different mode of devolution. That on the death of *B* the last *shebait* named by [illegible] of [illegible] bro[illegible] his [illegible] that the founder intended to exclude his sons by [illegible] *Tagore, L. R. I. A. (Sup. Vol.) 47, 66.* That the plaintiff had a four annas share in the *shebaitship.* That t[illegible]e the actual [illegible] post-poned [illegible] has no application to cases of the present description. That a *shebait* holds his office for life but this does not signify that he has a life-interest in the office with the remainder presently vested in the next taker. The entire office is vested in him, though his powers of alienation are qualified and restricted. The position of a *shebait* is analogous to that of a Hindu female in possession of the estate of the last full owner rather than to that of the holder of a life-estate and when a founder has given valid directions as to the devolution of the *shebaitship* as in the present case upon the death of the last *shebait* the office vests in persons who at the time constituted the heirs of the founder provided the last *shebait* has not taken it absolutely; when the office has so vested in them upon the death of each member of the group it passes by succession to his heir subject to the important qualification that the rule—that when a worship of *thakoor* has been founded the *shebaitship* is vested in the heirs of the founder in default of evidence that he has disposed of it otherwise or of there being some evidence of usage, course of dealing or some circumstances to show a different mode of devolution—cannot be applied so as to vest the *shebaitship* in persons who according to the usages of the worship cannot perform the rights of the office KUNJAMANI DASSI *v* NIKUNJA BIHARI DAS (1915) . **20 C. W. N. 314**

4. —— [illegible] endowmen[illegible] illusory—[illegible] *of the descendants of the settlor.* By a deed of endowment, so-called, executed not long prior to his death, a Hindu professed to dedicate practically the whole of his property in favour of an idol It was provided in this deed that the settlor should apply for mutation of names in favour of the idol, and that he should use the income of the property for the expenses *puja* and *rajbhog* and for the repair of the temple, and that he should keep regular accounts of the income and expenditure. The settlor himself was to be the first manager, after him his wife, and thereafter his daughter's sons and their descendants Some sixteen months after the execution of this deed, the settlor died and was succeeded as manager by his wife. The widow brought a suit for a declaration that the property was endowed property, in the cou[illegible] no attempt had [illegible] names in favour [illegible] were forthcoming [illegible] the property by [illegible] on the idol did not amount to more than one-tenth of the income, and that the widow was unable to account for her own dealings with property, the subject matter of the suit. *Held,* that in these circumstances there had been no real dedication of the property to religious purposes, but only an attempt to create a perpetuity in favour of the descendants of the settlor's daughter SRI THAKURJI *v.* SUKHDEO SINGH

I. L. R. 42 All. 395

5. ——————— *Public charitable trust, management of—Devolution—right of female heirs.* Th[illegible] ses[illegible] in [illegible] the heirs including females in the same manner as ordinary family property. A claim that the most senior male member alone amongst the

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HINDU LAW—RELIGIOUS ENDOWMENT— *concld.*

heirs is entitled to manage or that female heirs are excluded from management should be proved as a special custom. *Ramanathan Chetti* v. *Murugappa Chetti, (1906) I. L. R., 29 Mad. 283 (P. C),* followed. *Purappavanelingam Chetti* v. *Nullasivan Che i, (1863) 1 M. H. C. R., 415,* and *Chenna Kesavaraya* v *Vaidelinga, (1877) I. L. R., 1 Mad., 343,* not followed. MEENAKSHI ACHI *v.* SOMASUNDARAM PILLAI (1921)

I. L. R. 44 Mad. 205

6. ——— **Requirements for the completion of a valid Gift**—*Registered deed alone not sufficient without delivery of possession.* The mere execution of a deed of endowment is not sufficient under the Hindu law to create a valid endowment but to complete the gift there must be a transfer of the apparent evidences of ownership from the donor to the donee. *Dagai Dabee* v. *Mathura Nath Chattopadhya, I. L. R., 9 Calc., 854, Kalidas Mullick* v. *Kanhaya Lal Pandit, I. L. R., 11 Calc., 121,* and *Watson and Company* v. *Ram Chand Dutt, I. L. R.., 18 Calc., 10,* referred to. RAM DHAN *v.* PRAYAG NARAIN

I. L. R. 43 All. 503

7. ——— In the construction of ancient grants and deeds evidence is admissible as to the manner in which the thing granted has always been possessed and used for so the parties thereto must be supposed to have intended but the principle does not apply unless there is an ambiguity. KULADA PROSAD DEGHORIA *v.* KALI DAS NAIK . **I. L. R. 42 Calc. 536**

8. ——— The manager of a public temple has no right to remove the image from the old temple and instal it in a new one especially when the removal is objected to by the majority of the worshippers. HARI RAGHUNATH *v.* ANANTJI BHIKAJI . **I. L. R. 44 Bom. 46**

HINDU LAW—RELIGIOUS OFFICE.

——— *Religious office and emoluments—Hindu females, right of, to inherit.* *Held* by the Full Bench (SADASIVA AYYAR, *J., dissenting*), that according to the practice and precedents obtaining in the Madras Presidency, a Hindu female is not incompetent by reason of her sex to succeed to the office of archaka in a temple and to the emoluments attached thereto. *Sundarambal Ammal* v. *Yogavana Gurukkal, I. L. R. 38 Mad. 850,* overruled. *Mohan Lalji* v. *Gordhan Lalji Maharaj, I. L. R. 35 All. 283,* distinguished. ANNAYA TANTRI *v.* AMMAKKA HENGSU (1918)

I. L. R. 41 Mad. 886

——— ——— *Held,* that the office of hereditary Priest is a Nibandha and ranked among the hereditary rights of immovable property but where a caste has appointed Priest no right of property is conferred. GHELABHAI GOURISHANKAR *v.* HARGOWAN RAMJI

I. L. R. 37 Bom. 95

——— *Shebait, agreement with pujaris of thakur that latter to forfeit office on misconduct to be determined by tribunal of private persons. Pujaris of thakur—Condition that Pujaris should forfeit office upon misconduct or neglect to be found by tribunal of private persons if valid, and en orceable by Civil Court—Condition, if valid on ground of remoteness—Rule of perpetuities, if applies to personal contracts—Private tribunal, decision of, when valid.* By an agreement between the *shebaits* of a *thakur* and a family of Chatterjees, the latter were appointed *pujaris* and some land was placed in their possession in order that the income might be applied for the purpose of worship and maintenance of the *sheba* and it was stipulated that the Chatterjees should be *pujaris* from generation to generation but, in case they were found guilty of misconduct or neglect by a tribunal constituted by the agreement, they were to forfeit their office of *pujaris*: *Held*—That personal contracts like that in the present case were not affected by the rule against perpetuities. That the conditions of forfeiture annexed to the office were lawful and as soon as the Defendants were disqualified for the religious office by reason of their misconduct, they became disentitled to retain possession of the land which was intended to be applied by the *pujaris* for the maintenance and worship of the *thakur*. That the decision of the tribunal constituted by the agreement was operative if their proceedings were as they were in this case, regularily conducted. There is nothing wrong in principle that the holder of a spiritual office should be subject to discipline and should be liable to deprivation for what may be called misconduct from an ecclesiastical point of view or for flagrant and continued neglect of duty. So far as Hindus are concerned, there is now no State church and no Ecclesiastical Court and there is nothing to prevent Civil Courts from determining questions such as those raised in the present case and from holding that a *pujari* has been removed from his office on valid grounds. NAFAR CHANDRA CHATTERJEE *v.* KAILASH CHANDRA MONDOL . **25 C. W. N. 201**

HINDU LAW—REVERSIONER.

See HINDU LAW—SURRENDER.

See HINDU LAW—WIDOW

See RES JUDICATA.

I. L. R. 41 Calc. 69

See SPECIFIC RELIEF ACT, S. 42

I. L. R. 42 Mad. 219

1. ——— **Alienation by female heir**—*Reversioner, suit by—Suit by next male reversioner maintainable without proof of collusion of nearer female reversioner.* The rule that suits to set aside alienations by a female heir having a limited interest should be brought by the next reversioner and that a remote reversioner cannot sue without showing collusion between the female heir and the next reversioner, does not apply where the next reversioner is a female and the suit is brought by the nearest male reversioner. Where a widow having daughters makes an alienation, the nearest male reversioner may sue without proving collusion between the widow and daughter. CHIDAMBARA REDDIAR *v.* NALLAMMAL (1909)

I. L. R. 33 Mad. 410

2.——— **Legal representative**—*Hindu Widow Reversionary heirs—Civil Procedure Code, 1908 s.2 (11)—Agra Tenancy Act (Local II of 1901), s. 202.* One *S K* filed a suit for possession of certain lands and for cancellation of a perpetual lease executed by her mother, but died during the pendency of the suit. *Held,* that the reversionary heir of the last male owner of the property in suit was the proper legal representative of the plaintiff. *Held,* also, that where the

HINDU LAW—REVERSIONER—*contd.*

defendant simply alleged that he was in possession of the land in suit as a tenant but did not allege that he was a tenant of the plaintiff, the Civil Court need not require the defendant to institute a suit in the Revenue Court as directed by s. 202 of the Agra Tenancy Act, 1910. RIKHAI RAI *v.* SHEO PUJAN SINGH (1910)

I. L. R. 33 All. 15

3. ——— *Suit for declaration by reversioner that deed of gift by holder of life-interest inoperative and for possession and other reliefs—Prayer in appeal confined to deed of gift only—Propriety of declaration—Court fee stamp.* The plaintiffs claimed to be the reversionary heirs

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after the death of *D*'s widow and daughter. Court-fees were paid upon these prayers in the lower Court which dismissed the suit as premature

appeal the latter prayer also was given up Rupees twenty only in court-fees was paid on the appeal.

ment in question. JAGDEEP NARAIN SINGH *v.* JAIBASI KOER (1914). **19 C. W. N. 1191**

to prove charges—Right of reversioner to sue for protection of the husband's estate. A plaintiff who brought a suit as presumptive reversionary heir against a widow in possession of her husband's estate, in order to protect the property, and made

claim have failed, any greater right to obtain such a declaration than he would have had if it had been asked for directly, and unaccompanied by other and unfounded claims. *Jaipal Kunwar* v. *Indar Bahadur Singh, I. L. R. 26 All. 238, L. R. 31 I. A. 67,* and *Venkatanarayana Pillai* v. *Subbammal, I. L. R. 38 Mad. 406; L. R. 42 I. A. 129,* distinguished. JANAKI AMMAL *v.* NARAYANASAMI AIYAR (1916) . **I. L. R. 39 Mad. 634**

5. ——— *Reversioner consenting party to sale by widow and inducing purchaser to believe and act on false recitals in deed of sale purporting to show legal necessity—Subsequent suit by such reversioner challenging sale on account of absence of legal necessity, if lies—Estoppel by conduct.* The plaintiffs, reversioners on the death of a Hindu widow, sued to recover certain lands which had been purchased from the widow by the defendants. It was found that the recitals in the deed of sale were not true and there was no legal necessity, but that the plaintiffs who were consenting parties to the sale induced the defendants to believe the recitals to be true and to act on them and themselves supervised the erection of buildings on the land at defendants' cost. *Held,* that it was a clear case of estoppel by conduct. No person who is a party to the

HARADHAN BHATTACHARYA (1916)

21 C. W. N. 728

—*Court of Wards Act (Mad. Act I of 1902), s. 35—Suit by reversioners for declaration—Alienations, held good—Declaration as to title of plaintiff, as reversioner, if can be given—Conversion of rent in*

the plaintiff, claiming to be the nearest reversioner to the last male owner of a zamindari, sued for a declaration that certain alienations, made by the Court of Wards during their management of the estate on behalf of the adoptive mother of the late zamindar on her succeeding to the estate as his heiress on his death, were not b

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tion in respect of the property taken under its charge, although the person on whose behalf the management was taken up was only a limited owner of the property like a widow; that consequently the alienations in the case were valid, without proof of necessity such as would support an alienation by a Hindu widow; and that the

are the nearest reversioners to an estate unless the decision of that question is incidental to the grant of some other relief to which they may be entitled;

dar and his replies thereto, made in registers or official correspondence kept for reference and record are admissible in evidence under s. 35 of the Indian Evidence Act, and are entitled to great consideration. *Rajah Muttu Ramalinga Seupati* v. *Perianayagam Pillai, L. R. 1 I. A. 209, 238,* referred to. NAVANEETHA KRISHNA THEVAR *v.* RAMASWAMI PANDIA THALAVAR (1916)

I. L. R. 40 Mad. 871

HINDU LAW—REVERSIONER—*contd.*

7. ———————— —*Rights of reversioner—Suit to recover property of grandfather alienated during infancy of next reversioner to agnates of deceased—Compromise by female owner and her husband—Awards in terms of compromise—Award made decree of Court under Act VIII of 1859, s. 327—Limitation Act, 1877, Sch. II, Arts. 95, 141—Guardian of minor.* A Hindu reversioner has no right or interest in *proesenti* in the property which the female owner holds for her life. Until it vests in him on her death, should he survive her, he has nothing to assign, or to relinquish, or even to transmit to his heirs. His right becomes concrete only on her demise; until then it is a mere "*spes successionis.*" His guardian, if he happens to be a minor, cannot bargain with it on his behalf, or bind him by any contractual engagement in respect thereto. On the death without issue of a Hindu governed by the Mitakshara law, and admittedly separated from his agnatic relations (respondents) leaving a widow, a daughter *K*, and the daughter's son, a minor (appellant), the widow though opposed by the agnates obtained possession of her husband's property for her life estate. On her death in 1864, a dispute arose with the agnates as to *K*'s right to succeed, in which her husband *R* took part as representing *K*, though there was nothing to show that he had any authority to act as her agent. The matter was referred to arbitration, but before the arbitrators had taken any action a compromise was come to in which *R* purported to act for *K* and her infant son, the effect of which was to completely extinguish the reversionary interest of the appellant in his grandfather's estate. The arbitrators made an award in accordance with the terms of the compromise. It was not shown that the proceedings before the arbitrators ever came to the knowledge of *K*, but it appeared that she did not acquiesce in the award and the agnates had to apply to have it made a decree of Court under s. 327 of Act VIII of 1859, the then Code of Civil Procedure; and notwithstanding *K*'s continued opposition such a decree was made and enforced, and the respondents were put into possession of the properties in 1865. *K* died in 1905, and in 1908 the appellant brought a suit to set aside the arbitration proceedings together with the compromise and award as being fraudulent and taken and entered into without knowledge or authority of *K*, and for a declaration that he was not bound by them. *Held* (reversing the decision of the High Court), that until *K*'s death the appellant had no right or interest in the properties which could be the subject of bargain: *R*'s action in referring to arbitration any matter connected with the appellant's reversionary right was, therefore, null and void. The award was based on the compromise, and even if the appellant had had an existing right, *R* would have had no power to enter into an arrangement which extinguished his interest practically without consideration. The compromise too was not for the benefit of the minor. The decree enforcing the award was based on the finding that *K* had, by her husband *R*, acquiesced in the reference to arbitration, and that she had consented to the compromise, and was therefore bound by the award: the order of the District Judge which was affirmed by the High Court affected *K*'s interest and hers only. The minor was not a party to the appeal to the High Court, and the Civil Courts did not in any way purport to deal with or adjudicate upon his reversionary right. The proceedings therefore culminating in the decree by which the appellant was sought to be bound, were entirely devoid of the conditions on which alone a reversioner can be shut out from the assertion of his right which comes to him altogether independently of the female owner. *Katama Natchiar* v. *Rajah of Shibagunga, 9 Moo. I. A. 539,* distinguished. AMRIT NARAYAN SINGH *v.* GAYA SINGH (1917)

I. L. R. 45 Calc. 590

8. ———————— *Reversioners—Compromise of disputes between the widow of the last male owner who took the whole estate of a Hindu joint family by survivorship and other widows of family entitled only to maintenance and person who claimed to have been adopted by one of the widows—Division of the property between them—Claims inducing widow of sole male owner to agree to take less than she is entitled to and alter her position to her detriment—Future claim by alleged adopted son for possession of whole estate—Estoppel of claim as reversioner by compromise proceedings.* At the time of his death in 1883 *B*, one of three brothers, was by survivorship the sole owner of the estate of a Hindu joint family, and his widow became entitled to that estate for life. Her title was, however, disputed by the present appellant and by *P* and *K*, the widows of the predeceased brothers of *B*. The appellant set up a claim to the entire family estate based on the allegation that he had been adopted by *P* to her deceased husband, and was entitled as such adopted son to the whole property. *P* supported his claim, and together with *K* alleged that the three brothers had separated and that their three widows were each entitled to a one-third share of the estate. To protect her own interests and those of her daughter, the widow of *B* brought two suits: one of the 20th of January, 1891, against the appellant and *P* for a declaration that the appellant's alleged adoption was null and void. That suit was dismissed on a technical ground, and an appeal against the decree dismissing it was preferred to the High Court at Allahabad. The other suit was brought on the 4th of February 1892, against *P* and *K* claiming a declaration that *B*, her late husband, had been the sole owner and possessor of the entire family property, that on his death she was herself in possession of and entitled to, that property according to Hindu law, and that *P* and *K* had no rights in it except to maintenance. Before the second suit came on for hearing, *B*'s widow, her daughter *P*, *K*, and the appellant had, on the 1st of August 1892, entered into a compromise referring their disputes to arbitration, the result of which was that *B*'s widow, her daughter, *P* and *K*, each obtained possession of a one-fourth share of the property in dispute. The appellant, though allotted no share of the family property, obtained the share allotted to his adoptive mother *P*, who relinquished it to him by executing a deed on the 22nd of August 1898, in his favour. In the award it was stated that the appellant had been adopted by *P*, but that he had nothing to do as such adopted son with the shares allotted to the other ladies. He obtained in accordance with *P*'s deed of relinquishment mutation of names in his favour. The appeal in *B*'s widow's first suit was not supported and was dismissed, and the second suit was withdrawn. In suits filed respectively on the 15th of July 1912, and the 28th of August 1913, by the

HINDU LAW—REVERSIONER—*contd.*

appellant for possession, as reversioner to the estate of *B*, of the properties allotted in January 1893, to *B*'s widow, her daughter, and *K* respectively: *Held* (affirming the decision of the High Court), that the appellant was precluded from claiming as a reversioner by his having been a party to the

he had the mere expectancy of being reversioner on the death of *B*'s widow. *Sumusuddin Goolam Husein* v. *Abdul Husein Kalimuddin, I. L. R. 31 Bom. 165*, distinguished. The claim of the appellant influenced *B*'s widow, who was induced mainly by that claim, but also by the claim of *P* and *K*, to consent to a division of the family property in which she only obtained a one-fourth share. By those claims she was induced to agree to a compromise against her own interests and those of her daughter and to alter her position greatly to her own detriment. The appellant was a party to it, and under it he obtained a substantial benefit which he has ever since enjoyed. He was consequently bound by the compromise, and could not now claim as a reversioner. KANHAI LAL *v.* BRIJ LAL (1918) . . . . **I. L. R. 40 All. 487**

9. ——————— *Reversioners, consent of.* The consent given by the reversioners would certainly raise a presumption of the existence of legal necessity SHYAMPEARY DASYA *v.* EASTERN MORTGAGE CO. (1917) **22 C. W. N. 226**

10. ——————— *Mortgage by widow —Suit for redemption filed by the widow —Dismissal of the suit on an admission made by the widow in a previous suit—Appeal filed but withdrawn—Subsequent suit by reversioner for redemption—Widow's suit did not involve a trial of the right of reversioner—Fair trial—Res Judicata—Limitation.* The plaintiffs sued to redeem a possessory mortgage, dated the 22nd December 1857. It was executed by the widow of the last male holder and contained a "Gahan Lahan" clause that if the money was not paid within a year the mortgagee should become the owner. In 1865 a suit was filed by the widow to redeem the mortgage. It was dismissed by the Munsiff on the ground that the widow had admitted on 21st October 1859, in proceedings between the mortgagee and the tenants, that the mortgagee had under the "Gahan Lahan" provision become the owner of the property. Against the decision an appeal was filed but it was withdrawn. The widow died in 1902 and in 1911 a suit was filed by the reversioner for the redemption of the mortgage of 1857 The defendants pleaded limitation and contended that the suit was barred

was no fair trial of the right of the reversioner *(ii) that the suit was not barred either by Art. 141* or by Art. 148 of the Limitation Act, 1908, as it was brought within 12 years of the death of the widow and within 60 years of the mortgage. *Per* HAYWARD, *J.* The rule laid down in *Katama Natchiar* v. *The Rajah of Shivagunga, 9 Moo. I. A. 539*, is a special rule applicable to the peculiar position of limited holders under Hindu law, and

HINDU LAW—REVERSIONER—*contd.*

not the general and strict rule of *res judicata* pre-

country to prevent the exercise of pressure over limited female holders to the prejudice of the rights of reversioners. The rule has therefore not to be interpreted with reference to the strict rules regarding fraud and irregularities required to invalidate decrees otherwise binding under the general law of procedure. BAI KANKU *v.* BAI JADAV (1919) **I. L. R. 43 Bom. 869**

11. ——————— *Reversioner—Widow's estate—Acceleration—Deed of gift by widow in favour of a daughter—Stipulation for maintenance of the widow for her life time—Nature of the transaction, whether acceleration or alienation.* One *S* made a gift of her widow's estate to her daughter *L*, with a condition attached that *L* was to maintain *S* till her death. The lower Court held that the gift amounted to a valid acceleration of *S*'s estate. On appeal to the High Court. *Held*, that there was no acceleration of *S*'s estate, for any consideration was sufficient to change the nature of the transaction from an acceleration to an alienation. ADIVEPPA *v.* TONTAPPA (1919) **I. L. R. 44 Bom. 255**

12. ——— **Compromise**—*between two persons claiming absolute estate, whether binding on reversioners.* Where *D*, who claimed certain property as the sole survivor of a Hindu joint family, and *J*, who claimed the property under the Will of her deceased husband, settled their dispute by a compromise, *held*, that the reversionary heirs to the estate of the last male owner were not bound by the compromise because *J* could not be said to have represented the interests of the reversioners JANAK KESHORI KUAR *v.* BABU DEBI PRASAD SINGH . . **2 Pat. L. J. 370**

13. ——————— *Reversioner, right of, to sue during lifetime of intermediate female holders of the estat*
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sioner is ...
the invalidity of transfers made by the widow of the last male owner notwithstanding that there may be other female lives between him and the estate. There is no legal necessity for a widow to mortgage the estate to secure funds for the marriage of a daughter until the marriage has been finally settled. RAMYAD PANDAY *v.* RAMBIHARI PANDE . . . . . **4 Pat. L. J. 734**

14. ——— **Alienation by widow**—*Declaratory suit by the then next reversioner—Subsequent suit by reversioner surviving at death of widow—Res judicata.* *Held*, that a decree obtained against a Hindu widow by the then next presumptive reversioner declaring that a sale made by the widow would not be valid after her death will not operate as *res judicata* in respect of a claim preferred by the next reversioner subsisting at the time of the widow's death. *Bhagwanta* v. *Sukhi, I. L. R. 22 All. 33*, *Venkatanarayana Pillai* v. *Subbammal, I. L. R., 38 Mad., 406*, and *Isri Dut Koer* v. *Mussamat Hansbutti Koerain, L. R., 10 I. A., 150*, referred to. DARBARI LAL *v.* GOVIND RAM . **I. L. R., 43 All. 558**

15. ——————— *Alienation—Interest of a reversioner—"Property"—Transfer of property (Act IV of 1882) s. 6.* So long as an estate is

HINDU LAW—REVERSIONER—*concld.*

vested in a female heiress, the interest of the reversioner is a mere chance of succession and cannot form the subject of any contract, surrender or disposal. *Sham Sundar* v. *Achhan Kunwar, I. L. R. 21 All. 71, Nand Kishore Lal* v. *Kanee Ram Tewary, I. L. R. 29 Calc. 355,* followed. ANNADA MOHAN ROY *v.* GOUR MOHAN MALLIK (1921)

I. L. R. 48 Calc. 536

HINDU LAW—SELF-ACQUISITION.

See HINDU LAW—JOINT FAMILY.

See HINDU LAW.—PARTITION

I. L. R. 34 Bom. 106
I. L. R. 32 All. 305

———— **Gains of science**—*Mitakshara—Partition—Self-acquired property—Astrology—Earnings made by unaided efforts without detriment to the family property.* In a joint Hindu family governed by the Mitakshara one of the sons obtained certain elementary education in astrology from his father, but no money of the family was expended on that education. While still quite young this son ceased to live with the rest of the family; continued his studies in astrology on his own account, and ultimately managed, by the exercise of his skill as an astrologer, to acquire a consideranle sum of money without detriment to the family property. *Held,* that this money was his self-acquisition and could not properly be regarded as belonging to the joint family. Katyayana's definition of "acquisition through learning which is not participable" cited in the Mitakshara [I., 4, 8] is not exhaustive, but illustrative merely. *Lachmin Kuar* v. *Debi Prasad, I. L. R. 20 All. 435,* and *Pauliem Valoo Chetty* v. *Pauliem Sooryab Chetty, I. L. R. 1 Mad. 252,* referred to. DURGA DAT JOSHI *v.* GANESH DAT JOSHI (1910)

I. L. R. 32 All. 305

———— **Ancestral or self-acquired property**—*Mitakshara School—Gift by owner of impartible estate of portion of property to younger son for maintenance of himself and his descendants—Property if ancestral or self-acquired in grantee's hands.* Where a Hindu instead of allowing his self-acquired or separate property to go by descent, makes a gift of it to his son or bequeaths it to him by will such property has been treated by the Calcutta High Court as ancestral property in the hands of the son as if he had inherited it from his father. *Muddun Gopal* v. *Ram Buksh 6 W. R. 71,* followed. Authorities reviewed and the views taken by the other High Courts discussed. The decision of the Privy Council in *Sartaj Kuari* v. *Deoraj Kuari, L. R. 15 I. A. 51; I. L. R. 10 All. 272,* and *Sri Raja Rao Venkata* v. *Court of Wards L. R. 26 I. A. 83; I. L. R. 22 Mad. 383,* recognise that the holder of an impartible estate has the right to alienate the estate without the consent of the next taker, but they do not by necessary implication involve the conclusion that if the holder of the impartible estate by a testamentary disposition or otherwise carves out a portion thereof and grants it to his younger son for the maintenance of the son and his descendants, such property becomes the self-acquired property of the grantee, liable to be capriciously alienated by him to the detriment of the grandsons of the grantor. Such property has all the incidents of ancestral property in the grantee's hands. *Durga Dutt* v. *Rameshwar, I. L. R. 36 Calc. 943; 13 C. W. N. 1013,* referred to. HAZARI MALL BABU *v.* ABANINATH ADHURJYA (1912) . . **17 C. W. N. 280**

HINDU LAW—SELF-ACQUISITION—*contd.*

———— **What constitutes an intention to convert self-acquired property into joint property.** The mere fact that a Hindu and his adopted son lived together and that the latter assisted in the management of the adoptive father's property is not sufficient to warrant the presumption that the adoptive father had thrown his self-acquired property into the common stock for the benefit of both himself and the adopted son. MOULVI SYED TAJMUL ALI *v.* JAGA MOHAN DASS.

1 Pat. L. J. 524

———— **Self-acquisition of father—Undivided son**—*Suit on promissory-note after death of father—Whether succession certificate necessary.* An undivided Hindu son acquires the self-acquired properties of his deceased father by inheritance and not by survivorship. Observation in *Nanna Tawker* v. *Rama Chandra Tawker, (1909) I. L. R., 32 Mad., 377,* dissented from. In a suit by the son for the recovery of money which was the self-acquired property of the deceased father a succession certificate must be produced before a decree can be given in his favour. *Venkataramanna* v. *Venkayya, (1891) I. L. R., 14 Mad., 377, followed.* VAIRAVAN CHETTIAR *v.* SRINIVASA CHARIOR (1921.)

I. L. R., 44 (F. B.), 499

HINDU LAW—SETTLEMENT.

———— *Settlement of a portion of joint family properties on foster-daughter in consideration of her marriage—Validity of settlement.* A settlement of portion of joint family property by a Hindu in favour of his foster-daughter in pursuance of a promise made by him in consideration of her marriage with another who offered to marry her on such a condition is not a gift but is valid and binding on the alienor's son to the extent of the alienor's share as an alienation for consideration. NANJUNDASWAMI CHETTI *v.* KANAGARAJU (1918) . . **I. L. R. 42 Mad. 154**

HINDU LAW—SHEBAIT.

See HINDU LAW—ENDOWMENT
—RELIGIOUS ENDOWMENT.

———— *Shebait's right to take a share of surplus income from offerings—Hindu widow succeeding to shebaitship—Sale of right to take surplus offerings by creditor of widow in execution and purchase by himself—Suit by widow to set aside decree and sale as fraudulent—Dismissal of suit as barred under s. 244, Civil Procedure Code (Act XIV of 1882) if legal—Suit by reversioner for declaration of his right to surplus income—Limitation—Appropriation of income if amounts to dispossession of office, or is act of ordinary trespass only.—Res judicata.* One of several co-shebaits of a temple who was entitled to receive a $3\frac{1}{2}$ as. share of the daily surplus income from the offerings to the temple having died, his widow succeeded to the shebaitship. A creditor of the widow, *G,* obtained a decree against her and caused the $3\frac{1}{2}$ as. share of the surplus daily offerings to be put up for sale, and himself purchased it, and from 1892 onwards went on appropriating the same. The widow's suit to set aside the sale on the ground that both the decree and the sale were fraudulent was dismissed in the view that her remedy was by application under s. 244 of Act XIV of 1882 and not by a suit. The widow died in 1890, and the plaintiff, her husband's reversionary heir,

HINDU LAW—SHEBAIT—*contd.*

brought this suit in 1910 for a declaration that he was entitled to receive the said 3½ as share of the surplus income. The office of the shebait was a hereditary one which could not be held by any one who was not a Brahmin Panda, and the purchaser was not a Brahmin Panda but a man of inferior caste who was not competent to hold the shebait's office or to provide for the performance of the duties of that office: *Held*, that the appropriation from time to time by the purchaser of the income derivable from the 3½ as. share did not deprive *G* or the plaintiff of the possession of the office of the shebait, although that income was receivable by them in right of the shebaitship, and Art. 124 of the Limitation Act had no application to the case By adversely taking and appropriating to his own use a share of the surplus daily income from the offerings, the purchaser acquired no title and no right to a share of that income. On each occasion upon which he appropriated the share of the surplus income, he committed a fresh actionable wrong in respect of which a suit could be brought against the shebait. The right to the office of the shebait did not arise from or depend upon the receipt of a share of the surplus daily income from the offerings, although the right to receive it was attached to and dependent on the possession of the right to the shebaitship, *Held*, also, that the defendant's further plea that the suit was barred by *res judicata* was untenable. BHAIAJI THAKUR *v* JHARULA DAS (1914).

I. L. R. 42 Calc. 244.
13 C. W. N. 1029

HINDU LAW—STRIDHAN.

See HINDU LAW—SUCCESSION.

I. L. R. 37 Calc. 863
I. L. R. 34 Bom. 385
I. L. R. 39 Calc. 319

effect of—Partition—Permanent improvements—Enquiry. A Hindu governed by the Bengal school of Hindu Law, died in 1886 leaving a will, whereby he devised certain immoveable property to his daughter *A*, subject to certain charges by way of maintenance. Probate was granted to the executors, *B* and others, in 1887. *A* died in 1891 intestate, leaving her surviving five sons, *B* and four others, a married daughter, and two unmarried daughters, the plaintiff and another. In 1900 a conveyance of the property was executed by *B* and his surviving brothers in favour of the defendants. This deed proceeded on the assumption that *B* and his brothers were absolutely and beneficially entitled to the property; they, however, purported to convey "all the estate, right, title, interest, claim and demand whatsoever of the vendors unto and upon the said property." On a suit instituted by the plaintiff for the declaration of her title to a moiety in the property and for partition:—*Held*, that, inasmuch as on *A*'s death the property devolved as her *stridhan* property on her unmarried daughters, and as *B* did not purport to sell and convey as executor, the plaintiff was entitled to a moiety in the property as against the defendants, and that a decree for partition should be passed. Inasmuch as by a decree, dated the 10th December 1903, the defendants became absolutely entitled to the moiety which had devolved on plaintiff's unmarried sister,

HINDU LAW—STRIDHAN—*contd.*

and as the defendant had expended moneys in improving the property:—*Held*, that there must be an account of the money expended by the defendants in permanent inmprovements since the 10th December 1903, and an enquiry as to the extent to which the pesent value of the property had been increased by the expenditure. PURA SUNDARI DASI *v.* BIJRAJ NOPANI (1910).

L. R. 37 Calc. 362

2. ——————— *Kamathis—Mitakshara—Mayukha—Law governing Kamathis who live in Bombay—Succession—Anvadheya Stridhan—Preference between husband and son born of adulterous intercourse—Shudras—Forms of marriage—Presumption as to form.* The Kamathis, settled in Bombay, are governed for the purposes of inheritance by the law of the Mitakshara and the Mayukha, where they agree; but where they differ, the Mayukha law must prevail. The *stridhan* of a female devolves on her death upon her husband in preference to the son born of her by adulterous intercourse. The law will, even [illegible] RAGHUNATH *v.* NARAYAN (1910)

I. L. R. 34 Bom. 553

3 ——————— *Succession—Stridhan—Property acquired by adverse possession.* Where a Hindu female acquires a title to property by means of adverse possession, such property becomes her *stridhan* and descends as such to her heirs. *Brij Indar Bahadur Singh* v. *Ranee Jankir Koer, L. R. 5 I. A. 1*, and *Mohim Chunder Sanyal* v. *Kashi Kant Sanyal, 2 C W. N. 161*, followed. KANHAI RAM *v.* MUSAMMAT AMRI (1910).

I. L. R. 32 All. 189

4. ——————— When certain property was acquired from earnings of husband and wife by trading jointly. *Held*, her interest therein was her Stridhan. MUTHU RAMA KRISHNA NARCHEN *v.* MASIMUTHER GOUNDAN

I. L. R. 38 Mad., 1036

5. ——————— Maiden's stridhan—*Succession—Mitakshara—Father's brother's son—Sister—Sister's son.* Under the Mitakshara school of Hindu law, a sister (father's daughter) and a sister's son (father's daughter's son) are entitled to succeed to a maiden's *stridhan* in preference to a father's brother's son. *Per* N. R. CHATTERJEA, *J*—Under the Mitakshara law, in the absence of any rule determining the nearness among relations of the father in case of succession to a maiden's *stridhan*, the question should be decided by analogy to the order of succession to the *stridhan* of a childless woman married in a disapproved form, so far as it is applicable, for in both cases the succession is confined to the father's family. The *stridhan* of a childless woman married in a disapproved form devolves, after the father, in the same manner as if it had belonged to the father himself, and the succession follows the order laid down in the text of Yajnavalkya regulating obstructed succession. *Quære:* Whether the son or grandson of the father in such a case takes before the father or after him and before the other heirs mentioned in the said text. DWARKA NATH ROY *v.* SARAT CHANDRA SINGH ROY (1911)

I. L. R. 39 Calc. 319
15 C. W. N. 1036

HINDU LAW—STRIDHAN—*contd.*

6. ——————————— . *Deceased Hindu maiden—Stridhan—Competing heirs—Father's sister—Father's male gotraja sapindas five or six degrees removed—Preference to father's sister.* In the case of a deceased Hindu maiden leaving surviving her father's sister and her father's male *gotraja sapindas* five or six degrees removed, her *stridhan* goes to her father's sister in preference to his said male *gotraja sapindas.* TUKARAM *v* NARAYAN RAMCHANDRA (1912) . **I. L. R. 36 Bom. 339**

7. ——————— **Devolution**—*Mitakshara—Mayukha—Stridhan—Daughter's sons take severally and not jointly—Co-parcenary—Basic notion of co-parcenary—Obstructed and unobstructed succession—Estate by partition—Estate by birth—Dayada—Rikhta—Interpretation—Self-acquired property.* Property inherited by sons from their mother is not a joint estate but a tenancy-in-common, according to both the Vyavahara Mayukha and the Mitakshara. The basic principle of a joint tenancy or co-parcenary under Hindu law explained. A joint tenancy is property inherited as an unobstructed succession and is called *rikhta.* It devolves on the heirs as a co-parcenary. A tenancy-in-common is property inherited as an obstruction and is called *samavibhaga*, because when the inheritance falls in, it devolves on the heirs as a divided estate. The terms *self-acquired property*, as distinguished from *joint property*, explained. Property originally self-acquired, because acquired without detriment to joint ancestral estate, becomes joint when it has been mixed with and treated as part of the said joint estate by the co-parceners. BAI PARSON *v.* BAI SOMLI (1912) . . . **I. L. R. 36 Bom. 424**

——————————— *Stridhanan—Maiden's property—Sapindas, right of inheritance of—Father's sister—Father's paternal uncle's son—Preferential heir—Texts of Baudhayana and Brihaspati—Mitakshara and Smriti Chandrika.* Under the Mitakshara Law the heirs to the stridhanam property of a maiden, who died leaving neither uterine brothers, nor mother, nor father, are the sapindas of her father; and, as between her father's paternal uncle's son and her father's sister, the former is the preferential heir. Text of Brihaspati, held inapplicable; text of Baudhayana and commentaries of Mitakshara and Smriti Chandrika discussed. *Kamala* v. *Bhagirathi, (1915) I. L. R. 38 Mad. 45,* followed. SUNDARAM PILLAI *v.* RAMASAMIA PILLAI (1920) . **I. L. R. 43 Mad. 32**

8. ——————— **Half-sister's son of Hindu widow**—*Probate, application for—Daughter's son of the great-grandson of the great-great-grandfather of the testatrix' husband whether preferential heir to half sister's son.* Under the Dayabhaga School of Hindu law a half-sister's son of a widow is heir to her *stridhan* property, in preference to the daughter's son of the great-grandson of the great-great-grandfather of her husband, and that therefore the latter has no *locus standi* to oppose an application for probate by the former, of a will alleged to have been executed by the said widow in regard to such property. *Dasharathi Kundu* v. *Bipin Behary Kundu, I. L. R. 32 Calc. 261,* and *Bholanath Roy* v. *Rakhal Dass Mukharji, I. L. R. 11 Calc. 69,* referred to. *Chatoo Kurmi* v. *Rajaram Tewari, 11 C. L. J. 124,* distinguished. SHASHI BHUSHAN LAHIRI *v.* RAJENDRA NATH JOARDAR (1912) . . **I. L. R. 40 Calc. 82**

HINDU LAW—STRIDHAN—*contd.*

9. ——————— **Prostitute's property**—*Succession to.* The mere fact that a Hindu woman has adopted the life of a prostitute does not sever the tie which connects her to her kindred by blood; and, consequently, her *stridhan* property passes, upon her death, in the absence of nearer heirs, to her brother's son as an heir under the Bengal school of Hindu law. *Tara Munee Dossea* v. *Motee Buneanee, 7 Mac. Sel. Rep. 325; 8 I. D. (O. S.) 247, Ramnath Talapattro* v. *Durga Sundri Devi, I. L. R. 4 Calc. 550, In the goods of Kamineymoney Bewah, I. L. R. 21 Calc. 697, Ramananda* v. *Raikishori Barmani, I. L. R. 22 Calc. 347, Sarna Moyee Bewa* v. *Secretary of State for India, I. L. R. 25 Calc. 254,* and *Sundari Letani* v. *Pitambari Letani, I. L. R. 32 Calc. 871,* overruled so far as they hold that tie of blood is destroyed by unchastity or, in the case of a Hindu woman, by her adopting the life of a prostitute. *Bisheshur* v. *Mata Gholam 2 All. H. C. 300, Musammat Ganga Jati* v. *Ghasita, I. L. R. 1 All. 46, Advyapa* v. *Rudrava, I. L. R. 4 Bom. 104, Kojiyadu* v. *Lakshmi, I. L. R. 5 Mad. 149 Subbaroy Pillai* v. *Ramasami Pillai, I. L. R. 23 Mad. 171, Bhutnath Mondol* v. *Secretary of State for India, 10 C. W. N. 1085, Sundari Dasse* v. *Nemye Charan Daw, 6 C. L. J. 372,* and *Tripura Charan Bannerjee* v. *Harimati Dassi, I. L. R. 38 Calc. 493,* approved. *Sivasangu* v. *Minal, I. L. R. 12 Mad. 277,* and *Narasanna* v. *Ganga, I. L. R. 13 Mad. 133,* distinguished and dissented from. HIRALAL SINGHA *v.* TRIPURA CHARAN RAY (1913) . **I. L. R. 40 Calc. 650**

10. ——————— **(Mitakshara),—Preference of co-wife's daughter to sapindas of husband.** Under the Mitakshara law of inheritance, the daughter of a co-wife of a deceased woman married in one of the approved forms is entitled to succeed to her stridhanam property in preference to the sapindas of her husband, such as his father's brother's son. *Placitum* 11 of section XI of Chapter II, Mitakshara, applied. Colebrooke's translation of 'sapinda' in that *placitum* as 'kinsmen allied by funeral oblations' is incorrect; the correct meaning being 'kinsmen allied by affinity' or 'persons allied to each other by possession of particles of the same body.' According to the above text the stridhanam property of a woman married according to an orthodox form, who has left no issue, will devolve on her husband, and on failure of the husband the property will go to his sapindas in the order laid down in the Mitakshara with reference to the succession to the property of a male. *Venkatasubramaniam Chetti* v. *Thayaramma, I. L. R. 21 Mad. 263, Gojabai* v. *Shrimant Shahajirao Maloji Raje Bhosle, I. L. R. 17 Bom. 114, 117, Jagannath Prosad Gupta* v. *Runjit Singh, I. L. R. 25 Calc. 354, 367, Krishnai* v. *Sripati, I. L. R. 30 Bom. 333, Bai Kesserbai* v. *Hunsraj Morarji, I. L. R. 30 Bom. 31, Thakoor Deyhee* v. *Rai Bauk Ram, 11 Moo. I. A. 139, 175,* and *Champat* v. *Shiba, I. L. R. 8 All. 393,* applied. West and Buhler, p. 518, T. Krishnasami Aiyar's translation of Smriti Chandrika, Chapter IX, section III, verse 83, Golab Chandra Sircar Sastri's Hindu Law, 4th edition, p. 461, and Bhattacharya's Hindu Law, p. 580, referred to. NANJA PILLAI *v* SIVABAGYATHACHI (1913).
I. L. R. 36 Mad. 116

11. ——————— **Widow's estate**—*Alienation—Property acquired by Hindu widow with accumulations of income of husband's estate.* Property acquired by a Hindu widow, with accumulations of

HINDU LAW—STRIDHAN—*contd.*

the income of her husband's estate, does not constitute her *stridhan* but forms part of the *corpus* of the estate and as such as inalienable except for purposes that would justify alienation of the original estate. *Bhagbutti Deyi* v. *Bholanath Thakoor, I. L. R. 1 Calc 104 ; L. R. 2 I. A. 256*, and *Ishri Dutt Kor* v. *Hansbutti Koerain, I. L. R. 10 Calc. 324 ; L. R. 10 I. A. 150*, referred to. KULA CHANDRA CHAKRAVARTI *v.* BAMA SUNDARI DASEE (1914)

I. L. R. 41 Calc. 870

12. ———— **Mitakshara Brother's widow not an heir**—*Burden of proof in suit for possession.* The stridhanam property of a Hindu female devolves on her death on her husband, and failing the husband, on his sapindas in the order laid down in the Mitakshara with reference to the succession to the property of a male. *Marya Pillai* v. *Sivabagyathachi, 2 Mad. W. N. 168*, followed A brother's widow is a *gotraja sapinda* but is not entitled to succeed as an heir under the Madras system of inheritance. *Balamma* v. *Pullayya, I. L. R. 18 Mad. 168*, followed. *Mari* v *Chinnammal, I. L. R. 8 Mad. 107*, and *Venkatasubramaniam Chetti* v. *Thayarammah, I L. R. 21 Mad. 263*, referred to. On failure of the husband's sapindas, the blood relations of the *propositus* are entitled to succeed to the exclusion of the Crown. A plaintiff seeking to recover possession from a defendant in possession though as a trespasser, must prove his own title. KANAKAMMAL *v.* ANANTHAMATHI AMMAL (1914)

I. L. R. 37 Mad. 293

13. ———— **Promise to give dowry at marriage**—*Land given years afterwards, if jautuka —Ajautuka properties, succession to—Preferential heir—Husband or brother.* On the death of a Hindu married woman, governed by the Dayabhaga Law, her *ajautuka stridhan* properties will always be inherited by the brother in preference to the husband, irrespective, of the form in which the marriage was celebrated. Prope y given by a brother to his sister, 7 years after the latter's marriage, in apparent fulfilment of a promise made at the time of marriage to give a quantity of land as dowry, is nevertheless *ajautuka*, as the promise could not have been specifically enforced in respect of the land given, which in fact was given after marriage. MAHENDRA NATH MAITY *v,* GIRIS CHANDRA MAITY (1915)

19 C. W. N. 1287

14. ———— **Female heirs**—Stridhan inherited by female heirs does not become the latter's *stridhan.* The female heirs take only a Hindu woman's estate in the property. *Sheo Shankar Lal* v. *Devi Sahai, I. L. R. 25 All. 468 ; L. R. 30 I. A. 202, Prankissen Laha* v. *Noyanmoney Dassee, I. L. R. 6 Calc. 222*, and *Hari Doyal Singh Sarmana* v. *Grish Chunder Mukerjee, I. L. R. 17 Calc. 911*, referred to. JOGENDRA CHANDRA BANERJEE *v* PHANI BHUSAN MOOKERJEE (1915)

I. L. R. 43 Calc. 64

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principle in Bengal is that women can only inherit under some express text, and a daughter's daughter is not included in the text-books in the special line of heirs to *stridhan*, whether the *stridhan* is of the class known as *yautaka* or *ayautaka*. A woman inheriting *stridhan* property takes only the limited estate of a Hindu woman in such property and

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on her death it passes to the heir of the woman whose *stridhan* it was. MADHUMALA DASSI *v.* LAKSHAN CHANDRA PAL (1913) **20 C. W. N. 627**

16. ———— **Saudayika**—*Gift of property by a father to his daughter before her marriage—Power of alienation.* A gift of property by a father to his daughter before her marriage is saudayika *stridhanam* which is at her absolute disposal. *Per* SESHAGIRI AYYAR, J—*Saudayika stridhanam* is gifts from affectionate kindred and includes both *yautaka* and *ayautaka* not received from strangers. Hindu Law texts examined. *Ponnusowmy Moodelly* v. *Subbaroya Moodely (1859) 6 Selwin's S. D. A. Rep. 7*, referred to. *Judoo Nath Sircar* v. *Busunt Coomar Roy Chowdhry, 19 W. R. 264*, applied. *Bhau* v. *Raghunath I. L. R 30 Bom. 229*, referred to *Dantuluri Rayapparaz* v. *Mallapudi Rayudu, 2 Mad. H. C R. 360*, distinguished. *Quære* · Whether immoveable property received from the husband should be excluded from this species of disposable property. MUTHUKARUPPA PILLAI *v* SELLATHAMMAL (1914.)

I L. R. 39 Mad. 298

17. ———— **Mitakshara Succession—Adoption**—*Rights of adopted son—Competition between adopted son and natural son of co-wives —Sapindas—Co-wife's natural son, if "son"—Texts, construction of—Mitakshara, Ch. II, s. XI, paras 9, 11, 25—"Without issue' meaning of—Manu, Ch. IX, verse 183—Yajnavalkya Ch. II, verses 117, 145.* S, a Hindu governed by the Mitakshara school of Hindu Law, married four wives in succession. In conjunction with his first wife, by whom he had no issue, he adopted a son *H*. By his second wife, *S* had a son *G* born to him. *S* predeceased his fourth wife *M*, having had no issue by her *M* died intestate. On a suit brought by *H* :—*Held*, that both *H* and *G* were entitled to succeed to *M's stridhan* property as *sapindas* of *S*, and in the absence of any express text curtailing the rights of the adopted son in the circumstances of the present case, *H* was entitled to share equally with G on the general principle that the adopted son occupies the same position as a natural son and his rights are in every respect similar to those of a natural son. *Joykishore Choudhury* v. *Panchoo Baboo, 4 C. L. R. 302, Padmakumari Devi* v. *Court of Wards, I. L. R. 8 Calc. 500, L. R. 8 I. A. 229*, followed. *Nagindas Bhagwandas* v. *Bachoo Hurkissendas, I. L. R. 40 Bom 270*, referred to. The expression "without issue" in Mitakshara, Chap. II, s. XI, para. 9, must be construed in its ordinary sense, and *M* must be deemed to have died "without issue." *Quære :* Whether Manu, Chap. IX, verse 183 has any reference to questions of inheritance. *Annapurni Nachiar* v. *Forbes, I. L. R. 23 Mad. 1, Bhimacharya* v *Ramacharya, I. L. R. 33 Bom. 452*, referred to. *Per* MOOKERJEE, J. A , special text forming an exception to a general text should be construed strictly and applied only to cases falling clearly within it. *Gangu* v. *Chandrabhagabai, I. L. R. 32 Bom. 275*, and *Anandi* v. *Hari Suba, I. L. R. 33 Bom. 401*, referred to. GANGADHAR BOGLA *v.* HIRA LAL BOGLA (1916)

I. L. R. 43 Calc. 944

18. ———— **Vyavahara Mayukha—Succession**—*Non-technical stridhana—Sons take precedence over sons' sons.* The non-technical *stridhana* of a Hindu female governed by the Vyavahara Mayukha descends to her son in priority to her

HINDU LAW—STRIDHAN—*contd.*

son's son. BAI RAMAN *v.* JAGJIVANDAS KASHIDAS (1917) . . **I. L. R. 41 Bom. 618**

19. ———— **Ajautuka**—*Stridhan, succession to—Son or married daughter—Property whether jautuka or ajautuka—Onus.* The commonly accepted view of the succession of *ajautuka* property of a Dayabhaga Hindu woman is that the sons and the maiden daughters are entitled to it in equal shares, but the married daughters are postponed to the sons. DELANNEY *v.* PRAN HARI GUHA (1918) . . . **22 C. W. N. 990**

20. ———— **Husband's younger brother or son adopted**—*By father after mother's death and marrying a second wife—Succession Act (X of 1865), s. 111.* *A*, a daughter of *D* by his first wife, to whom *D* by his will had bequeathed an annuity which in the event of her death was to pass to her heirs, having died a widow without issue, the question was whether her husband's younger brother or a boy adopted by *D* after the death of his first wife and marriage of a second wife was the preferential heir: *Held*, that the husband's younger brother was entitled to the annuity in preference to the adopted son of *D*. That s. 111 of the Succession Act did not apply, and *A*'s heirs were not precluded from claiming the annuity by reason of *A* having survived the testator. GUNAMONI DASI *v.* DEBI PROSANNA ROY (1919) . . . **23 C. W. N. 1038**

HINDU LAW—SUCCESSION.

See AGRA TENANCY ACT, 1901, s. 22.
I. L. R. 32 All. 314
I. L. R. 37 All. 558
I. L. R. 41 All. 629

See HINDU LAW—CO-PARCENER.

See HINDU LAW—CUSTOM.
I. L. R. 32 All. 363

See HINDU LAW—SURVIVORSHIP.
I. L. R. 33 Mad. 165

———— **grandfather's daughter's son**—
See WILL. **24 C. W. N. 316**

1. ———— **Stridhan**—*Dayabhaga—Ayautuka stridhan—Succession—Property of childless widow—Step-brother—Husband's younger brother.* Under the Dayabhaga law, the younger brother of the husband of a childless widow is entitled to succeed to her *ayautuka stridhan* property in preference to her step-brother. DEBIPRASANNA ROY CHOWDHRY *v.* HARENDRA NATH GHOSE (1910)
I. L. R. 37 Calc. 863

2. ———— *Anvadheya stridhan—Sons and daughters succeed equally—Among daughters unmarried have preference—Mayukha.* A Hindu female, governed by the Mayukha, died leaving property which she inherited from her father, under a deed of gift subsequent to her marriage. She left her surviving three daughters and one son. A dispute as to succession having arisen:—*Held*, that the property being *anvadheya* stridhan, should be divided equally among her son and daughters: with this difference, however, as to the latter, that the unmarried should have preference over the married. *Ashabai* v. *Haji Tyeb Haji Rahimtulla, I. L. R. 9 Bom. 115*, and *Sitjabai* v. *Wasantrao, 3 Bom. L. R. 201*, followed. DAYALDAS LALDAS *v.* SAVITRIBAI (1909)
I. L. R. 34 Bom. 385

HINDU LAW—SUCCESSION—*contd.*

3. ———— **Step-mother**—*Mitakshara—Father's sister's son—Gotraja-sapinda—Letters of Administration.* In the Bengal Presidency, under the interpretation of the Mitakshara law as accepted in the districts governed by that law, a step-mother is not entitled to succeed to the estate of her step-son either as a *gotraja-sapinda* or in preference to the father's sister's sons. *Joti Lal* v. *Durani Kower, B. L. R. Sup. Vol. 67, Kumaravelu* v. *Virana Goundan, I. L. R. 5 Mad. 29 Muttammal* v. *Vengalakshmi Ammal, I. L. R. 5 Mad. 32*, and *Rana Nand* v. *Surgiani, I. L. R. 16 All. 221*, referred to. *Kesserbai* v. *Valab Raoji, I. L. R. 4 Bom. 188, Lallubhai Bapubhai* v. *Cassibai, I. L. R. 5 Bom. 110*, and *Russoobai* v. *Zoolekhabai, I. L. R. 19 Bom. 707*, not followed, having regard to the principle laid down in *Collector of Madura* v. *Moottoo Ramalinga Sathupathy, 12 Moo. I. A. 397*, TAHALDAI KUMRI *v.* GAYA PERSHAD SAHU (1909)
I. L. R. 37 Calc. 214

4. ———— **Uncle of half blood**—*Mitakshara—Competition between uncle of the half blood and the son of an uncle of the whole blood.* *Held*, that according to the Hindu law of the Mitakshara school, an uncle of the half blood succeeds in preference to the son of an uncle of the whole blood, the former being nearer in propinquity than the latter. *Suba Singh* v. *Sarafraz Kunwar, I. L. R. 19 All. 215*, distinguished. KESRI *v.* GANGA SAHAI (1910) . **I. L. R. 32 All. 541**

5. ———— **Step-brother**—*Mitakshara—Ahban Thakurs—Step-brother if may succeed equally with brother of whole blood—Special family custom contrary to Mitakshara—Proof—Wajib-ul-arz, entries in—Value as evidence of custom.* Under the Mitakshara law a brother of the whole blood is entitled to succeed to estate of a deceased brother in preference to a step-brother, and in the absence of evidence sufficient to establish such a special custom in the family as to rebut the ordinary presumption that the Mitakshara law prevailed the claim of the step-brother to an equal share was properly rejected. There is no class of evidence which is more likely to vary in value according to circumstances than that of *Wajib-ul-arzes*. *Muhammad Imam Ali Khan* v. *Sardar Husain Khan, L. R. 25 I. A. 161, 169 : s. c. 2 C. W. N. 737 ; Musammat Parbati Kunwar* v. *Rani Chandrapal Kunwar, L. R. 36 I. A. 125 : s. c. 13 C. W. N. 1073*, followed. Where from an internal evidence it seemed probable that the entries recorded connoted the views of individuals as to the practice they would wish to see prevailing rather than the ascertained fact of a well-established custom: *Held*, that the Court in India had properly attached weight to the fact that no evidence at all was forthcoming of any instance in which the alleged custom had been observed. THAKUR ANANT SINGH *v.* THAKUR DURGA SINGH (1910)
I. L. R. 32 All. 362
14 C. W. N. 770

6. ———— **Daughter's daughter's son**—*Mitakshara—Bandhus—Alienation by Hindu widow—Legal necessity.* *Held*, that under the Mitakshara law a daughter's daughter's son is a *bandhu*, and in the absence of any other heir is entitled to succeed to the estate of the last owner. *Ajudhia* v. *Ram Sumer Misir, I. L. R. 31 All. 454*, followed. RAM PHAL THAKUR *v.* PAN MATI PADAIN (1910)
I. L. R. 32 All. 640

HINDU LAW—SUCCESSION—*contd.*

7. ———— Samanodakas—*Mitakshara—Succession—Bandhus—Cause of action. Samonodanas* are those who participate in the same oblations of water and include descendants from a common ancestor more remotely related than the thirteenth degree from *propositus*. A sister's son is only a *bandhu*. A *samanodaka* is a nearer heir to a deceased Hindu than a *bandhu* and will exclude the latter. Where therefore *B* was in the thirteenth degree from the common ancestor *L* and *D* was in the fourteenth degree from him, and *B's* widow executed a deed of compromise declaring that after her death *D* would become entitled t(. *Held*, that this sister's son for a ancellation of the deed. *Bai Devkore* v. *Amritram Jamiatram, I. L. R. 10 Bom. 372*, referred to. RAM BARAN RAI *v.* KAMLA PRASAD (1910)

I. L. R. 32 All. 594

8. ———— Illegitimate son—*Illegitimate son succeeds as a co-heir with the widow.* The illegitimate son of a separated Hindu, who dies without legitimate male issue, succeeds as a co-heir with the widow, daughter or daughter's son. *Ramalinga Muppan* v. *Pavadai Goundan, I L. R. 25 Mad. 519, 521*, approved. *Chinnammal* v. *Varadarajulu, I. L. R. 15 Mad. 307*, followed. MEENAKSHI ANNI *v.* APPAKUTTI (1909)

I. L. R. 33 Mad. 226

9. ———— *Illegitimate son, by widow whose re-marriage is prohibited, has no right of succession—Adverse possession—Right of true owner to recover possession by inducing tenant to attorn.* An illegitimate son by a Sudra widow, whose re-marriage is forbidden, has no right of inheritance. *Venkatachela Chetty* v. *Parvatham, 8 Mad. H. C. 134*, referred to. To entitle the illegitimate son to succeed, the connection must not be adulterous or forbidden by law. Where persons, holding adversely to the true owner, enjoy the lands through a tenant who, however, has not been let into possession by them or their predecessors in title, the true owner is not estopped from recovering possession by inducing such tenant to attorn to him. ANNAYYAN *v.* CHINNAN (1909)

I. L. R. 33 Mad. 366

10. ———— Religious endowment—*Ballavacharya Gosains. Held*, that where there is a dedication of property by a private individual for religious purposes, in the absence of any proof of disposal or direction by the dedicator, the trusteeship will vest in the latter's heirs. *Held*, also, that as regards temples belonging to the Ballavacharya Gosain sect the ordinary rule of the Hindu law does not apply; but the succession is regulated by special customs. In the present case a custom set up by the plaintiffs by which a daughter's sons were entitled to the succession was held not to have been established *Gossami Sri Gridhariji* v. *Romanlalji Gossami, I. L. R. 17 Calc. 3, Rajah Mutta Ramalinga Setupati* v. *Perianayagum Pillai, L. R. 1 I. A. 209*, and *Srimati Janoki Debi* v. *Sri Gopal Acharjia, L. R. 10 I. A. 32: I. L. R. 9 Calc. 766*, referred to. MOHAN LALJI *v.* MADHUSUDAN LALA (1910)

I. L. R. 32 All. 461

11. ———— Sanyasis—*Property left by—Succession—Dasnami sanyasis—Chela's right to succeed—Biraja Home ceremony, if essential to valid appointment of chela—How and at what age performed—Period of probation—Mulmantras—"Yati," mohunt if—Nomination of chela as successor or election by neighbouring mohunts, if indispensable—Subordinate muth, if must be governed by rules of parent muth—Lapse of mohunt's property on death to monastery, custom of—Proof.* The inadequacy or untrue recital of the consideration is a question between the assignor and the assignee, and would not of itself be sufficient to invalidate the transaction. *Lal Achal Ram* v. *Kazim Husain Khan, L. R. 32 I. A. 113: s c. 9 C. W. N. 477; Kunwar Ram Lal* v. *Nilkanth, L. R. 20 I. A. 112; Rajah Mokham Singh* v. *Rajah Rup Singh, L. R. 20 I. A. 127; Bhagwat Dayal* v. *Devi Dayal, L. R. 35 I. A. 48: s.c. I. L. R. 35 Calc. 420, 12 C. W. N. 393*, followed. *Held*, on the evidence, that according to the custom of the *dasnami sanyasis*, every aspirant for entrance into the order has to pass through a period of probation which may extend to months or even years and during which period it is open to the *chela* to revert to his natural family. It is not till the performance of the final ceremony or the *biraja home*, that the aspirant is irrevocably attached to the sect and completely severed from his family. It is, therefore, essential to entitle a *chela* to claim by inheritance the estate of his *guru* that the *biraja home* should have been duly performed. It is not usual to whisper the *mulmantras* into the ears of the novice at the time of the first initiation when it is still uncertain whether he will or will not return to the enjoyments of worldly life, though some *mantras* may be recited on such an occasion. *Quære:* Whether *biraja home* ceremony can be performed when the *chela* is under sixteen years of age; but unquestionably the rule is that the *chela* must have reached years of discretion so as to be able to realise for himself the full significance of the final act of the renunciation of the world. *Mahunt Ramji Das* v. *Lachhu Dass, 7 C. W. N. 145; Giyana Sambandha Pandara Sannadhi* v. *Kandasami Tambiran, I. L. R. 10 Mad. 375; Rangachariar* v. *Yegna Dikshatur, I. L. R. 13 Mad. 524*, referred to. The *chela* of a mohunt cannot claim to be the latter's heir under the rule which allows a "virtuous pupil" to succeed to a "*yati*." The ordinary rule is that among the *sanyasis* generally no *chela* has right as such to succeed to the property of his deceased *guru*, he must be nominated by his *guru*, such nomination being generally confirmed by the mohunts of the order, or in default of such appointment, he must be elected by the mohunts and principal persons of the sect in the neighbourhood But this is not a universal rule, and in some cases, according to custom, the principal *chela* succeeds as of right even without such appointment or formal election; but apparently an election or recognition by members of the sect is necessary. *Nirunjun Barthee* v. *Padaruth Barthee, 1 S D. A. N. W. P. 512; Madho Das* v. *Kamta Das, I. L. R. 1 All. 539; Jugunnath Paul* v. *Bidianund Dutt, 10 W. R. 172; Chhajju Gir* v. *Diwan, I. L. R. 29 All. 109*, referred to. When one *muth* is the offshoot of another, there is no fixed rule which regulates the relation between the two, and it cannot be said that the subordinate *muth* necessarily follows the customs of the parent one. *Kashibashi* v. *Chitumbernath, 20 W. R. 217; Giyana Sambandha Pandara Sannadhi* v. *Kandasami Tambiran, I. L. R. 10 Mad. 375, Prayad Das* v. *Mohunth Kriparam, 8 C. L. J. 409*, relied on. In order to establish a custom that on the death of the mohunt his properties lapse to the

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muth and devolve on the spiritual head thereof, it is necessary to show, not only that in some instances the properties had so passed to the spiritual head, but also that this had taken place in the presence of a *chela* who would otherwise have been competent to take by inheritance. GOSSAIN RAMDHAN PURI *v.* GOSSAIN DALMIR PURI (1909) **14 C. W. N. 191**

12. ———— **Unchaste widow**—*Unchastity of widow no bar to her right of succession to her son.* There is no authority for holding that a Hindu lady, who after her husband's death has waited and then gone to live with another man, is thereby excluded from inheritance to the estate left by her son. DAL SINGH *v.* MUSAMMAT DINI (1909) . . . . **I. L. R. 32 All. 155**

13. ———— **Ayautuka stridhan**—*Succession.* Under the Dayabhaga, the husband's younger brother is entitled to succeed to the *ayautuku stridhan* property of a childless woman in preference to a step-brother. DEBI PRASANNA ROY *v.* HARENDRA NATH GHOSE (1910) **15 C. W. N. 383**

14. ———— **Mother's unchastity**—*Mitakshara—Unchastity of mother no bar to her inheriting son's estate. Held,* that unchastity does not preclude a Hindu mother from succeeding to her son's property. *Ganga Jati* v. *Ghasita, I. L. R. 1 All. 46 ; Dal Singh* v. *Dini, I. L. R. 32 All. 155,* and *Vedammal* v. *Vedanayaga Mudaliar, I. L. R. 31 Mad. 100,* followed. BALDEO SINGH *v.* MATHURA KUNWAR (1911) . . **I. L. R. 33 All. 702**

15. ———— **Nambudris in Malabar**—*Self-acquired property of Nambudri Brahman does not pass to the undivided family, but to his heirs under Hindu Law.* Nambudri Brahmans are governed by Hindu Law, except in so far as it is shown to have been modified by usage or custom having the force of law, the probable origin of the special usage being either some doctrine of Hindu Law as it stood at the date of their settlement in Malabar, though now obsolete or some Marumakmakkatayam usage. The Hindu Law applicable is that laid down in the Mitakshara. The self-acquisition of a Nambudri Brahman passes to his heirs under the Mitakshara Law, and not to the undivided family to which he belongs. No Marumakkatayam usage has influenced the family law of Nambudris in this respect, and no doctrine of ancient Hindu Law denied the right of the son to succeed to the separate property of father. VISHNU NAMBUDRI *v.* AKKAMMA (1910) **I. L. R. 34 Mad. 496**

16. ———— **Prostitute's estate**—*Stridhan—Severance as effect of degradation—Succession to property of degraded woman.* The absolute property of a Hindu prostitute is to be treated as her *stridhan* for the purposes of succession. So far as succession is concerned, the degradation suffered by prostitution severs a woman from her natural relations at the moment she becomes degraded, but not from her sons or chaste daughters born after degradation. *In the goods of Kamineymoney Bewah, I. L. R. 21 Calc. 697, Sarnamoyee Bewa* v. *Secretary of State for India, I. L. R. 25 Calc. 254, Bhutnath Mondol* v. *Secretary of State for India, 10 C. W. N. 1085, Narasanna* v. *Gangu, I. L. R. 13 Mad. 133,* followed. *Taramunnee Dassee* v. *Motee Buneeanee, (1846) S. D. A. 297, Sivasangu* v. *Minal, I. L. R. 12 Mad. 277,* approved but distinguished. *Sundari Dassi* v. *Nemye Charan Daw, 6 C. L. J. 372, Subbaraya Pillai* v. *Ramasami Pillai, I. L. R. 23 Mad. 171, Narain Das* v. *Trilok Tiwari, I. L. R. 29 All. 4,* not followed. TRIPURA CHARAN BANNERJEE *v.* HARIMATI DASSI (1911) **I. L. R. 38 Calc. 493**

17. ———— **Impartible property**—*Mitakshara—Succession—Impartible property governed by the rule of primogeniture nevertheless joint property.* Where ancestral property is impartible and is held by a single member of the family, all the members of the family must be deemed to be joint in estate and the rule of succession to the property is the same as that which governs the case of partible property, so that a junior member of the family, who gets maintenance from the person holding the impartible estate, succeeds upon his death to the estate by right of survivorship. Whatever may be the powers of alienation of the holder of an impartible estate, the succession to it is governed not by the rule which applies to separate property but by the rule of survivorship. Therefore the person who succeeds to the estate does not do so as the heir or legal representatives of his predecessor and the estate cannot be regarded as the assets of the last previous holder. *Harpal Singh* v. *Bishan Singh, 6 A. L. J. 753,* followed. *Raja of Kalahasti* v. *Achigadu, I. L. R. 31 Mad. 454,* and *Zamindar of Karvetnagar* v. *Trustee of Tirumalai, I. L. R. 32 Mad. 429,* dissented from. INDAR SEN SINGH *v.* HARPAL SINGH (1911) **I. L. R. 34 All. 79**

18. ———— **Great-grandmson of the grandfather**—*Mitakshara—Succession—Grand son of the great-grandfather.* According to the Mitakshara law the three immediate descendants of the grandfather succeed in preference to the great-grandfather and his descendants, and the great-grandson of the grandfather is a perferential heir as against the grandson of the great-grandfather. The following cases were referred to in the judgments delivered :—*Kalian Rai* v. *Ram Chander, I. L. R. 24 All. 128, Rutcheputty Dutt Iha* v. *Rajunder Narain Rae, 2 Moo. I. A. 133, Kashibai Ganesh* v. *Sitabai Raghunath Shivram, 13 Bom. L. R. 552 ; Rachava* v. *Kalingapa, I. L. R. 16 Bom. 716, Kureem Chand Gurain* v. *Oodung Gurain, 6 W. R. 158, Chinnasami Pillai* v. *Kunju Pillai, I. L. R. 35 Mad. 152 ; Bhyah Ram Singh* v. *Bhyah Ugur Singh, 13 Moo. I. A. 373 ;* and *Suraya Bhukta* v. *Laksaminarasamma I. L. R. 5 Mad. 291.* BUDDHA SINGH *v.* LALTU SINGH (1912) **I. L. R. 34 All. 663**

19. ———— **Step-sister**—*Vyavahara Mayukha—Succession—Paternal uncle—Priority.* According to Hindu Law, as administered under the Vyavahara Mayukha, the half-sister of the *propositus* is entitled to succeed in preference to his paternal uncle. TRIKAM PURSHOTTAM *v.* NATHA DAJI (1911) . **I. L. R. 36 Bom. 120**

20. ———— **Maiden's stridhan**—*Mitakshara—Stridhan—Father's brother's son—Sister—Sister's son.* Under the Mitakshara school of Hindu Law, a sister (father's daughter) and a sister's son (father's daughter's son) are entitled to succeed to a maiden's *stridhan* in preference to a father's brother's son. *Per* N. R. CHATTERJEA, *J.* Under the Mitakshara law, in the absence of any rule determining the nearness among relations of the father in case of succession to a maiden's

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stridhan, the question should be decided by analogy to the order of succession to the *stridhan* of a childless woman married in a disapproved form, so far as it is applicable, for in both cases' succession is confined to the father's family. The *stridhan* of a childless woman married in a disapproved form devolves, after the father, in the same manner as if it had belonged to the father himself, and the succession follows the order laid down in the text of Yajnavalkya regulating obstructed succession. *Quære :* Whether the son or grandson of the father in such a case takes before the father or after him and before the other heirs mentioned in the said text. DWARKA NATH ROY *v.* SARAT CHANDRA SINGH ROY (1911)

I. L. R. 39 Calc. 319
15 C. W. N. 1036

21. ———— **Succession among collateral sapindas**—*Mitakshara. Law—'Brother's son,' in Mitakshara does not include brother's grandson—Under Mitakshara Law, test in determining priority among unenumerated heirs is not spiritual efficacy but nearness of relationship—Brother's great-grandson succeeds in preference to uncle's grandson.* The word 'sons' in the text of the Mitakshara Chap. II, s. I, verse 2, s IV, verses 7 and 8, and in s. V, verse 1, should not be given an extended

'sons' the grandsons as well whether of the brother, the paternal uncle or the great-uncle Such grandsons cannot claim rights of inheritance as heirs enumerated in the above texts. *Lakshmi Narasamma* v. *Jagannadham, I. L. R 5 Mad 291*, approved. *Kalian Rai* v. *Ramachandra, I. L. R. 24 All. 128*, not followed In the case of competition between sapindas not enumerated in the above texts, the nearest sapinda entitled to succeed must be determined not by considerations of superior religious efficacy but by nearness of relationship and preference should be given to the sapinda belonging to the nearer line The great principle pervading the law of inheritance under the Mitakshara system is that the nearer line excludes the more remote. The brother's great grandson succeeds in preference to the uncle's grandson. CHINNASAMI PILLAI *v.* KUNJU PILLAI (1911) . . . **I. L. R. 35 Mad. 152**

22. ———— **Stridhan, succession to**—*Step-sister's son as heir.* A step-sister's son is a preferential heir to a woman's *stridhan* to the daughter's son of the great-grandson of the great-grandfather of the woman's husband. SASI BHUSAN LAHIRI *v.* RAJENDRA NATH JOARDAR (1912) . . . . **16 C. W. N. 1094**

23. ———— **Mitakshara—Succession—Priority**—*Full sister—Son of a separated half-brother—Civil Procedure Code (Act V of 1908), s. 11*—Res judicata *between co-defendants.* Under the Mitakshara, the son of a separated half-brother is entitled to succeed in preference to a full sister of the *propositus*. *Bhagwan* v. *Warubai, I. L. R. 32 Bom. 300*, followed. *Per* SHAH, *J.*—In order that any decision between co-defendants might operate as *res judicata* in any subsequent suit between them, it is necessary to establish that there was a
dants, and
real rights

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sc. Ramchandra Narayan v. *Narayan Mahadev, I. L R 11 Bom. 216*, followed. HARI ANNAJI *v.* VASUDEV JANARDAN (1914) .

I. L. R. 38 Bom. 438

24. ———— **Step-mother cannot inherit under Mitakshara law**—*But may inherit according to a special caste custom.* A step-mother is not to be allowed to inherit to her step-son as a *gotraja sapinda*. *Mari* v. *Chinnammal, I. L R. 8 Mad. 107*, explained. The *Mitakshara* law (apart from usage) does not recognise a step-mother as in the line of heirs at all. Property should go to the Crown in preference to her. This case was remanded on the following additional issue (*inter alia*), "whether according to the usage of the caste to which she and the first defendant belong, the step-mother is entitled to inherit to her step-son?" SEETHAI *v.* NACHIAR 1914)

I. L. R. 37 Mad. 286

25. ———— **Custom of primogeniture**—*Allegation of family or local custom—What must be proved—Continuity and immemorial user—Onus—Finding that custom proved, if finding of fact—Record of-rights pending suit—Judgment of revenue officer in settlement proceedings, if evidence in suit—Attestation proceeding, finding in favour of custom recorded at, and based upon, hearsay* Whether certain facts found by the lower Appellate Court (and as such binding on the High Court) do or do not establish an alleged custom of primogeniture, is a question of law Where a party relies upon a special custom of a family to take the succession out of the ordinary Hindu Law such custom must be proved to be ancient and continuous The alleged custom must be very satisfactorily proved by evidence of particular instances so numerous as to justify the Court in finding in favour of the custom Where subsequently to the institution of the suit, and at the attestation stage of proceedings for preparation of record-of-rights, an Assistant Settlement Officer found upon information gathered from the tehsildar of the Raja's estate that the custom of primogeniture prevailed among Kurmi Mahtos in 82 out of 84 of the villages within the estate and the lower Appellate Court relying upon this judgment found the custom established in the village in suit, the parties being Kurmi Mahtos · *Held*, that, apart from the circumstance that the fact of the record-of-rights having been completed since the institution of the suit affected the value and importance of the decision of the Settlement Officer, his judgment had been used for a purpose for which it was not admissible in law. That reliance might possibly have been placed upon it to show that the custom was recognised by the revenue authorities, but the findings of the Settlement Officer could not be incorporated into the evidence in the case and treated as practically conclusive between the parties That whether the Assistant Settlement Officer was competent or not to act upon information gathered from the Raja's tehsildar (which was clearly not legal evidence), that statement of the tehsildar was inadmissible in evidence in the Civil Court. DURGA CHARAN MAHTO *v.* RAGHUNATH MAHTO (1913) . . . **18 C. W. N. 55**

26. ———— **Succession to a yati** (*religious ascetic*)—*Chela or sisya (disciple or pupil) of Hindu religious ascetic or mendicant—Heirs natural and special under rules of Hindu Law.* A Brahmin who had left his home in early life and settled in Burrabazar in Calcutta, where he lived the life

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of a Hindu mendicant and practised religious austerities but dressed himself in ordinary cloths and deposited monies with firms in Burrabazar on interest, and had also acquired property in the Punjab, cannot be taken to have renounced the world and was not a *yati* or a religious ascetic in the sense of the Hindu Law and on his death his natural heirs under the ordinary rules of the Hindu Law are entitled to succeed to his property. Nor was the plaintiff who claimed to be the heir of the deceased Brahmin as his *chela*, his *satsisya* or virtuous pupil in the sense of the Hindu Law and was not entitled to succeed against his natural heirs, who have proved themselves to be his legal heirs. GOURI SUNKER BYAS *v.* NIADER SINGH (1913) . . . **18 C. W. N. 59**

27. ———— **Dayabhaga School**—*Doctrine of spiritual benefit—Paternal great-grand-father's son's daughter's son and maternal uncle, who is preferable.* Under the Dayabhaga School of Hindu Law, the paternal great-grand-father's son's daughter's son of a deceased Hindu is preferable to his mother's brother as heir, even though the latter is specifically mentioned in the Dayabhaga as an heir and the former is not, and his precise position in the category of heirs is not laid down in the case of *Guru Govind* v. *Ananda Lal, 13 W. R. F. B. 49, c Braja Lal* v. *Jiban Krishna, I. L. R. 26 Cal. 285,* referred to. KAILASH CHUNDER ADHIKARI *v.* KARUNA NATH CHOWDHRY (1913) **18 C. W. N. 477**

28. ———— **Daughters inheriting father's estate jointly**—*Death of one—The other if succeeds to deceased's interest as reversionary heir—Adverse possession for more than twelve years during both daughters' lifetime—Surviving daughter's right to recover moiety share belonging to deceased, if arises from her death—Limitation Act (IX of 1908), Sch. I, Art. 141.* Where one of two daughters of a Hindu who inherited his properties, died, the survivor did not acquire in the interest enjoyed by the deceased a title of the nature described in Art. 141 of Sch. I, of the Limitation Act. Where after both daughters had been kept out of possession for more than 12 years one of them died, and the other by some means or other got back possession: *Held,* that she could not maintain her possession against the person who by 12 years' adverse possession had acquired title in the entire property, including the interest of the deceased daughter, to which she succeeded by survivorship and not by inheritance. SACHINDRA KISHORE DEY *v.* RAJANI KANT CHUCKERBUTTY (1914) . . **18 C. W. N. 904**

28 (*a*). ———— *Held,* that under the Mitakshara Law the preference of heirs of the whole blood to those of the half blood is confined to "Sapindas of the same degree of descent from the common ancestor" where therefore the choice of heirs lay between Sapindas of different degrees an uncle of the half blood as being less remote from the common ancestor is a preferential heir to the sons of an uncle of the whole blood. The Provisions of s. 317 of the Civil Procedure Code 1882 were designed to create some check on the practice of making so called benami purchases at execution sales for the benefit of Judgment debtors and in no way affects the title of persons otherwise beneficially interested in the purchase. GANGA SAHAI *v.* KESRI. **I. L. R. 37 All. 545**

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29. ———— **Mitakshara—"Sapindaship,"** *definition of, if governs inheritance or marriage only—Bhinnagotra sapindas or bandhus who may succeed as—Limit of five degrees and mutuality to be satisfied—Classes of bandhus enumerated in Mitakshara, if to be extended—Interpretation of rules of Hindu Law—Suit in ejectment—Plaintiff to strictly prove title. Sapinda* relationship, according to the Mitakshara, is based not on the presentation of funeral oblations, but on descent from a common ancestor, and in the case of females, also on marriage with descendants from a common ancestor, this relationship ceasing—not merely for purposes of marriage, but generally and therefore for purposes of inheritance also—after the seventh degree from the common ancestor on the father's side and fifth on the mother's. The word "*bandhu*" in the system of the Mitakshara bears a distinct and technical meaning signfying the *bhinna-gotra sapindas*, and the limitation of the five degrees clearly applies and can only apply to the *bhinna-gotra sapindas.* Besides being within the fifth degree from the common ancestor, a *bandhu* to be entitled to succeed to the inheritance must be so related to the *propositus* that they are *sapindas* to each other. *Held,* accordingly, that the plaintiffs who were the paternal grand-father's son's son's daughter's daughter's sons of the *propositus* were not his heirs, both because they were his *bhinna-gotra* beyond the fifth degree and also because the element of mutuality was wanting between them and the *propositus.* The ruling in *Gridari Lal* v. *The Bengal Government, 12 Moo. I. A. 448,* that the enumeration of *bandhus* who were entitled to succeed is not exhaustive but merely illustrative, hardly warrants the conclusion that the classes specified by Vijnaneswar, *viz., atma-bandhus, pitri-bandhus, matri-bandhus,* can be added to. *Lallubhai* v. *Mankuvarbai, I. L. R. 2 Bom. 588, Umaid Bahadur* v. *Udai Chand, 4 C. W. N. 866 : s. c. I. L. R. 25 Mad. 61, Babu Lal* v. *Nanku Ram, I. L. R. 22 Calc. 339,* referred to. The Hindu Law contains its own principles of exposition, and questions arising under it cannot be determined on abstract reasoning or analogies borrowed from other systems of law, but must depend for their decisions on the rules and doctrines enunciated by its own law-givers and recognised expounders. RAMCHANDRA MARTAND WAIKAR *v.* VINAYAK VENKATESH KOTHEKAR (1914) . . . . **18 C. W. N. 1154**
L. R. 41 I. A. 290

30. ———— **Mitakshara**—*Ch. II, s. 5, pl. 4 and 5—Mayukha, Ch. VIII, pl. 18—Compact series of heirs—Brother's widow—Sapinda—Uncle's sons—Brother's widow nearer heir.* The widow of a brother of the deceased is, as a *sapinda,* a nearer heir of the deceased than his paternal uncle's sons. BASANGAVDA *v.* BASANGAVDA (1914)
I. L. R. 39 Bom. 87

31. ———— *Mitakshara, Chapter II, s. 8, para. 2—Claim by plaintiff as Pitrai Chela to recover the property of a deceased Bairagi—Claim not maintainable on the ground of custom and Hindu Law—Bairagis—Sanyasis—Hermit, ascetic, student in theology—Heirs—Preceptor, virtuous pupil and spiritual brother in reverse order.* The plaintiff claiming as Petrai Chela of a deceased Bairagi sued to recover the property of the deceased. *Held,* dismissing the suit, that both on the ground of custom and on the ground of Hindu Law the plaintiff had failed to make out his case. The

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declared heir of a Sanyasi under the Mitakshara is a virtuous pupil. According to the Mitakshara, Chap. II, s. 8, para. 2, the heirs of the property of a hermit, of an ascetic and of a student in theology are the preceptor, the virtuous pupil and the spiritual brother belonging to the same hermitage in the inverse order. *Quære:* Whether Bairagis can be classed as Sanyasis because the order of Bairagis is not confined to the members of the twice born castes. RAMDAS GOPALDAS *v.* BALDEVDASJI KAUSHALYADASJI (1914)

I. L. R. 39 Bom. 168

32. ———— **Maiden's property—Preferential heir.** One Sitabai who became entitled to Rs. 3,000, under an insurance policy on the death of her father, died unmarried; and the plaintiff, the sister of her mother, sued for a declaration that the defendant who was the step-mother of the deceased Sitabai was not her heir under the Hindu Law and that she as the maternal aunt of the deceased was her lawful heir and entitled to the amount that was held in deposit in Court. *Held,* that the plaintiff was not entitled to succeed in preference to the defendant. The sapindas, both of the father and the mother, must refer to the same persons as the mother becomes a member of the father's family on her marriage. *Tukaram* v. *Narayan Ramchandra, I. L. R. 36 Bom. 339, Janglubai* v. *Jetha Appaji, I. L. R. 32 Bom. 409,* and *Dwarka Nath Roy* v. *Sarat Chandra Singh Roy, I. L. R. 39 Calc. 319,* followed. The rule that female gotraja sapindas do not inherit as agnate relations taking the rank which they would be entitled to if their claims were based on sapinda relationship has been applied to the succession of male's property. *Balamma* v. *Pullayya, I. L. R. 18 Mad. 168,* and *Thayammal* v. *Annamalai Mudali, I. L. R. 19 Mad. 35,* referred to. The rule that in the case of succession to sridhanam property, a daughter inherits as sapinda where the succession has to be traced through the father or the husband applies also to the case of a wife or widow. *Manja Pillai* v. *Sivabhagiathachi, 21 Mad. L. J. 551,* applied. KAMALA *v.* BHAGIRATHI (1912)

I. L. R. 38 Mad. 45

33. ———— **Dayabhaga School**—*Whether great-grandfather's son's daughter's son or maternal uncle preferential heir—Stare decisis.* In a Dayabhaga family the great-grandfather's son's daughter's son is entitled to succeed as heir in preference to the maternal uncle. *Kailash Chandra Adhikari* v. *Karuna Nath Choudhry, 18 C. W. N. 477,* followed. *13 W. R. (F. B.) 49; 5 B. L. R. 15,* cannot be questioned now. KEDAR NATH BANERJEE *v.* HARI DAS GHOSE (1915) . . **I. L. R. 43 Calc. 1**

34. ———— **Illegitimate son**—*of a Sudra by a dancing woman kept in continuous and exclusive concubinage—Right to succeed to joint family property.* The illegitimate son of a Sudra by a dancing woman who was by profession a prostitute before she came into his keeping but who was kept by him in continuous and exclusive concubinage thereafter, is entitled to get his appropriate share in the joint family property after his father's death provided the connection between his father and mother was not incestuous or adulterous. This right is not subject to a further condition that a marriage could have taken place between the father and the mother according to the custom of the caste to which the mother belonged. SOUNDARARAJAN *v.* ARUNACHALAM CHETTY (1915) . . . **I. L. R. 39 Mad. 136**

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35. ———— **Lunacy**—*Effect on the devolution of immovable property of lunacy of next heir—Suit to recover possession from daughters of lunatic—Limitation—Limitation Act (IX of 1908), Sch. I, Art. 141.* A person is disqualified under the Hindu Law from succeeding to property if he is insane when the succession opens, whether his insanity is curable or incurable. *Deo Kishen* v. *Budh Prakash, I. L. R. 5 All. 509,* and *Tirbeni Sahai* v. *Muhammad Umar, I. L. R. 28 All. 247,* referred to. The daughter, therefore, of such person would derive no legal title through her father. The legitimate wife of a lunatic Hindu took possession during his life-time of certain immovable property which had belonged to his father and subsequently transferred part of it to her daughters and to the husband of one of them. She retained a portion herself, which after her death came into the possession of one of the daughters. *Held,* that a suit to recover the property of which possession had been so obtained and held was governed by Art. 141 of the first Schedule to the Indian Limitation Act, 1908. *Legge* v. *Ram Baran Singh, I. L. R. 20 All. 35,* distinguished. RAM SINGH *v.* MUSSAMMAT BHANI (1915) . . . . **I. L. R. 38 All. 117**

36. ———— **Bandhu**—*Mother's brother's son preferred to mother's sister's son.* According to Hindu Law of the Mitakshara School, the mother's brother's son takes precedence as an heir over the mother's sister's son. *Appandai Vathiyar* v. *Bagubali Mudaliyar, I. L. R. 33 Mad. 439,* dissented from. *Buddha Singh* v. *Laltu Singh, I. L. R. 37 All. 604,* referred to. RAM CHARAN LAL *v.* RAHIM BAKSH (1916) . **I. L. R. 38 All. 416**

37. ———— **Religious office**—*Right of females to inherit and do duty by proxy.* A female is not under the Hindu Law or custom disqualified from succeeding to a hereditary religious office (such as the office of *archaka* in a temple) and getting such duties as she may be disqualified by reason of her sex from performing, performed by proxy. *Ramasundaram Pillai* v *Savandrathammal 16 Mad. L. T. 423,* and *Tangirala Chiranjivi* v. *Raja Manikya Rao, 27 Mad. L. J. 179,* followed. *Sundarambal Ammal* v. *Yogavana Gurukkal, I. L. R. 38 Mad. 850,* not followed. RAJA RAJESWARI AMMAL *v.* SUBRAMANIA ARCHAKAR (1916)

I. L. R. 40 Mad. 105

38. ———— **Unchastity**—*in husband's life-time—Condonation by husband.* Under the Hindu Law, a widow is not debarred from inheriting to her husband on the ground that she had become unchaste in her husband's life-time, if the husband had condoned her unchastity. *Gangadhar Parappa Alur* v. *Yellu kom Virasvami Shiravale, I. L. R. 36 Bom. 138,* followed. *Mutunginee Dabee* v. *Joykallee Dabee, 14 W. R. A. O. J. 23,* and *Moniram Kolita* v. *Keri Kolitani, I. L. R. 5 Calc. 776,* referred to. RADHE LAL *v.* BHAWANI RAM (1917)

I. L. R. 40 All. 178

39. ———— **Full sister entitled to priority.** According to the Mitakshara School of Hindu Law, a full sister is entitled to succeed in priority to the half-sister. JANA *v.* RAKHMA (1918)

I. L. R. 43 Bom. 461

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40. ———— Sudra—Illegitimate son not allowed collateral succession. On the death of a Sudra, his property was claimed by two persons, one of whom was his divided brother, and the other was the illegitimate son of his father:—*Held*, that the former was entitled to succeed, since the illegitimate son was, under Hindu Law, excluded from all collateral succession. *Ravji valad Mahadu* v. *Sakuji valad Kaloji*, (*1909*) *34 Bom. 321* ; *Shome Shankar Rajendra Varere* v. *Rajesarswami Jangam* (*1898*) *21 All. 99* and *Ramalinga Muppan* v. *Paradai Goundan* (*1901*) *25 Mad. 519*, followed. DHARMA LAKSHMAN *v.* SAKHARAM RAMJIRAO (1919) . . . I. L. R. 44 Bom. 185

41. ———— Sudras—*Leva Kunbis of Changdeo in the East Khandesh District, whether Sudras—Illegitimate sons dividing property with legitimate sons, mother entitled to a share.* Leva Kunbis residing at Changdev in the East Khandesh District are Sudras. Under Hindu Law, even when, among the Sudras, the illegitimate sons divide the property with the legitimate sons, the mother is entitled to a share. MANCHHARAM BHIKU *v.* DATTU (1919) . . I. L. R. 44 Bom. 166

42. ———— Brahmans of tahsil, Kharar District, Ambala—*father's sister's sons or village proprietors—Limitation—presumption in favour of continuance of life*—onus *of proving death.* Plaintiffs, the father's sister's sons of one Sardha, deceased, sued for possession of the latter's land which had been taken possession of by the village proprietors on the death of *Mussammat* Atri, the widow of Mula, father of Sardha. The deceased was a Brahman and the village proprietors (defendants) are Rajputs. The suit was instituted on the 5th May 1914 and the only evidence as to the date of *Mussammat* Atri's death was a report of the *Patwari* in September 1902 to the effect that she died in May 1902. The Lower Appellate Court held that the plaintiffs were heirs by Hindu Law and that the claim was within time. The defendants appealed to the High Court. *Held*, that by the *Mitakshara* system of Hindu Law the father's sister's sons are heirs. *Tahaldai Kumari* v. *Gaya Pershad* (*I. L. R. 37 Calc. 214*) and Mayne's Hindu Law, 8th Edition, Chap. XVI, p. 704, and Trevelyan's Hindu Law, 2nd Edition, p. 402, referred to. *Held, also*, that there is a presumption in favour of continuance of life and that in the absence of proof by the defendants that *Mussammat* Atri died before the 4th of May 1902 she must be presumed to have died after that date and the suit was consequently within time. AMEER *Ali* and *Woodroffe's Law of Evidence, 5th Edition, p. 682*, referred to. TANI *v.* RIKHI RAM

I. L. R. 1 Lah. 554

43. ———— Khatris—*Sister of father's father's son's daughter's son—Adoption not in Dattaka form—whether adopted son entitled to collateral succession—Will by widow—validity of—possessory title.* Plaintiff claimed a house and some moveable property as heir to her deceased brother Harnam Das, son of Jai Ram. Plaintiff alleged also that she had got possession of the property on the death of *Mussammat* Ind Kaur, the widow of Harnam Das, and had been forcibly dispossessed by the defendant. The latter was the daughter's son of Ram Chand, brother of Jai Ram and was adopted by his maternal grandfather. He also claimed under a will made by *Mussammat* Ind Kaur in his favour. It was found as a fact that the adoption of defendant was not made in the

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Dattaka form; also that the plaintiff never got peaceful and exclusive possession of the property after the death of *Mussammat* Ind Kaur. *Held*, that the adoption of the defendant, not being in accordance with the *Dattaka* form, the latter was not entitled under the *Mitakshara* School of Hindu Law to succeed collaterally. *Jiwan Mal* v. *Jamna Das* (*67 P. L. R. 1911*), followed. *Held also*, that by Hindu Law a widow's powers of alienation are restricted to religious purposes, and the fact that there are no heirs capable of taking at her death does not affect these powers, and consequently the will of *Mussammat* Ind Kaur conferred no title on defendant. *The Collector of Masulipatam* v. *Cavali Vencata Narrainapah* (*8 Moo. I. A. 529, 551 P. C.*) and *Pandharinath Vishvanath* v *Govind Shivram* (*I. L. R. 32 Bom. 59, 71*), followed. *Alla Ditta* v. *Gauhra* (*3 P. R. 1914*), distinguished. *Held further*, that by *Mitakshara* Law the plaintiff as a sister is not entitled to succeed against the defendant who cannot be said to be a total stranger being the daughter's son of the deceased's uncle. *Shambu Nath* v. *Mussammat Ralli* (*52 Indian Cases 591*) and *Mayne's Hindu Law, 8th Edition, p. 744, para. 534*, followed. *Nanak Gir* v. *Mussammat Kishen Kaur* (*161 P. R. 1919*), distinguished. *Held moreover*, that defendant as a father's father's son's daughter's son is a *bandhu* and has a better title than the plaintiff. Mulla's Hindu Law, 3rd Edition, pp. 58 and 59, referred to, also *Abdul Hamid* v. *Surbuland Khan* (*78 P. R. 1902*). *Held finally*, that the fact that there was a scramble for possession on the death of the widow *Mussammat* Ind Kaur and plaintiff as well as defendant put a lock on the door of the house is not sufficient to establish plaintiff's peaceful and exclusive possession, so as to entitle her to a decree for possession on the basis of her possessory title. In a suit on possessory title a plaintiff must prove more than what is necessary for him to do in a suit under the Specific Relief Act. *Abdul Hamid* v. *Surbuland Khan* (*78 P. R. 1902*), referred to. TIRTH RAM *v.* MUSSAMMAT KAHAN DEVI . . . . I. L. R. 1 Lah. 588

44. ———— Bengal and Benares Schools—*Succession—brother's daughter—whether a bandhu.* The plaintiff, the brother's daughter of one Mani Ram, deceased, sued for a declaration that Jagiri Mal had not been adopted by Mani Ram or his widow. The Lower Court dismissed the suit on the ground of limitation. The plaintiff appealed to the Chief Court and it was contended by the defendants-respondents that even if the suit was not barred by limitation the plaintiff not being a *bandhu* with rights of inheritance had no *locus standi*, to bring the suit. *Held*, that by the Bengal and Benares Schools of Hindu Law the only females entitled to inherit are the widow, the daughter, the mother, the father's mother and the father's father's mother and that consequently plaintiff as a brother's daughter had no *locus standi* to bring the present suit. *Gauri Sahai* v. *Rukko* (*I. L. R. 3 All. 45*), *Jagat Narain* v. *Sheo Das* (*I. L. R. 5 All. 311*), *Nanhi* v. *Gauri Shankar* (*I. L. R. 28 All. 187*), *Jagan Nath* v. *Champa* (*I. L. R. 28 All. 307*), *Jogdamba Koer* v. *Secretary of State* (*I. L. R. 16 Calc. 367, 370*), *Mussammat Bibi Sodhan* v. *Harsa Singh* (*51 P. R. 1916*) and *Shambhu Nath* v. *Mussammat Ralli* (*52 Indian Cases 591*), followed. Mulla's Hindu Law, 3rd Edition, p. 68, Ghose's principle of Hindu Law, Vol. I, 3rd Ed., p. 156, Rama Krishna's Hindu Law, Vol.

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distinguished. ... MAL . . . . . I. L. R. 1 Lah. 608

44(a) ———— Mother's Sister's Son's Son—*is to be preferred to mother's paternal aunt's son—Atma bandhus to be preferred irrespective of question of propinquity and religious efficacy—"Son" includes "son's son"—"Sapindas" who are.* Under the Mitakshara law, the mother's sister's son's son of the deceased propositus is preferred as heir to his mother's paternal aunt's son. In families governed by the law of the Mitakshara, the right of succession amongst the three classes of *bandhus* mentioned in the Mitakshara, Chap. 15, sec. 6, is governed by the propinquity of the class; and a *pitri-bandhus* does not succeed until the class of *atma bandhus* is exhausted and a *matri-bandhu* does not succeed until the classes of *atma bandhus* and *pitri-bandhus* are exhausted. The rule in preferring the nearer to the more remote class of *bandhus* is not dependent on individual propinquity or on the efficacy of offerings to the deceased person. A *bandhu* must in order to be heritable in a female line fall within the fifth degree from the common male ancestor and must be so related to the deceased person that they are mutually *sapindas* of one another, that is, persons connected by particles of one body. The grandson of a mother's sister falls within the general description of an *atma-bandhu*, a person related to the propositus himself, and is not to be excluded only because he is not mentioned among the illustrations in the text of the Mitakshara. *Muthuswami Mudaliyar* v. *Simambedu Muthukumaraswami Mudaliyar, L. R. 23 I. A. 83: s.c. I. L. R. 19 Mad. 405 (1896). Buddha Singh* v. *Laltu Singh. L. R. 42 I. A. 208: s.c. 20 C. W. N. 1 (1915). Ramchandra Martand Waikar* v. *Vinayak Venkatesh Kothekar, L. R. 41 I. A. 290 s. c. I. L. R. 42 Calc. 384; 18 C. W. N. 1154 (1914).* ... *na Ayyangar,* ... *Vili* v. *Bai* ... 1907) referred to. ADIT NARAYAN SINGH *v.* MAHABIR PRASAD TEWARI (P.C.) . . 25 C. W. N. 842

44(b) ———— Family Law, Renounced, if Governs succession—*To persons immigrated from another place—Succession to Hindu whose family immigrated from another place—Mahratta Brahmin emigrating and settling in the Central Provinces—No proof that he renounced his old family law—Daughter inherits absolutely under Mayukha, the personal law of the individual whose succession is in question—Influence of commentaries upon Hindu Law—Effect of domicile—Judicial decision operates retrospectively.* Amongst Hindus, the law of succession in any given case is to be determined according to the personal law of the individual whose succession is in question. If nothing is known about a man but his place of residence, it will be assumed that his personal law is the law which prevails in that place. ... re- ... at ... of personal law prevailed, in which case the law must be the family law as it was when the family emigrated. It is open to proof that he has renounced the law prevailing in his place of origin and accepted that prevailing in his place of domicile. The personal law of a Mahratta Brahmin whose ancestors had at one time lived in Maharashtra in the Bombay Presidency, is that prevailing in Bombay, and accordingly on his death his daughter takes an absolute interest in his property. The difference in the law existing in Bombay and the other Courts is due to the dominating influence of the different commentaries. But commentaries do not enact. They explain and are evidence of the congeries of customs which form the law. Bombay Courts relying on the Mayukha has arrived at totally different resul... othe... with... *kha Bhau* v. *Raghunath I. L. R. 30 Bom. 229 at p. 236 (1905),* approved. *Narayan Vithal* v. *Govind Narayan, 1 Nag. L.R. 154 (1905),* commented on. A decision of a Court of law is not to be regarded as a statute. It is declaratory of the law as it has existed. BALWANT RAO *v.* BAJI RAO (P.C.) . . 25 C. W. N. 243

45 ———— Custom of Remarriage—*Whethere a childless widowed daughter of child-bearing age free to remarry, by custom, and heir of her father.* In the caste in which widow remarriage is a custom, a childless widowed daughter of child-bearing age is not entitled to succeed to her father's property along with the married daughter having a son, in the absence of any proof of custom entitling her to succeed under such circumstances. BINODINI HAZRANI *v.* SUSTHEE HAZRANI. (1920)
I. L. R. 48 Calc. 300

46. ———— Impartible estate—*Mitakshara—Joint ancestral estate—Survivorship.* The successor to an impartible estate which is ances-... member of the senior branch of the family, therefore succeeds in preference to the direct lineal senior descendant of the common ancestor if the latter i... *Natchiar* ... *I. A., 54* ... *chalapati* ... *Rup Sin* ... *L. R,* ... *I. L. R., 28 Mad., 508; L. R., 32 I. A., 261,* approved and followed. *Neelkisto Deb Burmono* v. *Beerchunder Thakoor, 12, Moo.,I. A., 523,* and *Sartaj Kuari* v. *Deoraj Kuari, I. L. R., 10 All., 272; L. R., 15 I. A., 51,* explained and distinguished. The terms "co-parceners" and "co-pa... in all ... joint ... family property. Judgment of the High Court affirmed. BAIJNATH PRASAD SINGH *v.* TEJ BALI SINGH . . I. L. R. 43 All. 228

... not apply to it save so far as it was not inconsistent

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with the custom. Such a custom may, if observed and acted upon, survive the primitive conditon of things out of which it originally, from the very necessity of the case, sprung; and the head of the family for the time being cannot, by accepting from the Government of India a *sanad* containing clauses inconsistent with the custom, destroy it or render it inoperative. RAO KISHORE SINGH *v.* MUSSAMMAT GAHENABAI . **24 C. W. N. 601**

48. ———— **Bhinna gotra sapindas**—*Mother's sister's son and mother's paternal aunt's son.* Under the *Mitakshara* School of Hindu Law the mother's paternal aunt's son succeeds in preference to the mother's sister's son's son. ADIT NARAYAN SINGH *v.* MAHABIR PD. TEWARI **1 Pat. L. J. 324**

49. ———— **Property jointly acquired and thrown into common stock**—*Succession to.* Under the Hindu Law, property jointly acquired and thrown into the common stock is subject to succession by survivorship as between the parties who acquired the property. GOBARDHAN SAHU *v.* BULKHAN MAHTON . . **1 Pat. L. J. 195**

49(*a*) ———— **Widow's Remarrage**—*Right of succession in the family of her first husband—Succession as a gotraja sapinda.* Under Hindu Law, the father's sister is entitled to succeed in preference to the remarried widow of the paternal uncle. *Rasappa* v. *Rayava (1904) 29 Bom. 91,* distinguished. PRANJIVAN HARGOVAN *v.* BAI BHIKHI (1921)
I. L. R. 45 Bom. 1247

50. ———— **Maternal uncle of last male owner** *and sister's daughter's son. Held,* by the Full Bench (DAWSON MILLER, *C. J.*, and IMAM, *J.*, dissenting) that in a family governed by the *Mitakshara* the maternal uncle of the last male owner is preferred to the sister's daughter's son as heir to the estate. UMASHANKER PRASAD PRASARI *v.* MUSSAMMAT NAGESWARI KOERS
3 Pat. L. J. 663

HINDU LAW—SUDRA.

See HINDU LAW LEGITIMACY.

1. ———— *Custom of family—Primogentiure—Rajput family—Evidence—Long continuance of family.* In a Rajput family settled for many centuries in the Nimar district (Central Provinces) a custom of succession by primogeniture was alleged, the eldest son succeeding to the *gaddi* and the title of Rana, and the younger sons being entitled only to maintenance. The oral evidence showed that the practice during the last four generations had been in accordance with that custom, and the documentary evidence confirmed it showing the existence of a *gaddi* and the title Rana from a very early period. Under Mahomedan rule the head of the family was the holder of a hereditary fiscal office. The Appellate Court (reversing the trial Judge) held that the custom alleged was not proved as existing as of right. The view of the Court was that since the abolition of the fiscal office the subsistence which the younger sons had formerly received as a favour had become a share claimed as of right and increasing in quantity to the equality favoured by ordinary Hindu law from which circumstances had diverted the enjoyment of the family property. *Held,* that the evidence established the custom, the view of the Appellate Court being based on a theory of

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a speculative character, and omitting to give weight to the survival of the family as an entity during many centuries, which survival could have occurred only with the help of a family custom of the kind alleged. Mere cessation of services to which *uatan* lands are attached, which are by custom impartible, does not ordinarily destroy the custom. Judgment of the Court of the Judicial Commissioner reversed. RANA MAHATAB SINGH *v.* BADAN SINGH, (1921)
I. L. R. 48 Calc. 997

2. ———— **Bandhus**—*Male bandhu entitled to preference over a female bandhu though the latter be nearer in degree.* Under the Mitakshara Hindu Law a male bandhu is entitled to preference over a female bandhu even though the latter is nearer in degree. *Held,* accordingly, a mother's sister's son is entitled to succeed in preference to a brother's daughter. *Rajah Venkata Narasinha* v. *Raja Surenani (1908) 31 Mad. 321,* followed. BALKRISHNA *v.* RAMKRISHNA. (1920) . . . . **I. L. R. 45 Bom. 353**

3. ———— *Succession—First cousins take per capita and not per stirpes.* Under Hindu Law, first cousins of the propositus take *per capita* and not *per stirpes. Nagesh* v. *Gururao (1892) 17 Bom. 303,* referred to. NARSAPPA *v.* BHARMAPPA. (1920)
I. L. R. 45 Bom. 296

4. ————**Murder as a disqualification**—*to inherit—Public policy precluding a person from benefiting by his crime—Succession among Bandhus—Priority between father's sister's son and father's brother's daughter.* Among Hindus, a murderer is disqualified from inheriting the estate of the person murdered. (Applicability to Hindu Law of the rule of public policy which precludes a person from benefiting by his own crime, discussed.) According to the Bombay School of Hindu Law, father's sister's son is entitled to succeed in preference to the father's brother's daughter. Under the Mitakshara, a male *bandhu* is entitled to preference over a female *bandhu* even though the latter is nearer in degree. *Balkrishna (1920) 45 Bom. 353* v. *Ramkrishna* and *Rajah Venkata* v. *Rajah Surenani (1908) 31 Mad. 321,* followed. GIRIMALLAPPA CHANNAPPA *v.* KENCHAVA (1920)
I. L. R. 45 Bom. 768

5. ———— *Right of succession of widowed daughter when remarriage permitted.* A Hindu was succeeded by his widow and on her death the contest for succession was between a childless widow daughter aged about 16 and a married daughter having a son. In the caste to which the parties belonged widow remarriage was permitted. *Held,* that although widow remarriage is a custom in the caste that does not by itself predicate the further custom that the widow daughter is entitled to succeed equally with the married daughter. There must be clear proof of such a custom. BINODINI HAZRANI *v.* SUSTHEE HAZRANI
26 C. W. N. 29

6. ———— *Bandhus—Maternal uncle—Father's sister's grandson—Preference among atma-bandhus.* Under the Mitakshara law a maternal uncle succeeds in preference to a son of the paternal aunt's son. So *held* on the ground that both claimants being

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atma-bandhus, the maternal uncle and the deceased were *sapindas* to each other, whereas the other claimant offered *no pinda* to the ancestors of the deceased, and the maternal uncle was the nearer in degree; a contention that the claimant who was *ex parte paterna* should be preferred to the claimant who was *ex parte materna* being rejected. Four propositions as to bandhu's enunciated by the Madras High Court in *Muthusami* v. *Muttukumarasami* (*1883*) *I. L. R. 16 Mad. 23, 30*, approved, as furnishing a safe guide in the absence of any express authority varying the rule. *Sundarammal* v. *Rangasami Mudaliar*, (*1895*) *I. L. R. 18 Mad. 193*, and *Balusami Pandithar* v. *Narayana Rau*, (*1897*) *I. L. R. 20 Mad. 342*, so far as they held that among *bandhus* of the same class those *ex parte paterna* are to be preferred to those *ex parte materna*, disapproved. Judgment of the High Court reversed. VEDACHELA MUDALIAR *v* SUBRAMANIA MUDLIAR (1921) . . **I. L. R., 44 Mad. 753**

7. ———————— *Hindu Law—Right of succession of young widowed daughter in a caste where widow remarriage is permitted—Necessity of proof of custom entitling the widowed daughter to succeed equally with a married daughter.* A Hindu was succeeded by his widow, and on her death, the contest for succession was between a childless widowed daughter aged 16 or 17 and a married daughter having a son. In the caste to which the parties belonged widow remarriage is permitted. *Held*, that though widow remarriage is a custom in the caste, that does not by itself predicate the further custom that the widowed daughter, because it is open to her to remarry, is entitled to succeed equally with the married daughter. There must be clear proof of custom entitling the widowed daughter to succeed equally with the married daughter. BINODINI HAZRANI *v.* SUSTHEE HAZRANI . . . . **26 C. W. N. 29**

8. ———————— MITAKSHARA (SOUTHERN S[illegible] *succession, order of, amongst atma-* [illegible]

mines preference—[illegible] *of preference—The rule in Mitakshara, if open to question as spurious or as incomplete—Enumeration of heirs, illustrative—Viramitrodaya, authority of, in Southern India—Maternal uncle's place in the order of succession.* The passage in the Mitakshara, Chap. II, sec. 6, para. 1, laying down the order of succession amongst the bandhus has been accepted by a series of Commentators and by eminent Hindu Judges in the British Indian Courts and any doubt at this stage as to its [illegible] ...ly to perple... ...on of bandhus ...in the passage... ...way of illustration only, the rule is not open to objection on the ground of incompleteness. The question being whether according to the law of the Mitakshara as recognised in the Dravira Country, the maternal uncle or the son of the paternal aunt's son (both of whom are atma-bandhus) should succeed as the preferential heir. *Held*, that there is nothing in para. 598 of the Sarasvati Vilasa, to justify the division of the atma-bandhus in two sub-classes, *viz.*, *ex parte paterna* and *ex parte materna* or the preference of the former to the latter. That, in the absence of express authority varying the rule, the propositions enunciated in *Muttusami* v. *Muttukumarasami* (*3*), furnish a safe guide, and the maternal uncle, ... degree and ... and grandson of the ... the preferential heir. The place assigned by Sarbadhikary and Mayne to the maternal uncle in their tables of succession questioned. Although the Smriti Chandrika in the Southern Presidency is regarded as the most authoritative commentary on Vijnaneswara's work, the Viramitrodaya holds as in Western India, a high position. V. A. S. VEDECHELLA MUDALIAR *v.* R. I. RANGANATH CHETTIER . . . . **26 C. W. N. 161**

HINDU LAW—SURETY.

1. ———————— *Father's liability as surety—Whether son is liable to pay debt incurred by father as surety.* Under the Hindu Law, a son is liable for a debt incurred by his father as a surety. *Tukarambhat* v. *Gangaram Mulchand Gujar, I. L. R. 23 Bom. 454*, and *Maharaja of Benares* v. *Ramkumar Misir, I. L. R. 26 All 611*, referred to. RASIK LAL MANDAL *v.* SINGHESWAR RAI (1912) . . . **I. L. R. 39 Calc. 843**

[illegible] *surety-bond—Effect on son's liability.* Where a Hindu executed a surety-bond stating that he would make the debtor pay within two months the amount due on a promissory note already executed by the latter and that, in default of payment by the debtor, he would pay: *Held*, that the surety was one for payment; that the sons of the surety were liable under Hindu Law for the payment and that it made no difference that the money had already been lent to the creditor before the surety-bond was executed. Suretyship, according to the texts of Yajnavalkya, is of three kinds, *viz.*, for appearance, for assurance and for payment: in the last case the surety's sons are also liable to pay his surety-debts. According to the Mitakshara commentary, the suretyship by way of assurance consists of a general warranty of credit, but a surety for payment is one who says, "If he does not pay, then I myself will pay." *Tukaram Bhat* v. *Gangaram, I. L. R. 23 Bom. 454; Rasik Lal Mandal* v. *Singhesuar Rai, I. L. R 39 Calc 843*, referred to. THANGATHAMMAL *v.* ARUNACHALAM CHETTIAR (1918) **I. L. R. 41 Mad. 1071**

3. ———————— *Surety-debt of father—Son's liability for—Order in execution against father as surety—Subsequent partition between father and son—Attachment of property allotted to son's share—Non-liability of such property—Claim petition* [illegible] *—Subsequent suit by son* ... *execution*— ... *2), ss. 253,* ... *V of 1908), s. 53—Inapplicable where father is living.* The second defendant obtained a decree for maintenance against the third defendant. Pending an appeal against the decree, the former recovered the amount in execution on the first defendant standing surety for the second defendant. The

HINDU LAW—SURETY—*contd.*

decree was reversed on appeal; the third defendant applied in execution proceedings for restitution against the first defendant as surety; an order was passed in execution for recovery of the amount against the first defendant and certain lands were attached. The plaintiff, who was the son of the first defendant, filed a claim petition objecting to the attachment on the ground that under a partition between his father and himself made subsequent to the order against the first defendant but before the attachment, the properties in question had fallen to his (plaintiff's) share and consequently were not liable to attachment. The petition was dismissed. The plaintiff thereupon brought the present suit for a declaration that the suit properties were not liable to be attached under the order passed against the first defendant. *Held*, that, under ss. 253 and 583 of the Civil Procedure Code (Act XIV of 1882), an order can be passed against a surety for recovering in execution proceedings the amount due from him. *Held*, further, that a Hindu son is liable for the surety-debt of his father, to the extent of the joint family property which came to his hands at partition. *Ramachandra Padayachi* v. *Kondayya Chetti, I. L. R. 24 Mad. 555*, followed. But a decree for such a debt obtained against the father before partition is not executable after partition against the son and the joint family property allotted to him. *Krishnasami Konan* v. *Ramasami Ayyar, I. L. R. 22 Mad. 519*, followed. S. 53 of the Code of Civil Procedure (Act V of 1908), which provides that property, in the hands of a son, which under the Hindu Law is liable for the payment of a debt of his deceased father in respect of which a decree has been passed, shall be deemed to be assets in the hands of the legal representative only applies to the case of a deceased father; the principle of the section cannot be extended to a case where the father is living. KAMESWARAMMA *v.* VENKATA SUBBA ROW (1914) . **I. L. R. 38 Mad. 1120**

HINDU LAW—SURRENDER.

See HINDU LAW—REVERSIONER—

1. ———————— *Surrender by widow—Essentials of a valid surrender—Provision for maintenance and residence of widow, whether invalidates surrender—Surrender, to be* bonâ fide *of entire interest in whole property and to nearest reversioner.* A reasonable provision for maintenance and residence in favour of a Hindu widow, does not affect the validity of a surrender by her of her husband's estate to the nearest reversioner, provided it is a *bonâ fide* surrender of the *entire* interest of the widow in the *whole* estate and is not a mere device to divide the estate with the nearest reversioner. *Rangasami Goundan* v. *Nachiappa Goundan, I. L. R. 42 Mad. 523*, explained. *Mussammat Bhagwat Koer* v. *Dhanukdhari Prasad Singh, 37 M. L. J. 513*, relied on. ANGAMUTHU CHETTI *v.* VARATHARAJULU CHETTI (1919) . . . . **I. L. R. 42 Mad. 854**

2. ———————— *Surrender by widow and daughter in favour of daughter's son—Deed executed by both—Stipulation for maintenance of both for their lives—Surrender, whether valid—Title of daughter's son—Title of reversioners.* Where the widow and the only daughter of a deceased Hindu surrendered their interests in the estate of the deceased in favour of the daughter's son under a deed executed by them both, stipulating therein that he should maintain them during their lifetime, and, on the death of them all, the reversioners of the deceased sued to recover the estate from the father of the deceased daughter's son. *Held*, that the surrender was valid under the Hindu Law and operated to vest the estate in the daughter's son, and that the reversioners had no title to the property *Sriramulu Naidu* v. *Andalammal, I. L. R. 30 Mad. 145*, and *Challa Subbiah Sastry* v. *Paluri Pattabhiramayya, I. L. R. 31 Mad. 446*, referred to. CHINNASWAMI PILLAI *v.* APPASWAMI PILLAI (1918) . **I. L. R. 42 Mad. 25**

3. ———————— *Essentials for validity of —Mithila Law*—Two conditions must be fulfilled to make a surrender by a widow with consent of the next heir (necessity being out of the question) valid. The first is that the surrender must be total not partial. The second is that the surrender must be a *bonâ fide* surrender, not a device to divide the estate with the reversioners. To make an arrangement such a device, it is not necessary that the lady surrendering should take part of the property directly. CHOWDHURY SURESHWAR MISSER *v.* MUSAMMAT MAHESHRANI MISRAIN . . **25 C. W. N. 194**

HINDU LAW—SURVIVORSHIP.

———— **Reunited family, succession in**—*Mitakshara—Law of survivorship.* Succession in a reunited family governed by Mitakshara law is by survivorship. This mode of succession is not confined to the members who actually reunited and the son of a reunited member born after the reunion is reunited and takes by survivorship. *Krishtraya* v. *Venkatramayya, Appeal No. 170 of 1901 (unreported)*, followed. *Ramasamy* v. *Venkatasan, I. L. R. 16 Mad. 440*, distinguished. SAMUDRALA VARAHA NARASIMHA CHARLU *v.* SAMUDRALA VENKATA SINGARAMMA (1909)
I. L. R. 33 Mad. 165

HINDU LAW—TEMPLE.

See HINDU LAW—ALIENATION.

See HINDU LAW—RELIGIOUS ENDOWMENT.

HINDU LAW—TRUST.

———— **Trust created by will**—*Trust coming into being at a future date—Duty of heirs to carry out the trust—Civil Procedure Code (Act XIV of 1882), s. 539—Trust for public religious purpose—Dedication of property as shivarpana—Ejectment of trespassers from the trust property—Court—Jurisdiction.* Where a Hindu who had directed a trust of his property for a religious purpose dies before giving effect to it, the Hindu Law authorises his heir to take steps for carrying out his directions after recovering the property from a trespasser. Where the testator merely directs that his property should be endowed for a certain purpose at a certain time by certain persons after his death, then until the arrival of the time and the complete dedication of it in the manner and for the object pointed out by the testator, the property must be regarded, in the eye of law, as part of his estate but impressed with a trust or an obligation on the part of those taking that estate as heirs to carry out his directions at the appointed time. He who succeeds him as heir has the right to do what the owner himself would have done or has directed to be done so as to complete the trust with the sanc-

HINDU LAW—TRUST—*contd.*

tion of the Court, if necessary. Before he can do that, he must first secure the property from the wrong-doer into whose possession it has passed. GHELABHAI GAVRISHANKAR *v.* UDERAM ICHARAM (1911) . . . . . **I. L. R. 36 Bom. 29**

HINDU LAW—WIDOW.

See BENGAL TENANCY ACT.
S. 86 . . . **4 Pat. L. J. 548**

See HINDU LAW—ALIENATION JOINT FAMILY REVERSIONER "STRIDHAN".

See HINDU WIDOW.

See CIVIL PROCEDURE CODE, 1908, s. 11.
I. L. R. 37 Bom. 172

———— **nature of possession of—**

See LIMITATION ACT, 1877, SCH. II ART. 144 . **I. L. R. 42 All. 152**

1. ———— **Alienation**—*Alienation by Hindu widow for legal necessity—Property sold for more than the amount needed—Reversioner if may recover on paying amount needed.* Where a Hindu widow *bonâ fide* executed a permanent lease upon taking a *selami* of Rs. 125 in order to pay off a debt of her husband's amounting to Rs. 100: *Held*, that this was not a case in which the reversioners should be allowed to recover possession upon payment of the amount actually needed to pay off the loan. *Chatra Narayan* v. *Uba Kunuari, 11 C. W. N. 474*, and *Sugeeram* v. *Juddoobuns, 1 B. L. R. 201*, relied on. The Privy Council in *the Deputy Commissioner of Kheri v. Khanjan Singh, 11 C. W. N. 474*, did not intend to lay down the rule that a Hindu widow is in every instance bound to sell property for payment of a debt due from her husband for exactly the sum due to the creditor. FELARAM ROY *v.* BAGALANAND BANERJEE (1910) . . . . . **14 C. W. N. 895**

2. ———————— *Alienation by*

general principle which prohibits a Hindu widow's alienation of immoveable property otherwise than for legal necessity is relaxed in cases where the consent of the whole body of persons constituting the next reversion has been obtained. The reason

that is, for legal necessity. *Bajrangi Singh* v. *Manokarnika Bakhsh Singh, I. L. R. 30 All, 1*, and *Vinayak* v. *Govind, I. L. R. 25 Bom. 129*, followed. The operation of the principle is ordinarily limited to transfers for consideration and cannot be ex-

has made only a partial relinquishment of the estate. PILU *v.* BABAJI (1909)
I. L. R. 34 Bom. 165

3. ———————— *Sale by widow to next reversioner of a portion of property—Validity—Conveyance of whole estate to reversioner in consideration of latter conveying back half absolutely—Validity.* A Hindu widow can transfer by sale a portion of the property left to her to the then reversioner so as to confer on the latter an absolute

HINDU LAW—WIDOW—*contd.*

estate in such portion. *Hem Chunder Sanyal* v. *Surnomoyi Debi, I. L. R. 22 Calc. 354*; *Nobo Kishore Sarma Roy* v. *Hari Nath Sarma Roy, I. L. R. 10 Calc. 1102*; *Behari Lal* v. *Mudho Lal Ahir Gayawal, I. L. R. 19 Calc. 236*, referred to. Where it was alleged that a lady possessing the limited estate of a Hindu daughter sold the properties back absolutely to the lady, and that in pursuance of the agreement the reversioner reconveyed half the properties to the lady: *Held*, that the conveyances must be shown to have formed parts of one and the same transaction to be open to attack on that ground. KANURAM DEB *v.* KASHI CHANDRA SHARMA CHOWDHURI (1909)
14 C. W. N. 226

4. ———————— *Hindu widow, transfer by, without legal necessity, whether becomes void on widow's death—Transferee's suit to eject transferee of non-transferable occupancy holding.* The transfer by a Hindu widow of properties inherited from her husband when neither legal necessity justifying the sale nor consent of the reversioners has been established, does not become void, on the death of the widow. *Bhagwat Doyal Singh* v. *Debi Doyal Sahu, 12 C. W. N. 393*; *s.c. I. L. R. 35 Calc. 420*; *Bejoy Gopal Mukherjee* v. *Krishna Mahishi, 1 C. W. N 424*; *s.c. L. R. 34 I. A. 87*; *I. L. R. 34 Calc 329*, considered. Such a transferee can maintain a suit for ejectment against the transferee of an occupancy holding which is not transferable by custom. KISHORI PAL *v.* SHEIKH BHUSAL BHUIYA (1909)
14 C.W.N. 106

5. ———— **Compromise by**—*When such compromise tantamount to alienation—Possession when adverse to reversioner.* Where a widow, whose right to property is disputed, enters into a compromise with the disputant by which she merely undertakes to make no further claim to the property, such compromise does not amount to an alienation by the widow and the disputant does not hold the property under any title derived from her. *Sheo Narain Sing* v. *Khurgo Koery* and *Sheo Narain Singh* v. *Bishen Prosad Singh, 10 C. L. R. 337*, dissented from. *Radha*

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widow
as representative of the separate estate or on one which leaves no separate estate to be represented. KAMBINAYANI TIMMAJI *v.* KAMBINAYANI SUBBARAJU (1910) . . **I. L. R. 33 Mad. 473**

6. ———— **Debt**—*Debt contracted by widow for necessary purposes binding, though no formal charge created.* A debt contracted by a widow as representative of the estate, for the purposes of the estate will be binding on it in the hands of the reversioners, though no formal charge on the estate is created when the creditor looks not to the personal credit of the widow but to her as representative of the estate and relies on the credit of such estate. *Ramasamy Mudaliar* v. *Sellattammal, I. L. R. 4 Mad. 375*, referred to. REGELLA JOGAYYA *v.* NIMUSHAKAVI VENKATARATNAMMA (1910) . . **I. L. R. 33 Mad. 492**

7. ———— **Gift**—*Mitakshara—Gift by Hindu widow to daughter—Gift of immoveable property to daughter at "gowna" or "dwiragaman"*

HINDU LAW—WIDOW—*contd.*

ceremony—Post-nuptial gifts—Reversionary heirs. It is competent to a Hindu widow governed by the Mitakshara law to make a valid gift of a reasonable portion of the immoveable property of her husband to her daughter on the occasion of the daughter's *gowna* ceremony; and such a gift is binding upon the reversionary heirs of her husband. CHURAMAN SAHU *v.* GOPI SAHU (1909) **I. L. R. 37 Calc. 1**

8. ——————— *Gift made by Hindu widow with consent of next reversioners—Suit by more remote reversioners to set aside the gift.* A gift by Hindu widow, who succeeded to the separate estate of her deceased husband of such estate, is not valid and does not create a title which cannot be impeached by the remoter reversioner because it has been made with the consent of the next reversioner. *Ramphal* v. *Tula Kuari, I. L. R. 6 All. 116,* followed. *Bajrangi* v. *Manokarnika Bakhsh Singh, I. L. R. 30 All. 1,* distinguished. *Rani Anund Koeri* v. *The Court of Wards, L. R. 8 I. A. 14,* referred to. BAKHTAWAR *v.* BHAGWANA (1910) . **I. L. R. 32 All. 176**

9. ——————— **Re-marriage**—*Hindu Widow's Re-marriage Act, s. 2—Hindu widow—Re-marriage permitted by rules of caste—Widow not deprived of property of first husband.* Where the rules of her caste recognize the right of a Hindu widow to re-marry, a second marriage has not the result of divesting her of the property of her first husband. MULA *v.* PARTAB (1910) **I. L. R. 32 All. 489**

10. ——————— **Unchaste widow**—*Unchastity of widow no bar to her right of succession to her son.* There is no authority for holding that a Hindu lady, who after her husband's death has waited and then gone to live with another man, is thereby excluded from inheritance to the estate left by her son. DAL SINGH *v.* MUSAWMAT DINI (1909) . . . . **I. L. R. 32 All. 155**

11. ——————— **Family debt incurred by Hindu widow**—*Sale of absolute estate in satisfaction of—Legality of sale—Registration Act XVI of 1864—Interest, reasonableness of.* A simple money decree was passed when the Registration Act XVI of 1864 was in force for a debt incurred by Hindu widow on account of legal necessity:—*Held,* the absolute estate in the properties was liable to be sold in satisfaction of the decree. If the foundation of the decree be a debt of the character, for which the widow could have bound the entire interest, it is sufficiently clear, as the result of Privy Council decisions, that even if the decree is based on the widow's contract, and does not give a charge on the husband's estate, and the reversioners had not been made parties to the suit or execution proceedings the decree-holder would be entitled to have the entire estate sold, and if in fact the entire estate was sold and bought by the purchaser, the reversioners could not defeat the purchaser's title to the property. It must depend on the circumstances in which a loan is incurred whether a provision for compound interest agreed to be paid by a Hindu widow is reasonable or not. VEERABADRA AIYAR *v.* MARUDAGA NACHIAR (1910) **I. L. R. 34 Mad. 188**

12. ——————— **Payment by wife of husband's debts during his life-time**—*Hindu widow—Voluntary payment—Absence of proof of obligation to repay—Burden of proof.* In this case which was an appeal from the decision of the High Court in the case of *Himmat Bahadur* v. *Bhawani Kunwar, I. L. R. 30 All. 352,* the Judicial Committee merely affirmed that decision on the ground that the appellant on whom the onus lay had not proved that there was any obligation on the part of the husband or his estate to pay the moneys which were paid by his wife, and dismissed the appeal. BHAWANI KUNWAR *v.* HIMMAT BAHADUR (1911) . . . . **I. L. R. 33 All. 342**

13. ——————— **Power to partition**—*Hindu widow—Nature of estate held by two widows succeeding jointly.* Whatever limitations there may be upon the power of alienation of one of two Hindu widows succeeding as such to a life interest in their husband's estate, so long as the property remains undivided, there is nothing to prevent them effecting a partition of such estate. *Mussammat Sundar* v. *Mussammat Parbati, L. R. 16 I. A. 186 : I. L. R. 12 All. 51,* and *Kanni Ammal* v. *Ammakannu Ammal, I. L. R. 23 Mad. 504,* followed. *Ram Piyari* v. *Mulchand, I. L. R. 7 All. 114,* distinguished. *Bhugwandeen Doobey* v. *Myna Baee, 11 Moo. I. A. 487,* and *Gajapathi Nilamani* v. *Gajapathi Radhamani, I. L. R. 1 Mad. 291,* referred to. DURGA DAT *v.* GITA (1911) **I. L. R. 33 All. 443**

14. ——————— **Mesne profits**—*Mesne profits decree for, against Hindu widow—Execution if may be had against estate—Subrogation—Acts necessary or beneficial to estate—Wrongful acts.* The mere fact that a decree for mesne profits has been obtained against a Hindu widow does not entitle the decree-holder to execute such decree against the estate of her husband. It is not open to a Hindu widow to commit an act of trespass and by that fact alone to impose a liability upon the estate of her husband. That estate cannot be bound by acts of the widow which are neither necessary nor beneficial to the estate. *Harmanoje* v. *Ram Prasad, 6 C. L. J. 462,* relied on. *Pramada Nath* v. *Purna Chandra, I. L. R. 35 Calc. 691 : s.c. 12 C. W. N. 550,* doubted. *Giribala* v. *Srinath, 12 C. W. N. 769 ; Kallu* v. *Fyazali, I. L. R. 30 All. 394,* referred to. SADASI KOER *v.* RAMGOBIND SINGH (1911) **15 C. W. N. 857**

15. ——————— *Mesne profits—Decree against Hindu widow for—Husband's estate when bound.* Where a Hindu widow in good faith and for the benefit of her husband's estate took possession of property from which she was subsequently ejected, the estate of the husband is liable for mesne profits due by the widow. LALJI SAHAY *v.* GOBERDHONE JHA (1909) . **15 C. W. N. 859**

16. ——————— **Partition**—*Widow—Co-widow—Right to enforce partition when joint enjoyment impossible.* Although Hindu widows taking a joint interest in the inheritance of their husband have no right to enforce an absolute partition of the joint estate between them, yet where the widows cannot go on peaceably in the enjoyment of the property, they can by mutual agreement or otherwise separately hold the property, although they have no right to partition in the proper sense of the term, and the share of one will go by right of survivorship to the other notwithstanding the separation. *Gajapathi Nilamani* v. *Gajapathi Radhamani, I. L. R. 1 Mad. 290 : Kathaperumal* v. *Venkabai, I. L. R. 2 Mad. 194.* and *Bhagwandeen Dubey* v. *Myna Baee, 11 Moo. I. A. 487,* referred to. CHHITTAR KUNWAR *v.* GAURA KUNWAR (1911) **I. L. R. 34 All. 189**

HINDU LAW—WIDOW—*contd.*

17. ———— Gift—*Hindu widow—Suit by remote reversioner to set aside alienation by widow—Immediate reversioner a female having a life estate only—Acceleration of estate.* *N* died leaving a widow *W*, a daughter *R D*, and a daughter's son *K S*. *W* during the life-time of *R D*, made a gift of the property to *K S* *Held*, on suit by other reversioners more remote than *K S* for a declaration that the gift was not binding on them, that the suit would lie The question of acceleration of *K S's* estate would not arise because at the date of the gift the donee was not the next reversioner. *Bal Gobind* v. *Ram Kumar I. L. R. 6 All. 431; Hanuman Pandit* v *Jota Kunwar, All. Weekly Notes, 1908, 907*, and *Abinash Chandra Mazumdar* v. *Harinath Shaha, I. L. R. 32 Calc. 62*, followed. *Madari* v. *Malki I. L. R. 6 All. 428*, and *Ishwar Narain* v *Janki, I. L. R. 15 All. 132*, dissented from. *Rani Anand Koer* v. *The Court of Wards L. R. 8 I. A., 14; I. L. R. 6 Calc. 764*, referred to. RAJA DEI *v.* UMED SINGH (1912) **I. L. R. 34 All. 207**

18. ———— Reversioners—*Hindu widow—Decree fairly obtained against widow binding on reversioners, although the widow did not contest the suit.* A decree in a suit against a Hindu widow, respecting property of her husband, of which she is in possession as such widow, may be binding on the reversioners notwithstanding that the widow did not contest the suit, provided that the plaintiff's case was properly and fairly stated and the widow had reasonable opportunities, of which she did not choose to avail herself, of defending the suit. GUR NANAK PRASAD *v.* JAI NARAIN LAL (1912)

I. L. R. 34 All. 385

19. ———— Maintenance—*Widow—Arrears of maintenance—Demand and refusal—Residence in deceased husband's family house—Residence elsewhere for improper purpose.* Arrears of maintenance cannot be refused to a Hindu widow in consequence of failure to prove demand and refusal. A Hindu widow is not bound to reside in her deceased husband's family house and does not forfeit her right to maintenance by residing elsewhere, unless she leaves the house for an improper purpose. *Ambabai kom Balaji Vinayak Kale* v. *Ramchandra Balaji Kale, (1895), P. J. 41*, followed. *Girianna Murkundi Naik* v. *Honama, I. L. R. 15 Bom. 236*, referred to. PARWATIBAI *v.* CHATRU LIMBAJI (1911) **I. L. R. 36 Bom. 131**

20. ———— Right to maintenance—*Grant of arrears—Exigencies of the case.* By Hindu Common Law, the right of a widow to maintenance is one accruing from time to time according to her wants and exigencies. The grant of arrears of maintenance depends on the wants and exigencies of the widow as proved in each particular case. RANGUBAI *v.* SUBAJI RAMCHANDRA (1912)

I. L. R. 36 Bom. 383

21. ———— Alienation by—*Transfer to reversioner—Condition that properties should not be transferred during widow's life and maintenance paid out of income—Deed of settlement—Restraint on alienation—Transfer by reversioners valid but subject to widow's right to maintenance—Notice.* Where a Hindu widow by a deed of family settlement transferred properties inherited from her husband to the latter's reversionary heirs subject to the conditions: (i) that a fixed monthly allowance should be paid to her out of the income of the estate transferred, and (ii) that the reversionary heirs should have no right to transfer any

in which such interests was to be applied or enjoyed by him within the meaning of s 11 of the Transfer of Property Act. *Quære:* Whether the doctrine of English law that a condition or conditional limitation upon alienation, limited in time, is bad when attached to a vested interest is applicable in view of s. 10 of the Transfer of Property Act. *Held*, as to the other condition, that persons in whose favour the reversionary heirs executed mortgages must be taken to have had notice of all the covenants in the deed of settlement and that the widow was entitled to a declaration that her right to receive maintenance under that deed was in no way affected by the mortgages. CHAMARU SAHU *v.* SONA KOER (1911) . **16 C. W. N. 99**

22. ———— Widow's estate—*Widow, agent appointed by—Profits, realised but not paid, accountability for, to reversioner—Widow's savings.* An agent appointed by a Hindu widow is bound to account to the reversioner for profits realised by him in the widow's life-time and not paid to her. Such profits cannot be presumed to be the widow's *stridhan* but must be treated as her savings which not having been disposed of followed the estate. *Soorjemoney* v. *Dinobundoo, 9 Moo I. A. 123; Revett Carnac* v. *Jusbai, I. L. R. 10 Bom. 428; Paddo Monee* v. *Dwarka Nath, 25 W. R. 335*, referred to. *Isri Dut* v. *Hansbutti, I. L. R. 10 Calc. 324*, followed. SRIDHAR CHATTOPADHYA *v.* KALIPADA CHUCKERBUTTY (1911)

16 C. W. N. 106

23. ———— *Widow's estate—Accumulations, rights of a Hindu widow to—Husband's property repurchased out of income, if absolute property of the widow—Unrealised rents, if absolute estate of the widow and assets liable for her personal debts.* The true test to determine whether accumulations in the hands of a Hindu widow were her absolute property or an accretion to the husband's estate, is the intention of the widow, *i.e.*, whether she intended to treat them as part of her husband's estate or as temporary savings to be spent by her subsequently. Where a *howda* which was part of the husband's estate had passed into the hands of a stranger and had been recovered by the widow out of the savings of the estate, the inference was that she intended to treat it as part of her husband's estate. Unrealised rents in the hands of tenants cannot be treated as temporary savings by the widow on her own account, but should be looked upon as an accretion to her husband's estate. *Rivett Carnac*

16 C. W. N. 834

24. ———— *Widow's estate—Rent-decree against Hindu widow and her co-sharers, paid off by latter—Decree for contribution by latter against widow—Sale in execution of decree if affects reversionary interest—Personal liability*

HINDU LAW—WIDOW—*contd.*

his widow and other co-sharers and the decree obtained in the suit was discharged by the other co-sharers: *Held*, that a sale of the share of the taluk held by the widow in execution of a decree obtained by her co-sharers in a contribution suit against her, did not affect the title of the reversionary heir. The liability of the widow for the rent in question should be regarded as a personal liability which ought not to be held to attach to the reversion unless and until the landlord proceeded to bring the tenure to sale under the special provisions of the rent law. *Brojo Lal Sen* v. *Jiban Krishna Roy, I. L. R. 26 Calc. 200; Baijun, Doobey* v. *Brij Bhookun Lall, I. L. R. 1 Calc. 133 s. c. 24 W. R. 306; L. R. 2 I. A. 275.* relied on. MAHOMED SADAT ALI MILKI *v.* HARA SUNDARI DEBYA (1912) . . . **16 C. W. N. 1070**

25. ———— **Mortgage by**—*Widow of part of the estate—Legal necessity—Presumption— Reversioner.* Alienation by way of mortgage by a Hindu widow, as heiress, of a portion of the estate of her deceased husband without proof either of legal necessity or of reasonable enquiry and honest belief as to its existence, but with the consent of the next reversioner for the time being, will be valid and binding on the actual reversioner, if the presumption of legal necessity or of reasonable enquiry and honest belief raised by such consent is not rebutted by more cogent proof. *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy, I. L. R. 10 Calc. 1102*, considered. *Bajrangi Singh* v. *Manokarnika Baksh Singh, I. L. R. 30 All. 1; L. R. 35 I. A. 1*, referred to. DEBI PROSAD CHOWDHURY *v.* GOLAP BHAGAT (1913) **I. L. R. 40 Calc. 721**

26. ———— **Compromise**—*Followed by an award settling disputes as to the property of various members of the family—Effect of such award on reversionary interests.* Where the widow of one and the son of the other of two brothers, Hindus separated in estate, entered into a compromise, which was found to be reasonable in its nature, concerning the partition of the property of the two brothers, and an award was made on the basis of such compromise, it was *held* that it was not open to the reversioner to dispute the validity of the compromise and award, specially when a considerable time had elapsed and most of the property had changed hands meanwhile. *Khunni Lal* v. *Gobind Krishna Narain, I. L. R. 33 All. 356*, and *Mohan Lal* v. *Chuttan Singh, 10 All. L. J. 101*, followed. BIHARI LAL *v.* DAUD HUSSAIN (1913) . . **I. L. R. 35 All. 240**

27. ———— **Alienation by**—*In respect of the property of her husband—Transfer of debt secured by a mortgage.* A Hindu widow in possession as such of property which had been the property of her husband in his life-time can always alienate her life interest in such property and a transfer by her of the corpus of the property without legal necessity and not for a pious purpose, is not void but only viodable at the instance of the reversioners. A Hindu widow, without legal necessity, transferred a mortgage debt and the security therefore which had been the property of her late husband, to *D* who thereafter sued to recover the debt by sale of the mortgaged property: *Held*, that the transferee acquired all the rights which the widow had and could exercise during her life-time in respect of the mortgage, one of these being to recover the debt. *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi, I. L. R. 34 Calc. 329*, referred to. DURGA KUNWAR *v.* MATU MAL (1913) . . **I. L. R. 35 All. 311**

28. ———— **Mortgage by**—*Suit for declaration that mortgage by widow did not effect plaintiff's reversionary rights—Plaintiffs not nearest reversioners—Pleadings.* Where plaintiffs sued as next reversioners for a declaration that a mortgage executed by a Hindu widow was not binding on them, and it was found that as a matter of fact even the nearest of the plaintiffs could only succeed to the estate if four males and one female died in his life-time: *Held*, that the plantiffs ought not to have a decree. MEGHU RAI *v.* RAM KHELAWAN RAI (1913) . **I. L. R. 35 All. 326**

29. ———— **Conversion**—*Caste Disabilities Removal Act, s. 1—Hindu Widow's Remarriage Act (XV of 1856), s. 2—Hindu widow—subsequent remarriage—Widow's estate not divested—Hindu law.* The widow of a separated Hindu became a convert to Mahomedanism and married a Mahomedan: *Held*, that the widow did not thereby lose her interest in the property of her late husband in view of the provisions of Act XXI of 1850 nor did s. 2 of the Act XV of 1856 affect the situation inasmuch as that section applied to *Hindu* widows only. *Khunni Lal* v. *Gobind Krishna Narain, I. L. R. 33 All. 356*, followed. *Matungini Gupta* v. *Ram Rutton Roy I. L. R. 19 Calc. 289*, dissented from. ABDUL AZIZ KHAN *v.* NIRMA (1913) . . **I. L. R. 35 All. 466**

30. ———— **Estate—Investments by widow from income of husband's estate**—*Whether or not such investments become accretions to the husband's estate.* Where immoveable property is purchased by a Hindu widow in possession as such of the estate of her late husband out of the income of that estate, such property does not necessarily become an accretion to the husband's estate. The widow has full power to dispose of it during her life-time, and it is only when she manifests during her life-time a clear intention to treat it as an accretion to her husband's estate, or allows it at her death to remain undisposed of, that such property will become part of that estate. WAHID ALI KHAN *v.* TORI RAM (1913) . . . . **I. L. R. 35 All. 551**

31. ———— *Widow's estate—Nature of interest arising out of contract with surviving co-parceners.* *P* and *C* were undivided brothers of a joint Hindu family. *P* died. *C* entered into an agreement with *L*, the widow of *P*, whereby *P* was to receive a younger son of *C* (if such should be born) in adoption or in default a half share in the family properties. No adoption took place. *C* died leaving his widow *B*. *B* and *L* effected a partition of the properties in equal shares. The plaintiff was a daughter of *P* by another wife. *Held*, that the half share taken by *L* was a widow's interest and that it would pass on her death to her husband's reversioners and the plaintiff being the nearest reversioner was entitled to succeed. A woman's estate can be obtained by a Hindu female not only by inheritance but also by contract of parties, by a grant, or by prescription. VENGAMMA *v.* CHELAMAYYA (1913) **I. L. R. 36 Mad. 484**

32. ———— **Alienation by**—*with consent of reversioner of part of estate—Effect—Presumption of necessity when defeated—Several limited owners, arrangement between, how long effective—*

HINDU LAW—WIDOW—*contd.*

Alienation of her separated share for legal necessity—Legal necessity, if to be determined with reference to whole estate or the share. The Full Bench in *Debi Prasad Choudhuri* v. *Golap Bhagat, I. L. R. 40 Calc. 721; 17 C. W. N. 701,* has decided that the doctrine of relinquishment and acceleration cannot apply to partial transfers by a limited owner, which can be supported only by legal necessity. The consent of the next reversioner is merely strong presumptive evidence of the necessity. The propriety of an alienation with the consent of the next reversioner may come in question not only with reference to the conduct of the widow, whether or not she was justified by necessity, but also with reference to the conduct of the next reversioner, whether or not his conduct was honest. If, in the absence of legal necessity, he engineered the transaction to suit his own ends and for his own immediate gain, his consent would lose all its virtue. The transaction would stand no higher than a partial alienation in his favour and would have to be judged from that standpoint. Nevertheless, whatever might be said of the conduct of the widow or the next reversioner, the transferee, if he made due enquiry and acted *bonâ fide*, would still be entitled to the benefit of the equitable rule laid down by the Privy Council in *Huncomanpershad* v *Babooee Munraj, 6 Moo. I. A. 393,* and now enacted in s. 38 of the Transfer of Property Act. Nor would the antecedent mismanagement of the estate affect him unless he was in some way a contributory party thereto. If two widows or two daughters taking jointly the estate of their deceased husband or father make an arrangement for separate possession and enjoyment. the arrangement will [illegible]

[illegible] of a portion [illegible] sion should be determined with reference to the estate as a whole and not with reference to the separated portion in her possession. SHYAMA DAS ROY CHOWDHURY *v.* RADHIKA PRASAD CHATTERJI (1918) . . . . **22 C. W. N. 846**

[illegible]

[illegible] in 1872 his nephew obtained a [illegible] Act XXVII of 1860 as sole survivor of his joint family; the widow of the deceased opposed the application and alleged a partition in 1864. By agreements made in 1874 the widow accepted the decision, recognized the nephew's title, and was granted by him a maintenance allowance which she continued to receive until her death in 1904. The nephew died in 1894 and the estate passed under his will to the first appellant. In 1907 the respondent sued to recover the estate as heir to the holder who died in 1872 upon his widow's death, and proved that a partition had taken place in 1864: *Held,*—that the widow's agreement of 1874, in conjunction with her acceptance of maintenance till 1904, amounted to a complete relinquishment of the estate to the nephew, then the next reversioner, and that the respondant's claim accordingly failed. *Rangasami Gounden* v. *Nachiappa Gounden L. R. 46 I. A. 72,* applied. (ii) A Hindu by his will

HINDU LAW—WIDOW—*contd.*

authorized his widow to adopt a son if no male or female child should be born to him. He died without issue, but had a posthumous daughter. After the death of the posthumous daughter, the testator's widow purported to adopt a son to him: *Held,* that in construing the will effect could not be given to a presumption that the testator desired that a son should be adopted to him, since authority to adopt in the events which happened was clearly excluded by the language used. BHAGWAT KOER *v.* DHANUKDHARI PRASHAD SINGH (1919)

L. R. 46 I. A. 259

34. ———— Alienation—*Consent of next reversioner—Validity of alienation—Legal necessity need not be proved—Registration Act (XVI of 1908), s. 17, cl. (d)—Document showing assent—Spes successionis—Registration not compulsory.* A Hindu widow who had inherited property from her husband alienated a portion of it. Her only daughter assented to the alienation a few days after by a writing which was not registered. After the deaths of the widow and the daughter, an heir of the daughter sued to set aside the alienation on the ground that it was not made for legal necessity The Court found the legal necessity not proved, and decreed the claim. The defendant having appealed —*Held,* that the [illegible]

[illegible] its date no more than *spes successionis* [illegible] MALLIK SAHIB *v.* MALLIKARJUNAPPA (1913)

I. L. R. 38 Bom. 224

35. ———— *Alienation—Settlement of dispute by compromise—Hindu widow who is party if thereby alienates property in excess* [illegible] the daughters [illegible] claiming to be solely entitled to the estate, [illegible] settled by a compromise, each party getting thereunder a share in the family property. In a suit by a daughter of the alleged adopted son (as one of the [illegible] expectant on her mother's [illegible] word an alienation by a limited owner of the family property, but a family settlement in which each party takes a share of the family property by virtue of the independent title which is, to that extent, and by way of compromise, admitted by the other parties. *Lala Khunni Lal* v. *Kunwar Gobind Krishna Narain, L. R. 38 I. A. 87: s. c. 15 C. W. N. 545,* followed. HIRAN BIBI *v.* SOHAN BIBI (1914) . . . **18 C. W. N. 929**

36. ———— *Alienation by Hindu widow—Suit by vendee to recover property after widow's death from stranger—Proof of legal necessity, if necessary.* An alienation by a Hindu widow without legal necessity is voidable but not void, ar[illegible] that term th[illegible] sioner) [illegible] it stands good, and the alienee is entitled to recover possession from a stranger without being required to prove legal necessity. *Bejoy Gopal* v. *Krishna Mahishi, I. L. R. 25 Calc. 1, Madhusudan*

HINDU LAW—WIDOW—*contd.*

v. *Rooke, 11 C. W. N. 424*, referred to. DEONANDAN PERSHAD *v.* UDIT NARAIN SINGH (1914)
18 C. W. N. 940

37. ——————— *Alienation—Legal necessity—Pilgrimage to Gaya—Feast given after return from Gaya, whether legal necessity—Reversioner—Suit for declaration that alienation was without legal necessity—No offer to reimburse money spent on legal necessity—Suit whether maintainable.* A Hindu widow is competent to alienate her husband's estate for expenses in connection with a feast given to Brahmins, etc., after return from pilgrimage to Gaya. *Makhan Lal* v. *Gyan Singh, I. L. R. 33 All. 255*, not followed. *Quœre:* Whether a declaratory suit can be maintained by a reversioner who does not offer in the plaint to reimburse the purchaser to the extent that the sale was for necessity. DINANATH GHOSH *v.* HRISHIKESH PAL (1914) . . **18 C. W. N. 1303**

38. ——————— *Alienation in part for necessity—Reversioner suing for declaration as to invalidity of sale, on payment of binding portion of the consideration—Absence of offer to pay, if fatal to suit—Conditional declaration—Form of decree.* When a reversioner, during the life-time of the widow, sues for a declaration that an alienation in part for necessity, is invalid beyond the life-time of the widow, on payment of the binding portion of the consideration: *Held*, that the suit should not fail on the mere ground of the absence of an offer in the plaint to pay the amount that was binding on the reversioner. *Singham Setti Sanjivi Kondayya* v. *Draupadi Boyamma, I. L. R. 31 Mad. 153*, not followed. *Bhagwat Dayal Singh* v. *Bebi Dayal Sahu, I. L. R. 35 Calc. 420*, applied. *Held*, also, that a conditional decree may be passed. *Mahomed Shumshool* v. *Shewukram, L. R. 2 I. A. 7*, referred to. *Per* SUNDRA AYYAR J.—The uncertainty regarding the person who would be entitled to succeed the widow is no ground for refusing a declaration regarding the character of the alienation, and a declaration may be made that the alienation is invalid as a whole, but that on equitable grounds the alienee should have a charge dec'ared in his favour for the binding portion of the consideration. *Isri Dutt Koer* v. *Hansbutti Koerain, L. R. 10 I. A. 150*, applied. *Semble:* The proper form of the decree in such suits is merely to make a declaration that the alienee has a charge for a certain sum of money. PAPARAYUDU *v.* RATTAMMA (1914) . **I. L. R. 37 Mad. 275**

39. ——————— **Right of reversioner to sue**—*Suit to set aside alienation and for possession—Nearest reversionary heir alleged to be precluded from suing* In this case it was *held* (affirming the decision of the High Court at Allahabad that the appellant could not maintain the suit (to set aside an alienation by a widow and for possession) because a nearer reversionary heir was in existence whom he had failed to prove to be precluded from suing. The general rules laid down in *Rani Anund Koer* v. *The Court of Wards, I. L. R. 6 Calc. 764; L. R. 8 I. A. 14*, followed. JHANDU *v.* TARIF (1914)
I. L. R. 37 All. 45

40. ——————— **Rights of widow in respect of the property of her deceased husband.**—A Hindu widow in possession as such of her husband's estate is not liable to account to anyone but is at liberty to do what she pleased with the property during her life-time, provided only that she does not injure the reversion. RENKA *v.* BHOLA NATH (1915) . **I. L. R. 37 All. 177**

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41. ——————— **Alienation**—*by widow of her husband's estate—Surrender by widow to nearest reversioner, subsequent to alienation—Effect of surrender on alienations.* A surrender by a Hindu widow of her interest in her husband's estate in favour of the nearest male reversioner cannot affect alienations, which were made by her prior to the surrender and which though not binding on the reversioners were binding on her for her life. *Sreeramulu* v. *Kristamma, I. L. R. 26 Mad. 143*, followed. *Singaram Chetty* v. *Kalianasundaram Pillai* (1914), *Mad. W. N. 735*, referred to. *Ramakrishna* v. *Tripura Bai I. L. R. 33 Bom. 88*, dissented from. SUBAMMA *v.* SUBBRAMANYAM (1915) . **I. L. R. 39 Mad. 1035**

42. ——————— **Decree against for husband's debt**—*Attachment of property—Previous alienation by widow for no justfiable cause—Attachment and sale thereupon, effective to convey reversionary interest.* A plaintiff who had obtained a decree against a Hindu widow in respect of a debt due by her late husband attached a certain property as belonging to her husband which she had sold to a stranger several years before the attachment, for no purpose binding on the reversioner. *Held*, that the decree holder was entitled to attach and bring to sale the reversionary interest in the property, subject to the enjoyment thereof by the alienee during the widow's life-time. CHIAMBARAMMA *v.* HUSSAINNAMMA (1915) . . **I. L. R. 39 Mad. 565**

43. ——————— **Compromise**—*Rights of reversioners.* A Hindu widow in possession as such of her husband's estate brought a suit for possession of two shops on the allegation that they formed part of her husband's estate. The suit was compromised, the effect of which was that the widow recognized the defendants as full proprietors and they, on the other hand, had to pay a certain sum of money. To raise this money they mortgaged the two shops. The mortgagee brought a suit for sale and the shops were purchased by one H, at the auction sale. After the death of the widow the reversioners of her deceased husband brought a suit to recover possession of the aforesaid shops. *Held*, that a compromise entered into by a Hindu widow, with a limited estate, resulting in the alienation of property forming part of her husband's estate cannot bind the reversioners, unless it is shown that it was for such purposes as would justify a sale by a Hindu widow. —*Imrit Konwar* v. *Roop Narain Singh, 6 C. L. R. 76*, *Musammat Raj Kunwar* alias *Sheo Murat Koer* v. *Musammat Inderjit Kunwar, 5 B. L. R. 585*, *Rajlakhshmi Dasee* v. *Katyayani Dassee, I. L. R. 38 Calc. 639*, *Khunni Lal* v. *Gobind Krishna Narain, I. L. R. 33 All. 356*, *Mahadei* v. *Baldeo, I. L. R. 30 All. 75*, and *Behari Lal* v. *Daud Husain, I. L. R. 35 All. 240*, referred to. KANHAIYA LAL *v.* KISHORI LAL (1916) . **I. L. R. 38 All. 679**

44. ——————— **Maintenance**—*Secured by deed—Subsequent unchastity—Living chaste at the time of suit, effect of.* Where in a suit by a Hindu widow against her deceased husband's brother for maintenance at the rate fixed by agreement, it was found that the plaintiff had since lived an immoral life but reformed her ways at the time of the suit: *Held*, that she lost her right to the rate fixed in the deed but was entitled to a

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starving allowance. Texts and case law reviewed. SATHYABHAMA *v.* KESAVA CHARYA (1915)

I. L. R. 39 Mad. 658

45. ———— **Gift by widow in favour of the next presumptive reversioner**—*Of entire property of husband.* It is competent to the widow of a separated Hindu, being in possession as such widow of her husband's property, to make a gift of the whole of it in favour of the next presumptive reversioner. *Bajrangi Sing* v. *Manokarnika Bakhsh Singh, I. L. R. 30 All. 1,* and *Bhupal Ram* v. *Lachma Kuar, I. L. R. 11 All. 253,* referred to. *Bakhtawar* v. *Bhagwanta, I. L. R. 32 All, 176,* distinguished. SHAM RATHI RAI *v.* JAICHHA KUNWAR (1917) . . **I. L. R. 39 All. 520**

46. ———— **Sale of husband's property by one of two widows**—*Right of succession of the other—Purchaser not entitled to refund of money spent on improvements.* A Hindu died leaving two widows. The widows, as a matter of convenience, divided the property of their deceased husband between them. One of the widows sold a house which had fallen to her share. She then died, and her co-widow sued to recover possession of the house. *Held,* that the purchaser could not claim a refund of money spent in improving the property so purchased. NANDI *v.* SARUP LAL (1917) . . . **I. L. R. 39 All. 463**

47. ———— **Transfer by widow to reversioner**—*Acceleration of succession.* Where a Hindu widow transfers an estate to the nearest reversioner, such transfer, in order to have the legal effect of accelerating the succession, must be of the whole estate which the widow possesses. The doctrine does not apply to the transfer of a portion of the estate, though it be of the widow's entire interest in that portion. *Behari Lal* v. *Madho Lal Ahir Gayawal, I. L. R. 19 Calc. 236, Pilu* v. *Babaji, I. L. R. 34 Bom. 165,* and *Marudamuthu Nadan* v. *Srinivasa Pillai, I. L. R. 21 Mad. 128,* referred to. The rule laid down by the Privy Council in *Bajrangi Singh* v. *Manokarniku Bakhsh Singh, I. L. R. 30 All. 1,* that a transfer made by a Hindu widow with the consent of the nearest reversioner will take effect as against the more remote reversioner, is applicable to cases of transfer for consideration. It has not been extended to a case where a transfer has been made by way of gift. *If the transfer be with the consent of the* nearest reversioner, it takes effect because it affords evidence of the propriety of the transaction, in other words, it justifies the transaction on the ground of legal necessity. KHAWANI SINGH *v.* CHET RAM (1916). . **I. L. R. 39 All. 1**

48. ———— **Acceleration of estate by the** [illegible] **to next reversioners**—*Entire int* [illegible] *Al* [illegible] *tion—Divesting of estate by adoption—*[illegible] *cannot take advantage of his own fraud—Maxim.* A Hindu widow, who was in possession of her husband's property, mortgaged it with defendant No. 1 in 1893. The plaintiffs, who were next reversioners, sued to set aside the alienation on the ground *that it was not supported by consideration.* The suit ended in an award by arbitrators, which provided: (i) that the plaintiffs were entitled to redeem the mortgage; (ii) that defendant No. 1 was thereupon to reconvey the property to the plaintiffs; (iii) that the widow was to surrender to the plaintiffs her right, title and interest in the property and (iv) that out of the property so reconveyed the plaintiffs were to give to the widow a house and eighteen *bighas* of land for her life as maintenance. *No decree was passed in terms of the award; and parties* took no action under the award. In 1906, defendant No. 1 created a sub-mortgage on the property; and executed a rent-note to the sub-mortgagee. Sometime afterwards, the plaintiffs *took a reconveyance of the property from the* defendant No. 1 but without making any payment to him; they paid off the sub-mortgage; and they took an assignment from the sub-mortgagee of his rights under the sub-mortgage. In 1909, the widow adopted defendant No. 2 who was the *natural son of defendant No. 1.* Defendant No. 2 was placed in possession of the property by his natural father. The plaintiffs filed the present suit to recover possession of the property. *Held,* dismissing the suit, that the award *which was the basis of plaintiffs' claim,* could not be supported either as an acceleration by the widow of her interest, which to be valid required the surrender of the whole of her interest in the property, or as an alienation which was *not for a legal necessity and which therefore was* not binding on defendant No. 2. *Held,* further, that defendant No. 2 was not precluded from contesting the plaintiffs' claim to possession, inasmuch as he was not guilty of any fraud at all, and as he had not thereby gained any advantage in the special issue to be determined between him and the plaintiffs. An acceleration by a Hindu widow enjoying a life-estate in favour of the next reversioner is valid only if the accelera*tion is of the whole of her interest in the pro*perty. In an alienation by a Hindu widow of her husband's estate, the consent of the reversioners is no more than a factor in the proof of legal necessity. A true acceleration differs from alienation for legal necessity. The two legal notions are not only irreconcilable, but virtually antagonistic. MOTI RAIJI *v.* LALDAS JEBHAI (1916) . . . . **I. L. R. 41 Bom. 93**

49. ———— **Right of residence in joint family house**—*Effect of alienation during the life-time of widow's husband.* When a right of residence or maintenance comes into existence in favour of the widow of a man who was lately a member of a joint Hindu family, she takes that right in the property as it stands at the time of her husband's death. She cannot set up her right of maintenance or residence as against alienations effected during the life-time of her husband. *Amdhia Prasad* v. *Jasoda, 1887, All* [illegible] owed daughter- [illegible] the plea of the [illegible] by the father-in-law during [illegible] time. *Sohni* v. *Mohan Kuer, 9 A. L. J. 23,* followed. RAMZAN *v.* RAM DAIYA (1917) . **I. L. R. 40 All. 96**

50. ———— **Gift**—*Suit to contest alienation made by widow—Plaintiff not nearest reversioner.* In order that a reversioner may be able to maintain a suit to contest an alienation, made by a Hindu widow, of her husband's property he must *either be the next presumptive reversioner or* he must show that the nearer reversioners are colluding with the widow. *Rani Anand Kunwar* v. *The Court of Wards, I. L. R. 6 Calc. 764,* and *Meghu Rai* v. *Ram Khelawan R*[illegible]

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All, 376, followed. *Raja Dei* v. *Umed Singh, I. L. R. 34 All. 207,* distinguished. GUMANAN *v.* JAHANGIRA (1918) . . **I. L. R. 40 All. 518**

51. ———— **Transfer by assignee from widow**—*Right of suit of reversioner—Specific Relief Act (I of 1877), s. 42—Limitation—Limitation Act (IX of 1908), Sch. I, Arts. 120 and 125.* An alienation made by the transferee from a Hindu female in possession with a limited estate, or by a stranger in possession holding under her, may furnish the nearest reversioner with a cause of action for a declaratory suit equally with an alienation made by the Hindu female herself. To such a suit the limitation applicable is not that prescribed by Art. 125, but that prescribed by Art. 120 of the first schedule to the Indian Limitation Act, 1908. BALBHADDAR PRASAD *v.* PRAG DAT (1919)

I. L. R. 41 All. 492

52. ———— **Reversioners**—*Whether award or compromise decree against widow binds reversioners.* The principle that a decree fairly obtained against a Hindu widow binds the reversioners, does not apply to a compromise or an award decree, not shown to have been fairly obtained against the Hindu widow as representing the estate. *Jeram* v. *Veerbai, 5 Bom. L. R. 885,* followed. RAMA BIN SANTU *v.* DAJI BIN NARU (1918) . . . **I. L. R. 43 Bom. 249**

53. ———— **Alienation for religious purposes.**—For purposes which are supposed to conduce to the spiritual welfare of her husband a widow has a larger power of disposition than she possesses of a purely worldly purposes. KUNJ BIHARI LAL *v.* LALTU SINGH

I. L. R. 41 All. 130

53(a). ———————— *Whether after-born son divests widow's estate*—A sale by a widow was held good notwithstanding the birth of a son after the death of the father as the rights of a son (in Hindu Law) in the estate of his father date from his birth HIRA *v.* BUTA.

I. L. R. 1 Lah. 128

53(b) ———— **Power to make permanent lease**—*Benefit of estate—Acquisition of tenant's rights—Accretion to husband's estate—Onus on appellant to show error in judgment appealed from.* A permanent lease executed by a Hindu widow does not bind the reversioners unless legal necessity and benefit to the estate are proved. The mere fact that the rent and purchase price represent the fair market value does not of itself prove necessity. Tenant's rights acquired by a Hindu widow are, in the absence of proof that they were acquired out of the accumulated savings of her income and were dealt with as her separate property, accretions to her husband's estate and as such cannot be sold by her so as to give a title as against the reversioners. The burden of showing that the judgment appealed from is wrong lies on the appellant. NABAKISHORE MANDAL *v.* UPENDRA KISHORE MANDAL.

26 C. W. N. 322

54. ———— **Alienation by**—*With consent of immediate reversioner—Actual reversioners, his sons, if estopped from recovering—Presumption of legal necessity, rebuttal of—Proof of legal necessity —Recitals in deeds, value of—What is legal necessity, mere existence of debt, if.* Where the conveyance by a Hindu widow covers a portion only of the estate left by her husband, the transferee can successfully resist the claim only on proof of legal necessity or such *bonâ fide* enquiry as entitles him to protection from a Court of equity. In a suit by the reversionary heir to recover the property from the alienee, the burden of proving that there was legal necessity or *bonâ fide* inquiry rests in the first instance on the person who claims title from the widow. Recitals in deeds as to the existence of such necessity cannot by themselves be relied upon for the purpose of proving the assertion of fact which they contain. The existence of necessity must be substantiated by evidence *aliunde.* It is not sufficient for the transferee to prove that there were some debts payable by the deceased full owner or his widow. The true rule is that the creditor to protect himself, where he is not shown to have made a *bonâ fide* enquiry, must prove that there was an actual pressure on the estate or danger to be averted, such as a threatened suit on a genuine debt, an outstanding decree or an impending sale which the widow had no funds to meet. Where, however, the alienation is made with the concurrence of or jointly with the next reversioner, a presumption arises in favour of the validity of the transaction. The circumstances under which the consent was given must be carefully scrutinised and if it transpires that the transaction was in essence a device to divide the estate with the reversioner his consent will lose its probative value. The actual reversioners are not estopped from suing to recover property alienated by the deceased widow of the full owner by the fact that their father as immediate reversioner had concurred in the alienation and this even when they had after the death of their father and before the death of the widow taken by inheritance land transferred by the widow to their father by way of gift. RAMESH CHANDRA CHAKRAVARTY *v.* SASHI BHUSAN UPADHYA (1919)

23 C. W. N. 1025

55. ———————— A widow alienated certain property for a purpose not binding on the inheritance and thereafter adopted a son. *Held,* that the alienation was not binding on the son and he could sue to have the alienation set aside. VAIDYANATHA SASTRI *v.* SAVITHRI AMMAL . . **I. L. R. 41 Mad. 75**

56. ———— **Co-widows—Relinquishment by one in favour of the other**—*Predecease of the latter before the former—Male reversioners—Right of inheritance, whether accelerated—Limitation Act (IX of 1908), Art. 141—Suit by alienee from male reversioners, more than twelve years from death of latter widow, but within twelve years of the death of surviving widow—Limitation.* Where a Hindu widow gave up all her rights in her husband's estate in favour of her co-widow, and the latter predeceased the former, the right of succession of the male reversioners to the estate is not accelerated so as to entitle them to succeed to it immediately on the death of the widow in whose favour the relinquishment was made. A suit by the reversioners to set aside an alienation by the latter widow would be within time, under Art. 141 of the Limitation Act, if brought within twelve years from the death of the last surviving widow. CHANGAPPA *v.* BURADAGUNTA (1920)

I. L. R. 43 Mad. 855

57. ———— **Will, construction of**—*Adoption excluded by language of will—Acceptance by*

HINDU LAW—WIDOW—*contd.*

widow for long period after recognition of title of the next reversioner. It is settled by long practice and confirmed by a series of decisions that a Hindu widow can renounce the estate of her husband in favour of the nearest reversioner, and by a voluntary act efface herself from the succession as effectively as if she had then died. This voluntary self-effacement is sometimes referred to as a surrender, sometimes as a relinquishment or abandonment of her rights, and it may be effected by any process having that effect, provided that there is a *bonâ fide* and total renunciation of the widow's right to hold the property. *Rangasami Gounden* v. *Nachiappa Gounden, I. L. R. 42 Mad 523; L R. 46 I. A. 72,* followed. Three Hindu brothers, *S*, *B* and *J*, lived as a joint-family governed by Mitakshara law. *J* died in 1872 without issue leaving a widow *A*. *S* died subsequently in 1872 without male issue, leaving a widow and two daughters, and *B* died on 9th February 1874, leaving a son *M*. After *J*'s death *B* applied to the District Court under Act XXVII of 1860 for a certificate to collect his debts alleging that the three brothers had been joint and that he was entitled as survivor to *J's* estate. *J's* widow *A* opposed the application, claiming that a partition between the three brothers had taken place in 1864, and consequently at the date of *J's* death they were separate and she was entitled to succeed to her husband's estate. The District Judge decided that the partition had not taken place, that the brothers were joint and granted the certificate to *M*, his father *B* being then dead. Though not precluded from raising the question of title, *A* accepted the contest the matter, and *M* took possession of the estate. *M* died on 21st June 1894, leaving no issue, but leaving two widows, *BK* and *R*, and having made a will, by which he authorised his widows or the survivor of them to adopt a son only "if no male or female child should be borne to him." His widow, *R*, on 11th October 1894, gave birth to a posthumous daughter, who died in 1895, her mother, *R* in 1899, and *A*, widow of *J*, in 1904, having received maintenance out of the estate up to her death. On 19th February 1906 *BK*, purporting to act under a power conferred upon her by her husband's will, adopted a son to her husband. In suits brought in 1907 by *D*, the present respondent, who was the next reversionary heir to the estate of *J* and *M*, against *BK* and the adopted son, the appellants, to recover those estates it was proved that a partition had taken place in 1864. *Held*, that there was a complete self-effacement by *A* in 1874, which precluded her from asserting any further claim to the estate. Her agreement of that date, followed by the acceptance for 30 years of maintenance, out of the estate under the terms of the agreement amounted to a complete relinquishment by her of her estate in favour of *M*, the title of whose representatives was established, and the suit was

I. L. R. 47 Calc. 456

HINDU LAW—WIDOW—*contd.*

57(a) ———————— Where it is found as a fact on the evidence that a transfer of her husband's property made by a widow is not one for legal necessity the fact that the next reversioner has joined do not make it binding on remote reversioners. GHISIAWAN PANDE *v.* MUSAMMAT RAJ KUMARI

I. L. R. 43 All. 535

58. ———— **Gift**—*By widow of property of her deceased husband for the spiritual benefit of the deceased.* The question whether the gift of a portion of her husband's property made by a Hindu widow was made for the benefit of his soul is a question of fact in each case. *Khub Lal Singh* v. *Ajodhya Misser, I. L. R. 43 Calc., 574,* referred to. It is not a necessary condition to the validity of such a gift that the donee should be expected to do something which might be supposed to confer some benefit on the soul of the deceased. GOBIND UPADHYA *v.* LAKHRANI

I. L. R., 43 All. 515

59. ———— **Surrender of her estate to next reversioners**—*Will of deceased husband inoperative when he was a member of a joint family with infant son—Compromise of suit by nearest reversioner—Widow entitled to moveables under Mithila Law—Compromise not a device to divide estate with reversioner.* A Hindu governed by Mithila Law died leaving a widow, four daughters, and a son six years of age, who died very soon after his father. The latter left a will under which on the death of the son without issue the daughters succeeded to the immoveable property, and they, though opposed by a first cousin of the testator, who if the will was inoperative would be by Hindu Law the nearest reversioner, obtained possession of it. The nearest reversioner thereupon brought a suit for a declaration that the property being joint the will was inoperative; that the son inherited the immoveable property; that on his death his mother became entitled to a woman's estate in it; and that on her death it would devolve on the then next reversioner. The suit was opposed by the daughters and by the mother and came on for trial, but before judgment a compromise was come to between the parties in terms of which the suit was decreed. The rights under the will were given up; the moveable property was given absolutely to the widowed mother who by the Mithila Law was entitled to it; and she surrendered all right of succession to the immoveable property, to which the plaintiff in the compromised suit became by such surrender entitled as next reversioner, and of which he gave a moiety to the daughters, and he and the daughters each gave the widow a small portion of the land for her maintenance. In September 1911 the plaintiff in the compromised suit having died, the present appellants, as next reversioners brought the present suit for a declaration that the compromise was invalid and ineffectual as against them as being only a device to divide the property with the reversioner and therefore not *bonâ fide*, but they abandoned that plea in the Appellate Court. *Held*, [illegible] as to the moveable property the widowed [illegible] was absolutely entitled to it under the [illegible] Law; the compromise only recognised her [illegible] to it. As regards the immoveable [illegible] surrender was total, not partial [illegible] small portion of land [illegible]

HINDU LAW—WIDOW—*contd.*

for her maintenance. The compromise was made for good consideration on both sides, and was *bonâ fide* and valid within the principles laid down by the Board in *Rangasami Gounden* v. *Nachiappa Gounden, I. L. R. 42 Mad., 523; L.R. 46 I. A. 72.* SURESHWAR MISSER *v.* MAHESHRANI MISRAIN 1920 . . **I. L. R. 48 Calc. 100**

60. ———— Alienation for religious or charitable purposes—*Spiritual benefit of husband—Building dharamsala—Succession "Atma-bandhus."* Unless it can be established that the alienation of a portion of her husband's estate by a Hindu widow is for the performance to religious acts supposed or intended to be for the spiritual benefit of the deceased the alienation cannot operate to the prejudice of the reversioners, even though the portion of the property alienated be not excessive. *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah, 8 Moo., I. A. 529, Puran Dai* v. *Jai Narain, I. L. R. 4 All., 482, Khub Lal Singh* v. *Ajodhya Misser, I. L. R., 43 Calc., 654,* and *Kunj Behari Lal* v. *Lalu Singh, I. L. R. 41. All., 156,* referred to. Amongst *atma-bandhus* the paternal grand father's son's son is nearer heir than the sister's daughter's son. SHAM DEI *v.* BIRBHADRA PRASAD **I. L. R., 43 All. 463**

61. ———— Escheat—*Burden of proof—Crown to prove that property vested in the husband—Stridhan.* When the Secretary of State for India in Council seeks to recover possession of property as having escheated to the Crown on the death of a Hindu widow by reason of the failure of the deceased husband's heirs, it lies upon him to show that the property in suit had vested in the husband. *Diwan Ran Bijai Bahadur Singh* v. *Inderpal Singh (1899) L. R. 26 I. A. 226,* relied on. On the failure of her husband's heirs, the *stridhan* of a widow would go to her blood relations in preference to the Crown. *Kanakammal* v. *Ananthamathi Ammal (1912) 37 Mad., 293,* approved of. GANPAT RAMA *v.* SECRETARY OF STATE FOR INDIA **I. L. R. 45 Bom. 1106**

62. ———— Right of residence—*Transferee for value not affected by the right.* Under Hindu Law, a widow cannot assert her right of residence in a house which has been sold by her husband during his life-time, unless a charge is created in her favour prior to the sale. The right which a Hindu wife has during her husband's life-time is a matter of personal obligation arising from the very existence of the relation and quite independent of the possession by the husband of any property, ancestral or self-acquired. *Manilal* v. *Bai Tara (1892) 17 Bom., 398,* considered. *Joyanti Subbiah* v. *Alamelu Mangamma (1902) 27 Mad., 45,* followed. GANGABAI *v.* JANKIBAI **I. L. R. 45 Bom. 337**

63. ———— Competence of widow, carrying on her deceased husband's business, to sell property—*Acquired by her in the course of such business—"Legal necessity."* The widow of a separated Hindu succeeded as such to the business of her deceased husband and carried it on for a series of years with reasonable prudence on the same lines as it had been conducted in his life-time. The business was that of a banker and money-lender, and involved from time to time the purchase and re-sale of immoveable

HINDU LAW—WIDOW—*contd.*

property. *Held,* that, as regards immoveable property not inherited from her husband but purchased *in the course of business* by her, the widow was competent to sell again outright, without proof of any special legal necessity being requisite, the "legal necessity" being that the property was sold in the course of a business which she was entitled, if she chose to do so, to carry on. Neither was it, in individual instances, a proof of absence of "legal necessity" that the property was sold for less than the widow had paid for it. *Sham Sundar Lal* v. *Acchan Kunwar, I. L. R. 21 All. 71, Sakrabhai Nathubhai* v. *Maganlal Mulchand, I. L. R. 26 Bom. 206, Radha Kishan* v. *Janki.* Weekly Notes, 1907, p. 155, referred to. PAHALWAN SINGH *v.* JIWAN DAS (1920) **I. L. R. 42 All. 109**

———— Re-marriage, effect of. A Hindu widow on re-marriage forfeits the life-interest which she holds as the mother of a deceased son who survived her husband. SHEOBARAN MAHTO *v.* MUSSAMMAT BHOGEA **3 Pat. L. J. 639**

64. ———— Husband's estate—*Inheritance—Moveable property—Corpus—Waste of corpus—Reversioners, right of—Suit by reversioners to prevent waste—Suit against widow and her alienees without consideration—Receiver—Right to place property in hands of Receiver—Liability of alienees to replace moveable corpus in their possession—Accountability of widow as to corpus—Nature of accountability—Duty of widow to replace corpus, if in her possession—Right to enjoy income of such property—Limitation Act (IX of 1908), Art. 120.* A Hindu widow inheriting moveable property of her husband is not entitled to commit waste of the corpus of such property. Where she commits waste of the corpus of such property, the nearest reversioner is entitled to file a suit praying that such corpus may be reduced into possession and handed over to a receiver appointed in the suit; the transferees from the widow without consideration can be directed to replace any part of the corpus of the moveable property which can be traced to their hands, and the widow herself made accountable for waste in the sense of making her replace the moveable corpus of her husband's estate which she has made away with, if she is in a position to do so, allowing her to enjoy the income of the fund so replaced. Article 120 of the Limitation Act applies to such a suit. *Nabin Chunder Chuckerbutty* v. *Issur Chunder Chuckerbutty (1868) 9 W. R., 505 (F.B.)* and *Radha Mohan Dhar* v. *Ram Das Dey (1869) 3 B. L. R., 362,* referred to. *Sinclair* v. *Brougham, (1914) A. C., 398,* applied. VENKANNA *v.* NARASIMHAM . **I. L. R. (1920), 44 Mad. 984**

65. ———— Acceleration of reversion's interest—*Relinquishment of property with provision for maintenance, effect of.* *A* and *B,* two widows of a deceased Hindu, compromised a dispute between them as to who was entitled to succeed to their husband on the terms that *A* should take one-fourth of the property absolutely and *B* three-fourths absolutely. *Held,* that in the circumstances in which the compromise was effected neither widow took an absolute estate in the property. One of the widows made over her share in equal shares to her two daughters and, with the consent of those daughters, to the son

HINDU LAW—WIDOW—*contd.*

of a deceased daughter, but stipulated that she should receive for life the rents of certain villages on account of an agreed maintenance of Rs. 1,200 *per annum*. *Held*, that the surrender of the estate by the widow was sufficient to accelerate the estate of the daughters. One of the daughters, (*C*) died after having made a mortgage of her share in the form of an *ijara*, and the surviving daughter (*D*) accepted rent (*huqq ajari*) from the *ijaradar*. *Held*, that *D* had elected to affirm the *ijara*. *Held, further*, on the evidence, that there had been a valid family arrangement whereby each daughter became entitled to deal with her share as she pleased during the life-time of the other. MUSSAMMAT DILTOR KUER *v.* HARKHU SINGH . . . . . . 2 Pat. L. J. 578

66. ———— Widow alienating her deceased husband's property to save it—*From being sacrificed at a forced sale—Part of the purchase money being for personal necessities in anticipation.* One G. D. died in 1091 leaving a widow and 2 minor sons, and a house at Amritsar, of which the widow got possession on behalf of her sons. The sons died in 1906 and 1907 respectively. The house had been mortgaged by G.D. in 1892 for Rs. 450 and the mortgagee sued in 1909 and obtained a decree for Rs. 556 and an order for the sale of the house in default of payment. In execution of the decree the house was put up to sale by auction and was purchased by one T. S., the highest bidder, on the 10th February 1913 for Rs. 1,100. T. S., however, failed to deposit ¼th of the price and a fresh warrant was issued for 14th July 1913 and the sale fixed for 20th August 1913. Meanwhile the plaintiff, a son of a brother of G. D., had put in objections to the attachment of the house, but these were eventually disallowed and he took no further action. On 12th August 1913 the widow sold this house for Rs. 1,944 and paid the decretal amount into Court. The consideration included also an item of Rs. 800 for maintenance and customary contributions on the marriages, etc., of her daughter's children. It was found that at the time of the sale the widow had practically no income, and that she had 3 daughters and eleven grandchildren, and that the sale was executed under circumstances which left her no choice and was in reality an act of good management on her part. *Held*, that a widow is not always bound to sell exactly for the amount for which there is legal necessity and the Courts have to see in each case whether, having regard to circumstances, the alienation was a proper one. *Lala Chatranarayan* v. *Uba Kanuari* (*1 Beng. L. R. 201*), *Felaram Roy* v. *Bagalanand Banerjee* (*14 Calc. W. N. 895*), and Trevelyan's Hindu Law. 2nd Edition, page 512, followed. *Gurdit Singh* v. *Mehr Singh* (*67 P. R. 1881*), and *Nihal Singh* v. *Must. Rajon* (11 P. R. 1885), distinguished. *Held also*, that the proposition that a widow cannot anticipate her personal necessities (Mayne's Hindu Law, VI Edition, paragraph 633) is not an inflexible rule. *Moti Singh* v. *Sobhomal* (*30 Indian Cases 968*), followed. What is to be seen is whether in the particular case the widow has dealt fairly towards the expectant heir. *Held further*, that as the bulk of the consideration was for legal necessity the sale in question ought to be upheld. *Thalugara Ramanna* v. *Kalagara Gangayya* (*26 Indian Cases 178*) *Kannu Chetty* v. *Amirthammal* (*26 Indian Cases 418*), and *Padum Singh* v. *Must. Badrabai* (*57 Indian Cases 675*), followed. NAMA MAL *v.* HARBHAGWAN. I. L. R. 2 Lah. 357

67. ———— Husband's Estate— Inheritance—*Moveable property—Corpus—Waste of corpus—Reversioners, right of—Suit by reversioners to prevent waste—Suit against widow and her alienees without consideration—Receiver—Right to place property in hands of Receiver—Liability of alienees to replace moveable corpus in their possession—Accountability of widow as to corpus—Nature of accountability—Duty of widow to replace* [illegible]

[illegible] property, [illegible] waste of the *corpus* of such property. [illegible] she commits waste of the corpus of such property, the nearest reversioner is entitled to file a suit praying that such corpus may be reduced into [illegible] receiver appoint- [illegible] from the widow [illegible] replace [illegible] roperty [illegible] widow [illegible] herself made [illegible] e sense of making her replace the moveable corpus of her husband's estate which she has made away with, if she is in a position to do so, allowing her to enjoy the income of the fund so replaced. Article 120 of the Limitation Act applies to such a suit. *Nobin Chunder Chuckerbutty* v. *Guru Persad*, (*1868*) *B. L. R. Supp. Vol. 1008* (*F. B.*) *9 W. R.*, *505* (*F.B.*) and *Radha Mohan Dhar* v. *Ram Das Dey*, (*1869*) *3 B. L. R. 362*, referred to. *Sinclair* v. *Brougham*, (1914) A. C. 398, applied. VENKANNA *v.* NARASIMHAM. I. L. R., 44 Mad. 984

68. ———————— *Hindu widow—Widow's estate—Property acquired by widow without the aid of the husband's estate and without detriment to it—Widow's power of disposition over property so acquired—Widow not trustee for reversioner—Act No. II of 1882* (*Indian Trusts Act*), *section 90*. A Hindu widow in possession as such of her husband's estate acquired certain property through the exercise of a right of pre-emption which she had in that capacity. The pre-emptive price was not, however, paid from the [illegible] of a [illegible] *Held* [illegible] in t[illegible] the [illegible] part of the [illegible] separate property of the widow. *Held also*, that section 90 of the Indian Trusts Act, 1882, had no application to the facts of the case. SRI RAM JANKIJI BIRAJMAN MANDIR *v.* JAGDAMBA PRASAD. I. L. R. 43 All. 374

69. ———————— *Hindu widow—Alienation by widow—Consent of the then nearest reversioner not sufficient to validate the alienation if there is no legal necessity.* Where it is found as a fact upon the evidence that a transfer of her husband's property made by a Hindu widow is not a transfer for valid legal necessity the fact that the next reversioner has joined the widow in making the transfer does not render it valid and binding as against the remoter reversioners. *Bajrangi Singh* v. *Manokarnika Bakhsh*

HINDU LAW—WIDOW—*concld.*

Singh, I. L. R., 30 All. 1, and *Rangasami Gounden* v. *Nachiappa Gounden, I. L R., 42 Mad., 523,* referred to. GHISIAWAN PANDE v. MUSAMMAT RAJ KUMARI. **I. L. R. 43 All. 531**

HINDU LAW—WILL.

See HINDU LAW—ADOPTION. **24 C. W. N. 274**

See HINDU LAW MINOR. **I. L. R. 38 Mad. 166**

See SPECIFIC RELIEF ACT, s. 42 . **I. L. R. 42 Mad. 699**

See WILL . . **3 Pat. L. J. 199**

1. ——— **Bequest for establishment of an idol**—"*Relinquishment in favour of a sentient person*"—*Bequest for establishment of an image and worship of a Hindu deity.* The principle of Hindu law, which invalidates a gift other than to a sentient being capable of accepting it, does not apply to a bequest to trustees for the establishment of an image and the worship of a Hindu deity after the testator's death, nor does it make such a bequest void. *Upendra Lal Boral* v *Hem Chundra Boral, I. L. R. 25 Calc. 405, Rojomoyee Dassee* v. *Troylukho Mohiney Dassee, I. L. R. 29 Calc. 260,* and *Nogendra-Nandini Dassi* v. *Benoy Krishna Deb, I. L. R. 30 Calc. 521,* overruled so far as they conflict with the view of this Full Bench. BHUPATI NATH SMRITITIRTHA *v.* RAM LAL MAITRA (1909) **I. L. R. 37 Calc. 128**
14 C. W. N. 18

2. ——— *Validity of bequest to complete a temple and instal an idol. Held* that a bequest to complete the building of a temple which had been commenced by a testator and to instal and maintain an idol therein is a valid bequest under the Hindu law. *Bhupati Nath Smrititirtha* v. *Ram Lal Moitra, I. L. R. 37 Calc. 128 ; 14 C. W. N. 18,* followed. MOHAR SINGH *v.* HET SINGH (1910) . . . . **I. L. R. 32 All. 337**

3. ——— **Absolute gift**— *Construction—Bequest to widow—*"*Malik like myself*"*—Absolute or limited gift—Limitations over after absolute bequest—Validity.* The use of the word *malik* in a Hindu will does not conclusively show that the donee is intended to take an absolute interest in the property, but the effect of the disposition is to be gathered from all the terms of the will. In spite of the use of the word "*malik*" the donee may take a limited interest in the property. *Shib Lakshan Bhakat* v *Tarangini Dasi, 8 C. L. J. 20 ; Surajmani* v. *Rabi Nath Ojha, I. L. R. 30 All. 84 ;* and *Punchoomoney Dossee* v. *Troylucko Mohiney Dossee, I. L. R. 10 Calc. 342,* referred to. But where the testator uses the expression "*malik* like myself" the effect is ordinarily to create an absolute interest in the donee. *Raj Narain Bhaduri* v *Katyayni Dabee, I. L. R. 27 Calc. 649,* referred to. Where a power of disposition is conferred on the donee, it is an indication that the testator intended to create an absolute interest in favour of the donee. *Toolsi Dass Karmokar* v. *Madan Gopal Dey, I. L. R. 28 Calc. 499,* and *Jogeswar Narain Deo* v. *Ram Chandra Dutt, I. L R 23 Calc. 670, referred to.* Where the will of a Hindu ran as follows:—"After my death my wife, the said *M.*, will be *malik* like myself having right to give away, sell, etc., and will manage, look after and possess these properties, and after the death

HINDU LAW—WILL—*contd.*

of my wife, the said *M.*, all that property will come under the control of my said son, if he is reformed otherwise, if the said son's character is not reformed up to the death of my said wife, that property, etc., will come after my wife's death on behalf of my grandsons, under the control and management of their mother *S.*" *Held,* that *M,* the widow, took an absolute estate, and that the effect of the subsequent clause is not to cut down to a life-estate the full proprietary rights conferred on the widow by the previous clause. AMARENDRA NATH BOSE *v.* SHURADHANI DASI (1909) . **14 C. W. N. 458**

4. ——— **Construction**—*Bequest in favour of two married daughters—Joint tenancy or tenancy in common.* A Hindu died leaving a will whereby he bequeathed the whole of his property to his two married daughters without specification of shares. *Held,* that the estate taken by the legatees was a tenancy in common and not a joint tenancy. *Jogeswar Narain Deo* v. *Ramchandra Dutt, L. R. 23 I. A. 37, 44,* followed. GOPI *v.* MUSAMMAT JALDHARA (1910) . . . **I. L. R. 33 All. 41**

5. ——— *Construction of Will—Bequest to a Class—Persons not born at death of testator—Intention of testator.* The will of a Hindu testator without issue, after giving his wife and his mother possession of his property moveable and immoveable for their lives, contained the following clause: "On the death of my mother and my wife, the sons of my sisters, that is to say, their sons who are now in existence as also those who may be born hereafter shall in equal shares hold the said properties in possession and enjoyment by right of inheritance, and shall maintain intact and continue the service of the established duties and ancestral rites according to the practice heretofore obtaining." The testator died the day following the execution of the will. *Held* (affirming the decision of the High Court), that the intention was not to declare that the sisters' sons had a "right of inheritance," but to give them under the will a vested interest in their respective shares at the testator's death, though postponing their possession and enjoyment until the deaths of the mother and widow. Assuming that the testator's intention was that all his nephews, whether then in existence or after born should take, there was a valid bequest to such of them as were capable of taking at his death, notwithstanding that others of the class were incapacitated from taking because not then born. *Ram Lal Sett* v. *Kanai Lal Sett, I. L. R. 12 Calc. 663,* upheld and approved, as laying down the general rule of construction applicable to Hindu wills in the case of such a bequest where there is no other objection to it. *Dias* v. *De Livera, L. R. 5 A. C. 123,* referred to, as stating a convenient rule to apply to wills of Hindus, that a gift to children not in existence at the date of the gift should be limited to those born between the date of the will and the death of the testator. BHAGABATI BARMANYA *v.* KALICHARAN SINGH (1911) **I. L. R. 38 Calc. 468**

6. ——— *Construction of will—Judgment of Privy Council—*"*In equal shares for life and with benefit of survivorship between themselves*"*—Judgment to be limited to the events then happened—Gift to a class valid, although some of class born after testator's death and hence incapable of taking—Hindu Wills Act (XXI of 1870), ss. 2, 3—Indian Succession Act (X of 1865), ss. 85, 98,*

HINDU LAW—WILL—*contd.*

100, 101, 102—Incorporation of statutes—Liberty to apply—Practice. The will of a Hindu directed his executors in certain events (which happened) "to make over and divide the whole of my estate both real and personal unto and between my daughters in equal shares to whom and their respective sons I give advise and bequeath the same but should either of my said daughters die without leaving any male issue surviving but leaving my other daughter her surviving then in such case the surviving daughter and her sons shall be entitled to the share of the deceased daughter or in the case of the death of either daughter leaving sons the share of such daughter is to be paid to such her son or son's share and share alike." The testator died leaving him surviving his widow, two daughters *R* and *P* and three sons of *P*, *viz.*, *R P*, *K P*. and *J P*. At the time of the happening of the events on which the gift in favour of the daughters and their sons came into operation, there were living *R* and *P* and four sons of *P*, *viz.*, *R P*, *K P*, *P L* and *B L*, the latter two of whom were born subsequent to the testator's death In a suit brought by *R* for the construction of the will and a declaration of the rights of the parties, the Privy Council held that "in the events that had happened, the daughters *R* and *P* were entitled to the testator's estate in equal shares for life and with benefit of survivorship between themselves." The liberty to apply reserved by the High Court to the parties, amongst whom were the sons of *P* was affirmed. Subsequent to the order in Council, *P* died leaving her sons *R P*, *K P*, *P L*, and *B L* her surviving. *R P* and *K P* thereupon claimed to be entitled to their mother's share. An application, in this behalf, was made by *R P* to the High Court:—*Held*, that the application was properly made under the liberty reserved. The Privy Council in

time had happened, and had no intention to decide the rights of sons in reference to a subsequent contingent event, which had now happened in the death of *P* leaving sons. The canon of construction to be applied to a statute incorporating the provisions of another statute, as defined in *In re Wood's Estate, 31 ch. D. 607*, approved of. S. 3 of the Hindu Wills Act, which controls both the quantity and quality of the interest created including the capacity of the donee to take, modifies the operation of the incorporated *s. 98 of the* Succession Act, by the introduction of the rule of Hindu Law, that a bequest to a person not in existence at the time of the testator's death, is void. *Alangamonjori Dabee* v. *Sonamoni Dabee, I. L R. 8 Calc. 637*, and *Cally Nath Naugh Chowdhry* v *Chunder Nath Naugh Chowdhry, I. L. R. 8 Calc. 378*, followed. Hence *P L* and *B L* took no share and *P's* share devolved on *R P*, *K P* and the repre-

could be ascertained within the period permitted by law. *Leake* v. *Robinson, 2 Meri, 363*, distinguished. *Kingsbury* v. *Walter, [1901] A. C. 187, Dowset* v. *Sweet, 1 Amb. 175, Young* v. *Davies, 2 Drew, & Sm. 167, Shaw* v. *M'Mahon, 4 Dr. & War. 131, Fell* v. *Biddulph, L. R. 10 C. P. 701*, referred to. RADHA PRASAD MALLICK *v.* RANIMONI DASI (1910) . . . **I. L. R. 38 Calc. 188**

HINDU LAW—WILL—*contd.*

7. ———— *Will—Use of expression "malik"—Widow's estate—Construction.* A Hindu died, leaving a Will by which (*inter alia*) he appointed his wife as residuary legatee in the

in the Will and certain other restrictions were placed on the management of the property by the wife. Finally provision was made for the further distribution of the property after the wife's death. *Held*, that the widow took a widow's estate and not an absolute estate. The use of the expression

the ordinary notions or customs of Hindus is to be considered in construing a Will. MOTILAL MITHALAL *v.* THE ADVOCATE-GENERAL OF BOMBAY (1910) . . . **I. L. R. 35 Bom. 279**

8. ———— **Trust to accumulate income for marriage expenses of son**—*Bequest to wife to be married—Wife married, born before testator's death—Bequest if valid—Mortgage suit against legal representative of mortgagor who sets up paramount title—Maintainability.* Where the testator by her Will directed the executor to hold certain properties in trust to accumulate the income for the marriage expenses of an unmarried son, and to give the property to the wife of the son if he married

ie bequests, to

e proceeds for

Held, that the

direction to accumulate contained in the will was valid. That the testator's son having married, within the period specified, a lady who had been born before the testator died, the bequest took effect according to Hindu Law *Tagore* v *Tagore, L. R. I. A. Sup. Vol. 47, Bai Malivahoo* v. *Bai Mamoo Bai, L. R 24 I. A. 93 · s c. 1 C W. N. 366*, relied on. NAFAR CHANDRA KUNDOO *v.* RATAN MALA DEBI (1910) . . . **15 C. W. N. 66**

9. ———— **Stridhan property**—*Dayabhaga—Ayautuka—Succession—Husband's younger brother or step-brother, preferential heir—Probate—Practice—Caveat by both—Real successor dismissed from proceeding—Probate in common form upon withdrawal of objection by the other—Revocation on appeal—Proof in common from in presence of right heir directed.* On a will being propounded of a childless Hindu woman governed by the Dayabhaga, caveat was entered by her step-brothers as well as by her husband's younger brothers. The Judge held the former to be the preferential heirs upon intestacy and dismissed the objections of the latter on the ground that they had no *locus standi*. The step-brothers subsequently not contesting the preceedings, probate was granted in common form. *Held*, on appeal, that the probate must be revoked and the propounder called upon to prove in solemn form in the presence of the husband's younger brothers. DEBI PRASANNA ROY CHOWDHRY *v.* HARENDRA NATH GHOSH (1910) . . . **15 C. W. N. 383**

10. ———— **Gift to future wife of son of testator, she being in existence at the time of the testator's death**—*Succession Act (X of 1865), s. 99, effect of—Hindu Wills Act (XXI of 1870), s. 3, how far controls principles*

HINDU LAW—WILL—*contd.*

of Hindu law. S. 99 of the Indian Succession Act does not apply to the will of a Hindu and invalidate provisions made in accordance with the principles of the Hindu Law. A bequest made by a father to the would-be wife of his son may be deemed a bequest to a person described as standing in a particular degree of kindred to his son within the meaning of the exception to s. 99 of the said Act. Although by s. 3 of the Hindu Wills Act, the provisions of s. 99 of the Indian Succession Act were made applicable to the Hindus, the intention of the Legislature was to leave unaffected the rules of Hindu Law. According to the principles of Hindu Law, a bequest made by a person to his son's would-be wife, who was in existence at the time of the testator's death, is valid, notwithstanding the provisions of s. 99 of the Indian Succession Act. DINESH CHANDRA ROY CHOWDHURY *v.* BIRAJ KAMINI DASSEE (1911).

I. L. R. 39 Calc. 87
15 C. W. N. 945

11. ———— **Construction of**—*Bequest to testator's daughter-in-law after death of wife—Whether it conferred an absolute or only a life-estate in the property.* The will of a Hindu testator after reciting that he had no male heir, and had already provided for his widowed daughter, stated:— "I have resolved that after my death my wife legatee No. 1, shall remain in possession and enjoyment of all my property with all powers or authority like myself, and that after the death of my wife my daughter-in-law, widow of Raghuraj Singh, legatee No. 2, shall remain in possession and enjoyment of all the properties aforesaid like myself and legatee No. 1 . . . . I therefore execute a will in favour of my daughter-in-law, so that on the demise of myself and my wife the estate and name of my ancestors may continue as before, and she in place of Raghu raj Singh shall perform my funeral ceremonies and those of my wife according to the *shashtras* and the custom of the family, and then she shall have power to nominate any one whom she may think fit as 'heir' so that the name of the family" may continue as formerly and now with honour. *Held* (affirming the decision of the Court of the Judicial Commissioner), that, on the true construction of the will, the word "heir" meant heir to the testator, and the daughter-in-law took (as did the wife) not an absolute interest, but only a life estate in the testator's property, which was therefore on her death *not liable to attachment* and sale under decrees against her representative. BRIJ LAL *v.* SURAJ BIKRAM SINGH (1912).

I. L. R. 34 All. 405

12. ———— *Construction of will—Period of distribution of property bequethed—Succession Act (X of 1865), s. 111—Hindu Wills Act (XXI of 1870)—Absolute gift to son on attaining majority—Bequest contingent on son's death which did not happen till after period of distribution.* The right of the appellant to succeed to the *shebaitship* of certain *debutter* properties depended on the construction of his grandfather's will, and on the nature of the right which his father took in those properties. After declaring the properties to be *debutter* for the maintenance of the family idol, the testator in his will stated that "my present begotten son" (the appellant's father) "will be *shebait* for performance of the ceremonies." And after making provision for his own death during the minority of his son, in which case his widow was to be the *shebait* as his son's guardian, the testator continued "and my son on attaining majority will personally conduct the work of the *sheba.* God forbid, if during my life or after my death, my said son dies, then my widow will be the *shebait,* and after her my daughters by her" (the respondents) "will be *shebaits* . . . . . Moreover, for carrying out the directions under this will until my minor begotton son comes of age, my wife" (and two male persons named), "will be executors . . . . and on my said begotten son attaining majority the said executors will be discharged, and the said son by continuing in his present faith will go on performing the *sheba,* etc., of the said idol": *Held* (reversing the decision of the High Court), that, on the true construction of the will, there was an absolute gift of the *shebaitship* to the appellant's father on his attaining his majority, and it was not cut down by anything that followed. There were provisions in case of his death as a minor, but no cutting down of the absolute gift to him. The appellant therefore, and not the respondents, succeeded on the death of the testator's son, who had attained his majority and held the *shebaitship* until his death. TRIPURARI PAL *v.* JAGAT TARINI DASI (1912) . . . **I. L. R. 40 Calc. 274**

13. ———— *Testator's direction to his brother to get his daughters married—Betrothal by the brother—Marriage of the daughter by her mother and maternal uncle with another person—Suit by the brother to recover damages which he had to pay to the betrothed husband for breach of contract—The right of the testator's brother to give in marriage no more than the right under the Hindu law and subject to the limitations of that law—Right of the mother as legal guardian.* A testator in his will directed that his brother should get his minor daughters married with the testator's money. The brother accordingly got one of the daughters betrothed to *H.* Subsequently the girl's mother and maternal uncle got the girl married to *C.* The testator's brother, thereupon, brought a suit against the mother, maternal uncle and *C* to recover damages which he had to pay to *H* for breach of contract. *Held,* that the suit was not maintainable. The plaintiff's right under his brother's will was not absolute and exclusive. The right was no more than the right under the Hindu law, and subject to the limitations under that law. According to the next of *Yajnyavalkya* the persons entitled to give a girl in marriage were "the father, paternal grandfather, brother, kinsmen (*sakulya*) and mother" in the order stated. The text only dealt with the bare right to give a girl in marriage. It did not deprive the mother of her right of legal guardianship but only specified who could make a gift in marriage. The paternal male relations of the girl were placed above the mother for the purpose of the gift, because women were dependent and they could not perform certain ceremonies essential to or usual in a marriage. The text did not say that the mother was to have no voice at all and might be altogether set at naught where there were paternal male relations of the girl competent to give her in marriage. BAI RAMKORE *v.* JAMNADAS MULCHAND (1912) **I. L. R. 37 Bom. 18**

14. ———— **Condition**—*Life-estate to widow, remainder to another upon condition to be fulfilled—Sale by widow with concurrence of latter before condition fulfilled—Condition made impossi-*

HINDU LAW—WILL—*contd.*

Bequest to husband of unmarried ... married in testator's life-time, if valid. A testator by his will conferred a life-estate in most of his properties to his widow *B* and provided that if *B* adopted a son the said properties would on her death pass to him, but that if no son was adopted the properties would pass absolutely to *N* provided he lived in the testator's ancestral house; but that if *N* or his son or other descendant failed to live in the ancestral house the properties would pass to other specified relatives of the deceased, subject to the like condition and on the failure of any such relatives to fulfil such condition to ... failing agnates, to any Brahmin

... was not invalid so far as it affected *N* although it was attached to the gift of an absolute estate. That *N's* interest being a contingent one which fell into possession on the death of the widow the condition or residence had to be satisfied at the date of the widow's death, and that *N* not having lived there at that time and having made it impossible for him ... of the house, he ... will. *Held,* the ... over to agnates ... for uncertainty, the other ... valid and in the absence of proof that there was no other person qualified to take under the succeeding clauses of the will upon *N's* failure, the plaintiffs who claimed as heirs could not recover. A bequest by a Hindu in favour of the husband of a son's daughter unmarried at the date of the will but married in the testator's life-time would be valid. SHYAMA CHARAN BHUTTACHARYA *v.* SARUP CHANDRA SEN (1912) . . **17 C. W. N. 39**

16. ——————**Perpetuities,** *rule against—Hindu Wills Act (XXI of 1870) ss. 2, 3—Indian Succession Act (X of 1865), ss. 101, 102—Gift to grandsons after all of them have attained majority,—if valid—Primary and secondary intention—Gift, if may be sustained as to grandsons in existence at testator's death.* Upon the construction of a ... his execut... my grand... (he having ... to their respective sons, that is to say my grandsons," the High Court had *held* that the distribution was to take place only after all the sons who might be born to the sons of the testator should have attained their majority, and that such a disposition was invalid under s. 101 read with s. 102 of the Indian Succession Act which by s. 2 of the Hindu Wills Act are applicable to Hindu wills; that s. 3 of the Hindu Wills Act, although it might have the effect of invalidating ... under s. 101 of the ...

... read with s. 102 even if the grandsons referred to in the will meant garndsons who were in existence at the testator's death; that the disposition should not be given effect to in favour of the three grandsons who were in existence at the testator's death on the assumption of a supposed secondary intention on the part of the testator absolutely inconsistent with his intentions as expressed in the will; and that as regards the subject matter of this disposition there was an intestacy. Appeal from this decision was dismissed by the Judicial Committee P. V. SUBRAMANIA PILLAI *v.* P. V. MURUGESA PILLAI (1912) . **17 C. W. N. 483**

17. ——————**Construction—** *Contingent bequest in future of whole estate—Succession Act (X of 1865), s. 107, Part XV.* A Hindu governed by the Bengal School of Hindu Law died leaving a will, the material portion whereof was as follows:—"I hereby authorise my said wife to adopt *dattaka putra.* In case of death of an adopted son my said wife shall adopt one after another five sons in succession. If my said wife dies without adopting a son or if such adopted son predeceases her without leaving any male issue, in such case my estate after the death of my said wife shall pass to the sons of my sister, Sreemati Benodini Dassee, who may be living at the time of my death." There were two sons of the testator's sister living at his death. The widow adopted a son who predeceased her unmarried: she then died. On a suit for a construction of the will:—*Held,* that there was a valid contingent bequest in favour of the testator's nephews, which came into operation in the events that had occurred. A contingent bequest *in future* of the whole estate of a testator is valid and operative under Hindu Law. *Soorjee Money Dassee* v *Denobundoo Mullick, 9 Moo. I. A. 123,* referred to. BHUPENDRA KRISHNA GHOSE *v.* AMARENDRA NATH DEY (1913). **I. L. R. 41 Calc. 642**

18 ——————*Construction of* ... *Sub-* ...

In this case their Lordships of the Judicial Committee upheld the decision, on appeal, of the High Court in *Radha Prasad Mullick* v. *Ranimoni Dasi, I. L. R. 38 Calc. 188,* to the effect that on the death ... Dassi leaving male issue, the moiety ...

... Their Lordships did not decide the ... whether the High Court was wrong in holding that no grandson of the testator born or adopted after his death could take under his will, but said that their decision in the present appeal was not to prejudice the position of Jugal Kishore Sen, the second appellant, if and when such question came before a Court for decision. RANIMONI DASI *v.* RADHA PRASAD MULLICK (1914). **I. L. R. 41 Calc. 1007**

19. ——————*Construction of will—Self-acquired property—Bequest dividing pro-* ... *sons with gift over to* ...

... *his death—Period of distribution.* A ... dent of Surat in the Presidency of Bombay made a will, dated 20th August 1899, by which after appointing his two sons "executors, heirs and owners" of the whole of his property (which was self-acquired) and directing them to divide and take equal shares in it with certain exceptions, gave

HINDU LAW—WILL—*contd.*

each of them a half share of his estate not specifically disposed of by the will. By clause 9 he made the following bequests: "I have divided between and given to my two sons the whole of my property as mentioned above. But should either of these two sons die without having had (leaving) any male issue, the survivor of the said two sons is duly to take the whole of the property appertaining to the share of the deceased son who may have (leave) no male issue (behind him) after undertaking (to defray) the expenses in connection with the maintenance of his widow and marriage of his minor daughter. But under the circumstances the heirs of my deceased son Surajlal shall not get any right whatever." The testator died on 4th July 1901 leaving him surviving his two sons. The elder son died on 2nd January 1903 leaving a widow and a daughter. In a suit by the surviving son to enforce the provisions of cl. 9 of the will, the High Court held that the period of distribution contemplated by the testator was the period of his death at which his time half of his estate became vested in each of his sons absolutely, and that cl. 9 should be read as if the survivorship there provided was limited to survivorship at the death of the testaor. *Held,* (reversing that decision) that the words of cl. 9 were not limited to survivorship during the testator's life, but clearly pointed to survivorship whenever it should occur; and that the surviving son was as such survivor entitled to the estate conveyed by the clause, subject to the obligation imposed upon him of maintaining his brother's widow and daughter. CHUNILAL PARVATISHANKAR *v.* BAI SAMRATH (1914).

I. L. R. 38 Bom. 399

20. ———————— Absolute gift by will to Hindu widow—*Property acquired after date of will—Rule of law that will speaks from the death of the testator, before and after the Hindu Wills Act.* A Hindu testator executed a will at Benares in which he provided: "Upon my death my wife shall get the lands, jamas, cash money, Government promissory notes, etc., and all other immoveable and moveable properties of which I am in possession and enjoyment save and except the lands and buildings mentioned in the schedule and possess and enjoy the same with the right to transfer by gift or sale, and no one will be entitled to raise any objection regarding any gift or sale to be made by her." The testator after the date of the will purchased a house at Benares of which he was in possession and enjoyment at the time of his death: *Held,* that the widow did not get merely a widow's estate in the property bequeathed but she took it as an absolute heritable estate. That the Hindu Wills Act did not apply to the property in Benares. That the words "upon my death my wife shall get all my properties which I am in possession" meant that she was to take all the property which the testator would possess at the time of his death and there was no intestacy so far as the house at Benares was concerned. S. 77 of the Succession Act which is incorporated in the Hindu Wills Act enacts in other words that the will speaks from the death of the testator. The Hindu Wills Act did not vary the mode of construction of wills in this respect nor is it correct to hold that in parts of India, where the Act does not apply, the ordinary rule that the will speaks from the death of the testator does not obtain. JITENDRA KUMAR

HINDU LAW—WILL—*contd.*

CHATTOPADHYA *v.* NRITYA GOPAL MUKHOPADHYA (1912) . . . . **18 C. W. N. 140**

21. ———————— Devise to widow—Gift-over—*Life interest—Absolute gift—Power of appointment—Alienation by gift or sale—Administration suit—Cause of action.* A Hindu testator by his will provided for the performance of certain religious ceremonies and devised all his moveable and immoveable properties to his wife with power to alienate by gift or sale. He also by the same will made a gift-over to his daughter in the following terms:—"My daughter, Hara Kumari, shall become entitled to and possessor of whatever property will remain after your death and she shall enjoy the same keeping up and maintaining the aforesaid *sheba*, etc." The will then went on to say:—"the said daughter shall have the same rights as you have and he to whom my said daughter may willingly give away those properties shall while possessing the same and keeping up and maintaining the *sheba* enjoy them." At his death on the 11th March, 1866, the testator left him surviving his widow and an only daughter, Hara Kumari. The widow having obtained probate of the testator's will, executed on the 19th May, 1898, in favour of her two grand-daughters, Hemangini and Nagendrabala, born some time after the testator's death a deed of gift of certain properties acquired by her under the said will. On the 30th September, 1898, the widow died. In October, 1899, Mahim Chandra Sarkar, the testator's nephew, dispossessed Hemangini and Nagendrabala of these properties and took possession of the same. On the 8th March, 1908, Hara Kumari, in whose favour the High Court had decided a suit brought by Mahim Chandra Sarkar for the construction of the testator's will and for a declaration of the rights of the parties thereunder (*11 C. W. N. 412; 7 C. L. J. 540*) executed a deed of gift in favour of her daughter Hemangini and, on the 8th April, 1908, she also executed a similar deed in favour of her other daughter, Nagendrabala, and a *kobala* in favour of Hemangini. In suits brought for administration by Mahim Chandra Sarkar against Hara Kumari, who died during its pendency, for recovery of arrears of rent and cesses in respect of a certain *darpatni* belonging to the estate of the testator, by Mahim Chandra Sarkar against the *darpatnidar* and Hemangini and Nagendrabala and for recovery of possession of certain property acquired by virtue of the deed of gift from the testator's widow, by Hemangini and Nagendrabala against Mahim Chandra Sarkar. *Held,* that Mahim Chandra Sarkar had no cause of action and could not maintain the suit for administration. *Held,* also, that the testator could make an absolute gift to his daughter who was his reversionary heir in absolute estate and that the gift to her under her father's will was an absolute gift. *Held,* also, that there was no power of appointment to the daughter enjoining her to nominate an heir or successor to her father's estate. *Held,* also, that the provision for keeping up the *sheba* was merely a collateral chargeon the property in whosoever's hands it might be and did not affect the absolute character of the gift. *Brij Lal* v. *Suraj Bikram Singh, I. L. R. 34 All. 405,* distinguished. *Moulvi Mahomed Shumsool Hooda* v. *Shewukram, L. R. 2 I. A. 7, Radha Prasad Mullick* v. *Raneemoni Dassi, I. L. R. 35 Calc. 896; L. R. 35 I. A. 118, Jatindra*

HINDU LAW—WILL—*contd.*

Mohan Tagore v. *Ganendra Mohan Tagore, 9 B. L. R. 377, Mussamut Kollany Kooer* v. *Luchmee Pershad, 24 W. R 395, Thakur Singh* v. *Nokhe Singh, I. L. R. 23 All. 309,* and *Ramasami* v. *Papayya, I. L. R. 16 Mad. 466,* referred to. *Held,* also, that the *patni* was vested in Hemangini and Nagendrabala by alienation during Hara Kumari's life, that they were Hara Kumari's heirs, the property being *stridhan*, and that Mahim Chandra Sarkar had no title whatever to any of the properties left by Hara Kumari. *Held,* also, that the widow had absolute power of alienation in derogation of the rights of the sole reversioner, her daughter, who was only entitled to the residue, that the gift by the widow to Hemangini and Nagendrabala was valid, and that Mahim Chandra Sarkar could not plead his right as reversioner against a suit by the heirs of Hara Kumari to eject him as a trespasser, even though the gift should fail. *Hara Kumari Dasi* v. *Mahim Chandra Sarkar, 12 C. W. N. 412 ; 7 C. L. J. 546,* referred to. *Held,* further that the power of alienation, which, though perhaps analogous to what was known as a power of appointment in English law, could not be goverened by the rules of English law relating to such appointments. *Bai Motivahu* v. *Bai Mamubai, I. L. R. 21 Bom. 709,* referred to. MAHIM CHANDRA SARKAR *v.* HARA KUMARI DASI (1914) . . **I. L. R. 42 Calc. 561**

22. ———————— *Construction of will—Bequest in favour of two brothers—Legatees to take in equal shares—Tenancy in common or joint tenancy.* A Hindu who had been adopted made will authorizing his wife to make an adoption, and in case she failed to do so, leaving his property to his two own brothers "in equal shares." *Held,* that the brothers took as tenants in common and not as joint tenants. *Gopi* v. *Jaldhara, I. L. R. 33 All. 41,* followed. *Mankamna Kunwar* v. *Balkishan Das, I. L. R. 28 All. 38,* distinguished. *Jogesswar Narain Deo* v. *Ram Chandra Dutt, I. L. R. 23 Calc. 670,* referred to. HAR PRASAD *v.* SUKHDEVI KUNWAR (1915).

I. L. R. 37 All. 241

viving his widow, two daughters and a minor son The testator also left a brother and the two sons of his brother who were the defendants. The son of the testator died having survived his mother by a few days. The eldest daughter died in the lifetime of her mother leaving a daughter who died unmarried. The plaintiffs were the two surviving sons of the other daughter of the testator. The testator by his will had made his minor son the *malik* of all his properties. The will provided that he should succeed to and enter upon possession and occupation of the whole of his estate and appointed the widow as the manager and legal guardian of the infant son. After providing for the management of the property during the son's minority the will provided—"If after my death the said minor son dies, the mother of the said son shall in his stead become the *malik* in possession and occupation when like myself the said Musammat shall acquire all the proprietary powers and all kinds of properties, moveable and immoveable, and after the death of the widow the property was to go to the testator's two daughters in equal shares." *Held,* that the gift-over in favour of the widow in the event of the son dying without having attained majority was not a void gift as being repugnant to the form of the gift that was previously made in favour of the son. The provisions of the Indian Succession Act rendered such a g[illegible]

the Succession [illegible]

rules of the Eng[illegible]

gift-over shall take effect on the failure of the prior bequest, although the failure may not have occurred in the manner contemplated by the testator. The mere fact that the testator contemplated that if his son died a minor and the [illegible]

of the benefit of the legacy given to them by the [illegible]

son, had no interest in the estate of the testator. DURGA PERSHAD *v.* RAGHUNANDAN LAL (1914).

19 C. W. N. 439

24. ———————— *Construction—Indian Succession Act (X of 1865)), s. 111, rule of construction in—Legacy with power to sell, make a gift, etc., in respect of properties bequeathed, if absolute gift to legatee.* A Hindu in his will provided as follows :—" I bequeath to both of you (the testator's widow and his brother's daughter) the rest of the properties . . . You will [illegible]

survive will hold and enjoy the whole of the property as *malik.*" *Held,* that the case fell within s. 111 of the Indian Succession Act and the widow not having predeceased her husband and having survived the period of distribution took an absolute interest under the will. That the ordinary rule of construction when the testator has given an absolute gift to a legatee and then has made a gift-over *simpliciter* on a contingency of death is that he was referring to death before the period of distribution. This s clearly provided for in s. 111 of the Indian Succession Act which applies to Hindu wills. The rule in this section is an absolute rule of construction and not a rule of construction which may be contradicted by other evidence appearing on the face of the will. NISTARINI DEBYA *v.* BEHARY LAL MUKHERJEE (1914) . . **19 C. W. N. 52**

25. ———————— *Execution of a will by a Hindu widow—Suit for declaration by reversioner—Cause of action—Whether suit maintainable.* A Hindu widow executed a will and thereby bequeathed her husband's property in her hands to a certain person purporting to do so under the oral directions of her husband. The next reversioner brought this suit for a declaration that the will in question was void and ineffectual as against his interest. *Held,* that the mere execution of the will did not afford a sufficient reason for granting a declaratory decree. *Ram Bhajan* v. *Gurcharan, 1 All. L.J. R. 468,* followed. *Jaipal Kunwar*

HINDU LAW—WILL—*contd.*

v. *Indar Bahadur Singh, I. L. R. 26 All. 238,* referred to. UMRAO KUNWAR *v.* BADRI (1915).
I. L. R. 37 All. 422

26. ——————— *Will—Birth of a son subsequent to the execution of the will, effect of —Death of the son before the testator—No revocation of the will under the Indian law—Revocation under the old English law prior to Wills Act—Statutory law in India—Indian Succession Act (X of 1865), s. 57—Probate and Administration Act (V of 1881), s. 4.* A will, executed by a Hindu testator disposing of his ancestral property, is not revoked in law by reason of the birth subsequent to the execution of the will of a son who died before the testator. The rule of English law that it was essential to the validity of a devise of freehold lands that the testator should be seized thereof at the making of the will, and that he should continue so seized without interruption until his decease, is no longer in force in England in consequence of the enactment of the Wills Act. The principle applicable in India is that adopted in the English Wills Act that a will has the same effect as if it were executed at the time of the testator's death. The statutory law of wills in India has not adopted the principle that a will should be deemed to be revoked in consequence of a change in the circumstances of the testator or a change with respect to his rights to the property disposed of by the will. (*See* s. 57 of the Indian Succession Act). Survivorship has the effect of rendering a will invalid only with respect to the property which the testator could not dispose of at the time of his death. All other dispositions made by him are valid. *Shib Sabitri Prasad* v. *The Collector of Meerut, I. L. R. 29 All. 82,* and *Subba Reddi* v. *Doraisami Bathan, I. L. R. 30 Mad. 369,* followed. BODI *v.* VENKATASAMI NAIDU (1913) . . . **I. L. R. 38 Mad. 369**

27. ——————— *Ancestral moveable property—Will—Bequest—Bequest by Co-parcener.* One Pandharinath Ramchandra, a Hindu testator made a will by which he directed that Rs. 2,001 should be paid to each of his three daughters out of the ancestral moveable property. He died leaving a son surviving him. In a suit by one of the daughters to recover amount of the legacy from the estate of the testator: *Held,* that the legacies were directed to be paid by the testator out of property which he had no power to dispose of by will. *Vitla Butten* v. *Yamenamma, I. L. R. 8 Mad. H. C. R. 6,* followed. *Hanmantapa* v. *Jivubai, I. L. R. 24 Bom. 547,* distinguished and *Bachoo* v. *Mankorebai, I. L. R. 29 Bom. 51,* and *I. L. R. 31 Bom. 373,* distinguished. PARVATIBAI *v.* BHAGWANT VISHWANATH PATHAK (1915).
I. L. R. 39 Bom. 593

28. ——————— *Will giving power to widow to adopt with consent of trustees where one declines to act.* A Hindu testator by his will appointed five trustees of his property and gave power to his widow to adopt a son with their consent and advice; and one of the trustees declined to act. *Held,* that the consent of the declining trustee was not necessary, and the adoption made with the consent of the other four trustees was valid. BAL GANGADHAR TILAK *v.* SHRINIVAS PANDIT (1915) **I. L. R. 39 Bom. 441**

29. ——————— *Probate application for —Locus standi to oppose—Mitakshara father, will by, in favour of widowed daughter—*

HINDU LAW—WILL—*contd.*

Widow of predeceased son if may contest will, when no ancestral property—Right to maintenance against devisee—Provision in will, if may be referred to. Where there is no ancestral property, a Hindu governed by the Mitakshara law, is ordinarily under no legal obligation to maintain his predeceased son's widow. His obligation is merely a moral or an imperfect obligation which however ripens into a legal obligation on the part of the heir who gets his estate after his death. *Devi Proshad* v. *Gunwanti Koer, I. L. R. 22 Calc. 410,* and *Siddeshury Dasi* v. *Jonardan Sarkar, 6 C. W. N. 530 : s. c. I. L. R. 29 Calc. 557,* referred to. *Quære*: Whether such a right can be enforced against a devisee of the entire estate under a will executed by the father-in-law. *Held,* that as the daughter-in-law's right to maintenance which could have been enforced in case of intestacy would be taken away by the will, she ought to be allowed to appear and oppose the grant of probate of the will. Where the right to maintenance is enforceable against the devisee. *Quære*: Whether the claimant of maintenance has sufficient interest to oppose the grant of probate in all cases. *In the goods of Sarat Chunder Patro, 2 C. W. N. cclvi (1898) Garabini Dassi* v. *Protap Chandra, 4 C. W. N. 602,* and *In the goods of Gobindu Chandra Babajee, 17 C. W. N. 1141,* referred to. The provisions of the will may be looked at to see if the will really affects the right to maintenance. Where the will of the father-in-law directed that all the properties should be sold and a certain sum of money paid to the widowed daughter-in-law and after payment of certain legacies, the balance was to be appropriated by his widowed daughter who was not his heir. *Held,* that in this case the will seriously affected the interest of the daughter-in-law and she had sufficient interest to oppose the grant of probate. *Garabini Dassi* v. *Protap Chandra, 4 C. W. N. 602* referred to. INDUBALA DASI *v.* PANCHUMANI DASI (1914).
19 C. W. N. 1169

30. ——————— *Construction of will—Contingent bequest in future of whole estate —Succession Act (X of 1865), ss. 107, 111—Event on occurrence of which distribution was to take place, specified in will.* The will of a Hindu resident in Calcutta and subject to the Dayabhaga School of Law, who died on 10th November 1907, stated, "I appoint my wife Poritoshini Dasi to be the sole executrix of this my will. I hereby authorise my said wife to adopt *dattaka putra.* In case of death of an adopted son my said wife shall adopt one after another five in sons in succession. If my said wife dies without adopting as son, or if such adopted son predeceases her without leaving any male issue, in such case my estate after the death of my said wife shall pass to the sons of my sister Benodini Dasi who may be living at the time of my death." Two sons of his sister were living at the death of the testator. On his death his widow as executrix duly obtained probate of the will and in August 1909, in pursuance of the authority given her by her deceased husband, she adopted a son who, however died on 10th March 1910, an infant unmarried and leaving no male issue; and a few days afterwards the widow herself died. In a suit by the adoptive mother of the testator, now represented by the appellants, against the two sons (the presen respondents) of his sister, for a declaration that

HINDU LAW—WILL—*contd.*

in the events that had happened the devise to them had failed, and that the testator's estate had devolved on her. *Held*, on the construction of the will (affirming the decisions of the Courts in India), that on the death of the testator the widow took an interest in the estate which by virtue of the probate was not divested on her adoption of a son to her husband, and on her death the executory bequest to the sons of the testator's sister took effect and the estate passed to them. Section III of the Succession Act (X of 1865) was not applicable because the event on the occurrence of which the distribution was to take place was distinctly mentioned as, in the words of the will, "the death of my wife," and the gift to the testator's nephews was therefore not affected by that section. BHUPENDRA KRISHNA GHOSE *v.* AMARENDRA NATH DEY (1915).

I. L. R. 43 Calc. 432

31. ——————— Revocation of Will —*Will disposing of property and nominating boy for adption to be completed later and giving wife power to complete it if he does not do so—Subsequent completion of adoption by testator—Subsequent will making different disposition of property but not revoking former will—Later will held in former suit illegal as disposing of ancestral property, which testator had no power to do—Dependent relative revocation.* A Hindu testator being the sole co-parcener of certain property made a will in 1889 by which he appointed his wife *S*, and his daughter *R* executrices, and in which he nominated as his son, one *V*, a son of his daughter, but stated that he had not completed the adoption, and he directed that if he should die before completing it, *S* should after his death perform the necessary ceremonies, and take the grandson in adoption, and the will contained the following caluse:—"In case any danger may happen to my grandson *V* during the lifetime of my wife *S* who is one of my executrices, my wife may according to her wishes take in adoption one of my aforesaid daughter's sons, and give my properties to that son." The testator completed the adoption of *V* on 9th February 1890. On 21st March 1890 he executed another will of which a third person was made executor together with *S* and *R* and which contained a gift that in case in the former will which gave *S* a contingent power of adoption. On 4th April 1890 the testator died. The will of 1889 was not admitted to probate, but a grant of probate was made of the will of 1890. *V* died on 4th June 1891. In 1894 the appellant as reversionary heir of *V* obtained a decree declaring the will of 1890 void and inoperative according to Hindu law as disposing of ancestral property over which the testator had no power of disposal. On 13th August 1906 *S* adopted the respondent *P* in accordance with the authority given her by the will of 1889. In a suit by the appellant against *S* and *P* for a declaration that *P*'s adoption was illegal and invalid. *Held*, that the document executed by the testator in 1889 was a will, and not a mere non-testamentary authority to adopt. It contained the appointment of executors, and was executed by a testator who at his date had power to dispose of the property of which he purported to dispose. *Held*, also, that after the completion

HINDU LAW—WILL—*contd.*

of *P*'s adoption and the consequent admission into the joint family of another co-parcener, the testator had no power to dispose of the property which on his death was ancestral property, and to that extent the will of 1889 became ineffectual. But there was no such inconsistency between the two wills as that the provisions of the earlier will could not stand with the existence of the later will. The will of 1890 no doubt prevailed over the will of 1889, but the contingent power to adopt was unaffected by anything in the later will. *Held*, further, that the question whether the disposition of the property in the later will revoked the provisions as to its disposal in the earlier will, turned upon the application of the doctrine of dependant relative revocation which was really a question of intention, and that under the circumstances an alternative inconsistent disposition which was not valid or effectual in itself did not revoke an earlier disposition of the same property. *Alexander* v. *Kirkpatrik, L. R. 2 H. L. Sc. & Div. 397*, followed in principle. VENKATANARAYANA PILLAY *v.* SUBBAMMAL (1915).

I. L. R. 39 Mad. 107

32. ——————— *Construction of will—Will of Hindu widow in possession of her husband's estate—Bequest of whole estate to one person on conditions—Conditions containing excep-* widow in possession of her husband's estate disposed of it by will as follows:—"Under the will of my husband I am the sole 'owner in possession' of his entire estate and possess all the proprietary powers . . . I bequeath the entire estate of my husband to Fateh Chand . . . . subject to the following conditions. . . (i) So long as I live I shall continue to be the 'owner in possession' of the entire estate. . . and possess all the powers and such as making sales, mortgages, gift, etc. (ii) After my death the said person (the legatee) shall become 'owner in possession' of the entire estate of my husband, and he, too, shall possess all the powers of alienation like myself. (iii) I have bequeathed mauza Khudda with all the property to Musammat Gomi. . . After my death she shall be the 'owner in possession' of the entire property in mauza Khudda aforesaid." *Held* (affirming the decision of the High Court), that on the construction of the will the words "owner in possession" (*Maliq-o-qabiz*) in cl. 4, conferred on Musammat Gomi an absolute estate, and that completeness of the ownership and possession was not altered by any other expressions in the will. *Surajmani* v. *Rabi Nath Ojha, I. L. R. 30 All. 84, L. R. 35 I. A. 17.* Taking all the clauses of the will together there was no repugnancy in such a construction, for, though the entire estate was conveyed in the first place to Fateh Chand, it was subject to conditions, one of which (cl. 4) bequeathed mauza Khudda as an exception to the conveyance of the entire estate. FATEH CHAND *v.* RUP CHAND (1916) . **I. L. R. 38 All. 446**

33. ——————— *Will—Co-executors* *estate by one executor to the other—Renunciation of executorship—Validity of compromise—Action of executor without probate, validity of—Probate and*

HINDU LAW—WILL—*contd.*

Administration Act (*V of 1881*), *ss.* 2. 4, 82, 92—*Applicability of, to all Hindus—Executor, trustee of charities under the will—Claims of trustee against trust estate—Charge—Limitation Act, Art.* 130—*Suit for account and for scheme, against trustee—Right of trustee as defendant to equities in such suit—Decree in favour of trustee as defendant—Civil Procedure Code* (*Act V of 1908*), *s.* 92. It is doubtul if an executor is competent in law to compromise the claims of his co-executor against the testator's estate; but assuming that he has such a power it is essential that the compromise should be entered into *bonâ fide* and for the benefit of the estate. *Per* WALLIS, C. J.—The Probate and Administration Act does not say that s. 82 is to apply only to cases of Hindus governed by the Hindu Wills Act, but s. 2 provides that chapters II to XIII, which include s. 82 are to apply to every Hindu. *Per* SESHAGIRI AYYAR J.—It is not incumbent on an executor of the will of a Hindu to obtain probate before acting as an executor. S. 82 of the Probate and Administration Act is no bar to an executor acting as a representative of a Hindu testator's estate, because a co-executor had alone obtained probate of the will in his name. S. 92 of the said Act should be confined to cases where probate is compulsory before dealing with the property. An executor, who was appointed trustee of a charity under a will and who had claims against the estate in respect of his administration, has no charge on the estate in respect of such claims but should bring his suit within six years under art. 120 of the Limitation Act. But when a suit was brought against him for an account, if he was under a liability to account to the trust at the date of the suit, he would be entitled to all the equities flowing from the taking of the account and a decree could be passed in such suit in her favour for the amount that might be found due to him from the estate, though a suit by the trustee for the same might be barred by limitation. CHIDAMBARA MUDALIAR *v.* KRISHNASAMI PILLAI (1914) . . . . **I. L. R. 39 Mad. 365**

34. ——————— *Construction—Absolute gift—Rules of construction approved by Courts—Effect of subsequent clauses in will restricting absolute gift created in previous clauses—will of a Hindu, matters which Court may consider in construing—Malik—Nirbyudha malik, meaning of.* A Hindu testator left a will the material portions of which were as follows. The second and third clauses of the will appointed the testator's widow as executrix and authorised her to meet the expenses and pay the debts by sale, if necessary, of a portion of the estate. The fourth clause provided that the widow shall obtain as *nirbyudha malik* whatever moveable and immoveable properties shall be left by the testator and she shall be the absolute owner with the rights of gift, sale and all other kinds of transfer. In the next three clauses the testator authorised the widow to adopt a son and prescribed the devolution of the estate in the event of such adoption and in the last clause he provided that if at the time of the death of his widow there be no adopted son or if no son or wife of the adopted son be alive, then the testator's heir according to the Hindu *shastras* who shall be alive at the time shall get the properties which shall remain after disposal by the widow by way of gift or sale of the same *Held*, that under the fourth clause of the will the widow took an absolute interest in the estate devised and the gift-over contained in the last clauses of what might remain undisposed of by her was void and inoperative in law. That the provisions of the will relating to adoption and the devolution of the estate in the event of adoption could not qualify the effect of the fourth clause even though they contained provisions repugnant thereto. That where an absolute interest is given the Court will not cut it down by subsequent words in the will unless they clearly have an effect to restrict it. That where a devisee takes an absolute interest a gift-over on his failure to dispose of the property or whatever part of the property he does not dispose of is void. That the rule of construction applicable to cases of this description is that not only ought the Court to look to the words of a will alone to determine the operation and effect of the devise but the Court ought to disregard altogether the legal consequences which may follow from the nature and qualities of the estate when such estate is once collected from the words of the will itself: *Scarborough* v. *Savile, 3 A. & E. 897, 962.* The instrument must receive a construction according to the plain meaning of the words and sentences therein contained, that is, the words are to be first read in their grammatical and ordinary sense unless the context shows otherwise. That in construing the will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property, namely, that a Hindu generally desires that an estate, specially an ancestral estate, shall be retained in his family and also that a Hindu knows that as a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate out where the terms are perfectly clear the Court cannot assume contrary to the plain meaning thereof that the testator intended to create estates of a particular description and then bend and twist the language in favour of the assumption so made. That the use of the term *malik* may not by itself necessarily create an absolute interest but the expression *nirbyudha malik* is the strongest and most unequivocal phrase employed in the vernacular to indicate absolute ownership. SURES CHANDRA PALIT *v* LALIT MOHAN DUTTA CHOUDHURI (1915) . . . **20 C. W. N. 463**

35. ——————— *Will, construction of—Bequest of life-estate to widow and remainder to grandsons born and to be born—Madras Hindu Transfers and Bequests Act* (*I of 1914*), *s.* 2, *cl.* (2), *effect of, on—Period of distribution to future grandsons, happening after the Act—Right of all grandsons born during widow's life, to take—Vested interest of grandson existing on the date of will.* A Hindu bequeathed by his will dated 1905 a life-estate to his widow and an absolute estate thereafter to *S*, a son of his daughter then born, and to other sons of the daughter that might be born thereafter. The testator died in 1906 and *S* died in 1909. In a suit by *S*'s widow against the testator's widow and another son of the daughter born during the course of the suit for a declaration that the plaintiff was solely entitled to the estate after the death of testator's widow and for an injunction to restrain the widow from wasting the estate, and alienating the same: *Held*, on a construction of the will, (i) that the

HINDU LAW—WILL—*contd.*

testator by interposing a life-estate intended *all* his grandsons to take his estate, who might be born before the death of the widow, which was the time fixed for distribution; (ii) that by s. 2, cl. (2), of Madras Act I of 1914, the bequest in favour of the unborn grandsons was good as the disposition in their favour was, under the will, to take effect only after the date of the Act; and (iii) that as the plaintiff's deceased husband had a vested interest under the bequest she was entitled to maintain the suit and to a share in the estate *along* with other grandsons of the testator who might be born before the death of the testator's widow. *Bhagabati Barmanya* v. *Kalicharan Singh, I. L. R. 38 Calc. 468,* referred to. VENKAYAMMA *v.* NARSAMMA (1916).

I. L. R. 40 Mad. 540

36. ——————— **Bequest to widow**—*Construction.* Unless a grant expressly gives only a limited estate or unless there is any uncertainty or ambiguity in the grant as to the extent of interest conveyed, a grant to a Hindu female conveys an absolute estate and there is no presumption of law to the contrary, at least in this Presidency. On the occasion of adopting a son, a Mahratta Brahman of Tanjore executed a will in 1858 by which, after making some small gifts in favour of strangers, he made a grant "in inam" as follows:—"Out of the remaining property my adopted son shall be entitled to enjoy one half of the property. Out of the remaining half my two wives shall take half and half." *Held,* that the wives took an absolute estate under the bequest. *Surajmani* v. *Rabi Nath Ojha, I. L. R. 30 All. 81,* applied. *Moulvie Mahomed Shumsool Hooda* v. *Shewakaram, L. R. 2 I. A. 7,* explained. RAMCHANDRA RAO *v.* RAMACHANDRA RAO (1918)

I. L. R. 42 Mad. 283

37. ——————————— *Will executed before the Hindu Wills Act—Gift of life-estate to grandsons, one of whom only in existence remainder to brother and nephew—Bequest if bad for remoteness or as offending against rule of perpetuities—Succession Act (X of 1865), s. 101.* The testator, a Hindu who died in 1868, after giving life-estates in succession to his wife and *two daughters,* directed that "after the [illegible] son or grandso[illegible] alive shall poss[illegible] *of inheritance*" time, and that all my propertie[illegible] is to say, to my brother *R* and my nephew *H,* etc., etc." At the date of his death he had living one grandson *N* and no other grandson was born during the lives of his widow and daughters: *Held,* that although *N* was not mentioned in the will, there was a valid bequest in his favour of a life-estate with a valid remainder in favour of *R* and *H,* and the latter bequest was not affected by the rule of remoteness as applied in England and it did not offend against the law as to perpetuities. S. 101 of the Succession Act lays down a special rule which differs from the English law on the subject and there is no reason why it should be invoked for the construction of Hindu Wills made before that section came into operation. DAKSHAYANI DASI *v.* AMRITA LAL GHOSH (1919) . . . . **23 C. W. N. 825**

37(a) ——————————— *Gift to idol—Provision for heirs—Construction.* In determining whether the Will of a Hindu gives the testator's estate heirs [illegible] the es[illegible] the use of particular terms in the Will. It depends on the construction of the Will as a whole. *Sonatun Bysack* v. *Sreemutty Juggutsoondree Dassee, 8 Moore's Indian Appeals,* followed. HAR NARAYAN *v.* SURJA KUNWARI.

I. L. R. 43 All. 291

38. ————— **Will bequeathing husband's estate to her three daughters—Oral partition by daughters**—*Share taken absolutely by each—Death of one of the daughters, leaving her daughter as heir—Suit by surviving daughters to recover deceased's share as heirs of their father—Estoppel—Oral partition whether valid—Survivorship, whether extinguished—Rights of reversioners.* A Hindu widow, inheriting her husband's estate, treated it as her absolute property and bequeathed it absolutely to her three daughters, who divided it into three equal shares by an oral partition and took each one share purporting to take it absolutely under their mother's will. One of the daughters died leaving a daughter as her heir who took possession of the deceased's share. The two surviving daughters sued, as heirs of their father, to recover the share of the deceased daughter from her daughter who was in possession: *Held,* that the plaintiffs were not estopped from claiming [illegible] as heirs of their father. [illegible] ever value can be effected orally and without a registered instrument, that the partition made between [illegible] operated to extinguish the right [illegible] it might [illegible] reversione[illegible] the plaintiffs were not entitled to recover the properties from the deceased daughter's share. *Gyannessa* v. *Mobarakannessa (1893) I. L. R. 25 Calc. 210,* followed and *Latchumamammal* v. *Rangammal (1911) I. L. R. 34 Mad. 72,* applied. ALAMELU AMMAL *v.* BALU AMMAL (1920).

I. L. R. 43 Mad. 849

39. ————— **In favour of a female**—*Proper interpretation—whether same in case of females beneficiary as in a male.* A Hindu executed a will bequeathing *his moveable* and immoveable property in equal shares to his mother and widow [illegible] the words "*Kuli ikhtiyar wa milkiat*" in [illegible] an absolute estate unless there is something in the context to qualify it. *Surajmani* v. *Rabi Nath Ojha (I. L. R. 30 All. 81 P. C.), Gurmukh Singh* v. *Malkan Singh (61 P. R. 1911), [illegible] Das* v. *Mussammat Deoki (214 P. L. R. [illegible]), Nek Muhammad* v. *Maya Ram (32 Indian Cases 605), Sulochana Debi* v. *Jagattarini Debi [illegible] L. J. 51)* and *Deorao* v. *B[illegible] (33 Indian Cases 195),* followed. *Moti Lal-Mul[illegible] Lal* v. *[illegible] General of Bombay (I. L. R. [illegible]), Kedarpa Nath* v. *Jogendra [illegible]* [illegible] *141),* distinguished. [illegible]

HINDU LAW—WILL—*contd.*

Ved Kaur (27 P. R. 1898), dissented from. MUSSAMMAT WAZIR DEVI *v.* RAM CHAND.

I. L. R. 1 Lah. 415

40. ———— Bequest to woman—*Presumption from.* Per *Mullick, J.* A bequest of the income of the property without disposing of the *corpus* is void under the Hindu Law as offending against the rule against perpetuities. Under the Hindu Law, in the absence of words of limitation, gifts to women, with the exception of a widow, must be presumed to convey an absolute estate. A Hindu woman is competent to alienate immoveable property, for the purpose of discharging the debts incurred by her in carrying on a business which forms part of the estate in which she has the ordinary interests of a Hindu woman. JAGARNATH PRASAD *v.* JAIKISHUN PD. **1 Pat. L. J. 16**

41. ———————— *In favour of testator's wife—Proper interpretation—What constitutes a gift with full ownership—gift-over of remainder on death of legatee with full ownership—whether of any legal effect—Indian Succession Act, X of 1865, section 111—Hindu Wills Act, XXI of 1870.* One J. D., a Hindu, made a will in which he bequeathed the house in suit to his wife, Musst. U. D., using words to the following effect—"Is ki malik meri zauja Uttam Devi hogi—us ko ikhtiyar hai ke jis tarah chahe ba marzi khud us ko intikal ya saraf kare. Basharat-i-ke mere aurat kisi ko makan na de jawe ya intikal na kare to phir makan mere har do poton Niranjan Das aur Narsingh Das ka mushtarka hoga." After his death his widow, Uttam Devi, along with plaintiffs, Niranjan Das and Narsingh Das, got possession of the house, and when the widow died plaintiffs continued in possession. The defendant Mohan Lal, another grandson of testator by his other son, having dispossessed the plaintiffs they brought the present suit claiming possession of the house under the terms of the will of their grandfather (the testator). The defendant resisted the suit principally on the ground that under clause 3 of the will the house in suit was given absolutely to Musst. Uttam Devi with full powers of alienation, that she had acquired full ownership thereof on the death of the testator, and that the provision in respect of gift-over in favour of the plaintiffs being opposed to law was void and unenforceable. The first Court decreed the claim. The defendant appealed to the High Court. *Held*, that a will by a Hindu in favour of a female must be interpreted in the same way as if it was in favour of a male and therefore under clause 3 of this will, read as a whole, the testator conferred an absolute and complete ownerships on his wife Musst. Uttam Devi. The use of the word "malik" implies absolute ownership unless there is anything in the context or surrounding circumstances to qualify such meaning. *Surajmani* v. *Rabi Nath Ojha (I. L. R. 30 All., 84 P.C.)* *Thakur Parshad* v. *Ram Jumna (I. L. R. 31 All. 301)*, and *Mussammat Wazir Devi* v. *Ram Chand (I. L. R. 1 Lah. 415)*, followed. *Norendra Nath* v. *Kamalbasini Dasi (I. L. R. 23 Cal. 563, P.C.)* and *Lala Ramjewan Lal* v. *Dal Koer (I. L. R. 24 Cal. 406)*, referred to. *Held also*, that the gift-over of what might remain undisposed of by Musst. Uttam Devi at her death was void and inoperative in law. *Sures Chandra Palit* v. *Lalit Mohon (31 Indian Cases 405)*, *Nistarini Debya*

HINDU LAW—WILL—*contd.*

v. *Behari Lal (27 Indian Cases 239)*, *Salochana Devi* v. *Jagattarini Devi (53 Indian Cases 602* and *Tripurani Pal* v. *Jagat Narain Dasi (I.L.R. 40 Cal. 274, P. C.)*, followed. *Lallu* v. *Jagmohon (I. L. R. 22 Bom. 409)*, *Ram Chand* v. *Dewan Chand (65 P. R. 1912)*, and *Hara Kumari Dasi* v. *Mohim Chandra Sarkar (12 Cal. W. N. 412)*, distinguished. MOHAN LAL *v.* NIRANJAN DAS.

I. L. R. 2 Lah. 175

42. ———————— *Testator, resident in Presidency town of Madras—Bequest to unborn persons, validity of—Rule of Hindu Law, whether abrogated by Hindu Wills Act (XXI of 1870), or by Hindu Transfers and Bequests Act, Madras (I of 1914)—Latter Act whether ultra-vires of provincial legislature—Indian Councils Act, 1861, ss. 22 and 42—Indian High Courts Act, 1861, s. 11—Supreme Court Charter, cl. 22—Rule of perpetuity—Indian Succession Act—(X of 1865), ss. 101, 102, 111 and 126—Bequest to daughters and on their death their shares to be taken by their children who shall attain 21 years—Indian Majority Act (IX of 1875), s. 3—Bequest, whether void for perpetuity—Absolute gift followed by settlement on children—Failure of settlement—Reversion to original donee as absolute estate.* A testator, resident in the City of Madras, executed at Madras a will in 1897 disposing of his properties situate mostly therein, and died in 1904. By the will after directing the formation of a fund for the payment of a monthly sum to his widow during her life, the testator provided that "the residuary trust funds are vested in trustees in trust to apportion the fund into as many equal shares as there may be daughters of mine living at the time of my decease or who having predeceased shall have left issues her or them and me surviving, and to pay the income of each equal share to my said daughters respectively during their lives and thereafter to stand possessed of the share in trust for all the children of the deceased daughter who shall attain the age of twenty one in equal shares, etc." Only some of the grandchildren were born before the testator died. On a suit being brought on the Original Side of the High Court by some of the grandsons after the death of testator's widow and his three daughters for a construction of the will and a declaration of the rights of the parties. *Held*, that the rule of Hindu Law that gifts and bequests in favour of unborn persons are invalid, had not been abrogated, by the Hindu Wills Act (XXI of 1870); and that Madras Act (I of 1914) Hindu Transfers and Bequests Act (1914), which validates such dispositions was *ultra vires* of the legislative powers of the provincial Legislative Councils in so far as it purports to affect the law administered on the Original Side of the High Court, having regard to the Indian Councils Act, 1861, ss. 22 and 42, and the Indian High Court Act, 1861, s. 11; and that therefore the bequests to the unborn persons in the will were void; that the bequests were void under section 101, Indian Succession Act, made applicable by the Hindu Wills Act to Hindu Wills executed in Presidency Towns, because the vesting of the property under the will in the grandchildren, *might be delayed beyond* the life-time of the daughters and the minority of the grandchildren by whom the property was to be taken, and the provisions of the Indian Majority Act (IX of 1875)

HINDU LAW—WILL—*contd.*

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s. 101 of the Act, the bequest in favour of the whole cases of the grandchildren, including those born in the life-time of testator also failed under s. 102 of the Act; that the bequest to the grandchildren did not fall within the terms of section 111 of the Indian Succession Act and was not affected by its provisions; that under section 126 of the same Act, which embodies the rule laid down in *Las-ence* v. *Tierney, (1849) I Mac. & G. 551; s.c. 41, E.R., 1379,* where there is an absolute gift to a legatee and the provisions that follow in the will are in the nature of a settlement of that gift, then the settlement, if it is effectual, will have operation and reduce what appears to be an absolute gift into a life estate; if however the settlement for any reason fails then in so far as it fails there is no intestacy but the person who was the object of the original gift takes the property absolutely; that on the true construction of the provisions of the will, there was a clear intention to confer an absolute estate on each of the daughters followed by a settlement in favour of ... within the meaning of the rule refe...
the failure c...
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daughters remained good; and the share of each of the daughters passed on her death to her heirs. SOUNDARARAJAN *v.* NATARAJAN. (1921).

I. L. R., 44 Mad. 446

43. ———— Hindu Law—*Construction—Bequest to widows by Mithila Hindu—Interest given whether absolute or limited—*"Malik", "Malkiyat," *meaning and effect of—Danger of construing one Will by reference to another—Translation of vernacular documents, challenged in the High Court—Proper procedure.* The term "malik" when used in a Will or other document as descriptive of the position which a devisee or donee is intended to hold, has been held apt to describe an owner possessed of full proprietary rights including a full right of alienation, unless there is something in the context or in the surrounding circumstances to indicate that such full proprietary rights were not intended to be conferred. But the meaning of every word in an Indian Will must always depend upon the setting in which it is placed, the subject to which it related, and the locality of the testator from which it may receive its true shade of meaning. Where a Hindu governed by the Mithila School of Hindu Law purported by his Will to confer on his wives "full power and all proprietary rights (*malkiyat*) over all his moveable and immoveable properties." *Held,* that the rights intended to be conferred included full rights of alienation. It is always dangerous to construe the words of one Will by the construction of more or less similar words in a different Will which was adopted by another Court. Proper procedure where translation challenged indicated. MUSSAMMAT SASIMAN CHOWDHURANI *v.* SHIB NARAYAN CHOWDHURY.

26 C. W. N. 425

44. ———— "Malik"—*If a term of art and imports full ownership—Trust, if valid, when subject-matter uncertain.* A Hindu testator gave the whole of his immoveable estate to his wife as "malik" and directed that she should leave the property to his two daughters in such manner as she might like: *Held,* that the word "malik" taken in conjunction with the context indicated a clear intention to pass an absolute estate, and that even assuming it were intended to create a trust, the subject-matter of such trust was too uncertain. The word "malik" is not a term of art, it does not necessarily define the quality of estate taken but the ownership of whatever that estate may be, but in the context of the present Will, it imported that the estate was absolute. If words are used in a Hindu's Will conferring absolute ownership upon the wife, the wife enjoys the rights of ownership unless the circumstances or context show otherwise. BHAIDAS SHIRDAS *v.* BAI GULAB.

26 C. W. N. 129

HINDU LAW—WOMAN'S ESTATE.

See HINDU LAW—WILL.　1 Pat. L. J. 16

1. ———— *Alienation by Hindu mother—Property inherited from son—Legal necessity—Spiritual benefit—Installation of idol and endowment of temple—Bonâ fide dedication—Disproportion ...*
of maintenanc...
est, only a ve... for religious purposes and that only when it would conduce to the spiritual welfare of her deceased husband. The installation of an idol and the endowment of its temple do not come within the category of acts which conduce to the spiritual benefit of the deceased husband. The mother's power of promoting the spiritual benefit of the son whose property she inherits being less than that of a widow to promote the spiritual welfare of her husband, the power of the former to alienate property so inherited for the purpose of installing an idol and endowing its temple may be less but is certainly not greater than the power of the widow to alienate her husband's property for a similar purpose.
her husband, d...
for religious purposes ... benefit only. She cannot, as heiress to her son, alienate property inherited from him for her own spiritual benefit *Held,* on the evidence, that a deed of endowment in favour of family idols did n... *fide dedication* regard being
h...
d...
of the ... was allocated to it under the settlement. *Kalik... Chandra* v. *Gour Mohan, 1 W. R. 48, Collector of Masulipatam* v. *Cavelly Venkata Narayanappa, ... Narain* v. *Kubali. Bor-...*

... **17 C. W. N. 7..**

2. ———— *Sale of portion with consent of presumptive reversioner, if passes absolute title—Presumption of property.* The mere assent of the immediate reversioner to a sale by a Hindu female of a portion of an estate inherited by her, is not sufficient to confer an absolute title on the alienee. Such assent merely raises a presumption of the property of the transaction. *Debi Prosad* v. *Golab Bhagut, 17 C. W. N. 701 : 17 C. L. J. 499,* followed *Nabo Kishore Sarma* v.

HINDU LAW—WOMAN'S ESTATE—*contd.*

Hari Nath Sarma, I. L. R. 10 Calc. 1102, referred to. *Pulin Chandra* v. *Bolai Mundal, I. L. R. 35 Calc. 939 : 12 C. W. N. 837,* overruled. GOPESHWAR MISRA *v.* DURGAMANI BAISHNABI (1913).

17 C. W. N. 1062

3. ——————— *Female heir, wrongful possession of immoveable property by—Mesne profits, decree for, if may be passed against reversionary heirs—Female heir nominal litigant, one of reversionary heirs conducting defence, effect of.* Where a *darputni* in the possession of a Hindu woman as daughter and heir of a former *darputni-dar* was annulled by an auction-purchaser of the *putni* right by notification under s. 167, Bengal Tenancy Act, but she refused to vacate the land : *Held,* that this was a personal tortious act on her part and not an act done by her as representing the estate and for the benefit of that estate, and a decree for mesne profits for the period, she was in wrongful possession, could be made only against her personal estate which passed on her death to her heirs and not against the estate in the hands of the reversionary heirs. *Held,* further, that the fact that one of her sons who were the reversionary heirs carried on the litigation on her behalf, and that she was merely a nominal defendant was not sufficient to convert the act into anything different from a tortious act for which she was personally liable. *Katama Natchiar* v. *The Raja of Shivagunga, 9 Moo. I. A. 539, Hari Nath Chatterjee* v. *Muthur Mohan Goswami, I. L. R. 21 Calc. 8, Grish Chunder Lahiri* v. *Shoshi Sekhareshur Roy, I. L. R. 27 Calc. 951, 957, and Harihar Pershad* v. *Bholi Pershad, 6 C. L. J. 383, Lalji Sahaya Singh* v. *Kurki Jha, 11 C. L. J. 90,* and *Sadasi Koer* v. *Ram Govind Singh, 14 C. L. J. 91,* referred to. NAFAR CHANDRA PAL CHOWDHRY *v.* KAMINI KUMAR LAHIRI (1912) . . . **18 C. W. N. 542**

4. ——————— *Woman's Estate—Hindu widow, debts contracted by, for costs of litigation—Binding effect on reversioner—Legal necessity—Facts necessary to be proved by lender—Rate of interest must be proved necessary even when legal necessity for loan exists.* The plaintiff, who was an assignee of a mortgage executed by a Hindu widow in respect of her husband's property, of which she was in possession as a Hindu widow, sued to enforce the mortgage against the property in the hands of the reversionary heir, and it appeared that the money was borrowed for meeting the costs of litigation relating to certain suits brought by certain ex-managers of the estate for salary and it appeared that at the time the money was borrowed a portion of the estate was sold in execution of a decree obtained by one of the ex-managers and other properties were going to be sold in execution of another decree obtained by him and there was a heavy claim against the estate by another manager : *Held,* that the debts contracted by a Hindu widow for meeting the costs of litigation in defending her life-estate in her husband's property or for protecting the estate are binding upon the estate in the hands of the reversioner. That it was not necessary for the lender in the present case to show that the debt, which was in litigation, for meeting the costs of which he lent the money to the widow, was or was not her personal debt. It is sufficient, if it is shewn that there was pressure upon the estate, that there was necessity for borrowing money for the costs of the litigation or that the creditor made reasonable enquiries and was satisfied of the necessity for the loan. That although a loan by a widow may be necessary, the rate of interest at which she borrowed must be proved to be necessary before interest at that rate can be allowed. STEVENS *v.* JANKI BALLABH (1913) . **19 C. W. N. 80**

5. ——————— *Woman's Estate—Decree against Hindu widow and next reversioner in respect of obligation personal to widow, if binds reversion—Mortgage by widow and next reversioner, if binds reversion.* A sale of property inherited by a Hindu woman in execution of a decree for costs obtained against her personally does not bind the reversioners. *Jugal Kishore* v. *Jotindra Mohan, I. L. R. 10 Calc. 985, 991,* followed. The fact that the decree was obtained against her and the next reversionary heir jointly does not give the purchaser anything more than the qualified interest of the woman. A mortgage of a portion of the inheritance in the hands of a Hindu woman executed by her jointly with next reversioner does not necessarily bind the reversionary interest. It merely raises a presumption that the mortgage was entered into for legal necessity. *Debi Prosad* v. *Golap Bhagat, 17 C. W. N. 701,* referred to. NABIN CHANDRA SAHA *v.* HEM CHANDRA RAY (1913).

19 C. W. N. 265

6. ——————— *Woman's estate—Hindu widow, alienation by—Rent of superior landlord—Legal necessity—Suit against Hindu widow—Reversioner whether necessary party—What passes at a sale in execution of a decree against Hindu widow—Limitation Act (XV of 1877), Sch. II, Arts. 141, 120—Specific Relief Act (I of 1877), s. 42.* The powers of a Hindu widow in respect of alienation of the estate of her husband are similar to those of the guardian of an infant. *Hanooman Pershad* v. *Babooee Moonraj, 6 Moo. I. A. 393; 18 W. R. 81, Kameswar* v. *Run Bahadur L. R. 8 I. A. 8 : s. c. I. L. R. 6 Calc. 843, Lala Amarnath* v. *Achhan Kuer, L. R. 19 I. A. 196 : s. c. I. L. R. 14 All. 420,* and *Bhagwat Dyal* v. *Debi Dyal, 12 C. W. N. 393 : s. c. L. R. 35 I. A. 48; I. L. R. 35 Calc. 420,* followed. The mere fact that money is raised for payment of rent and applied for that purpose is not sufficient to prove legal necessity. The creditor to protect himself where he is not shown to have made a *bonâ fide* enquiry must prove that there was an actual pressure on the estate, such as an outstanding decree or an impending sale which the widow is not capable of meeting. *Lala Amarnath* v. *Achhan Kuer, L. R. 19 I. A. 196 : s. c. I. L. R. 14 All. 420, Dharamchand* v. *Bhaoani Misrain, L. R. 24 I. A. 183 : s. c. I. L. R. 25 Calc. 189 ; 1 C. W. N. 697, Sreenath* v. *Rutunmala, Beng. S. D. A. 421 (1859), Srimohun* v. *Brij Behary, I. L. R. 36 Calc. 753, Lala Byjnath* v. *Bissen, 19 W. R. 80, Mata Pershad* v. *Rhageeruthee, 2 All. H. C. R. 78, Ghanshyam* v. *Badiyalal, I. L. R. 24 All. 547,* and *Lakshman* v. *Radha Bai, I. L. R. 11 Bom. 609,* followed. Where a Hindu widow obtains a loan, she is at liberty to bind herself personally or when the purpose for which she borrows is a necessary one, she is at liberty to bind her husband's estate and the intention must be gathered from the statement if any in the deed or from the surrounding circumstances. *Damodar* v. *Jankibai, 5 Bom. L. R. 350,* and *Prosunna* v. *Umedar Raja, 13 C. W. N. 353,* referred to. A decre for rent which has accrued due after the death of her husband

is *primâ facie* a personal decree against the widow, *Jibankrishna* v. *Brajalal, I. L. R. 30 Calc. 550 : s. c. 7 C. W. N. 425, Kristo Gobind* v. *Hem Chandra, I. L. R. 16 Calc. 511, Mohammad Sadat Ali v. Harasundari, 16 C. W. N. 1070,* and *Bireswar v. Kamal Kumar 17 C. W. N. 337,* followed. The mere fact that the widow intended to create a liability on the estate is not enough The creditor has also to show that he intended to enforce such liability and the true test is to see whether the proceeding in which the sale was directed was brought against the widow personally or with a view to affect the whole inheritance. *Jugal* v. *Jotendra, L. R 11 I. A 66 · s. c. I. L. R. 10 Calc.*

J. 346, Kistomoyee v. *Prosunno, 6 W. R. 304, Bisto Beharee* v *Bynath, 16 W. R. 49, Baijun* v. *Brij Bhookan, L. R. 2 I. A. 275 : s. c. I. L. R. 1 Calc. 133, Bireswar* v. *Kamal Kumari, 17 C W. N. 237, Sadat Ali* v. *Harasundari, 16 C. W. N. 1070,* and *Trilochan* v *Bakkeswar, 15 C. L. J. 423,* referred to. It is not necessary that a reversioner should be joined as party to the suit, but if he is so joined, the fact would afford clear indication that the creditor intended to make the inheritance liable. *Bhagarathi Das* v. *Baleswar Bagerti, 19. C. L. J. 155 : s. c. 17 C. W. N. 877 ; I. L. R. 41 Calc 69, Mohima Chandra* v. *Ramkishore, 23 W. R, 174 ; 15 B. L. R. 142, Srinath Dass* v *Haripada, 3 C. W. N. 637. Nugendra* v. *Kamini 11 Moo. I. A. 241, 267,* and *Lloyd* v *Jones, 9 Ves. 37, 57,* referred to. RAMESWAR MONDAL *v.* PROVABATI DABI (1914) . **19 C. W. N. 313**

7. ——————— *Woman's Estate—Sradh expenses of widow of last holder, liability of reversioner to contribute.* The reasonable expenses of *sradh* of a widow of a deceased Hindu should be paid out of the estate in the hands of the reversioners and the reversioners who inherit the estate should contribute rateably towards such expenses RAMDHARI SINGH *v* PERMANUND SINGH (1913) **19 C. W. N. 1183**

8. ——————— *Legal necessity—Marriage of daughter's daughter when son-in-law gharjamai, if legal necessity—Construction—Mortgage of widow's "right and interest" if covers more than life-interest.* Where *A*, a zemindar's widow, married her only daughter *S* to a cultivator in order that the son-in-law may come and live in the mother-in-law's house, and the issue of the marriage was a daughter : *Held,* that though *A* might be under a moral duty to see that the girl was properly married, the expenses of the marriage could not be charged on her husband's estate as a legal necessity. The fact that a Hindu widow says she is mortgaging "her right and interest" in her husband's estate does not necessarily indicate that she was mortgaging only a life-interest. NARAINBATI *v.* RAMDHARI SINGH (1916) . . . . **20 C. W. N. 734**

9. ——————— *Alienation by limited owner—Property, test of—"Legal necessity" if only test—Consent of reversioner—Attestation of deed followed by subsequent ratification—Retrospective operation—Compromise and family arrangement—Compromise by limited owner—Bona fides of claim—Admission in compromise of futility of claim, if negatives bonâ fides—Conveyancing device not intended to express true state of executant's mind, effect if to be given to—Compromise which affirms previous executed registered lease, if requires registration.* The test to be applied in determining the validity of an alienation by a limited owner is whether the purpose for which the alienation was made was in the circumstances of the case proper and legitimate, and the existence of "legal necessity" in the narrow sense of actual pressure on the estate or the danger to be averted is not the only test. *Held,* that in this case a permanent *mokurari* lease granted by the daughter of a deceased Hindu of some properties belonging to his estate in settlement of a *bonâ fide* dispute was binding on the reversioner. *Khunni Lal* v. *Gobind Krishna Narain, L. R. 38 I. A. 87 : s. c. I L. R. 33 All. 356 ; 15 C. W. N. 545,* applied Where it appeared that the permanent lease was not only attested by the reversioner but that he later on set up the lease in answer to a suit of the grantee claiming the entire estate by survivorship as the undivided co-parcener of the last male owner and ultimately joined in a compromise by which the plaintiff in the suit admitted that he had no title to the estate and the reversioner affirmed the *mokurari potta*. *Held,* that if there was doubt as to the efficacy of consent as evidenced by the attestation, there was no question as to his subsequent ratification of the lease which operated retrospectively. That the compromise was not inadmissible in evidence for want of registration as it did not purport to convey, release or otherwise deal with immoveable property *Per* MOOKERJEE J —It only recorded the approval of the transaction by the reversionary heir and (per *Curiam*) afforded cogent evidence of its propriety. *Collector of Masulipatam* v. *Cavaly Venkata Narainapah, 8 Moo. I. A. 523, 551, Shamsundar* v. *Achhan Koer, L R. 25 I. A. 183 s. c I. L R. 25 All. 71 ; 2 C W N. 729,* and *Bejoy Gopal Mukerjee* v *Girindranath, I L R. 41 Calc. 793, 805 ;* s c. *18 C. W. N. 673,* referred to. That the recitals in the *mokurari potta* depreciatory of the grantee's claim should not be regarded as a correct description of his mind, being only a conveyancing device expressive of his abandonment of the claim for a consideration. *Hanooman Prosad* v. *Babooee Moneraj Kooeri, 6 Moo. I. A. 393,* and *Lal Achal Ram* v. *Raja Kazim Hossain, L. R. 32 I A. 113 :* s. c. *I. L. R. 27 All 271 ; 9 C. W. N. 477,* referred to. Authorities dealing with the validity of compromises in settlement of disputed claims and of family arrangements with reference to the question of consideration examined by Mookerjee, J. *Per* MOOKERJEE J.—A qualified owner like a Hindu widow, daughter, or mother is not bound at her peril to pursue a litigation in respect of the estate in her hands unremittingly to the ultimate Court of Appeal. UPENDRA NATH BOSE *v.* BINDESRI PROSAD (1915). **20 C. W. N. 210**

10. ——————— *Relinquishment—Abandonment of claim to Estate—Adoption—Authority to adopt—Will—Construction—Exclusion of Presumption.* Upon the death of a Hindu in 1872 his nephew obtained a certificate under Act XXVII of 1860 as sole survivor of his joint family; the widow of the deceased opposed the application and alleged a partition in 1864. By agreements made in 1874 the widow accepted the decision recognized the nephew's title, and was

HINDU LAW—WOMAN'S ESTATE—*contd.*

granted by him a maintenance allowance which she continued to receive until her death in 1904. The nephew died in 1894 and the estate passed under his Will to the first appellant. In 1907 the respondent sued to recover the estate as heir to the holder who died in 1872 upon his widow's death and proved that a partition had taken place in 1864. *Held*, that the widow's agreement of 1874 in conjunction with her acceptance of maintenance till 1904, amounted to a complete relinquishment of the estate to the nephew, then the next reversioner, and that the respondents' claim accordingly failed. RANGASWAMI GOUNDEN *v.* NACHIAPPA GOUNDEN. L. R. 46 I. A. 72

11. ———————— A Hindu by his Will authorised his widow to adopt a son if no male or female child should be born to him. He died without issue, but had a posthumous daughter. After the death of the posthumous daughter the testator's widow purported to adopt a son to him. *Held*, that in construing the Will effect could not be given to a presumption that the testator desired that a son should be adopted to him, since authority to adopt in the events which happened was clearly excluded by the language used. BHAGWAT KOER *v.* DHANUKHDHARI PRASHAD SINGH. L. R. 46 I. A. 259

12. ———————— *Widow, alienation by, when binds reversioner—Relinquishment for a consideration—Relinquishment of whole estate necessary—Widow retaining moveables and getting back some land to hold as life estate—Mithila law—Family arrangement.* It may be taken as established without doubt that a Hindu widow may relinquish her estate and this will have the effect of accelerating the estate of the next reversioner. Further, an alienation by a Hindu widow will be valid where there was consent of the next heirs and the alienation is capable of being supported by reference to the theory of relinquishment and consequent acceleration of the interest of the consenting heirs. But the alienation in such a case must be of the whole of the estate. *Debi Prosad Chowdhury* v *Gopal Bhagat, I. L. R. 40 Calc. 721 : s. c. 17 C. W. N. 721*, referred to. The widow is not precluded from obtaining a benefit for relinquishing her estate. *Nobokishore v. Hari Nath, I. L. R. 10 Calc. 1102, 1108*, followed. *Bajrangi* v. *Manokarnika, L. R. 35 I. A. 1 : s. c. I. L. R. 30 All. 1 ; 12 C. W. N. 74*, referred to, Where under a compromise made between the mother, the sisters and *M* the immediate male reversionary heir of a deceased Hindu infant governed by the Mithila school the whole of the immoveable property of the deceased was relinquished by the mother *M*, and the mother herself was given the whole of the moveable property inclusive of certain mortgage bonds, and *M* gave half of the immoveable properties to the deceased's sisters and the latter and *M* respectively gave 50 bighas of land to the deceased's mother with remainder to the respective donors and their heirs. *Held*, that, under Mithila law, the moveable properties (including the mortgage bonds) had passed by inheritance to the deceased's mother on his father's death. That the life [illegible] which the deceased's mother [illegible] was essentially different from the widow's estate [illegible] and could in no [illegible]

HINDU LAW—WOMAN'S ESTATE—*concld.*

of the widow's estate. That under the terms of the compromise the lady had effectively relinquished and destroyed her estate as a Hindu widow and accelerated that of M. *Semble*: The compromise might be supported as a family arrangement between all the parties competent to deal with the whole of the property (the daughters having claimed under a will of their father which had been probated). SURESSUR MISSER *v.* MOHESH RANI MESRAIN (1915) . . 20 C. W. N. 142

———————— *K* died leaving a widow *G*, a son B and two daughters *P* and *J*. *G* became the heir and with *P*, gifted property to defendants 1 to 4 sons of *J* after *G*'s life. *G* having died *P* filed a suit to recover the property from the donors: *Held*, that the gift was good as regards the life interest to *G*, but bad as regards the transfer of *P*'s chance of succession under s. 6 of the Transfer of Property Act, 1882. BAI PARVATI *v.* DAYABHAI MANCHHAM. I. L. R. 44 Bom. 488

———————— A Woman's estate can be obtained by a Hindu female not only by a heritance but also by contract grant or prescription. VENGAMMA *v.* CHELAMAYYA. I. L. R. 36 Mad. 485

HINDU SON.

———————— undivided, liability of, for debt of bankrupt—

See BANKRUPTCY I. L. R. 40 Mad. 581

———————— Hindu Testator.

See HINDU LAW—WILL.

See WILL.

———————— Creation of Estates as known to Hindu Law.

See WILL. I. L. R. 45 Bom. 1038

HINDU TEMPLE.

See HINDU LAW—TEMPLE.

1. ———————— *Public temple—Manager of the temple—Right to remove the image and instal it in a new building—Worshippers objecting to the removal—Injunction.* Under Hindu law, the manager of a public temple has no right to remove the image from the old temple and instal it in another new building, especially when the removal is objected to by a majority of the worshippers. HARI RAGHUNATH *v.* ANTAJI BHIKAJI (1919). . . . I. L. R. 44 Bom. 446

2. ———————— *Sanctuary of the temple—Admission of public to the sanctuary—[illegible]—Dakore temple—Levy of fees for admission not permissible—Gors, rights of.* Whilst the Shevaks were managing the affairs of the temple of Shri Ranchhod Raiji at Dakore, they issued in 18[illegible] rules levying fees from devotees and Gors who entered the sanctuary of the temple, known as the Nij Mandir. In a litigation brought to test the validity of those rules, the rules were declared invalid; but they continued to subsist pending the framing of the scheme of management of the temple. When the scheme came to be framed, the rules regarding levying of fees for admission into the Nij Mandir were incorporated in the scheme. The rules having been [illegible] rules under that scheme [illegible] *Held*, that the rules [illegible] objected to as invalid [illegible]

HINDU TEMPLE—*contd.*

prescribing the pass system were illegal and *ultra vires* in so far as they imposed fixed fees in payment for the passes, whether upon the Gors or the general public entitled to worship in the temple at Dakore. ASHARAM GANPATRAM *v.* THE MANAGER OF THE DAKORE TEMPLE COMMITTEE (1919). I. L. R. 44 Bom. 150

HINDU TRANSFERS AND BEQUESTS ACT (MAD. I OF 1914).

See HINDU LAW—GIFT. I. L. R. 40 Mad. 318
See HINDU LAW—WILL I. L. R. 44 Mad. 446
See WILL. I. L. R. 40 Mad. 540

HINDU WIDOW.

See GUARDIAN . I. L. R. 38 Calc. 862
I. L. R. 42 Calc. 953
See HINDU LAW—ALIENATION.
I. L. R. 36 All. 187
I. L. R. 41 All. 130
See HINDU LAW—BOND.
I. L. R. 40 All. 17
See HINDU LAW—DEBT.
I. L. R. 33 All. 255
See HINDU LAW—GIFT.
I. L. R. 32 All. 582
I. L. R. 34 All. 129
See HINDU LAW—REVERSIONER.
I. L. R. 33 All. 15
I. L. R. 40 All. 487
See HINDU LAW—SUCCESSION.
I. L. R. 32 All. 155
See HINDU LAW—WIDOW.
See HINDU LAW—WOMAN'S ESTATE.
See HINDU WIDOWS' REMARRIAGE ACT.
14 C. W. N. 346
See LAND ACQUISITION ACT (I OF 1894), s. 32 . . 14 C. W. N. 1024
See LIMITATION. . L. R. 46 I. A. 197
See LIMITATION ACT (XV OF 1877), s. 19; SCH. II. ARTS. 120 AND 148.
I. L. R. 32 All. 33
See LIMITATION ACT (IX OF 1908), SCH. I. ART. 91 . I. L. R. 40 Bom. 51
ARTS. 125 AND 120.
I. L. R. 37 All. 195
ARTS. 132, 75 . I. L. R. 39 Mad. 981
See REGISTRATION ACT (XVI OF 1908), s. 17 . . I. L. R. 40 All. 384
See SPECIFIC RELIEF ACT (I OF 1877), s. 42.
I. L. R. 41 All. 154
I. L. R. 36 All. 126
See SUCCESSION CERTIFICATE ACT (VII OF 1889), . I. L. R. 35 All. 249
I. L. R. 43 All 150
See UNITED PROVINCES LAND REVENUE ACT (III OF 1901)—
ss. 107, 111 . I. L. R. 35 All. 527
ss. 107, 111, 112.
I. L. R. 35 All. 548

HINDU WIDOW—*contd.*

——— alienation by—

See HINDU LAW—ALIENATION.
I. L. R. 42 Calc. 876

——— in possession of husband's estate will by—

See HINDU LAW—WILL.
I. L. R. 38 All. 446

——— sale by, of portion of property—

See HINDU LAW—WIDOW.
14 C. W. N. 226

——— surrender by, of whole estate—

See HINDU LAW—(Adoption).
24 C. W. N. 274

I. ——— *Alienation—Setting aside alienation—Compensation to defendant for improvements—Evidence of relationship—Statement in will of widow—Conjectural suggestions as to will in argument in lieu of evidence—Suggestions never made in cross-examination of writer of will.* The respondent on the death of a Hindu widow brought a suit as the next heir of her husband to set aside an alienation, made by the widow in favour of the appellant, of property consisting of a house and compound at Delhi. The respondent who was the son of the daughter of the husband by a former wife (though this was denied by the appellant), produced a will made by the widow five years before the suit, in which she stated "I have no issue or any near relative. Mathu Mal (the respondent) is related to me as a daughter's son (*rishte men nauasa*) and Khairati Lal as my husband's younger brother. These are my relatives on my husband's side." The oral evidence as to the respondent's title was found by their Lordships to be meagre and conflicting. *Held* (affirming the decision of the Chief Court), that the statement in the will was, under the circumstances, conclusive of the respondent's relationship. The widow was the proper person to make such a statement of fact, which was within the scope of her own knowledge; she put forward the respondent in the will as the first person in the order of choice for the performance of the funeral ceremonies; her statement was corroborated by the other relative mentioned in the will, who was a witness in the case, and whose evidence on the matter was against his own interest, and the statement was uncontradicted by any reliable evidence. Mere conjectural suggestions made in argument that the will had been executed for the purpose of

such conjectural considerations were suggested to him in cross-examination. In case the respondent succeeding, the appellant claimed the value of improvements made by him to the property while he was in possession of it, which included a temple (Rs. 2,700), a well (Rs. 300), an upper storey to the house (Rs. 2,500), and repairs to the house (Rs. 1,500), the whole amounting to Rs. 7,000. *Held* (affirming the decision of the Chief Court and for the reasons given by it), that Rs. 1,400, which represented half the expenditure by the appellant,

HINDU WILLS ACT (XXI OF 1870).

See HINDU LAW—WILL.
I. L. R. 38 Bom. 188, 399
I. L. R. 44 Mad. 446
I. L. R. 40 Calc. 274

See RECEIVER . I. L. R. 37 Calc. 754

See SUCCESSION ACT.
s. 187 I. L. R. 34 Bom. 506

———— ss. 2 and 3 and 5—

See HINDU LAW—WILL
I. L. R. 38 Calc. 188

———— s. 3—

See HINDU LAW—WILL.
I. L. R. 39 Calc. 87

General's certificate. A will made in Bombay is subject to the provisions of the Hindu Wills Act (XXI of 1870) and a person claiming as a legatee under the will is not entitled to sue without taking out probate as he would be bound by s. 187 of the Indian Succession Act (X of 1865) which is incorporated in the Hindu Wills Act (XXI of 1870). The provision of the Administrator-General's Act (II of 1874) is not affected by the incorporation in the Hindu Wills Act (XXI of 1870) of s. 187 of the Indian Succession Act (X of 1865). NARAYAN SHRIDHAR *v.* PANDURANG BAPUJI (1910).
I. L. R. 34 Bom. 506

2. ———— *Construction of will, testator's intention—Succession Act (X of 1865). s. 82, a bequest "to my daughter on attaining majority," whether creates an absolute or limited interest—S. 111, gift over to brother in case daughter dies childless—Whether the gift can take effect if the daughter does not die childless before the estate is distributable—The period of distribution, whether at the date of the daughter's attaining majority or of the death of the daughter childless—Meaning of the word santan, whether limited to male descendants or means issue generally—Reversionary interest, expectant on the happening of a specified uncertain event, if can be sold in execution.* Plaintiff had a brother *U* and a step-brother, and each had one-third share in ancestral property which was the subject-matter of the suit. *U* made a will bequeathing his share to his daughter and appointing plaintiff as executor, who was to make over the estate to the daughter on her attaining majority. There was a provision in the will that if the daughter died childless then the executor, *i.e.*, the plaintiff, would get the properties in *U's* share. Before probate had been issued the whole property was sold in execution of a money-decree, under which plaintiff said, he alone was liable. Plaintiff brought the present suit to establish his title to one-third of the property, which he said, he inherited under his brother *U's* will. Plaintiff alleged that the original share which he inherited from his father alone passed under the sale, but the reversionary interest in the one-third share which he acquired under his brother's will could not pass by the sale: *Held*, that under the Hindu Wills Act, in which are incorporated some of the provisions of the Indian Succession Act, the property did not pass to the plaintiff. Under s. 82 of the Succession Act, the daughter took an absolute interest, as there was nothing in the

HINDU WILLS ACT (XXI OF 1870)—*contd.*

———— s. 3—*contd.*

will to cut down the clear term of the gift "to my daughter on attaining majority." The principle laid down in *Bhobotarini Debi* v. *Peary Lal Sanyal, I. L. R. 24 Calc. 646: s. c. 1 C. W. N. 578*, followed. Under s. 111 of the Succession Act, the gift over, in favour of the plaintiff, must

unless it could be held that the daughter took less than an absolute interest. As the daughter took an absolute interest, the period of distribution under the terms of the will could not be postponed later than either the date of the death of the testator or the date when the daughter attained majority, whichever event happened later. The gift to the plaintiff could take effect if the daughter died during the testator's life-time or if she died during her minority. The daughter having survived the testator and having attained majority, the plaintiff took no interest in the one-third of the property under the will: *Held*, further, that if the plaintiff got a reversionary interest expectant on the death of his niece to one-third of the property under *U's* will, that interest could be sold, dealt with, and taken in execution without the will being proved, and that interest passed by the sale in execution to the defendants. *Santan* means "issue" generally, and is not limited to male issue. KUMUD KRISHNA MANDAL *v.* JOGENDRA NATH SARKAR (1917).
21 C. W. N. 854

HINDU WOMAN.

———— settlement by—

See SETTLEMENT BY A HINDU WOMAN ON TRUSTS . I. L. R. 40 Bom. 341

HINDUS IN BIHAR.

See MAHOMEDAN LAW—PRE-EMPTION.
I. L. R. 39 Calc. 915

HIRE-PURCHASE AGREEMENT.

———— *Agreement to hire machinery, whether conveyance or agreement—Stamp duty—Stamp Act (II of 1899), s. 2 (10), Sch. I, art. 5, cl. (c).* A hire-purchase agreement not being an agreement to purchase but simply an agreement to hire the machinery in question with an option on the part of the hirer to purchase, comes within the meaning of Art. 5, cl. (c) of Sch. I to the Stamp Act, and is, therefore, liable to a stamp duty of eight annas. *Helby* v. *Matthews, [1895] A. C. 471*, referred to. LINOTYPE AND MACHINERY, LD., AND THE WINDSOR PRESS OF CALCUTTA, *In re* (1916) . I. L. R. 44 Calc. 72

HIRE OF ANIMALS.

See LICENSE . I. L. R. 47 Calc. 809

HISTORICAL WORKS.

———— *Reference to Historical Works in appeal—Propriety.* References to works of history (not given in evidence or referred to in the Court of first instance) at the appellate stage are irregular and to be avoided. *Vallabha* v. *Madusudanan, I. L. R. 12 Mad. 495.* TUNI ORAIN *v.* LEDA ORAON (1916). 20 C. W. N. 1082

HOLDER.

———— **not a holder in due course—**

See NEGOTIABLE INSTRUMENTS ACT (XXVI OF 1881), ss. 30, 47, 59, 74, 94.
I. L. R. 39 Mad. 965

HOLDING.

———— **meaning of—**

See BENGAL TENANCY ACT, 1885, s. 3.
24 C. W. N. 1022

———— **sale of—**

See MADRAS ESTATES LAND ACT (MAD. I OF 1908,, s. 111, *et seq.*
I. L. R. 38 Mad. 1042

———— **splitting of—**

See MUNICIPALITY.
I. L. R. 46 Calc. 784

———— **surrender or abandonment of—**

See MADRAS ESTATES LAND ACT (I OF 1908) s, 8. . **I. L. R. 38 Mad. 608**

"HOLDING OUT."

———— **principle of—**

See PRINCIPAL AND AGENT.
14 C. W. N. 381

HOLDING OVER.

See LANDOLRD AND TNEANT.
I. L. R. 35 Bom. 333

HOLIDAYS.

———— **judgments pronounced on—**

See APPEAL IN FORMA PAUPERIS.
I. L. R., 40 Mad. 687

———— *Gazetted, trial of suit consent of parties—High Court Rules, Ch. 1, r. 2, (relating to practice and procedure in the District Courts)—Trial of suits on Gazetted holidays, if vitiates the decree.* With the consent of both parties a Civil Court holiday was fixed for the examination of some of the Defendant's witnesses in a suit. Owing to plaintiff's failure to bring any pleader to cross-examine the witnesses on that date the Court adjourned the suit till the next day which too was a holiday. On this date too the Plaintiff could not bring any pleader and two witnesses were examined but were not cross-examined by the Plaintiff. In these circumstances, the suit was ultimately dismissed. *Held*, that inasmuch as there was no consent by the parties to the adjournment of the case till the next day which was also a close holiday, the proceedings of the trial Court were irregular and the irregularity prejudiced the Plaintiff. The suit must be retried in accordance with law. *Ram Das* v. *Official Liquidator, I. L. R. 9 All. 366 (1887), Sheoram* v. *Thakur Prasad, I. L. R. 30 All. 136 (1908) Bennett* v. *Potter, 2 Cr. & J. 622 (1832)* and *Andrews* v. *Elliott, 5 El. & Bl. 502 (1855); 6 El. & Bl. 338 (1856)*, referred to. LAMBO NATH DATTA BARUA *v.* SARUNATH DATTA BARUA.
25 C. W. N. 300

HOLOGRAPH WILL.

See EVIDENCE ACT (I OF 1872), ss. 38, 45 . . **I. L. R. 41 All. 248**

HOME GUARANTEE.

See CONTRACT . **I. L. R. 43 Calc. 77**

HOMESTEAD LAND.

See ADVERSE POSSESSION.
I. L. R. 40 Calc. 173

See JURISDICTION OF CIVIL COURT.
I. L. R. 40 Calc. 402

———— **transferability of—**

See LANDLORD AND TENANT.
1 Pat. L. J. 502

———— *Suit for rent—Jurisdiction—Protected under-tenure—Revenue Sale Act (XI of 1859) s. 37 cl. (4)—Garden—Incumbrances, annulment of, on sale of taluk for arrears of revenue—Provincial Small Cause Courts Act (IX of 1887) Sch. II, Art. 8—Second appeal—Civil Procedure Code (Act V of 1908) s. 102.* S. 102 of the Civil Procedure Code is no bar to second appeals in suits for rent other than house rent although the value thereof does not exceed Rs. 500: *vide* Art. 8 of Schedule II of the Provincial Small Cause Courts Act. *Soundaram Ayyar* v. *Sennia Naickan, I. L. R. 23 Mad. 547*, distinguished. When land ceased to be garden-land about a quarter of a century ago, and tenants have been settled on the land since then, the tenure is not protected and does not fall within the 4th exception to s. 37 of the Revenue Sale Act (XI of 1859) and is liable to be annulled. The effect of a sale is not *ipso facto* to avoid under-tenures; the purchaser has the option of avoiding them or keeping them intact. *Titu Bibi* v. *Mohesh Chander Bagchi, I. L. R. 9 Calc. 683*, followed. It is necessary therefore that the purchaser must by some unequivocal act indicate his intention to avoid under-tenures if he desires to do so and the election of the purchaser to avoid must be brought to the knowledge of the under-tenure holder. A formal written notice is not essential. *Dursan Singh* v. *Bhawani Koer, 17 C. W. N. 984*, followed and explained. The facts, that the purchaser demanded rents from the tenants to the knowledge of the under-tenure holder, sued the tenants for *rent*, took out warrants of attachment in execution of decrees and realized rents from the tenants in repudiation of the under-tenure-holder's title, go to show that the under-tenure-holder had not only notice of unequivocal acts on the part of the purchaser indicating his election to avoid the *mokarrari* but the purchaser had in fact obtained possession of the estate. *Mir Waziruddin* v. *Deoki Nandan, 6 C. L. J. 472*, distinguished. *Per* N. R. CHATTERJEA J. The mere fact that a garden was made on a piece of land a quarter of a century before the sale, would not make it land on which a garden has been made for all time to come. *Per* BEACHCROFT, J. No particular method of expressing an intention to annul an under-tenure is necessary. There must be established (*i*) a definite intention to annul, (*ii*) an indication of that intention to the under-tenure-holder. To afford protection the work must *still be in existence* or the land be used for the purpose of the work. The perfect tense in "leases of land whereon . . . gardens *have* been made" denotes a present state. *Obiter:* If the *busti* land is covered by the lease of the land on which the mill stands, or if the *busti* is an integral part of the mill, and exists only for the purposes of the mill, it is possible that it might be protected. SAHADORA MUDIALI *v.* NABIN CHAND BORAL (1914) . . **I. L. R. 42 Calc. 638**

HONORARY MAGISTRATE.

See Criminal Procedure Code, ss. 15, 16, 350 . . I. L. R. 41 All. 116

HONORARY SECRETARY.

See Declaratory Suit.
I. L. R. 37 All. 313

HOROSCOPE.

See Evidence . L. R. 45 I. A. 284
I. L. R. 41 All. 63

See Hindu Law Joint Family—
5 Pat. L. J. 605

See Hindu Law—Minor.
I. L. R. 38 Mad. 166

HORSE.

——————— *Suit for damages for injury done by vicious horse—Liability of owner —Absence of negligence on owner's part if can exonerate him when he knew of the animal's vice.* The plaintiff sought to recover damages for injuries suffered by reason of his having been bitten by the defendant's horse. The finding was that the horse was a vicious animal and it did bite the plaintiff but that the defendant was not guilty of negligence and on this ground the lower Court dismissed the suit. *Held*, that if the horse was a vicious animal and if that fact was known to the defendant and knowing this he kept the horse and if it injured the plaintiff, then the defendant must be held liable notwithstanding that he was not guilty of negligence. Negligence is not a necessary ingredient in a suit of this nature. Ganda Singh v. Chuni Lal Shaha (1915). 19 C. W. N. 916

HOSTEL OF A COLLEGE.

See Bombay City Municipal Act (Bom. Act III of 1888), ss. 140 (c), 143 (1) (a) and (2) (d) I. L. R. 43 Bom. 281

HOSTILE FIRM.

See Hostile Foreigners Trading Order.

——— contract with—

See Contract Act (IX of 1872), ss. 56 (2), 65 . . I. L. R. 40 Bom. 570

——— status of—

See Contract with alien Enemy.
I. L. R. 41 Bom. 390

HOSTILE FOREIGNER'S TRADING ORDER, 1914.

See Contract Act (IX of 1872), ss. 56 (2), 65 . . I. L. R. 40 Bom. 570

See Contract with alien Enemy.
I. L. R. 41 Bom. 390
I. L. R. 44 Bom. 631

HOSTILE WITNESS.

See Police Diaries . 3 Pat. L. J. 568

See Private Defence. 3 Pat. L. J. 419

HOUSE AND TOWN PLANNING ACT, 1909 (9 EDW. VII, C. 44).

——— s. 58 (3)—

See Recoupment. I. L. R. 45 Calc. 343

HOUSE-BREAKING.

See Penal Code (Act XLV of 1860). ss. 457, 511 . I. L. R. 37 Bom. 553

——— death caused by one of the accused

See Indian Penal Code, s. 460.
I. L. R. 2 Lah. 342

HOUSE-DRAIN.

See Public Drain.
I. L. R. 44 Calc. 689

HOUSE PROPERTY.

See Income Tax Act, VII of 1918 ss. 8, 9, 11.
I. L. R. 43 All. 139

HOUSE SEARCH.

See Penal Code (Act XLV of 1860), ss. 332, 323. I. L. R. 37 All. 353

HOUSE-SITES.

See Mirasi Village.
I. L. R. 40 Mad. 410

HUNDI.

See Civil Procedure Code, O. II, r. 2
I. L. R. 136 All. 560

See Contract . I. L. R. 47 Calc. 583

See Evidence Act (I of 1872), s. 91.
I. L. R. 36 All. 259
I. L. R. 2 Lah. 330

See Negotiable Instrument
I. L. R. 1 Lah. 80

See Negotiable Instruments Act (XXVI of 1881)—

s. 22 . . I. L. R. 39 All. 86

s. 26 . I. L. R. 41 Mad. 815

ss. 64 and 76. I. L. R. 39 All. 364
I. L. R. 41 All. 40

s. 98 . . I. L. R. 33 All. 4

s. 118. I. L. R. 1 Lah. 429

See Penal Code (Act XLV of 1860), s. 405 . . I. L. R. 38 Mad. 639

——— accepted orally—

See Negotiable Instrument.
I. L. R. 1 Lah. 80

——— insufficiently stamped—

See Evidence Act, 1872, s. 91.
I. L. R. 2 Lah. 330

See Executor . I. L. R. 45 Calc. 538

——— interest payable by oral agreement—

See Evidence Act s. 92. 1 Pat. L. J. 71

——— material alteration in—

See Negotiable Instrument Act, 1881, ss. 76, 87, 93, 98 I. L. R. 1 Lah. 262

——— payable to bearer—

See Negotiable Instruments Act (XXVI of 1881), ss. 30, 47, 59, 74, 94.
I. L. R. 39 Mad. 965

HUNDI—*contd.*

——— *Suit on hundi—Hundi passed up-country and not made payable in Bombay—Consideration of the hundi being the balance of account between the Bombay merchant and the up-country merchant—Account settled up-country—Jurisdiction of the High Court—Letters Patent cl. 12—Leave of the Court to sue—Cause of action.* The plaintiffs carrying on business in Bombay had dealings with the defendant residing and carrying on business at Bassum in Akola. The account between the parties was made up and settled at Bassum, as a result of which the defendant passed at Bassum two *hundies* drawn on his own firm for Rs. 900 and Rs. 1,000, respectively, in favour of the plaintiffs. On the failure of the defendant to meet the said *hundies* at the due dates, the plaintiffs brought a suit in the High Court at Bombay to recover the amount due on the same. The defendant pleaded that the Court had no jurisdiction to entertain the suit, as the moneys were not payable in Bombay. The plaintiffs contended that as the consideration of the *hundies* was the balance of the account due by the defendant to the plaintiffs in respect of the transactions effected in Bombay, the moneys were virtually payable in Bombay, and the material part of the cause of action arose in Bombay. *Held*, that the cause of action being founded upon the *hundies*, and the *hundies* not being made payable in Bombay, the Court had no jurisdiction to entertain the suit. *Per* MACLEOD J.—In giving leave under cl. 12 of the Letters Patent in suits on promissory notes, or *hundies*, I have always given leave when the money was payable in Bombay; and, in my opinion, if there are transactions in Bombay, which result in a credit in favour of the Bombay merchant against an up-country merchant, and if the Bombay merchant goes to settle his account up-country and accepts a promissory note or *hundi* in satisfaction of his account, then if he wants to sue on that note in Bombay he must take the precaution to see that the note is made payable in Bombay. SEWARAM GOKALDAS *v.* BAJRANGDAT HARDWAR (1916) . . **I. L. R. 40 Bom. 473**

——— *Hundi drawn by second defendant without disclosing the name of any other person liable as principal—Evidence inadmissible either by claim or in defence to show that drawer was acting for an undisclosed principal—Principal must be disclosed by name, on the document to make him liable—Negotiable Instruments Act, 1881, ss. 26, 27 and 28—English Bills of Exchange Act, 1882, s. 23.* The name of a person or firm to be charged upon a negotiable document should be clearly stated on the face or on the back of the document so that the responsibility is made plain, and can be instantly recognised as the document passes from hand to hand. It is not sufficient that the name of the principal should be "in some way" disclosed; it must be disclosed in such a way that on any fair interpretation of the instrument his name is the real name of the person liable on the bill. Ss. 26, 27 and 28 of the Negotiable Instruments Act, 1881, contain nothing inconsistent with the above principles, and nothing to support the contention, which is contrary to all established rules, that in an action on a bill of exchange or promissory note against a person whose name properly appears as party to the instrument, it is open either by way of claim or defence to show that the signatory was in reality acting for an undisclosed principal. In this case it was held that on the terms of the *hundis* sued on, it did not appear that the first defendant was a principal, and that the second defendant who drew them was solely liable thereon. SADASUK JANKI DAS *v.* SIR KISHAN PERSHAD (1918).

I. L. R. 46 Calc. 663

HUNDI SHAH JOG.

——— *Payment to the Shah—Fraudulent hundi—Duty of Shah to trace the drawer—Payment of hundi not as Shah but as indorsee for collection of the hundi—Custom of Marwari merchants—In case of fraud, notice, when to be given—Laches.* On the 10th June 1912 the defendants presented to the plaintiff for payment a *hundi* for Rs. 3,000 purporting to be drawn by one *R* in favour of *M* on the plaintiff payable at sight to a *Shah.* The plaintiff having had no advice regarding the said *hundi* refused to pay the said sum of Rs. 3,000. On the next day the plaintiff received a letter purporting to be written by *R* from Harpalpur, enclosing a railway receipt for 300 bags of linseed, stated to have been consigned by *R* from Ranipur Station, and asking the plaintiff to sell the goods and in the meantime to accept and pay on presentment two *hundis*, each for Rs. 3,000 drawn by *R* in favour of *M* on the plaintiff, payable at sight to a *Shah.* The same day the plaintiff handed over the said railway receipt to one *K* and received payment of Rs. 5,600. The plaintiff thereupon paid Rs. 3,000 together with one day's interest to the defendants in respect of the *hundi* which had been presented by the defendants to the plaintiff on the previous day as aforesaid and which was one of the *hundies* mentioned in the letter. The goods referred to in the railway receipt never arrived and *K* returned the said receipt to the plaintiff and was repaid the sum of Rs. 5,600. On inquiries being instituted it was found that no such person as *R* existed and that the *hundi* and the railway receipt were forged. The plaintiff sued to recover the money from the defendants relying on the custom prevailing among Marwari Merchants that the *Shah* who obtained payment of a Shah Jog *hundi* was, in the event of the *hundi* turning out to be a false, fraudulent, stolen, or forged *hundi*, bound to refund the amount of the *hundi* with interest unless he "traced it to its source," *i.e.*, produced the actual drawer or the person who committed the fraud. *Held*, (*i*) that the defendants had been paid not as *Shah* but as indorsee for collection of a *hundi* purporting to be drawn against the security of a railway receipt. (*ii*) Assuming that there might be a liability imposed on the defendants by reason of the payment, to refund or to trace the *hundi* to its source, this would only be the case provided notice was given within reasonable time of the discovery of the forgery, that is provided the plaintiff lost no time in making this communication and claiming the refund. (*iii*) That the *hundi* had been "traced to its source" within the meaning of the Marwari Association Rules before the defendants received information of the fraud. R. D. SETHNA *v.* JWALAPRASAD GAYAPRASAD (1914) . . **I. L. R. 39 Bom. 513**

HUNTER'S STATISTICAL ACCOUNTS.

——— *Admissibility in private litigation.* Reference cannot legitimately be made to statements in Hunter's Statistical Accounts for the purpose of establishing the existence of Private rights. AHMODI BEGUM *v.* TARAKNATH GHOSE (1913) . . . 17 C. W. N. 1173

HURT.

See CHARGE . I. L. R. 40 Calc. 168

See CUMULATIVE SENTENCES.
I. L. R. 40 Calc. 511

See PENAL CODE (ACT XLV OF 1860), ss 337, 338 . I. L. R. 39 Bom. 523

HUSBAND.

——— **complaint by—**

See COMPLAINT. I. L. R. 41 Calc. 1013

——— **liability of—**

See WIFE . . I. L. R. 44 Calc. 35

HUSBAND AND WIFE.

See CONTRACT ACT (IX OF 1872), s. 25.
I. L. R. 37 Bom. 280

See DIVORCE

See DIVORCE ACT (IV OF 1869), s. 14.
I. L. R. 41 Bom. 36

See HINDU LAW—HUSBAND AND WIFE.

See HINDU LAW—INHERITANCE.
I. L. R. 36 Bom. 138

See PRESIDENCY SMALL CAUSE COURT ACT, 1882. I. L. R. 45 Bom. 318

See RESULTING TRUST.
I. L. R. 48 Calc. 260

——— **Concealment of Pregnancy—**

See MAHOMADAN LAW.
I. L. R 45 Bom. 151

——— **decree for Restitution of Conjugal Rights—**

See CIVIL PROCEDURE CODE 1908, O. XXI R.33 . . I. L. R. 44 Bom. 972

See MUHAMMADAN LAW.
I. L. R. 1 Lah. 597

——— **Security for Wife's Costs—**

See DIVORCE. I. L. R. 41 Calc. 963

1. ——— *Suit by husband for divorce on the ground of wife's fault—Allegation of her theft of jewellery belonging to husband—Wife's abandonment of defence and submission to decree for divorce—Decree not by mutual consent—Subsequent suit for partition of property—Civil Procedure Code (Act XIV of 1882), ss. 42, 43—Objection taken for first time on appeal.* For the purpose of dealing with and distributing, in accordance with the Burmese Buddhist law, property belonging to a husband and wife, who have been divorced, it was necessary, in a suit brought by the husband for partition, to determine whether the divorce was by mutual consent or was granted on the fault of the wife. It appeared from the husband's claim to a divorce that he set forth the wife's offence that she had by sundry fraudulent devices stolen certain jewels which were his property, and he asked for a decree on that ground alone. The wife in her defence denied the allegations as to her misconduct, and asked for the dismissal of the suit with costs. Witnesses were summoned, but on the day fixed for hearing she abandoned her defence, and, although continuing to deny her guilt, consented to a divorce, and judgment was therefore given for a "decree as prayed." *Held* (upholding the decision of the District Judge), that the divorce was not made by mutual consent. The proceedings disclosed not an agreement between husband and wife, but a claim by the husband to which the wife submitted. It was objected for the first time on appeal to the Chief Court that the husband had no right to partition of the property unless he asked for it in the suit for divorce. The Chief Court held that the matter being one of procedure must be determined by ss. 42 and 43 of the Civil Procedure Code of 1882, and decided that having failed to include in his suit for divorce a claim for partition he must be taken to have relinquished it, and his subsequent suit for that relief was barred. *Held*, that it was too late to raise the point for the first of the wife, and the cause of action for the partition was the divorce of the wife founded on that misconduct. The evidence needed in each case was also different, and the ground of divorce must be first and separately proved as a distinct cause of action before any question of partition could properly arise. If the Court found that the plaintiff had unnecessarily served his claim for a partition from that for a divorce, it could punish him by the exercise of its discretion as to costs; but such a severance did not come within the mischief aimed at by ss. 42 and 43 of the Code so as to bar the claim to a partition which may be founded on the decree for divorce itself. MAUNG PE *v.* MA LON MAGALE (1911) . . I. L. R. 38 Calc. 629

2. ——— *Restitution of conjugal rights demanded and refused—Inaction for more than two years—Suit for restitution barred under Limitation Act (XV of 1877), Art. 35—Limitation Act (IX of 1908)—General Clauses Act (X of 1897), s. 6.* On 11th July 1906 the plaintiff sent his wife (who had left him) a notice demanding restitution of conjugal rights. The demand was refused on 19th July 1906, but the plaintiff took no further action for more than two years, and eventually on 20th July 1911 filed a suit for restitution. *Held*, that this particular form of remedy had become barred under Article 35 of the old Limitation Act (XV of 1877). *Dhanjibhoy Bomanji* v. *Hirabai, I. L. R. 25 Bom. 644*, followed. *Held*, further that having become so barred, it could not be revived by the passing of the new Limitation Act (IX of 1908). The provisions of s. 6 of the General Clauses Act (X of 1897), discussed. MAHOMED MEHDI *v.* SAKINA BAI (1912).
I. L. R. 37 Bom. 393

HUSBAND'S DEBT.

See HINDU LAW—WIDOW.
I. L. R. 39 Mad. 565

——— **decree against widow for—**

See HINDU LAW—WIDOW.
I. L. R. 39 Mad. 565

HUSBAND'S ESTATE.

——— **accumulations of income of—**

See HINDU LAW—STRIDHAN.
I. L. R. 41 Calc. 87

HUSBAND'S ESTATE—*contd.*

———— right to get maintenance from—

See Hindu Law—Maintenance.
I. L. R. 38 Mad. 153

HUSBAND'S PETITION.

See Divorce . **I. L. R. 41 Calc. 963**

HUSBAND'S YOUNGER BROTHER.

See Hindu Law—Stridhan.
I. L. R. 37 Calc. 863

HYDERABAD STATE.

See Promissory Note.
I. L. R. 42 Bom. 522

HYPOTHECATION.

See Adverse Possession
I. L. R. 36 Mad. 97

See Stamp Act (II of 1899), s. 2 (*17*), etc . . **I. L. R. 38 Mad. 646**

HYPOTHECATION—*contd.*

See Transfer of Property Act (IV of 1882), s. 83 . **I. L. R. 39 Mad. 579**

———— of movable property—

See Limitation Act (IX of 1908), Sch. I, Art. 120 . **I. L. R. 40 All. 512**

———— property left in possession of debtor and sold by him—*See* Mortgage.
I. L. R. 1 Lah. 422

———— of movables—*Bonâ fide purchaser without notice, from hypothecator, whether affected by hypothecation—Indian Contract Act (IX of 1872), s. 108.* A *bonâ fide* purchaser without notice of the encumbrance, of *goods* hypothecated but left with the hypothecator, is not affected by the encumbrance and takes them free of it. Narasiah *v.* Venkataramiah (1918).
I. L. R. 42 Mad. 59

HYPOTHECATION DECREE.

See Limitation Act (IX of 1908), Sch. I, Arts. 120, 132. **I. L. R. 39 All. 74**

CALCUTTA: PRINTED BY SUPDT. GOVT. PRINTING, INDIA, 8, HASTINGS STREET.